

Miami University School of Law
Law 205A
Labor Law – Spring 2020

Syllabus, Course Outline & Reading Assignments

Professor Andrew Elmore

Class: 11–12:20, F-402

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Course Description and Learning Objectives

Labor law structures the process through which workers organize and engage collectively, rather than individually, with their employers. The basics of contemporary American labor law were established in the 1930s after years of violent struggle. While labor law has changed little since the 1940s, the economy has changed a great deal. Union density has declined considerably in the face of globalization, subcontracting, and a changed political economy. Meanwhile, economic and political inequality has increased. In this new environment, employees and employers are developing novel approaches and responses to organizing and collective bargaining, pushing the law in a myriad of directions.

The course has three goals. First, the course will cover the basics of private (and touch on public) sector labor law in the United States. Second, the course will examine how labor law is evolving. We will consider, for instance, who qualifies as an employee in the gig economy; the legal status of privately-negotiated processes for organizing and recognizing unions; the ability of non-unionized workers to engage in concerted action; federal preemption of state and local labor law; arbitration; and the “right to work” after *Janus v. AFSCME*. Finally, through the lens of labor law, the course will tackle issues of statutory interpretation, administrative law, and constitutional law.

Throughout the course, we will ask: How does labor law change from one administration to the next, and what is durable? How should labor law be reformed to address ongoing transformations in corporate organization and the nature of work? To what extent does or should labor law encourage worker participation and economic redistribution?

Required Text

The main text is COX & BOK’S LABOR LAW (16th ed., 2016) (“CB” in outline below), and the statutory & case supplement (“CB2”). An additional supplement (“S”) is posted on additional readings to be distributed via TWEN. You should also sign up for daily updates from the blog “On Labor” run by Harvard Law School (<http://onlabor.org/>).

Please note that in a few places the outline directs you to look at a statute (in CB2). In addition, when we get to the NLRA, you should get in the habit of looking at the relevant statutory language.

Class Participation and Grading

Grading will be based primarily on a 4-hour, open-book examination during the final exam period. You will also be allowed to bring in up to 5 pieces of standard-size paper with whatever you want on both sides (i.e., 10 sides).

I'll use a panel system for class participation, starting on the second class. That means that a number of you will be designated participants for that day, and should expect to be called on. I won't cold-call people who aren't on the panel. If we don't cover all the material assigned to a panel, I may ask those panel members to be prepared to wrap it up in the following session. 10% of your final grade will be based on attendance and in-class participation.

Religious Holy Days

The University of Miami, although a secular institution, is determined to accommodate those students who wish to observe religious holy days. Classes missed due to observances of religious holy days will count as excused absences only if you provide written notice of your intended absence(s) to me no later than the end of the first three meetings of our class.

Disabilities

If you have a disability, or suspect that you may have a disability, the Law School encourages you to contact The Office of Disability Services for information about available opportunities, resources, and services. You may also visit the Office of Disability Services website at www.law.miami.edu/disability-services.

Title IX

The University of Miami seeks to maintain a safe learning, living, and working environment free from all types of sexual misconduct including but not limited to: Dating Violence, Domestic Violence, Sex- or Gender-Based Discrimination, Sexual Assault (including Sexual Battery), Sexual Exploitation, Sexual Harassment, and Stalking. For additional information about the University's efforts to prevent, stop, and address sexual misconduct, including resources and reporting options, please visit www.miami.edu/titleix or contact the University's Title IX Office at titleixcoordinator@miami.edu.

Attendance

At the beginning of each class, please sign the attendance sheet at the front of the room before taking a seat. If you do not sign your name for a given day, I will consider you absent. If you sign your name as present, this is an indication that you are present for the entire class session.

In general, you may take up to four absences for any reason; there is no need to inform me about such absences either before or after you take them. Additional absences will affect your participation grade, and I reserve the right to enter an administrative withdrawal from the course for any student with five or more absences. Religious holidays do not count for purposes of the absence policy. If you miss class, please get notes from a classmate, check for any handouts or posted materials (e.g. slides), and then feel free to come during office hours to ask me any questions you have about the material covered in class. The class is taught in a cumulative fashion, and I frequently refer back to material covered earlier. So if you miss class or a day's readings, it will be helpful to catch up as soon as possible.

Use of Electronics During Class/Videotaping

You are permitted to bring a laptop to class, but [studies have consistently shown that laptop usage interferes with classroom learning and can harm your class performance.](#) Being a thoughtful notetaker is a vital skill for law students (and lawyers). Notetaking should help you process and condense the classroom discussion, rather than merely transcribing the class. In some classroom discussions I will instruct students to close laptops to encourage participation. I reserve the option to revoke laptop privileges in the event of students using laptops inappropriately during class, e.g. displaying offensive or distracting wallpaper, screen savers, or other material, or accessing email, games, news, videos, etc. Please remember to turn off phones before class. Any photographic, audio or video recording during class without my permission is prohibited. I will tape class if it is a make-up or under exceptional circumstances, but not for ordinary absences such as temporary illness, interviews, etc.

Course Outline & Reading Assignments

CB = Casebook/COX & BOK'S LABOR LAW (16th ed. 2016)

CB2 = 2018 Case & Statutory Supplement to Casebook

S = Supplement (available on TWEN)

Unit 1: Intro, History and Scope of NLRA

Note: on the first day of class I'll give a general overview of the course, we will discuss Washington Aluminum and the sample collective bargaining agreement (CBA), and we will begin a brief history of labor law leading to the passage of the National Labor Relations Act. Please read the below and come prepared to discuss how Washington Aluminum and the CBA help us understand how labor law shapes rights in the workplace for both union and non-union workers.

Class 1, Jan. 14: General Introduction to Course

Readings: CB 1-3, Supp., CB2 107-19*

Introduction, *Washington Aluminum*, sample collective bargaining agreement (CBA)*

*Skim the CBA, looking for provisions that might be relevant if this CBA were in effect during the events described in *Washington Aluminum*.

Class 2, Jan. 16: The Common Law, Antitrust, the *Lochner* era & the Norris LaGuardia Act

Readings: CB 5-36, CB2 1-10 (*Vegeahn, Plant, Lowe, Hutcheson*, portions of Sherman Act, Clayton Act, and Norris-LaGuardia Act).

Class 3, Jan. 21: The NLRA & The Supreme Court's Switch in Time

Readings: Railway Labor Act, Wagner Act (NLRA § 1), *Jones & Laughlin* (CB 41-48, CB2 25-26) *Thornhill* (CB 37-41).

Class 4, Jan. 23: Modern NLRA & Amendments, Jurisdiction and Introduction to NLRB

Readings: *J.I. Case*, CB 359-62; *Republic Aviation*, CB 90-94 (think about §§ 8(a) and 9(a) implications of these cases; we will revisit them later), National Labor Relations Act, CB 50-59; CB2 25-48* *This is the entire NLRA, as amended. Please read §§ 7, 8(a)-(b) (unfair labor practices) and 9 (representatives and elections). As for the rest, just skim it for now, & notice which are original 1935 provisions (plain text, not bold, italicized, or underlined) & which were added later (esp. bold); we will return to major provisions later.

Class 5. Jan. 28: Who is an Employer? Who is an Employee?

Readings: Covered and Excluded Employers (CB 56-61)

Independent contractors: Hearst, FedEx, SuperShuttle, Uber, Velox (CB 61-66, CB2 132-34, Supp.);

Supervisors: CB 66-69

Managers & confidential employees: Yeshiva University (CB 69-71, 73)

Students or Employees?: NYU, Brown, Northwestern Football Players, Columbia (CB 72, CB2 134)

Unit 2: Protected Concerted Activity, Union Organizing, Elections, and Recognition

*Optional helpful overview for this Unit: "How Workers Form and Join Trade Unions in the United States," from Human Rights Watch, *Unfair Advantage*, pp. 71-79 (Supp.)

Class 6, Jan. 30: Protected Concerted Activity (other than union activity)

Readings: *Board Handling of Complaints*: Review NLRA § 10 (CB2 26-28); CB 74-79

Basic Section 7 Elements: (Recall Wash. Aluminum); City Disposal, Meyer Indust. (notes), Eastex CB 512-26; 536-42

Company Rules, Social Media: Cintas CB 99-106

Class 7, Feb. 4: Non-Union Representation, the "Company Union" Bar, Labor-

Management Cooperation and Waiver Readings: *J.I. Case* (review), Electromation, Crown, Cork & Seal CB 187-99; 359-62 S 17-20, *Epic Systems* (CB 542-560, CB2 159-71)

Class 8, Feb. 6: Union Access vs. Employer Property Rights (& election procedure)

Readings: *Solicitation & Salts*: Republic Aviation (review); Lechmere, Town & Country, Toering Elec. CB 89-98, 106-20
Equal Access? NuTone & Avondale (notes), Rio All-Suits (Supp.), Excelsior CB 120-46

Class 9, Feb. 11: Employer Speech & Election Propoganda

Readings: Gissel, Midland Nat'l, Lorben, Struksnes, Exchange Parts, CB 146-87

Class 10, Feb. 13: Anti-Union Discrimination

Readings: Edward G. Budd, Nichols Aluminum CB 209-28
Adkins Transfer, Darlington CB 228-42

Class 11, Feb. 18: Remedies & Immigration Law:

Readings: Phelps-Dodge, EFCA CB 242-53;
Immigrant workers: Sure-Tan, Hoffman Plastic Compounds, Mezenos (CB 60-61, Supp.)

Class 12, Feb. 20: Election Procedures & Parties

Readings: *Basics*: CB 81-88; CB2 135-36; CB 253-63, 278-84
Joint Employer bargaining: Browning-Ferris CB 291-304; CB2 142, Fast Food Article (Supp.)

Class 13, Feb. 25: Gaining and Losing Bargaining Rights w/ & w/o an Election

Readings: *Compelled Recognition w/out an election*: Gissel, Gourmet Foods (notes), Linden Lumber CB 315-37
Voluntary Recognition & Neutrality Agreements: S 28-29; CB 199-202; 205 (n.2)-209; HERE Local 2, Bernhard-Altman, Dana, Mulhall S 30-33

Class 14, Feb. 27: Loss of Recognition:

Readings: *Brooks, Dana Corp., Shaw's Supermarket, Allentown Mack, Levitz Furniture* CB 337-55

Unit 3: Collective Bargaining, Economic Weapons & Enforcement

Class 15, March 3: Exclusivity & Intro to the Duty of Fair Representation & to Bargain in Good Faith

Readings: *Exclusivity*: J.I. Case (review), Steele, Emporium Capwell CB 357-63, 376-82, 364-75

Duty to Bargain: A-1 King Size Sandwiches, Truitt, CB 382-99
Insurance Agents, Katz CB 407-20

Class 16, March 5: Duty to Bargain in Good Faith & Subjects of Bargaining

Readings:
Subjects of Bargaining: American Nat'l Insurance, Borg-Warner CB 421-43

March 9-12: Spring Break

Class 17, March 17: Subjects of Bargaining (Cont.)

Readings: Fibreboard, 1st Nat'l Maint., Dubuque Packing CB 443-51, 456-79

Class 18, March 19: Remedies for Bad Faith Bargaining (& an Intro to Strikes)

Readings: *Remedies:* H.K. Porter, Ex-Cell-O CB 487-92, 497-510

Unprotected Concerted Activity: Jefferson- Standard CB 566-75

Class 19, March 24: Strikes and Employer Countermeasures (Cont.)

Readings: *Unprotected Concerted Activity:* Elk Lumber, Trompler (notes), Walmart CB 562-79; CB2 171-72

Employer Countermeasures: Mackay Radio, Erie Resistor, American Ship Building, Great Dane CB 580-602

Class 20, March 26: Employer Countermeasures Applied & Picketing and other Union Tactics (and the Constitution)

Readings: *More on countermeasures:* Laidlaw, Land Air Delivery, NE Health Care Ees, American Baptist CB 492-96, 609-18 (esp. n4, p614), S 34-36; CB2 173

Recognitional & Secondary Activity: Denver Bldg. & Constr. Trades, Douds CB 662-66; 682-92; 694-99;

Class 21, March 31: Picketing and other Union Tactics (and the Constitution) (Cont.)

Note: We will discuss the next bunch of cases (on the intertwined statutory & constitutional doctrine on union picketing & leafletting) in chronological order. That requires some jumping around in the casebook. Bear with me:

Readings: Vogt (CB 628-36); Servette & Tree Fruits (CB 703-15) Safeco (CB 715-19); DeBartolo I (CB 705-06); DeBartolo II (CB 638-44); Carpenters Local No. 1506 (CB 644-53)

Class 22, April 2: Grievance Arbitration and Judicial Enforcement

Readings: Overview; Enterprise Wheel & Car, Eastern Ass'd Coal, Misco (& Tom Brady) CB 763-74; 804-20; CB2 176

Unit 4: Preemption, & Rights of Union Members & Non-Members vs. The Union

Class 23, April 7: Preemption

Readings: Garmon, Farmer, Sears CB 977-1001

Machinists, Gould, Boston Harbor, Reich CB 1001-08; S 45-54

Class 24 April 9: Preemption (Cont.) & Duty of Fair Representation

Readings: *Preemption:* Ch. of Commerce v. Brown, Lueck, Lingle CB 1008-16; S 55; CB 1044-55

Duty of Fair Representation: Vaca v. Sipes, Hines, Bowen CB 1063-67, 1083-92, 1099-1110

Class 25, April 14: Union Security & The Right to Refrain

Readings:

Union Security & the Right to Refrain: Gen. Motors, Street, Beck, Ellis CB 1113-32, 1138-41

Class 26, April 16: Right to Refrain (Cont.) & What Else Is There? What's Wrong? What's Next?

Readings: *Janus v. AFSCME* (Supp); TBA

April 24-May 6 (EXAMS)