Preface to Fourth Edition

The period of time between the third and fourth editions constitutes the longest period between any of the editions of this book published thus far. Much of the discussion of the National Labor Relations Act relates to decisions and policy changes instituted by the National Labor Relations Board when I was its Chairman, appointed by President William Jefferson Clinton on June 28, 1993, and confirmed by the Senate on March 2, 1994. As noted in this fourth edition, perhaps the most important development during my tenure was a sharp and unprecedented upsurge in cases brought under the Board's injunctive authority set forth in Section 10(j). The focus on the NLRA in this edition is also upon a number of important policy decisions issued during my tenure as well as those submitted to the Board while I was Chairman, but decided only subsequent to my departure.

Similarly, there is discussion of Supreme Court decisions involving the National Labor Relations Act both prior and subsequent to my tenure. I have chronicled the events preceding my appointment, between appointment and confirmation, and during my four and a half years as Chairman in *Labored Relations: Law, Politics, and the NLRB—A Memoir*. Insofar as relevant to the work of the National Labor Relations Act, this fourth edition attempts to chronicle only the

decisions and policy changes without reference to much of the political drama surrounding them. For the latter, the reader can consult *Labored Relations*.

For the same basic reasons alluded to in earlier editions, union representation during these past eleven years has continued to decline to 13.5 percent, 9 percent in the private sector and 37.4 percent in the public sector. As was the case in previous editions, courts of general jurisdiction at the state level have continued to establish job security rights as an exception to the principle that the contract of employment is terminable at will. In the 1990s and at the turn of the century, however, the courts have begun to address employer-devised arbitration procedures designed to substitute that forum for individual claims involving unfair dismissals for courts and jury trials. This constitutes one of the new frontiers of not only judicial decision-making but also the policy debate in the political arena.

As anticipated in the third edition, the Americans with Disabilities Act of 1990 became an important area of litigation. But in virtually all cases, the United States Supreme Court rejected the positions of plaintiffs. In addition to cases involving sexual orientation, some of them arising out of President Clinton's 1993 "don't ask, don't tell" policy applicable to the military, the number of sexual harassment cases increased enormously, most of them involving alleged harassment of women by men. Much new law was made as a result of the Civil Rights Act of 1991 at both the Supreme Court and Circuit Court of Appeals level. This was attributable to the 1991 amendments' provision for compensatory and punitive damages triggered by the 1991 Anita Hill hearing relating to Justice Clarence Thomas. Some of the cases involved alleged same-sex harassment. And the Supreme Court's 2003 holding that private homosexual conduct between consenting adults is protected by the Constitution[1] will fuel the campaign to make antidiscrimination laws fully applicable to gay and lesbian people.

Labor conflicts in the professional sports arena continue to be an important part of labor-management controversy. A new comprehensive collective bargaining agreement was

negotiated in football and baseball (though baseball did endure a substantial strike, unprecedented in length, during 1994–1995). The basketball owners successfully instituted a lockout in 1998–1999, the result of which ushered in new salary cap restraints as part of the agreement in that sport. Collective bargaining agreements were negotiated in women's professional basketball.

The Curt Flood Act of 1998 made the same antitrust standards previously applicable to other sports' labor-management relations apply to the realm of labor activities in baseball, but a 1996 Supreme Court decision narrowed the scope of antitrust law and pronounced the preeminence of labor law in all sports.[2] However, in 2002, the Major League Baseball Players Association and Major League Baseball were able to resolve their differences by negotiation unlike the case in 1994–1995 when the sport was decimated by a substantial strike.

An important new frontier has emerged as the result of globalization and increased focus on human rights and international labor standards.[3] This is the extraterritorial application of American statutes to the conduct of corporations doing business abroad.[4] Unions, corporations, and nongovernmental organizations are the major participants in this debate which is on the streets (1999 in Seattle is the most prominent illustration), as well as in the courts.

Finally, in 2002, California became a pioneer by enacting the first paid-leave statute in the country, following up on President Clinton's establishment of unpaid leave a decade ago through the Family and Medical Leave Act of 1993. Shortly thereafter, former governor of California Gray Davis signed into law new legislation providing for mediation and arbitration for farm workers—they continued to be excluded from the National Labor Relations Act—when employees were unable to negotiate a collective bargaining agreement.

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