

DETAILED TABLE OF CONTENTS

	<i>Main Volume</i>	<i>Supple- ment</i>
ABOUT THE AUTHORS	v	v
ACKNOWLEDGMENTS, DEDICATION, AND OTHER MATTERS REDUX.....	vii	vii
PREFACE	xi	ix
SUMMARY TABLE OF CONTENTS	xv	xi
CORRECTIONS TO THE MAIN VOLUME.....	—	xli
CHAPTER 1. UNIQUE EMPLOYMENT AND LEGAL FEATURES OF THE CONSTRUCTION INDUSTRY	1-1	1
I. General Statutory Features.....	1-1	—
II. Characteristics of Construction Employment and Related Adaptations of Laws and Industrial Relations Practices	1-2	1
Chapter Summary	1-6	—
Part I. Wage and Hour and Government Contract Laws in the Construction Industry		
CHAPTER 2. WAGE AND HOUR ISSUES.....	2-1	5
I. Introduction: The Fair Labor Standards Act of 1938.....	2-2	—
II. Coverage	2-3	—
III. Basic Minimum Wage and Overtime Requirements	2-4	—
IV. Recordkeeping Requirements	2-5	—
V. Employer-Employee Relationships.....	2-7	6
A. Independent Contractors	2-7	6
B. Joint Employers	2-9	6
VI. Exempt Versus Non-exempt Employees	2-9	—
VII. Compensable Time.....	2-10	7
A. Work Defined	2-10	—
B. Continuous Workday Doctrine.....	2-13	7

	<i>Main Volume</i>	<i>Supple- ment</i>
C. Travel Time; Travel Between Jobs; Out-of-Town Travel.....	2-15	—
D. Meal Breaks; Break Periods.....	2-16	—
E. On Call, Waiting to Be Engaged, and Engaged to Be Waiting.....	2-18	—
VIII. Payment of Wages: Hourly, Piece-Rate, and Salaried Employees; Proper and Improper Deductions	2-19	8
A. What Is the “Regular Rate”?.....	2-19	—
B. Bonuses	2-20	—
C. Overtime Calculations	2-20	—
D. Compensatory Time	2-21	—
E. Overtime and Piece-Rate Workers	2-22	—
F. Overtime and Salaried Non-exempt Employees	2-22	—
G. Fluctuating Workweek Method.....	2-22	—
H. Two Rates of Pay [New Topic]	—	8
IX. Tools, Supplies, Uniforms, and Personal Protective Equipment.....	2-23	—
X. Working Foremen	2-24	—
XI. Supervisors and Managers	2-25	—
XII. Salary Basis Test	2-27	12
XIII. Retaliation	2-29	—
XIV. Enforcement and Litigation	2-31	—
A. Department of Labor Investigations.....	2-31	—
B. Private Lawsuits	2-31	—
XV. Presidential Memorandum on Executive, Administrative, and Professional Exemptions	2-32	—
XVI. State and Local Wage Laws	2-32	—
<i>Relevant Materials in Appendix Documents</i>	2-33	—
CHAPTER 3. THE DAVIS-BACON AND RELATED ACTS... 3-1	15	
I. Introduction.....	3-1	—
II. Coverage Under the Davis-Bacon Act.....	3-2	15
III. Prevailing Wage Rate	3-4	17
A. Rate Determinations by the Secretary of Labor...	3-4	17
B. Determining the Proper Classification of Workers	3-5	—
C. Challenges to Rate Determinations.....	3-6	17
D. Reimbursements Required to Maintain Prevailing Wage [New Topic]	—	20
IV. Recordkeeping Requirements	3-7	21
V. Enforcement.....	3-8	22
A. Private Causes of Action [New Topic]	—	22

	<i>Main Volume</i>	<i>Supple- ment</i>
VI. The Copeland Anti-kickback Act.....	3-11	—
VII. State Prevailing Wage Statutes.....	3-12	23
VIII. The Service Contract Act.....	3-12	23
IX. Executive Order 13,658	3-14	—
X. Interplay Between the Fair Labor Standards Act, the Davis-Bacon Act, and the Service Contract Act [New Topic].....	—	26
XI. Executive Order 13,706: Paid Sick Leave for Employees of Federal Contractors [New Topic].....	—	26
XII. Executive Order 13,495: Nondisplacement of Qualified Workers Under Service Contracts [New Topic]	—	33
Chapter Summary [New Summary].....	—	33
<i>Relevant Materials in Appendix Documents</i>	3-15	34
CHAPTER 4. PROJECT LABOR AGREEMENTS	4-1	35
I. Overview	4-1	—
II. The <i>Boston Harbor</i> Decision.....	4-2	35
III. Distinguishing Government Proprietary Actions From Regulatory Actions [Revised Topic Heading (Formerly “The <i>Snyder</i> Decision”)].....	4-3	35
IV. State and Federal Requirements Regarding Project Labor Agreements (PLAs)	4-5	—
A. State Requirements	4-5	—
B. Federal Requirements	4-5	—
V. PLAs and Antitrust Issues.....	4-6	—
VI. Davis-Bacon Act Issues	4-7	—
VII. Other Legal Challenges to PLAs	4-8	—
Chapter Summary	4-8	—
<i>Relevant Materials in Appendix Documents</i>	4-9	—

**Part II. Equal Employment Opportunity
in the Construction Industry**

CHAPTER 5. EQUAL EMPLOYMENT OPPORTUNITY: GENERALLY APPLICABLE LAWS	5-1	39
I. Introduction.....	5-3	—
II. Title VII of the Civil Rights Act of 1964	5-5	41
A. Overview of Title VII and Substantive Provisions.....	5-5	—
B. Kinds of Claims	5-8	41
1. Disparate Treatment.....	5-8	—
2. Disparate Impact.....	5-10	—

	<i>Main Volume</i>	<i>Supple- ment</i>
3. Systemic Discrimination.....	5-12	41
C. Religion.....	5-14	42
1. Reasonable Accommodations	5-16	42
2. Undue Hardship	5-18	—
3. EEOC Guidelines.....	5-21	—
4. Proof of Claim for Failure to Provide Reasonable Accommodation.....	5-22	—
5. The Application Process	5-22	—
D. What Is Harassment?	5-23	42
1. Same-Sex Harassment and Discrimination Based on Sexual Orientation or Gender Identity and Sex Stereotyping as Discrimination.....	5-29	43
2. Harasser’s Personal Liability	5-30	—
3. Remedies.....	5-30	—
4. State Laws.....	5-30	—
E. Retaliation	5-31	43
F. Remedies.....	5-32	—
G. Procedure	5-32	44
H. Women in Construction	5-34	—
I. Best Practices	5-34	—
III. The Age Discrimination in Employment Act.....	5-35	44
A. Overview of the ADEA.....	5-35	—
B. Prohibition Limited to Discrimination Against Persons Age 40 or Older	5-36	44
C. Age Stereotypes and Discrimination	5-36	—
D. Job Advertisements	5-37	—
E. Inquiries About Age in the Application Process	5-37	—
F. Bona Fide Occupational Qualification.....	5-37	—
G. Reasonable Factor Other Than Age	5-38	—
H. Apprenticeship Programs.....	5-39	—
I. Bona Fide Seniority System.....	5-39	—
J. Retaliation	5-40	—
K. Harassment Based on Age	5-40	—
L. The Older Workers Benefit Protection Act of 1990.....	5-40	—
M. Requirements for Valid Waivers of Age Discrimination Claims	5-41	—
N. Waivers Offered in Connection With Reductions in Force	5-42	—
O. Litigation Procedure.....	5-44	—
IV. The Americans with Disabilities Act as Amended...	5-44	45

	<i>Main Volume</i>	<i>Supple- ment</i>
A. Overview of the ADA	5-44	—
B. Coverage and Application.....	5-44	45
C. Substantive Requirements.....	5-47	—
D. Definitions.....	5-47	—
1. Disability.....	5-47	—
2. Qualification Standards.....	5-48	—
3. Impairment.....	5-48	—
4. Major Life Activity	5-48	—
5. Substantially Limits	5-49	—
E. Practice Tips.....	5-50	—
F. Reasonable Accommodations and Essential Functions of the Job.....	5-51	45
G. Undue Hardship	5-55	—
H. Direct Threat	5-56	46
I. Liability for Discrimination by Others	5-56	—
J. Pre-employment Inquiries.....	5-57	—
K. Confidentiality of Medical Information.....	5-58	—
L. Procedure	5-59	—
M. Remedies.....	5-59	—
N. Harassment.....	5-59	46
V. The Genetic Information Nondiscrimination Act ...	5-59	—
A. Overview of GINA.....	5-59	—
B. Genetic Information Defined	5-60	—
C. Discrimination Because of Genetic Information	5-61	—
D. Harassment Because of Genetic Information	5-62	—
E. Retaliation.....	5-62	—
F. Rules Against Acquiring Genetic Information...	5-62	—
G. Confidentiality of Genetic Information.....	5-65	—
H. Relationship With the Americans with Disabilities Act.....	5-65	—
VI. The Civil Rights Act of 1866, 42 U.S.C. Section 1981.....	5-66	47
VII. The Equal Pay Act	5-67	47
VIII. The Uniformed Services Employment and Reemployment Rights Act.....	5-71	—
A. Overview of USERRA.....	5-71	—
B. Notice of Military Duty	5-71	—
C. Length of Absence Due to Military Service	5-72	—
D. Application for Reemployment.....	5-72	—
E. Disabled Veterans.....	5-73	—
F. Failure to Apply for Reemployment	5-73	—

	<i>Main Volume</i>	<i>Supple- ment</i>
G. Escalator Principle	5-73	—
H. Seniority Rights	5-74	—
I. Health and Pension Benefits	5-74	—
J. Non-seniority Benefits	5-75	—
K. Limitations on Ability to Terminate Employment of Returning Service Members	5-76	—
L. Discrimination on the Basis of Military Service Prohibited.....	5-76	—
M. Department of Labor Enforcement	5-77	—
 CHAPTER 6. EQUAL EMPLOYMENT OPPORTUNITY LAWS APPLICABLE TO GOVERNMENT CONTRACTORS, SUBCONTRACTORS, AND FEDERALLY ASSISTED CONTRACTS		
I. Section 503 of the Rehabilitation Act	6-1	49
A. Overview of Section 503.....	6-2	50
B. Obligation to Invite Applicants and Employees to Self-Identify	6-2	50
C. Qualification Standards.....	6-3	50
D. Utilization Goals	6-4	—
E. Policy Statements.....	6-5	—
F. Reasonable Accommodations	6-6	—
G. Undue Hardship	6-7	—
H. OFCCP Oversight and Investigative Powers	6-8	—
I. Pre-award Compliance Evaluations	6-9	—
II. Executive Order 11,246	6-10	—
A. The Original Executive Order.....	6-11	51
B. Enforcement.....	6-11	51
C. Amendment to Executive Order 11,246: The Internet Applicant Rule	6-14	52
III. Executive Order 13,658: Super Minimum Wage	6-16	—
IV. Executive Order 13,665: Non-retaliation for Disclosure of Compensation Information.....	6-18	—
V. Executive Order 13,672: Prohibition on Discrimination Based on Sexual Orientation or Gender Identification	6-21	52
VI. Executive Order 13,673: Fair Pay and Safe Workplace Requirements	6-24	—
A. Determining Whether the Contractor or Subcontractor Is a Responsible Source.....	6-24	54
B. Paycheck Transparency.....	6-25	—
C. Complaint and Dispute Transparency.....	6-26	—
D. Implementing Regulations	6-27	—

	<i>Main Volume</i>	<i>Supple- ment</i>
VII. The Vietnam Era Veterans’ Readjustment Assistance Act of 1974.....	6-27	—
A. Rescission of 41 C.F.R. Part 60-250	6-29	—
B. Hiring Benchmarks	6-30	—
C. Data Collection	6-30	—
D. Invitation to Self-Identify.....	6-30	—
E. Incorporation of the Equal Opportunity Clause...	6-30	—
F. Job Listings	6-31	—
G. Records Access	6-31	—
VIII. Executive Order 13,495: Nondisplacement of Qualified Workers Under Service Contracts [New Topic]	—	55
IX. Executive Order 13,496: Notification of Employee Rights Under Federal Labor Laws [New Topic]	—	56
X. Executive Order 13,502: Use of Project Labor Agreements for Federal Construction Projects [New Topic]	—	57
XI. Executive Order 13,706: Paid Sick Leave [New Topic]	—	58
<i>Relevant Materials in Appendix Documents</i>	6-32	58
CHAPTER 7. SPECIAL EQUAL OPPORTUNITY ISSUES ASSOCIATED WITH HIRING HALLS AND APPRENTICESHIP PROGRAMS.....		
I. Introduction.....	7-1	59
A. Hiring Halls—Background	7-1	59
B. Apprenticeship Programs—Background	7-3	—
II. Relationship Between Apprenticeship Programs and Hiring Halls.....	7-4	—
III. History of Discrimination in Hiring Halls and Apprenticeship Programs.....	7-4	—
IV. Nepotism and Personal Referrals.....	7-4	60
V. Written Tests	7-5	—
VI. Other Requirements for Entry in Apprenticeship Programs That Discriminate Against Minority or Female Applicants.....	7-6	—
VII. Construction Employer Liability for Discrimination in Apprenticeship Programs or Hiring Halls.....	7-8	61
VIII. Practice Tip	7-10	—
Chapter Summary	7-10	—

**Part III. Safety and Workers' Compensation
Laws in the Construction Industry**

CHAPTER 8. SAFETY AND THE OCCUPATIONAL SAFETY AND HEALTH ACT	8-1	65
I. Introduction.....	8-2	—
II. Basics of the Statute.....	8-3	66
A. The General Duty Clause.....	8-5	—
B. Duty to Report Fatalities, Hospitalization, and Amputations.....	8-6	—
C. Recordkeeping	8-8	66
D. Types of OSH Act Citations.....	8-9	—
E. Basic Defenses	8-12	—
1. Statute of Limitations.....	8-12	—
2. OSH Act Section 4(b)(1) Defense.....	8-12	—
3. Due Process.....	8-13	—
4. Vagueness.....	8-14	—
5. Improperly Promulgated Standard.....	8-14	—
6. Exceptions Within Cited Standard	8-15	—
7. Permissive Versus Mandatory Language	8-16	—
8. More Specific Standard.....	8-17	—
9. Infeasibility Defense	8-19	—
10. Greater Hazard	8-21	—
a. Unpreventable Employee Misconduct ...	8-22	—
b. Rules	8-23	—
c. Communication.....	8-24	—
d. Diligence.....	8-25	—
e. Enforcement.....	8-26	—
11. Duplicative Citations.....	8-28	—
12. Reliance on Expertise	8-29	—
13. Multiemployer Work Site Defense.....	8-30	—
III. “Construction” Versus “General Industry” Standards.....	8-31	—
IV. Multiemployer Doctrine.....	8-38	—
V. Common OSH Act Violations in the Construction Industry	8-41	67
A. Fall Protection (29 C.F.R. Section 1926.500 et seq.).....	8-41	—
1. Leading Edge	8-42	—
2. Floor Holes.....	8-43	—
B. Excavation/Trenching (29 C.F.R. Section 1926.650 et seq.).....	8-43	—

	<i>Main Volume</i>	<i>Supple- ment</i>
C. Scaffolding (29 C.F.R. Section 1926.450 et seq.).....	8-44	—
D. Cranes (29 C.F.R. Section 1926.1400 et seq.) ...	8-44	—
E. Hazard Analysis (29 C.F.R. Sections 1926.20 and 1926.21)	8-45	—
F. Respirable Silica [New Topic]	—	67
VI. What to Expect When You’re Inspected.....	8-46	—
A. Managing an OSHA On-Site Inspection.....	8-46	—
1. Maintaining a Written Plan and Training Relevant Personnel Before OSHA Appears...	8-47	—
2. Whether to Insist the Compliance Officer Obtain a Warrant	8-48	—
3. The Actual Inspection	8-49	—
4. Keeping the Inspector on the “Straight and Narrow”.....	8-50	—
5. Duplicating All Photos and Measurements by the Compliance Officer	8-51	—
6. Interviews.....	8-51	—
7. Abatement	8-53	—
8. The Closing Conference	8-53	—
B. Warning: The Cards Are Stacked in OSHA’s Favor	8-54	—
C. . . . But Warrants Can Be Quashed If OSHA Overreaches.....	8-54	—
CHAPTER 9. WORKERS’ COMPENSATION ISSUES	9-1	69
I. General Concepts of Workers’ Compensation.....	9-1	—
II. Particular Importance to Construction Industry.....	9-3	—
III. Determining Who Is the Employer or Statutory Employer.....	9-4	—
IV. Use of Certificates of Workers’ Compensation Insurance Coverage, Indemnity Agreements, and the Like	9-6	—
V. Liability of Entities That Are Not Employers or Statutory Employers.....	9-7	—
VI. Potential Defenses to Workers’ Compensation Claims	9-7	—
A. Lack of Proper Notification by Employee of Injury.....	9-7	—
B. Whether the Injury Arises Out of and in the Scope of Employment.....	9-7	—
VII. Employee Misconduct	9-8	—

	<i>Main Volume</i>	<i>Supple- ment</i>
VIII. Misrepresentation of Condition and Undocumented Workers.....	9-8	—
IX. Old Injury, New Injury, or Aggravation of Preexisting Condition.....	9-9	70
X. Employee and Employer Fraud.....	9-9	—
XI. Proactive Control of Workers’ Compensation		
Costs.....	9-10	71
A. Insurance Coverage.....	9-10	—
B. The Application Process	9-12	—
C. Medical Examinations	9-12	—
D. Job Descriptions.....	9-14	—
E. Drug Testing Programs	9-14	—
F. Safety Programs	9-14	—
G. Claims Handling	9-15	—
H. Medical Treatment	9-17	71
I. Litigation Strategy.....	9-18	—
J. Employment Policies	9-18	—
K. Return to Work Programs and Light Duty	9-19	—
L. Subrogation [New Topic].....	—	72
M. Retaliatory Discharge, Interfering With Claims, and Discrimination [New Topic].....	—	74
Chapter Summary	9-19	—
<i>Relevant Materials in Appendix Documents</i>	9-21	—

Part IV. NLRA Concerns in the Construction Industry

Part IV-A. NLRA: Background, History, and Technical Issues

CHAPTER 10. STATUTORY BACKGROUND OF SPECIAL NATIONAL LABOR RELATIONS ACT RULES.....	10-1	81
I. Overview	10-1	—
II. Background to Landrum-Griffin Amendments and Construction Industry Proviso	10-2	—
III. Relationship Between Construction Industry Proviso and Other NLRA Provisions.....	10-4	—
IV. Threshold Requirements of Coming Within the Terms of the Construction Industry Proviso Relating to Job Site Work	10-8	—
V. Other Arguments for Lawful Subcontracting Provisions Relating to Work Preservation	10-12	—
VI. Work Preservation Versus Work Acquisition	10-14	—

	<i>Main Volume</i>	<i>Supple- ment</i>
VII. Other Considerations in Determining Work Acquisition.....	10-16	—
VIII. How Contract Interpretation Affects the Lawfulness of the Contract Provision.....	10-17	—
IX. Remedies for Violating Section 8(e).....	10-19	—
X. Construction Industry Pre-Hire Agreements and Section 8(f).....	10-19	81
XI. Interpreting Contract as Either a Section 8(f) or 9(a) Agreement.....	10-25	83
Chapter Summary	10-26	—
<i>Relevant Materials in Appendix Documents</i>	10-28	—
CHAPTER 11. COMMON-SITUS PICKETING.....	11-1	85
I. Introduction.....	11-1	—
II. History of the Related Work Doctrine and Inapplicability to the Construction Common Situs... ..	11-2	—
III. The <i>Moore Dry Dock</i> Rules and Their Application to the Common Situs.....	11-4	—
IV. General Application of the <i>Moore Dry Dock</i> Rules	11-5	—
V. Note on Persuasiveness of Totality of Conduct to Judges and Juries.....	11-6	—
VI. Evidentiary Considerations Involving “Threats” of Secondary Picketing.....	11-9	—
VII. Application of the First Two <i>Moore Dry Dock</i> Rules	11-12	—
VIII. The Establishment of Reserve Gates and the Third <i>Moore Dry Dock</i> Rule.....	11-13	—
IX. Maintaining the Separate Gate System.....	11-15	—
X. Picketing Sign Language and the Fourth <i>Moore</i> <i>Dry Dock</i> Rule	11-16	—
XI. Special Issue of Disruption to Neutral Third Parties and the <i>Fidelity Interior</i> Case.....	11-17	86
XII. Letters, Handbills, Banners, and the Issue of Coercion Versus Free Speech.....	11-22	87
XIII. Use of Letters, Banners, Handbills, etc., as Evidence of Secondary Object.....	11-27	—
XIV. The Inducement Theory of Prohibited Secondary Conduct	11-28	89
XV. Recognitional and Organizational Picketing.....	11-30	—
Chapter Summary	11-35	—
<i>Relevant Materials in Appendix Documents</i>	11-38	—

	<i>Main Volume</i>	<i>Supple- ment</i>
<i>Part IV-B. NLRA: Practical Application Issues</i>		
CHAPTER 12. UNION ORGANIZING.....	12-1	93
I. Overview	12-1	—
II. On-Site Union Organizing Activity by Employees With the Right to Be on the Property.....	12-2	—
A. Distribution and Solicitation	12-3	—
1. Company Email	12-7	—
2. Buttons and Other Paraphernalia	12-8	—
III. Off-Site Solicitation	12-8	—
IV. Summary of NLRB Rules on Employer Free Speech.....	12-10	—
V. Issues Relating to Access to Job Sites and Subcontractor Employees	12-12	—
VI. Which Entities Have the Right to Exclude	12-16	—
VII. Access to Job Sites of Union Employees.....	12-17	—
VIII. Special Union Campaign Issues Related to Construction, Including Multiemployer Collective Bargaining, Union Benefit Plans, and Union Hiring Halls.....	12-17	—
IX. Basic Arguments Against Unions	12-20	—
Chapter Summary	12-21	—
<i>Relevant Materials in Appendix Documents</i>	12-23	—
CHAPTER 13. BARGAINING UNIT DETERMINATIONS AND VOTER ELIGIBILITY RULES	13-1	95
I. Appropriate Unit	13-1	95
II. Formula for Voting Eligibility.....	13-3	—
III. Showing of Interest Requirements.....	13-4	98
IV. Unit Clarification/Accretion [New Topic]	—	99
Chapter Summary	13-5	—
CHAPTER 14. COLLECTIVE BARGAINING.....	14-1	101
I. Multiemployer Versus Single-Employer Bargaining Agreements.....	14-2	102
II. Creation of Employer Bargaining Groups	14-6	—
III. Short-Form Agreements.....	14-8	—
IV. Other Adoption Agreements	14-9	—
V. Project-Only Agreements.....	14-10	—
VI. Pre-hire Agreements.....	14-10	—
VII. National Agreements.....	14-11	—
VIII. Section 9(a) Agreements	14-11	—
IX. Section 8(f) Agreements	14-12	—

	<i>Main Volume</i>	<i>Supple- ment</i>
X. Separate Residential and Commercial Units.....	14-13	—
XI. Permanent and Project Workforces.....	14-14	—
XII. Interest Arbitration Versus Ordinary Collective Bargaining.....	14-14	—
XIII. Special Issues Resolving Reopeners Under Existing Collective Bargaining Agreements	14-18	—
XIV. Controversial Union Contract Provisions	14-20	102
A. Bans on Subcontracting	14-20	—
B. Union Signatory Clauses.....	14-22	—
C. Union Standard Clauses.....	14-23	—
D. Work Preservation Clauses	14-24	—
E. Fringe Benefit Delinquency Clauses.....	14-24	—
F. Union Label Clauses	14-27	—
G. Anti-Double Breasting Clauses.....	14-27	—
H. Picket Line Clauses.....	14-33	—
I. Most Favored Nations Clauses.....	14-34	—
J. Industry Fund Clauses.....	14-35	—
K. Market Recovery Programs	14-37	—
L. Special Job Classifications for Lower Skilled Workers	14-38	—
M. Traveler Provisions	14-39	—
N. Multiemployer Bargaining Agreements.....	14-40	—
1. Creation of Multiemployer Bargaining.....	14-41	—
2. Employer Withdrawal From Multiemployer Bargaining.....	14-42	—
O. Multi-Job Site Bargaining Units	14-44	—
P. Evergreen Provisions	14-45	102
Chapter Summary	14-46	—
<i>Relevant Materials in Appendix Documents</i>	14-50	—
 CHAPTER 15. GRIEVANCE HANDLING IN THE CONSTRUCTION INDUSTRY AND GRIEVANCE ARBITRATION	 15-1	 105
I. Issues Regarding Discipline.....	15-1	—
II. Other Issues.....	15-4	—
Chapter Summary	15-5	—
 CHAPTER 16. UNION ECONOMIC WEAPONS AND THEIR LIMITATIONS.....	 16-1	 107
I. Overview	16-1	—
II. Options Available to Unions	16-3	108
A. Collective Bargaining Strikes	16-4	—

	<i>Main Volume</i>	<i>Supple- ment</i>
1. Strikes for Economic or Unfair Labor Practice Reasons	16-6	—
2. Strikes for Recognition	16-8	—
B. The Informational Picketing Proviso Through Subparagraph (C)	16-12	—
C. Strikes in Violation of No-Strike Agreements....	16-12	—
D. Determining Whether the Union Activity Is Primary or Secondary Activity.....	16-15	108
E. Dealing With Organizational or Recognitional Picketing	16-19	—
F. Jurisdictional Disputes and Strikes	16-20	108
1. Background on Jurisdictional Disputes	16-20	108
2. Disclaimers of Interest	16-22	—
3. Deferral to Voluntary Dispute Settlement Procedures.....	16-23	109
4. Factors Considered in Determining Jurisdictional Disputes.....	16-24	—
5. NLRB Procedures in Jurisdictional Disputes.....	16-25	109
G. Union Area Standards Campaigns	16-26	—
H. Union Publicity and Other Forms of Corporate Campaigns.....	16-29	—
I. Consumer Picketing and Handbilling	16-32	—
J. Application of the Publicity Proviso.....	16-37	—
K. Ambulatory Picketing	16-37	—
L. Union Use of Salts in Relation to Labor Disputes.....	16-40	—
Chapter Summary	16-42	—
<i>Relevant Materials in Appendix Documents</i>	16-48	—
 CHAPTER 17. EMPLOYER RESPONSES TO UNION JOB ACTIONS, PARTICULARLY COMMON- SITUS PICKETING AND OTHER DEMONSTRATIONS		
	17-1	111
I. Responses to a Traditional Strike.....	17-2	—
II. Determining Nature of Employer Responses, Especially to Picketing.....	17-6	—
A. Classifying Union Job Actions.....	17-6	—
Exhibit 17-1. Sample Questionnaire Regarding Union Activity.....	17-7	—
B. Determining Employer's Response to Union Job Action(s)	17-8	—
1. Do Nothing.....	17-8	—

	<i>Main Volume</i>	<i>Supple- ment</i>
2. Respond in Writing	17-8	—
3. Talk to the Union.....	17-9	—
4. Set Up Separate Gates.....	17-10	—
5. Set Up Different Work Hours for Target Contractor	17-11	—
6. Offer to Allow Picketing Inside the Building.....	17-11	—
7. Other Options.....	17-11	—
III. Responses to Common-Situs Picketing	17-11	—
A. Putting Up a Reserved Gate in Response to Common-Situs Picketing	17-11	—
B. Alternatives to Putting Up a Reserved Gate	17-13	—
IV. Employer Responses More Relevant to Union Handbilling Than to Picketing	17-14	—
V. Responding to Union Banning Activities	17-15	—
VI. Responding to Union Use of Inflatable Balloons, Costumes, Skits, etc.	17-17	112
VII. Seeking Assistance From the NLRB for Employers to Get Injunctive Relief.....	17-19	—
VIII. Ability of Employers to Get Injunctive Relief Outside the NLRB.....	17-20	112
IX. Ability of Employers to Bring Damage Actions Against Strike-Related Misconduct	17-22	—
Chapter Summary	17-23	—
<i>Relevant Materials in Appendix Documents</i>	17-25	—
CHAPTER 18. DUAL SHOP OPERATIONS	18-1	113
I. Overview of Dual Shop or Double-Breasted Operations	18-2	—
II. The Legal Contexts in Which Dual Employer Controversies Commonly Arise	18-3	114
A. In a Charge to the Board by a Union That an Employer Has Violated NLRA Sections 8(a)(1) and (5)	18-4	—
B. In a Suit Filed by the Union Under Section 301 of the Labor Management Relations Act, 29 U.S.C. Section 185.....	18-4	114
1. Contract Applicability Argument	18-4	114
2. Arbitration Clause Argument	18-7	—
C. In a Claim for Pension Withdrawal Liability Under the Multiemployer Pension Plan Amendments Act of 1980	18-8	—

	<i>Main Volume</i>	<i>Supple- ment</i>
D. As a Consequence of the Initial Acquisition of Another Business and Being Deemed a “Successor Employer”	18-9	116
E. Distinctions Between Single-Employer Issues and Joint-Employer Issues [New Topic]	—	116
III. The Underlying Single-Employer and Alter Ego Tests for Litigating Challenges to the Legitimacy of Dual Shop Operations.....	18-9	—
A. The Single-Employer Theory of Employer Liability	18-10	—
B. The Alter Ego Theory of Employer Liability.....	18-15	—
C. Employer Defenses to Alter Ego Claims	18-17	—
1. Courts Are Likely to Examine the Order in Which the Open Shop and Union Shop Were Established.....	18-17	—
2. A Well-Articulated Legitimate Business Reason Can Constitute a Valid Defense.....	18-18	—
3. Maintain Awareness of and Follow Pertinent Market Trends and Practices	18-18	—
4. Preemption and Exhaustion Issues May Arise	18-19	—
D. Attendant Union Requests for Information, Employer Liability Under Section 8(a)(5).....	18-19	—
IV. Factors and Guidelines for Employers to Consider in Establishing a Double-Breasted Operation and for Unions to Consider in Determining Whether to Challenge Such an Operation.....	18-20	—
V. Additional Practical Advice for Maintaining the Requisite “Separateness”	18-23	120
A. Overarching and Start-Up Considerations	18-23	—
Exhibit 18-1. Sample Dual Shop Organizational Structures.....	18-24	—
B. Preparation of Written Employment Policies	18-25	—
C. Preparation of Formalized Administrative Service Agreements	18-26	120
D. Use of Common Facilities	18-26	—
E. Long-Term Borrowing and Loan Agreements ...	18-27	—
VI. Conclusions Regarding Dual Shop Issues	18-27	—
Chapter Summary	18-28	—
<i>Relevant Materials in Appendix Documents</i>	18-31	—

	<i>Main Volume</i>	<i>Supple- ment</i>
CHAPTER 19. SPECIAL ISSUES IN CONSTRUCTION ASSOCIATED WITH UNION JOB STEWARDS AND COMPANY FOREMEN	19-1	121
I. Supervisors and Foremen.....	19-1	—
A. NLRA Definition of “Supervisor”	19-2	—
B. NLRA Limitations on Union Actions Regarding Supervisors	19-3	—
C. Issues Under the NLRA Regarding Supervisors Who Also Are Union Members.....	19-4	—
II. Union Job Stewards	19-5	—
Chapter Summary	19-6	—
 Part V. Miscellaneous Issues in the Construction Industry 		
CHAPTER 20. UNION HIRING HALL AND JOB REFERRAL PROCEDURES	20-1	125
I. Overview	20-1	—
II. Legal Constraints on Hiring Halls Applicable to Unions	20-2	125
III. Advice for Employers	20-4	—
Chapter Summary	20-5	—
CHAPTER 21. APPRENTICESHIP PROGRAMS.....	21-1	127
I. Background	21-1	—
II. The National Apprenticeship Act.....	21-2	127
III. Establishing a Registered Apprenticeship Program	21-3	—
A. Federal or State Programs	21-3	—
B. Registered Apprenticeship Program Requirements	21-3	—
C. Creating an Apprenticeship Program	21-5	—
IV. Managing Registered Apprenticeship Programs.....	21-6	128
A. Establishment and Governance	21-6	—
B. Funding	21-6	—
C. Apprenticeship Agreement.....	21-7	128
D. Discrimination.....	21-8	128
E. Lawsuits Involving Apprentices.....	21-8	129
F. Compensable Time.....	21-9	—
G. Applicability of ERISA to Apprenticeship Programs	21-10	—
H. State and Local Apprenticeship and Other “Responsible Employer” Ordinances and Preemption Issues	21-10	129

	<i>Main Volume</i>	<i>Supple- ment</i>
I. Apprenticeship Programs and the Davis-Bacon Act.....	21-13	—
Chapter Summary	21-13	—
CHAPTER 22. JOB TARGETING	22-1	131
I. Prevalence of Job Targeting	22-2	—
II. Legal Challenges to Job Targeting.....	22-3	131
A. Challenges Under the Davis-Bacon Act.....	22-3	—
B. Challenges Under State Prevailing Wage Laws...	22-6	—
C. NLRA Preemption as a Barrier to Challenges Under State Prevailing Wage Laws.....	22-6	131
D. Antitrust Issues and Job Targeting	22-7	—
E. Other Issues in Job Targeting [New Topic].....	—	132
Chapter Summary	22-8	—
CHAPTER 23. CONSTRUCTION LABOR RELATIONS AND THE ANTITRUST LAWS.....	23-1	133
I. Applicability of Antitrust Laws to Labor Relations	23-1	—
II. Antitrust Issues in the Construction Industry Addressed in <i>Connell Construction Co.</i>	23-4	—
III. Implications of <i>Connell Construction Co.</i> for Construction Labor Relations Cases.....	23-7	133
IV. Job Targeting and the Antitrust Laws.....	23-10	134
A. Initial District Court Ruling in <i>American Steel Erectors</i>	23-10	—
B. Initial Appeal to the First Circuit	23-11	—
C. Proceedings in the District Court on Remand....	23-12	—
D. Second Appeal to the First Circuit.....	23-13	—
E. Additional Comments on <i>American Steel Erectors</i>	23-14	—
F. Third Appeal of <i>American Steel Erectors</i> to the First Circuit [New Topic]	—	134
V. Observations from Cases Discussed	23-15	—
Chapter Summary	23-17	—

Part VI. Trust Fund and ERISA Concerns in the Construction Industry

CHAPTER 24. UNION TRUST FUND BENEFIT PLANS	24-1	141
I. Union Trust Funds in the Construction Industry.....	24-1	—
II. Trust Fund Audits of Employer Contributions.....	24-2	—
III. Dispute Resolution Issues Involving Collection of Unpaid Benefit Contributions	24-7	141

	<i>Main Volume</i>	<i>Supple- ment</i>
A. Most Common Issues.....	24-7	141
B. Dispute Resolution Steps	24-7	—
C. Statutory Basis of Liability	24-8	—
D. Liability for Subcontractor Defaults	24-8	—
E. Particular Defenses	24-8	142
F. Statutes of Limitations	24-10	—
G. <i>Kaiser Steel</i> Ruling and Its Progeny	24-11	142
H. Differences Between Collective Bargaining Agreement and Benefit Plan Documents	24-13	—
I. Increases in Employer Contributions.....	24-13	—
J. Role of the NLRB in Benefit Claims Cases and Proper Tribunal	24-14	—
K. Other Enforcement Issues	24-15	—
Chapter Summary	24-16	—
 CHAPTER 25. MULTIEMPLOYER PENSION WITHDRAWAL LIABILITY		
I. Overview	25-1	143
II. When Withdrawal Occurs and How Liability Is Computed.....	25-2	143
III. Defenses to or Reductions of Withdrawal Liability	25-5	—
IV. Additional Liabilities and Underfunding Warnings	25-7	145
Chapter Summary	25-9	—

Appendices

APPENDIX 1. SEPARATE GATE SIGNS—LANGUAGE FOR COMMON CONSTRUCTION SITES (MANAGEMENT PERSPECTIVE)	A-3	—
APPENDIX 2. SAMPLE LETTER TO UNION REGARDING NOTIFICATION OF SEPARATE GATES AND/OR SEPARATE HOURS (MANAGEMENT PERSPECTIVE)	A-5	—
APPENDIX 3. SAMPLE UNION WARNING LETTER, PICKETING INSTRUCTIONS, HANDBILL, AND BANNER (UNION PERSPECTIVE)	A-7	—
APPENDIX 4. SAMPLE ADOPTION AGREEMENT OF MULTIEMPLOYER CONTRACT (NEUTRAL PERSPECTIVE)	A-15	—

	<i>Main Volume</i>	<i>Supple- ment</i>
APPENDIX 5. SAMPLE ME-TOO SHORT FORM ADOPTION AGREEMENT WITH CHANGES TO UNION ASSOCIATION AGREEMENT (NEUTRAL PERSPECTIVE)	A-17	—
APPENDIX 6. SAMPLE SECTION 9(a) UNION RECOGNITION CONTRACT TERMS (NEUTRAL PERSPECTIVE)	A-21	—
APPENDIX 7. SAMPLE SECTION 8(f) UNION RECOGNITION CONTRACT TERMS (NEUTRAL PERSPECTIVE)	A-23	—
APPENDIX 8. SAMPLE POLICY TOWARD STRIKER REPLACEMENTS (MANAGEMENT PERSPECTIVE)	A-25	—
APPENDIX 9. SAMPLE UNFAIR LABOR PRACTICE CHARGES AGAINST UNION FOR SECONDARY BOYCOTT ACTIVITIES AND/OR JURISDICTIONAL DISPUTE (MANAGEMENT PERSPECTIVE)	A-27	—
APPENDIX 10. SAMPLE SECTION 303 SECONDARY BOYCOTT LAWSUIT AGAINST UNION (MANAGEMENT PERSPECTIVE)	A-29	—
APPENDIX 11. SAMPLE STATE COURT INJUNCTION ACTION (MANAGEMENT PERSPECTIVE)...	A-51	—
APPENDIX 12. SAMPLE UNFAIR LABOR PRACTICE CHARGES AGAINST UNION FOR STRIKE MISCONDUCT ACTIVITIES (MANAGEMENT PERSPECTIVE)	A-63	—
APPENDIX 13. LIST OF QUESTIONS REGARDING UNION DEMONSTRATIONS (NEUTRAL PERSPECTIVE)	A-65	—
APPENDIX 14. BRIEF EXPLANATION OF DIFFERENCES: PICKETING, HANDBILLING, BANNERING, ETC. (NEUTRAL PERSPECTIVE)	A-67	—
APPENDIX 15. SAMPLE LETTER TO UNION DEALING WITH CONTRACTORS THAT MEET AREA STANDARDS (MANAGEMENT PERSPECTIVE)	A-69	—

	<i>Main Volume</i>	<i>Supple- ment</i>
APPENDIX 16. SAMPLE LEGALLY AGGRESSIVE LETTER TO UNION REGARDING UNION DEMONSTRATIONS (MANAGEMENT PERSPECTIVE)	A-71	—
APPENDIX 17. SAMPLE LETTER TO THIRD PARTIES ADVERSELY AFFECTED BY UNION DEMONSTRATIONS (MANAGEMENT PERSPECTIVE)	A-73	—
APPENDIX 18. WHAT UNIONS GENERALLY CAN DO AND CANNOT DO IN AN AREA STANDARDS CAMPAIGN (NEUTRAL PERSPECTIVE)	A-77	—
APPENDIX 19. SAMPLE PROPERTY RIGHTS AGREEMENT (MANAGEMENT PERSPECTIVE)	A-79	—
APPENDIX 20. OUTLINE OF STRATEGY FOR EMPLOYERS TO CONSIDER IN RESPONSE TO UNION DEMONSTRATIONS (MANAGEMENT PERSPECTIVE)	A-81	—
APPENDIX 21. SAMPLE UNFAIR LABOR PRACTICE CHARGES AGAINST EMPLOYER FOR DUAL SHOP ALLEGED TO BE SINGLE EMPLOYER OR ALTER EGO (UNION PERSPECTIVE)	A-85	—
APPENDIX 22. UNION REQUESTS FOR INFORMATION TO UNIONIZED EMPLOYER AS TO RELATIONSHIP TO OPEN SHOP (UNION PERSPECTIVE)	A-87	—
APPENDIX 23. ADMINISTRATIVE SERVICE AGREEMENT BETWEEN NON-UNION PARENT COMPANY AND DUAL SHOP SUBSIDIARIES (MANAGEMENT PERSPECTIVE)	A-93	—
APPENDIX 24. SAMPLE LETTER OF ASSENT TO PROJECT LABOR AGREEMENT (NEUTRAL PERSPECTIVE)	A-99	—

	<i>Main Volume</i>	<i>Supple- ment</i>
APPENDIX 25. SAMPLE PROJECT-ONLY AGREEMENT WITH CHANGES TO MULTIEMPLOYER CONTRACT (MANAGEMENT PERSPECTIVE)	A-101	—
APPENDIX 26. SAMPLE MULTIEMPLOYER AGREEMENT AS TO UNION RECOGNITION (NEUTRAL PERSPECTIVE)	A-103	—
APPENDIX 27. ADDITIONAL PROTECTIVE LANGUAGE FOR EMPLOYER TO CONSIDER ADDING TO BARGAINING AGREEMENT (MANAGEMENT PERSPECTIVE)	A-105	—
APPENDIX 28. SAMPLE UNION REMITTANCE REPORT (SOMETIMES HELD TO BIND EMPLOYER TO UNION AGREEMENT) (UNION PERSPECTIVE)	A-107	—
APPENDIX 29. EMPLOYER RESPONSES TO SALTING (MANAGEMENT PERSPECTIVE)	A-109	—
APPENDIX 30. AGREEMENT FOR FLUCTUATING WORKWEEK SALARY BASIS (MANAGEMENT PERSPECTIVE)	A-113	—
APPENDIX 31. ACORD CERTIFICATE OF LIABILITY INSURANCE INCLUDING WORKERS' COMPENSATION (NEUTRAL PERSPECTIVE)	A-115	—
APPENDIX 32. CONTRACTOR MINIMUM WAGE, EXECUTIVE ORDER 13,658 (FEBRUARY 12, 2014)	A-117	—
APPENDIX 33. U.S. DEPARTMENT OF LABOR, WAGE AND HOUR DIVISION FLSA POSTER.....	A-123	—
APPENDIX 34. U.S. DEPARTMENT OF LABOR, WAGE AND HOUR DIVISION DAVIS-BACON ACT POSTER.....	A-125	—
APPENDIX 35. OFCCP: STEPS TO ACHIEVE UTILIZATION GOALS	A-127	—
APPENDIX 36. APPENDIX B TO PART 60-300—SAMPLE INVITATION TO SELF-IDENTIFY	A-131	—

	<i>Main Volume</i>	<i>Supple- ment</i>
APPENDIX 37. EQUAL OPPORTUNITY FOR VEVRAA-PROTECTED VETERANS	A-135	—
APPENDIX 38. SEXUAL DISCRIMINATION GUIDELINES (FINAL RULE)—BEST PRACTICES FOR CONTRACTORS [NEW APPENDIX]	—	151
APPENDIX 39. U.S. DEPARTMENT OF LABOR, WAGE AND HOUR DIVISION, WORKER RIGHTS UNDER EXECUTIVE ORDER 13,706 POSTER: PAID SICK LEAVE FOR FEDERAL CONTRACTORS [NEW APPENDIX]	—	153
TABLE OF CASES	C-1	157
INDEX	I-1	—