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## Researching Labor Law

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## Researching Labor Law

By Robert A. McCormick

**Y**ou are a solo practitioner in the Keeweenaw Peninsula engaged in the general practice of law. One of your clients, the owner of a small factory near Eagle River, reports that he has received a letter from a large international union announcing that it represents a majority of his employees. The letter demands that your client immediately recognize and bargain exclusively with the union. At the same time, your client is furious that pamphlets which overstate the company's profits are circulating among employees. He plans to distribute his own leaflet telling employees just what he thinks about the union, and he wants you to "keep that union out of my business."

You moved north to savor the quiet life, and union organizing turmoil is surely not what you had in mind. But then your eyes fall upon the framed placard on your desk: "First, do no harm" it says. You took labor law 15 years ago so you know that your client, if nothing else, had better be exceedingly cautious about what he says and does in the next few days. You tell your client this, and tactfully add that employees do have the right to select a union. He doesn't take it well.

Some response to the union's pamphlet seems essential, and, in any event, you recognize the need to quickly plan a course of action, if only to keep your client out of real difficulty. You ponder the problem. Should you ship this one out? No, despite its apparent explosiveness and your lack of familiarity with labor law, you realize that these facts raise legal issues governed exclusively by the National Labor Relations Act (NLRA).<sup>1</sup> Perhaps your initial apprehension was unfounded.

In the private sector, the entire process of union organization, collective bargaining and the regulation of strikes and picketing are predominately governed by the NLRA. Thus, a single, discrete statute and body of precedent will guide you.

This is not always the case in other employment contexts. An intimidating array of labor laws affects relations between employers and employees from application for hire, compensation to be paid, hours to be worked, working conditions, decisions about discipline, promotion, union representation, pregnancy leaves, sick

pay, compensation for injury, layoff benefits, all the way to detailed regulation of pensions. The U.S. Department of Labor alone administers more than 160 federal statutes governing the employment relationship, and these statutes do not include the major labor laws administered by other agencies such as the National Labor Relations Board (NLRB) or the Equal Employment Opportunity Commission (EEOC). Neither do they include overlapping and sometimes conflicting state statutes. This regulatory proliferation often makes labor law appear labyrinthine to the nonspecialist.

In addition, the heightened emotions often accompanying employer-employee disputes and the swiftly changing nature of events aggravate the natural difficulties of research in this area. Despite these inherent burdens, though, a few general rules will help you to organize an approach, crystallize the issues and determine an appropriate course of action.

Although it is probably obvious, it bears repeating that research in labor law, as in other fields of legal inquiry, should begin with a review of general principles. Only then should you focus on the particular issue at hand. This is a rewarding stratagem even for the specialist to whom the tenor of a problem seems familiar, because easy familiarity with narrow issues may eclipse the basic principles from which case law interpretations derive. And, in the close or novel case, persuading a court or board that your view is more faithful to the underpinnings of the law may be critical.

Fortunately, there is a wealth of labor law scholarship to which you can turn for a general perspective as well as an immediate response. These sources come in many forms, of which hornbooks are the best known. Agency reports, law review articles, and even your old law school casebooks can help bolster your confidence and indicate potential, if still obscure, paths through the maze. (A list of suggested sources in various labor law areas is provided at the end of this article.)

Such secondary treatises will help you to select the relevant issues and learn the treatment of those — or analogous — issues by the Supreme Court, as well as significant interpretations by lower courts and agencies.

From there, the reporting services, carefully used, provide more particular answers and insights.

Labor cases, and especially NLRA decisions, are copiously reported. Since yours is a NLRA problem exclusively, there are several sources available. The Bureau of National Affairs (BNA) and Commerce Clearing House (CCH) publish full or abstracted decisions of the NLRB and the courts. As with all such research services, these publishers provide a subject matter index which ultimately leads the researcher to synopses of cases. The advantages of these services are that they are widely available and, because they are published weekly, are current.

For NLRA research, however, another, less-widely known service published by the NLRB itself, can be especially helpful. This is the multi-volume Outline and Index for NLRB decisions. Its organization is fairly typical of all such publications — a formless body of precedent and principles is structured into an outline with major themes grouped. The outline headings and subheadings are assigned numbers. A dictionary of terms and an index are provided to which numbers, corresponding with outline headings, are appended. These numbers, then, lead the researcher from a word or thought to the appropriate subheading of the outline.

The first volume, "Classified Outline for Decisions of the National Labor Relations Board and Related Court Decisions," is an extremely detailed subject matter classification of NLRB and court interpretations of the NLRA. To use it, first isolate the relevant issues and assign terms to them. The outline contains a list of terms which may apply to your problem and a topical index which lists, for each term, all outline headings containing that term. Upon finding the heading most closely addressing the issue raised, note the numerical code applicable to that issue. Spend some time looking over this publication — it illuminates nearly every conceivable NLRA issue.

For example, your client's problem involves possible fabrication in the campaign literature. Thus, the section "Conduct Interfering with Election Choice" appears appropriate. The subheading "Pre-Election Propaganda" more narrowly addresses your issue and, finally, within that subheading, "Misrepresentation Concerning Material Issue" is found.

Armed with the relevant classification number, turn to the second volume of the system. Here you will find notes of cases within each heading. When a particular note looks promising, read the entire case. The cases are published by the NLRB in bound volumes accompanying these indexes. The Outline and Index for NLRB decisions, while perhaps less up-to-date than other services, is exceptionally refined and will lead you from a general notion to the precise issue at stake.

While legal research on union organizing is distinct and circumscribed, other labor law conflicts can be amorphous and elusive. To illustrate, let us assume that you practice in Paw Paw. Your brother-in-law has just been fired from a factory in Kalamazoo for loafing on the job. He maintains that he was discharged only be-

cause he testified truthfully, although against his employer in a recent, unrelated, civil suit. Obviously a wrongful discharge action, you conclude.

You know that the at-will doctrine is undergoing considerable challenge and change in many states and that, in Michigan, state courts find that an employer, under certain circumstances, is contractually bound to show that just cause exists before disciplining an employee. In the best known Michigan cases, the employer has, through oral assurances or policy statements in company literature, limited his common law authority to set the terms and conditions of employment.

In this case, you decide that you will have to persuade a court to recognize a public policy exception to the rule that employees serve at the will of their employer. Unlike the earlier problem, this predicament implicates state common law as opposed to federal statute. In addition, unlike the first problem, the legal developments are nascent. As a result, you will find few, although developing, secondary materials.

An accepted approach to this problem calls for a review of *Corpus Juris Secundum* (CJS) or *Am. Jur. 2d*. These reference works, like hornbooks, are organized by topic and consist predominately of statements of the law as set forth in cases. CJS, a West publication, follows the West key number system. So, after finding your appropriate topic, proceed to a West reporter to read the case that applies. From *Am. Jur. 2d*, consult A.L.R. for annotations on your topic.

The difficulty with these systems is that they resemble summaries of headnotes or case holdings. With a problem calling for the extension of an idea, these reference works have limited value because they ignore unresolved legal issues and conflicts and do not attempt to editorialize or give examples. That is, their object is merely to set forth what the law is from a review of case precedent.

Where, as with the at-will issue, there are no existing treatises on the subject, a quick way to find available writings is to review the Index to Legal Periodicals. The ILP is a comprehensive index of over 700 law journals, several legal newspapers and other legal materials from general sources. It is an invaluable entry into scholarly legal literature.

Using the ILP is quite simple. It is arranged by subject, author/title, case name and statute. In addition, ILP is current; its listings are updated weekly. Recent commentary on your issue may be inestimable, for a well written, thoughtful article discusses even tangential issues and implications perhaps unperceived by you and — most useful of all — supports its statements with abundant references, many of which will be further research leads. In your case, the ILP yields two titles which appear to be particularly germane to your brother-in-law's claim: "Guidelines for a Public Policy Exception to the Employment At-Will Rule,"<sup>2</sup> and "Protecting Employees At-Will Against Wrongful Discharge: The Public Policy Exception."<sup>3</sup>

These articles show that where the reason for ►

disciplining an employee is the act of testifying truthfully, other states have recognized a public policy limitation on the at-will doctrine. With luck you'll find a citation to a Michigan case. Even if no Michigan cases are cited, however, leading cases from other jurisdictions should be briefly described. One of these cases may be analogous to yours. If so, you will have found authority for your position. More importantly, though, for purposes of your research, you will have gleaned terms or concepts to use to investigate Michigan case law.

The publications classifying Michigan common law are *Michigan Law and Practice* (MLP), *Michigan Digest* and *Callaghan's Michigan Digest*. MLP is an encyclopedia of Michigan law. It is comprised of a general index, again containing words and phrases, together with volumes of short expositions on Michigan law. One benefit of MLP is its wealth of citations. *Michigan Digest*, a West publication, also has a descriptive word index which leads to volumes of abridged versions of cases. If a case looks particularly apt, read the entire opinion. (The digest, after all, only purports to be an editor's condensed account.) *Michigan Digest* refers you not only to cases but also to attorney general opinions, law review articles, federal statutes, and the Code of Federal Regulations.

Your brother-in-law's case seems to call for an innovative treatment of the at-will doctrine. Such invention especially requires imagination in research and rhetoric. Here, your argument will revolve around the wisdom and ethics of requiring individuals to choose between livelihood and civic obligation. Naturally, there are sources beyond traditional legal ones that address this collision of values. Investigate non-legal fields such as the social sciences and the humanities in fashioning your arguments. For example, there is a study showing that discharged employees who were reinstated by labor arbitrators turned out to be, in the main, successful.<sup>4</sup> Such unorthodox authority may encourage a judge to break with an established doctrine. Creative research may make the difference between journeyman-lawyer and brilliant advocate.

Finally, imagine yourself in Alpena. An obese, caucasian male with a great deal of money to pay your fee tells you that he's just been laid off by a large local construction company. At the same time, a black female with less seniority was retained. The employer explained to your client that he had adopted an affirmative action program and that in order to satisfy his minority hiring and retention goals, he could not regard seniority as the controlling factor in the layoff decision. In addition, the employer told your client that his obesity had become detrimental to job performance. Your client wants his job back.

This pattern implicates both federal and state statutes. Title VII of the Civil Rights Act of 1964<sup>5</sup> outlaws discrimination on the basis of race and sex, while the Michigan Elliott-Larsen Civil Rights Act<sup>6</sup> proscribes employment decisions based on weight as well.

Title VII research is not unlike that for the union organizing problem. If you know the pertinent statute, look it up. For the federal law, look to United States Code

Annotated (USCA) or United States Code Service Annotated (Lawyer's Edition) (USCS). These volumes contain not only the statute but interpretive notes on cases, guides to commentary and law review articles, cross references to other statutes and additional research leads. Fair Employment Practice Cases (BNA) and Employment Practices Decisions (CCH) report decisions of the EEOC and the courts interpreting Title VII.

For the Elliott-Larsen Act, find the statute in *Michigan Compiled Laws Annotated* (MCLA) or *Michigan Statutes Annotated* (MSA). Like USCA and USCS, these publications set forth the statute as well as case digests and other research references. The value of the annotated code services, state and federal, is that they provide comprehensive and highly detailed research references. Even if your topic is treated only cursorily, a code service entry should be enough to get you started.

### How to Obtain Materials

For the lawyer in Detroit or Lansing, finding necessary materials is rarely difficult. If you are in Eagle River or Paw Paw, or Alpena, however, the seemingly impossible may only take a little longer.

Start with your local public library. In Michigan, every public library has access to an extensive list of federal materials through the three-tiered Federal Depository Libraries System, a network through which virtually all unclassified federal documents are available. Two Michigan libraries — the Detroit Public Library and the Library of Michigan in Lansing — are designated as first-tier regional depositories. They automatically receive, and must permanently retain, all federal depository literature, including legal documents.

On the second tier are about 35 selective depository libraries which do not automatically receive materials, but select from a list of federal publications. Libraries at all law schools, all tax-supported colleges and some private colleges, as well as a few municipal libraries are such selective libraries.

Finally, on the third tier are all the rest of the public libraries in Michigan — that is, smaller libraries that directly receive no federal materials. Through the depository system, though, your small, local library can borrow any depository item from any first or second tier library for you. So, to acquire a federal document that your library doesn't have, ask the librarian for the list of available publications and check the hundreds of entries under "Labor."

For the NLRA problem, for example, request the Outline and Index for NLRB Decisions and your librarian will interloan it for you from a second or first tier library. It may be a week or two before the requested item actually arrives. For more immediate information, and while you are still in the library, consult the current *U.S. Government Directory*.<sup>7</sup> This exhaustive source book lists departments, specialized boards, commissions, committees and officials, with their telephone numbers. Locate the agency which administers the statute governing your problem. For example, the NLRB has numerous regional offices, yours being in Detroit. Call the regional office and discuss your case with an agent. At the very least,

you'll come away with some further research leads and the procedures that the agency follows.

Your most effective research tool may be your telephone. Do not hesitate to call the governmental body or bureau about the problem. While agents are unlikely to pass out advice, they answer most well planned questions. Lawyers are often reluctant to reveal their ignorance about the law — particularly to the department which may judge their clients. That disinclination, natural as it may be, is almost always unwarranted and can deprive you of an important (and free!) source of valuable information. In addition, each of the depart-

ments has its own publications which will describe aspects, particularly procedural, of the department and the law. More importantly, each department has manuals by which its agents operate. For example, three NLRB manuals reveal that agency's procedures in painful detail and a surprising amount of substance as well.

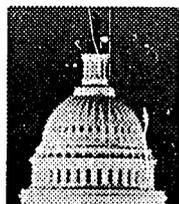
By law, every Michigan county must maintain a law library. Visit yours; it's probably in the county courthouse. County law libraries, unfortunately, need not maintain minimal listings. Many do not hold federal statutes or the ILP, let alone specialized reporting services. However, if your county law library doesn't have what you want, request that the librarian interloan it for you from another county law library. County law libraries also have access to some major law libraries.

One disadvantage of this approach is that an interloan presupposes that you've narrowed your research to the point that you can request a specific statute by section number or popular name or a case by citation or parties' names. Another drawback is that libraries will not interloan significant reference volumes. If you want a section from such a volume, the loaning library will copy it for you. Obviously, if your inquiry has not evolved to the stage where you know which specific section of a book to request, interloans are not for you.

State university libraries have extensive holdings. From Eagle River or Paw Paw, the drive to Houghton or Kalamazoo may well be worth the time. Both Michigan Tech and Western Michigan, as well as the Kalamazoo Public Library, are second-tier depository libraries.

Consider using a computer for your research. LEXIS and WESTLAW are law libraries reduced to computer storage.<sup>8</sup> Many county law libraries, all law school libraries, some major non-law libraries, and most sizable private firms have LEXIS or WESTLAW terminals; some have both. Many such institutions share their computers with "outsiders" for a fee. You may be able to use the terminals yourself, or request that a search be done for you. Keep in mind, however, that if a librarian does a search for you, he or she merely finds information without deciding whether or not it will be of ultimate use to you. Clearly, it is more efficient to use LEXIS and WESTLAW yourself, in person. ►

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A personal computer can be tremendously useful to a lawyer who has no ready access to a standard print library. If you already own a personal computer, think seriously of equipping it to receive the LEXIS or WESTLAW listings, which are vast. You will need a modem, appropriate software, a contract with either LEXIS or WESTLAW, and a printer. With a reasonable initial investment, a monthly service charge, and an increase in your telephone bill, you will have access to all LEXIS or WESTLAW holdings, including labor materials.<sup>9</sup> Both LEXIS and WESTLAW offer telephone consultation with lawyer/researchers to the subscriber who is having trouble formulating a search.

Consult the *Michigan Bar Directory* for other lawyers who could help you. A call to a labor law committee person or a member of an appropriate state board or commission might be fruitful.

In the end, legal research becomes intuitive. Some services simply work while others only frustrate; some treatises are clear while others are opaque; some commentaries are direct and enlightening while others are abstruse. The following bibliography should help. ■

The author would like to thank Elsa Shartois for her contributions.

Robert A. McCormick is a 1973 graduate of the University of Michigan Law School and is a professor of law at the Detroit College of Law.



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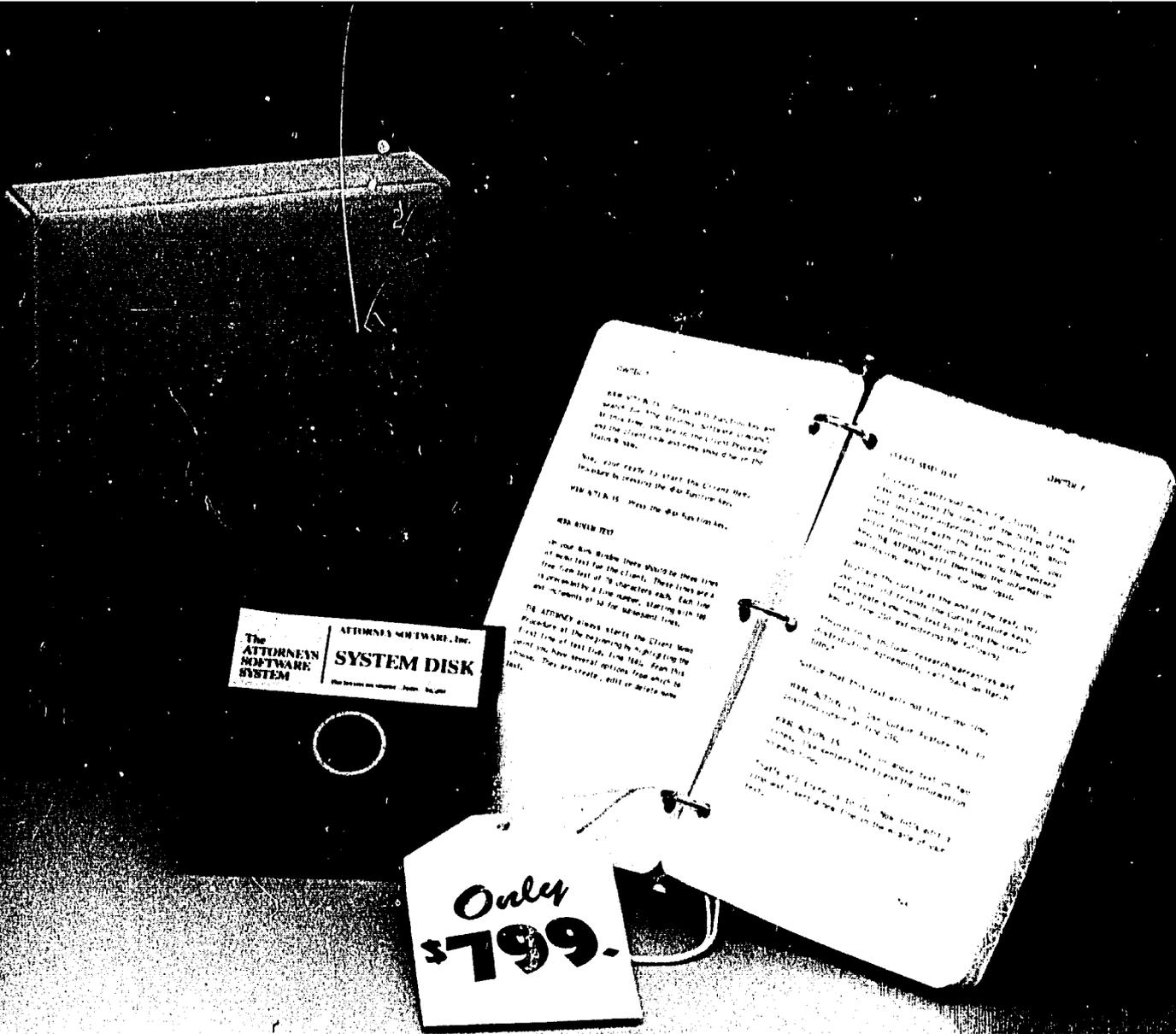
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### Footnotes

1. 29 U.S.C. §§ 151-69.
2. 13 *U. Conn. L.Rev.* 617 (1980).
3. 96 *Harv. L.Rev.* 1931 (1983).
4. Ross, Arthur M., "What Happens After Reinstatement" *Proceedings of the National Academy of Arbitrators. Critical Issues in Labor Arbitration* BNA (1957).
5. 42 U.S.C. 2000e-2.
6. MCLA § 7.2101
7. Another indispensable federal publication is the *Statistical Abstract of the United States*. The labor entries are extensive and include references to other surveys and to federal statutes. The *Directory and Abstract* may be purchased from the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402.
8. Indeed, CJS is linked through the key number system to the WESTLAW computerized law library.
9. These labor law holdings are currently limited but are developing.



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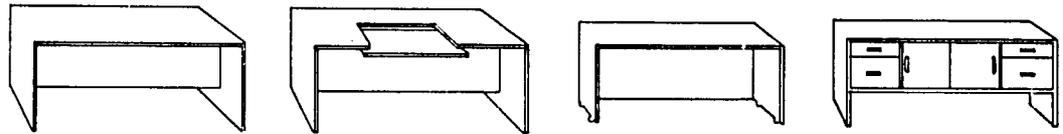
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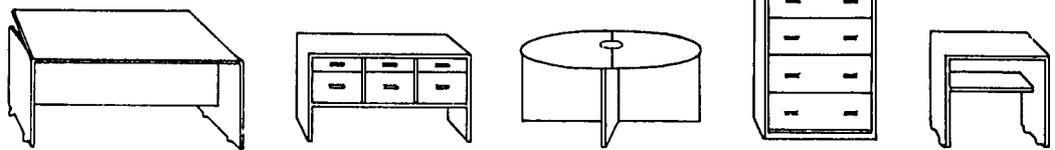
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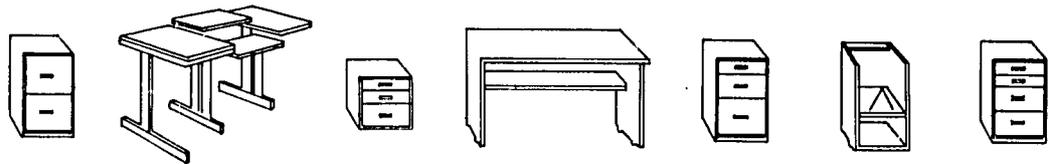
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