# Preface

*This Third Edition is current through June 2014 with selected updates through September 2014.*

In the Second Edition we noted the increase in cases arising out of employees' use of social media. There are now enough arbitral opinions that we have added to this Third Edition a new Chapter 10 titled "Social Media." We expect this chapter to have the most new cases when we issue the next edition for three reasons.

- First, social media use has become ubiquitous among all workers, particularly the millennium generation and younger, with new applications that encourage employees to be constantly "connected," following and updating "friends" on every facet of their lives, including their work lives—and also including aspects of their private lives that in some cases can have employment-related ramifications. Almost all workers have cell phones with cameras and Internet connections, giving them the ability to post pictures from and comment about the workplace. What previously was a private conversation about the workplace or a particular supervisor is now disseminated instantaneously and much more broadly, with potentially significant consequences.
- Second, employers have created policies to prevent inadvertent disclosures of trade secrets or HIPPA protected information. Other policies attempt to limit the content of social media posts consistent with the employer's obligation to prevent sexual harassment, bullying, or workplace violence. In addition, employers are seeking greater access to employee's public and even private social media posts and attempting to use that information in disciplinary proceedings, raising privacy concerns and increasingly blurring the line between off-duty and work-related misconduct.
- Third, the NLRB has made it clear that social media policies cannot chill employees' Section 7 rights. It has even offered employers guidance on appropriate policy language. Unions may

choose to challenge employer policies in disciplinary cases. Arbitrators may be required to interpret the interplay between policies and the law, in determining whether there is just cause for discipline when an employee violates the employer's policy. With more posting, more policies, and more potential issues, we expect the number of awards dealing with social media to increase in the coming years.

In addition to providing new areas for potential discipline, social media provides new challenges to investigating and defending alleged disciplinary infractions. In Chapter 10 we look at some of the legal constraints on obtaining electronic information that affect arbitral subpoenas. We also consider the potential ethical and disclosure problems arbitrators must consider when participating in social media such as LinkedIn; decisions on vacatur in employment law cases, we note in the chapter, may likewise impact judicial views of what constitutes required disclosure in labor-management arbitration—or a disqualifying appearance of bias.

As might be expected from the significantly higher union density in the public sector workforce than in the private sector workforce, an increasing number of awards we cite come from the public sector. We have tried to focus on the aspects of public sector awards that also are relevant to "the law of the shop" in the private sector, and point out instances where elements of such awards are unique to the public sector. What the awards cannot show—and what so far we have not chosen to discuss in this treatise—is the increasing procedural complexity of some public sector cases: In California, for example, e-discovery has become a regular feature of police disciplinary cases, with arbitrators having to resolve disputes over search strings. Also in police cases arbitrators have to sign protective orders, engage in *in camera* examinations, and make legal determinations about the availability of personnel file documents. While these procedural requirements are not always reflected in the disciplinary awards themselves, they affect how the parties plan and conduct arbitrations. If this increased procedural complexity becomes more widespread, it will be covered in future editions.

During times of workplace change brought by automation, containerization of cargo, and computerization, disciplinary arbitration has adapted to dealing with issues arising as a result of new technology. It is still adapting. Despite the increasing complexity of cases due to the rise of social media and new electronic technology, the basic principles of just cause and due process remain largely unchanged. Arbitrators have adapted the principles to decide disciplinary grievances over what is now a high tech workplace permeated by social media. We expect arbitrators will continue to adapt enduring principles to a changing workplace. And we expect to report those adaptations in our next edition.

We would like to express our appreciation to all the chapter editors who contributed to the Third Edition. Without their expertise and the considerable effort they devoted to this project, this book would not have seen the light of day.

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