Detailed Table of Contents

FOREWORD ................................................................. v
PREFACE ................................................................. vii
OVERVIEW ................................................................. ix

KEY TO ARBITRAL REPORTER ABBREVIATIONS AND HOW TO USE LA CDI CLASSIFICATION NUMBERS ......................................................... xi

SUMMARY TABLE OF CONTENTS ........................................... xiii

CHAPTER 1. ARBITRATION AND ITS SETTING ....................... 1-1
1. Arbitration Defined—Historical Background ...................... 1-3
2. Types of Arbitration .................................................. 1-6
   A. Compulsory Arbitration ........................................... 1-6
3. The Expanding Role of Arbitration in the Resolution of Statutory Employment Claims Under Collective Bargaining Agreements ........................................... 1-12
4. Arbitration Costs ....................................................... 1-13
5. Organizations Involved in Arbitration ............................. 1-16
   A. National Academy of Arbitrators ............................... 1-16
   B. Government Agencies Serving Arbitration ................. 1-17
   C. American Arbitration Association ............................ 1-18
   D. Sports Arbitration ................................................ 1-18

CHAPTER 2. LEGAL STATUS OF ARBITRATION IN THE PRIVATE SECTOR ................................................... 2-1
1. Introduction—Arbitration and the Law ............................ 2-2
2. Private-Sector Arbitration .......................................... 2-5
   A. Federal Law: Private Sector ................................. 2-5
      i. The Federal Arbitration Act ............................ 2-6
### How Arbitration Works

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>ii. The Labor Management Relations Act</td>
<td>2-8</td>
</tr>
<tr>
<td>a. The Lincoln Mills Case</td>
<td>2-8</td>
</tr>
<tr>
<td>b. The Trilogy</td>
<td>2-9</td>
</tr>
<tr>
<td>(1) Determining Arbitrability and Compelling Arbitration</td>
<td>2-9</td>
</tr>
<tr>
<td>(2) Enforcement and Review of Arbitration Awards</td>
<td>2-10</td>
</tr>
<tr>
<td>(3) Arbitral Modification of Incomplete or Deficient Awards</td>
<td>2-12</td>
</tr>
<tr>
<td>c. Post-Trilogy: Enforcement of Agreements to Arbitrate and Review of Arbitration Awards</td>
<td>2-13</td>
</tr>
<tr>
<td>(1) Arbitrability</td>
<td>2-13</td>
</tr>
<tr>
<td>(2) Concurrent Arbitral and NLRB Jurisdiction</td>
<td>2-17</td>
</tr>
<tr>
<td>(3) Arbitration and Section 301 Suits</td>
<td>2-18</td>
</tr>
<tr>
<td>(4) Vacatur of Arbitration Awards—General Principles</td>
<td>2-21</td>
</tr>
<tr>
<td>(5) Vacatur Based on Improper Remedies</td>
<td>2-26</td>
</tr>
<tr>
<td>(6) Awards Based on, or Inconsistent With, Statutory Law</td>
<td>2-28</td>
</tr>
<tr>
<td>(7) Procedural or Evidentiary Errors as Bases for Vacatur and Refusal to Enforce Arbitration Awards</td>
<td>2-29</td>
</tr>
<tr>
<td>(8) Vacatur and Refusals to Enforce Awards Based on Public Policy Grounds</td>
<td>2-31</td>
</tr>
<tr>
<td>(9) Vacatur Because of “Evident Partiality,” “Misconduct,” “Corruption,” and “Manifest Disregard of the Law”</td>
<td>2-34</td>
</tr>
<tr>
<td>(10) Sanctions and Costs for Frivolous Post-Arbitration Litigation</td>
<td>2-40</td>
</tr>
<tr>
<td>d. De Novo Litigation Following Arbitration</td>
<td>2-42</td>
</tr>
<tr>
<td>(1) De Novo Litigation of Statutory Claims</td>
<td>2-42</td>
</tr>
<tr>
<td>(2) De Novo Litigation of Claims Cognizable Under the Labor Management Relations Act</td>
<td>2-46</td>
</tr>
<tr>
<td>(3) State Law Tort Claims Arising From Wrongful Discharges: Federal Preemption and the Exhaustion of Arbitral Remedies Requirement</td>
<td>2-48</td>
</tr>
<tr>
<td>B. State Law: Private Sector</td>
<td>2-52</td>
</tr>
<tr>
<td>i. State Common Law</td>
<td>2-52</td>
</tr>
<tr>
<td>ii. State Arbitration Statutes</td>
<td>2-54</td>
</tr>
<tr>
<td>C. Jurisdictional Limits on State Arbitration Law</td>
<td>2-58</td>
</tr>
<tr>
<td>D. Employer Insurance Coverage</td>
<td>2-60</td>
</tr>
</tbody>
</table>
CHAPTER 3.  **SCOPE OF LABOR ARBITRATION** ........................................ 3-1

1.  Introduction ................................................................................................. 3-1
2.  Disputes of Rights and Interests ................................................................. 3-4
3.  Rights Arbitration .......................................................................................... 3-6
   A.  Subject Matter of Rights Arbitration ...................................................... 3-6
   B.  Arbitrator’s Function in Rights Disputes ............................................. 3-7
      i.  Expansion of the Arbitrator’s Role .................................................... 3-13
      ii. Arbitrator’s Function in Various Industries .................................. 3-16
      iii. Arbitrator as Mediator in Rights Disputes .................................... 3-18
   C.  Rights Arbitration Contract Clauses ...................................................... 3-21
      i.  Precontract and Post-Contract Grievances .................................... 3-27

CHAPTER 4.  **THE ARBITRATION TRIBUNAL** ........................................... 4-1

1.  Single Arbitrator Versus Arbitration Board .............................................. 4-2
2.  Types of Arbitrators ..................................................................................... 4-3
   A. “Temporary” or “Ad Hoc” Arbitrators .................................................. 4-3
      i. Advantages ......................................................................................... 4-3
      ii. Disadvantages ................................................................................. 4-4
   B. “ Permanent” Arbitrators ..................................................................... 4-5
      i. Advantages ......................................................................................... 4-8
      ii. Disadvantages ................................................................................. 4-10
3.  Danger of Favoritism or of “Splitting” Awards ......................................... 4-10
4.  Mediation by Permanent Arbitrators ......................................................... 4-14
5.  Tripartite Arbitration Board ....................................................................... 4-17
   A. Advantages ......................................................................................... 4-20
   B. Disadvantages ...................................................................................... 4-21
   C. Procedure Following the Hearing ......................................................... 4-23
6.  Tribunals Under the Railway Labor Act ...................................................... 4-26
   A. Railroad Interest Disputes .................................................................... 4-26
   B. National Railroad Adjustment Board .................................................. 4-28
   C. Railroad Special Boards of Adjustment ............................................. 4-34
   D. Airline System Boards of Adjustment .................................................. 4-35
7.  Statutory Tribunals for Critical Industrial Disputes .................................... 4-38
8.  Methods of Selecting Arbitrators ............................................................... 4-39
   A. Arbitrator’s Acceptance or Withdrawal ............................................. 4-44
9.  Arbitrators and Their Qualifications .......................................................... 4-45
   A. Background, Training, and Supply of Arbitrators ............................. 4-45
   B. Qualifications Set Forth in Agreement or by Regulation .................... 4-47
   C. Impartiality ............................................................................................. 4-48
   D. Integrity ................................................................................................. 4-50
   E. Ability and Expertise ............................................................................ 4-51
   F. Legal Training ....................................................................................... 4-53
   G. Immunity From Civil Liability ............................................................. 4-53
   H. The Arbitrator’s Accountability .............................................................. 4-56
I. Data on Arbitrators ................................................................. 4-58
10. Formulation and Enforcement of Ethical Obligations of Arbitrators and Advocates ........................................ 4-58
   A. Professional Responsibility in Accepting Appointment ................................................................. 4-58
   B. Disclosing Conflicts ................................................................................................................ 4-59
   C. Advertising and Solicitation .......................................................................................................... 4-62
   D. Advocate's Responsibilities in Arbitration .................................................................................. 4-63
   E. Sanctions for Violations of Codes of Conduct ........................................................................... 4-63
   F. Use of Nonlawyer Advocates and the Unauthorized Practice of Law ........................................ 4-64

Chapter 5. Grievances: Prelude to Arbitration ................... 5-1

1. The Grievance Procedure ...................................................... 5-3
2. Grievances Defined .................................................................. 5-5
3. Attitude of Parties to the Grievance Procedure ......................... 5-6
   A. Abuse and Misuse of Grievance Procedure ........................................................................... 5-9
      i. Remedies for Distressed Grievance Procedures ........................................................................ 5-10
   B. Failure to Comply Strictly With Technical Requirements of the Grievance Procedure ............... 5-10

4. Should Grievance Machinery Be Open to All Complaints? .......... 5-11
   A. Former Employees' Access to the Grievance Machinery .............................................................. 5-13
      i. Retirees' Status as Grievants ........................................................................................................ 5-13
      ii. Status of Employees Who Have Resigned as Grievant ............................................................. 5-15
      iii. Status of Grievance Filed by Subsequently Deceased Employees ........................................ 5-16
   B. Management and Union Grievances ......................................................................................... 5-17

5. Procedural Requirements ............................................................ 5-18
   A. Signature of Grievant ..................................................................................................................... 5-18
   B. Group Grievances ........................................................................................................................ 5-20
   C. Waiver of Procedural Requirements and Substantive Rights .................................................. 5-21

6. Steps in Grievance Procedure .................................................... 5-25
   A. Overview .................................................................................................................................. 5-25
   B. Advanced Step Filing .................................................................................................................... 5-27

7. Time Limitations ........................................................................ 5-28
   A. Filing Grievances .......................................................................................................................... 5-28
      i. In General .................................................................................................................................. 5-28
      ii. Continuing Violations ................................................................................................................ 5-30
      iii. Untimely Filings .......................................................................................................................... 5-32
      iv. Waiver of Time Limits ............................................................................................................. 5-33
      v. Computation of Time ................................................................................................................... 5-35
   B. Holding Hearings .......................................................................................................................... 5-39
**Detailed Table of Contents**

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>C.</td>
<td>Establishment of Time Limitations</td>
<td>5-41</td>
</tr>
<tr>
<td>8.</td>
<td>Grievance Representatives</td>
<td>5-43</td>
</tr>
<tr>
<td>A.</td>
<td>Common Characteristics</td>
<td>5-43</td>
</tr>
<tr>
<td>B.</td>
<td>Right to Union Representation at Early Stage</td>
<td>5-46</td>
</tr>
<tr>
<td>C.</td>
<td>Union Representation of Employees at Investigatory Interviews</td>
<td>5-47</td>
</tr>
<tr>
<td>9.</td>
<td>Grievance Adjustment by Individual Employees</td>
<td>5-56</td>
</tr>
<tr>
<td>A.</td>
<td>An Individual Employee's Right to Move to Vacate an Arbitration Award</td>
<td>5-61</td>
</tr>
<tr>
<td>10.</td>
<td>Duty of Fair Representation</td>
<td>5-61</td>
</tr>
<tr>
<td>11.</td>
<td>Privileges and Protection of Grievance Representatives</td>
<td>5-68</td>
</tr>
<tr>
<td>A.</td>
<td>Superseniority</td>
<td>5-69</td>
</tr>
<tr>
<td>B.</td>
<td>Plant Access</td>
<td>5-71</td>
</tr>
<tr>
<td>C.</td>
<td>Special Immunity</td>
<td>5-74</td>
</tr>
<tr>
<td>12.</td>
<td>Pay for Time Spent Handling Grievances</td>
<td>5-77</td>
</tr>
<tr>
<td>13.</td>
<td>Written Statement of Grievance</td>
<td>5-82</td>
</tr>
<tr>
<td>14.</td>
<td>Observance of Grievance Procedure</td>
<td>5-83</td>
</tr>
<tr>
<td>A.</td>
<td>Use of Grievance Procedure Versus Self-Help</td>
<td>5-84</td>
</tr>
<tr>
<td>B.</td>
<td>Company Obligation to Honor the Grievance Procedure</td>
<td>5-90</td>
</tr>
<tr>
<td>C.</td>
<td>Exhaustion of Grievance Procedure as Condition Precedent for Arbitration</td>
<td>5-91</td>
</tr>
<tr>
<td>15.</td>
<td>Grievance Settlements as Binding Precedents</td>
<td>5-92</td>
</tr>
<tr>
<td>16.</td>
<td>Notice of Intent to Arbitrate</td>
<td>5-96</td>
</tr>
</tbody>
</table>

**Chapter 6. Determining Arbitrability**

1. Where Arbitrability Challenges Might Be Lodged | 6-2 |
2. Determination by the Courts | 6-3 |
   A. Substantive Arbitrability | 6-6 |
   B. Procedural Arbitrability | 6-9 |
3. Determination by the Arbitrator | 6-10 |
   A. Trilogy Arbitrability Criteria and the Arbitrator | 6-12 |
   B. Procedural Techniques for Ruling on Arbitrability | 6-13 |
4. Delay in Contesting Arbitrability | 6-15 |

**Chapter 7. Arbitration Procedures and Techniques**

1. Need for a Hearing | 7-3 |
2. Control of Arbitration Proceedings | 7-3 |
3. Prehearing Issues | 7-5 |
   A. Initiating Arbitration | 7-5 |
   B. Stating the Issue | 7-6 |
   C. Changing the Scope of the Grievance | 7-8 |
   D. Simultaneous Arbitration of Several Grievances | 7-9 |
   E. Bilateral Arbitration of Trilateral Conflicts | 7-10 |
   F. Representatives in Arbitration | 7-13 |
G. Prehearing Conferences................................................. 7-15
H. Preparing Cases for Arbitration................................. 7-15
I. Stipulations of Fact .................................................. 7-17
J. Withdrawing Grievances From Arbitration.................... 7-17
K. Arbitrator's Charges When Case Is Canceled................. 7-18

4. The Arbitration Hearing........................................... 7-19
   A. Time, Place, and Notice of Hearing ......................... 7-19
   B. Attendance at Hearings ........................................ 7-20
   C. Continuances .................................................... 7-22
   D. Bifurcation of Arbitrability and Merits ..................... 7-23
   E. Split Hearings and Interim or Partial Awards.............. 7-24
   F. Transcript of Hearing ........................................ 7-25
   G. Hearing Procedures ............................................. 7-28
      i. Oaths of Arbitrator and Witnesses ..................... 7-28
      ii. Manner of Presentation .................................. 7-28
      iii. Order of Presenting Case .............................. 7-29
      iv. Opening Statements and Closing Arguments ... 7-30
      v. Examining Witnesses ...................................... 7-30
      vi. Exhibits ...................................................... 7-32
      vii. Objections to Evidence .................................. 7-32
      viii. Participation by the Arbitrator in the Hearing... 7-33
      ix. Site Visits .................................................. 7-34
      x. Settlement at Arbitration Stage ......................... 7-34

5. Post-Hearing Issues .............................................. 7-36
   A. Post-Hearing Briefs ........................................... 7-36
   B. Advisory Opinions ............................................. 7-37
   C. Consent Awards ................................................ 7-38
   D. Default Awards ................................................ 7-38
      i. Default Awards in Ex Parte Proceedings ............. 7-38
      ii. Enforcement of Default Awards ........................ 7-39
   E. Reconsideration and Clarification of Award and Retention of Jurisdiction ............................................. 7-40
      i. The Doctrine of Functus Officio ........................ 7-40
         a. Application of the Doctrine ......................... 7-40
         b. Exceptions to the Doctrine ......................... 7-44
      ii. Retaining Limited Jurisdiction to Resolve Remedial Issues .................................................... 7-49

6. Expedited Arbitration Procedures ............................. 7-54

7. Grievant's Right to Appeal Denial of Grievance to Arbitration and Appeal Adverse Arbitration Award to Court......................................................... 7-56

Chapter 8. Evidence.............................................. 8-1

1. Evidentiary Rules ................................................. 8-3
   A. Strict Observance of Judicial Jury Trial Rules of Evidence Usually Not Required ............................. 8-3
   B. Evidentiary Rules Under Arbitration Statutes............. 8-5
C. Evidentiary Rules of Arbitration Agencies .......... 8-6

2. Evidentiary Standards........................................... 8-7
   A. The Liberal Admission of Evidence Philosophy: Use of the Nonjury Trial Evidentiary Standard .......... 8-7
   B. Use of Administrative Agency Evidentiary Standards ................................................................. 8-9

3. Evidentiary Guidelines ........................................ 8-10
   A. Should All Evidence Be Received? ......................... 8-10
   B. What Type of Evidence Should Be Used? ............... 8-13
   C. Requiring the Production of Evidence ................. 8-16
   D. Evidence Requested by Arbitrator ....................... 8-18
   E. Arbitrator’s Subpoena Power and Discovery Authority ................................................................. 8-20
   F. Preservation of Evidence ................................ 8-29

4. Types of Evidence ............................................. 8-29
   A. Right of Cross-Examination: Anonymous Witnesses and Confidential Documents ....................... 8-29
   B. Remote Testimony ........................................... 8-32
   C. Hearsay Evidence ............................................ 8-32
      i. Affidavits of Nonpresent Witnesses ................... 8-36
   D. Contemporaneous Written Notes ......................... 8-37
   E. The Parol Evidence Rule ................................ 8-38
      i. Formal Versus Informal Records ....................... 8-39
      ii. The Best Evidence ...................................... 8-40
   F. Obtaining Information Through Coerced Employee Interviews ................................................. 8-40
      i. Confessions and Guilty Pleas to Criminal Charges .............................................................. 8-41
      ii. Offers of Compromise and Admissions ............... 8-43
   G. Use of Adverse Witnesses ................................ 8-45
   H. Failure of Grievant to Testify ............................ 8-48
   I. Significance of Failure to Provide Documentary Evidence or Call Available Witnesses .............. 8-50
      i. Circumstantial Evidence ................................ 8-52
      ii. Arbitral Notice and Presumptions .................... 8-55

5. Arbitral Use of the Doctrines of Res Judicata and Collateral Estoppel Following the Termination of Criminal, Civil, and Administrative Proceedings Arising Out of the Same Factual Context ............ 8-56

6. Types of Proceedings .......................................... 8-57
   A. Criminal Proceedings ....................................... 8-57
   B. Civil Litigation ............................................. 8-59
   C. Administrative Agency Proceedings ..................... 8-60
      i. Federal Administrative Agency Proceedings ....... 8-60
         a. Equal Employment Opportunity Commission .......... 8-60
         b. National Labor Relations Board .................... 8-61
ii. State and Local Government Administrative Agency Proceedings.......................... 8-61
iii. Unemployment Compensation Agency Hearings ...................................................... 8-62

7. Arbitrator Consultation of Experts ................................................................. 8-63
   A. Opinion Evidence by Expert Witnesses .................................................. 8-64
   B. Medical Evidence ................................................................................. 8-65
   C. Written Statements Versus Oral Testimony ......................................... 8-66
   D. Shall Medical Evidence Be Weighed? .................................................... 8-67
   E. Special Factors in Considering Medical Evidence .............................. 8-68
   F. Use of “Neutral” Doctors ................................................................. 8-70
   G. Doctor’s Certification of Illness .......................................................... 8-71
   H. Evidence Obtained by Allegedly Improper Methods ............................ 8-71
   i. Search of an Employee’s Person or Property ...................................... 8-72
   ii. Surveillance of Employees .................................................................. 8-74
   J. Drug and Alcohol Testing ...................................................................... 8-78
   i. Evidentiary Considerations ................................................................. 8-78
   ii. Entrapment .......................................................................................... 8-79

8. Admissibility .................................................................................................. 8-79
   A. Admissibility of Improperly Obtained Documents ......................... 8-79
   B. “New” Evidence at Arbitration Hearings ........................................... 8-79
   C. Consideration of Post-Discipline Evidence ....................................... 8-84
   D. After-Acquired Evidence ...................................................................... 8-85
      i. After-Acquired Evidence of Predisciplinary Misconduct ................ 8-85
      ii. After-Acquired Evidence of Post-Disciplinary Conduct ............... 8-86
      iii. Post-Discharge Evidence of Disparate Treatment ....................... 8-90
      iv. Evidence Submitted After the Hearing .......................................... 8-91
   E. Evidence to Be Heard by the Entire Board ....................................... 8-92
   F. Restriction on the Scope of Cross-Examination .................................. 8-92

9. Weight and Credibility of Evidence .............................................................. 8-93
   A. Weighing Testimony in Discipline Cases .......................................... 8-96
   B. Prior Bad Acts ....................................................................................... 8-98
   C. The Lie Detector .................................................................................... 8-100
   D. Unsupported Allegations ...................................................................... 8-104
   E. Burden of Proof ...................................................................................... 8-104
   F. Protecting Witnesses ............................................................................ 8-107

Chapter 9. Interpreting Contract Language ...................................................... 9-1

1. Disputes Over the Meaning of Contract Terms ........................................ 9-2
   A. Misunderstanding and the “Mutual Assent” or “Meeting of the Minds” Concept 9-2
B. Ascertaining the Meaning of Contract Terms .................. 9-5
   i. The Objective Approach ............................................. 9-5
   ii. The Subjective Approach ......................................... 9-6
   iii. Other Factors .......................................................... 9-7

2. Ambiguity and the Exclusion of Extrinsic Evidence .......... 9-8
   A. The “Plain Meaning” Rule ........................................... 9-8
      i. Criticisms ............................................................... 9-9
      ii. Exceptions ............................................................ 9-12
   B. The Parol Evidence Rule ............................................. 9-13
   C. Causes of Ambiguity and Misunderstandings .................. 9-14
   D. Gap-Filling and Omitted Terms ................................... 9-15

3. “Legislation” Versus “Interpretation” .............................. 9-19
   A. Rules to Aid Interpretation ........................................ 9-21
      i. Giving Words Their Normal or Technical Meaning ............... 9-22
         a. Trade or Technical Terms .................................... 9-23
         b. Use of Dictionary Definitions ................................ 9-24
         c. Keeping Meaning Consistent Throughout Collective Bargaining Agreement .................. 9-25
      ii. Precontract Negotiations and Bargaining History ................ 9-26
         a. Proposed Clause Rejected or Withdrawn ............... 9-27
         b. Meaning Not Communicated During Negotiations .......... 9-29
      iii. Prior Settlements ................................................... 9-32
      iv. Compromise Offers in Grievance Settlement Negotiations ...................... 9-32
      v. Custom and Past Practice of the Parties ....................... 9-33
      vi. Industry Practice .................................................. 9-33
      vii. Interpretation in Light of Purpose ......................... 9-34
      viii. The Contract as a Whole ....................................... 9-34
         a. Giving Effect to All Clauses and Words ............ 9-36
      ix. Company Manuals and Handbooks ................................ 9-36
      x. Insurance Policies .................................................. 9-37
      xi. The Mention of One Thing Is the Exclusion of Another ............................ 9-40
      xii. The Doctrine of Ejusdem Generis ............................... 9-40
      xiii. The Principle of Noscitur a Sociis ............................ 9-41
      xiv. Exact Terms Given Greater Weight Than General Language ............... 9-41
      xv. Avoidance of Harsh, Absurd, or Nonsensical Results .................. 9-42
      xvi. Effect of Arbitrator’s Knowledge of the Experience and Training of the Negotiators ...... 9-44
   B. Rules of Interpretation Based on Public Policy ............... 9-45
      i. Interpretation in Light of the Law ............................. 9-45
ii. Interpretation Against Party Selecting the Language .............................................. 9-48
iii. Duty of Good Faith and Fair Dealing ......................................................... 9-49
iv. Fair Bargain Concept ............................................................................ 9-52
v. Reason and Equity .................................................................................. 9-52
vi. Avoidance of a Forfeiture ................................................................... 9-54

4. Memoranda of Understanding and Supplementary Agreements ............. 9-56

CHAPTER 10. USE OF SUBSTANTIVE RULES OF LAW ......................... 10-1

1. General Considerations ........................................................................... 10-2
   A. Applying External Law ........................................................................ 10-2
   B. Errors of Law ...................................................................................... 10-5

2. Range of Views as to Application of “Law” ........................................... 10-12
   A. Views of Arbitrators .......................................................................... 10-13
   B. U.S. Supreme Court Statements Regarding Arbitral Consideration of External Law .................................................................................. 10-23
   C. Capability of Arbitrators to Deal With External Law ......................... 10-25
   D. Some Consequences of Arbitrator’s Choice Respecting External Law .................................................................................. 10-25
      i. Private-Sector Cases Subject to Section 301 of the LMRA in Which the Arbitrator Does Not Consider External Law ........................................ 10-26
      ii. Private-Sector Cases Subject to Section 301 of the LMRA in Which the Arbitrator Does Consider External Law ........................................ 10-26
      iii. Private-Sector Cases Governed by State Arbitration Law .................................................................................. 10-27
      iv. Federal Public-Sector Cases ................................................................ 10-27
      v. State Public-Sector Cases .................................................................. 10-28

3. Statutory Law ............................................................................................ 10-29
   A. Specific Federal Employment Statutes ................................................. 10-30
      i. Title VII of the Civil Rights Act ....................................................... 10-30
      ii. Fair Labor Standards Act ................................................................. 10-32
      iii. Americans with Disabilities Act ..................................................... 10-33
      iv. Family and Medical Leave Act ........................................................ 10-37
      v. The NLRA, the Arbitrator, and the NLRB ........................................ 10-40
         a. Disputes Involving Both Statutory Construction and Contract Interpretation Issues .................................................................................. 10-40
            (1) Arbitrator Consideration of NLRA Issues ................................ 10-41
            (2) Arbitrator Refusal to Consider NLRA Issues .......................... 10-44
b. NLRB Policy on Deferral to Arbitration........ 10-47
B. Other Federal Statutes............................................. 10-52
4. Judicial Decisions..................................................... 10-54
A. Arbitral Adherence to Judicial Precedent.............. 10-54
B. Arbitral Disagreement With Judicial Decisions...... 10-57
C. Use of Judicial Decisions for Guidance................. 10-58
5. Administrative Rulings............................................. 10-60
6. Agency Principles.................................................... 10-64
A. Responsibility for Acts of Agent.......................... 10-64
B. Subsequent Ratification of Agent’s Action............. 10-66
C. Authority to Bind a Party....................................... 10-67
D. Imputation of Knowledge....................................... 10-68
E. Agent’s Right to Indemnification......................... 10-69
7. Contract Principles.................................................. 10-69
8. Unjust Enrichment................................................... 10-72
9. Waiver and Estoppel............................................... 10-73
A. Estoppel.................................................................. 10-74
B. Waiver................................................................. 10-75
10. Authority to Bind a Party......................................... 10-80

Chapter 11. Precedential Value of Arbitral Awards........ 11-1

1. The Publication of Awards......................................... 11-2
A. General Caliber of Arbitrator Decisions: Importance
   of Prior/Published Awards........................................ 11-2
B. Criticism of Published Awards.................................. 11-4
C. Who Decides to Publish?.......................................... 11-5
D. Attitude of Arbitrators Toward Other Published
   Opinions............................................................... 11-6
2. Authoritative Prior Awards........................................ 11-8
A. Final and Binding Decisions...................................... 11-8
B. Permanent Umpires.................................................. 11-12
C. Temporary or Ad Hoc Arbitrators.............................. 11-15
3. Persuasive Prior Awards............................................. 11-21
A. Degree of Persuasive Force...................................... 11-21
B. Arbitrator Disagreement With Prior Awards............. 11-25
4. Precedent and the Evolution of Substantive Principles...
   11-27
A. Abuse of the Term “Principle”.................................. 11-29
5. Judicial Treatment of Precedential Value of Arbitration
   Awards........................................................................ 11-30
A. General Rule: Preclusive Effect of First Award Up
   to Second Arbitrator.................................................. 11-30
B. Exceptions and Variations......................................... 11-32
i. Inconsistent Decisions............................................. 11-33
ii. Contradictory Conclusions...................................... 11-34
iii. Effect of Prior Judicial Proceeding......................... 11-34
iv. NLRB’s General Rule .................................................. 11-37
v. Arbitral Awards and Enforcement of Federal
Statutory Rights ........................................................... 11-37

Chapter 12. Custom and Past Practice ................................. 12-1

1. Custom and Practice as a Term of the Contract ............. 12-2
2. Evidence Required to Establish a Binding Past
Practice ........................................................................... 12-4
3. Mutuality ...................................................................... 12-6
4. The Scope of Past Practice ........................................... 12-8
5. What Matters May Be the Subject of a Binding Past
Practice ........................................................................... 12-8
  A. Major Condition of Employment .............................. 12-8
  B. Methods of Operation or Direction of the Workforce ... 12-9
  C. Practice Involving a Benefit of Personal Value to
     Employees .................................................................. 12-12
6. Regulation, Modification, or Termination of Practice as
Implied Term of Contract .............................................. 12-14
7. Contract Clauses Regarding Custom ................................ 12-18
8. Role of Custom and Practice in Interpretation of
Ambiguous Language ..................................................... 12-21
9. Custom and Practice at Variance With Clear Contract
Language .......................................................................... 12-24
10. Past Practice as Evidencing an Amendment of the
Contract ............................................................................ 12-27
11. Past Practice as a “Gap-Filling” Remedy ....................... 12-28

Chapter 13. Management Rights ........................................ 13-1

1. Arbitrators’ Views Regarding Management Rights .......... 13-4
   A. Residual/Reserved Rights .......................................... 13-4
   B. Inherent Rights ........................................................ 13-7
   C. Past Practice ............................................................ 13-8
2. Limitations on Management Rights ................................. 13-8
   A. Inroads Made by Legislation ...................................... 13-8
      i. The Duty to Bargain: Right of Unilateral
         Action ....................................................................... 13-9
         a. Mandatory Subjects of Bargaining ...................... 13-9
         b. Expanding Subjects of Mandatory
            Bargaining ............................................................. 13-13
         c. “Shifting Burden” Analysis ................................. 13-15
         d. “Zipper” Clauses .................................................. 13-16
         e. Unilateral Action When Agreement Has Not
            Been Reached ......................................................... 13-19
         f. Arbitration Clauses Versus Duty to
            Bargain ........................................................................ 13-20
         g. Arbitrators’ Views Versus the Board’s View ... 13-23
ii. Duration of Limitation on Unilateral Action:
   Contract Limitation Versus Statutory Duty to
   Bargain .......................................................... 13-27
B. Inroads Through Collective Bargaining .................. 13-27
C. Inroads Through Arbitration ................................ 13-28

5. Control of Operation Methods ................................ 13-33
6. Wage Adjustments Following Changes in Operation
   Methods .................................................................. 13-37
   A. Hourly Rated Employees ....................................... 13-39
   B. Incentive Employees .............................................. 13-41

7. Production Standards, Time Studies, and Job
   Evaluation .................................................................. 13-43
   A. Production Standards ............................................. 13-43
   B. Time Studies .......................................................... 13-45
   C. Job Evaluation ........................................................ 13-46

8. Control of Quality Standards .................................... 13-48

9. Job and Classification Control ................................. 13-50
   A. Establishing, Eliminating, and Combining Jobs and
      Classifications ....................................................... 13-51
   B. Interjob and Interclassification Transfer of Duties ........ 13-54
   C. Jurisdictional Disputes ........................................... 13-58
      i. Allocation of Responsibility for Settling
         Jurisdictional Disputes Between the NLRB
         and the Arbitral Forum ........................................ 13-58
      ii. Factors Utilized to Resolve Jurisdictional
          Disputes .......................................................... 13-60
      iii. Disputes Resolved Under the AFL-CIO
            Constitution ..................................................... 13-62
      iv. Jurisdictional Disputes Between Crafts ............. 13-64
      v. Jurisdictional Disputes Between Industrial
         Unions .............................................................. 13-67
      vi. Jurisdictional Disputes Between Craft Unions
          and Industrial Unions ......................................... 13-69
      vii. Jurisdictional Disputes in the Public Sector ........ 13-70
   D. Assignment of Duties and Tasks ............................ 13-70
      i. Management Discretion ......................................... 13-70
      ii. Limitations ........................................................ 13-74
      iii. Unskilled Work Assigned to Skilled Workers .... 13-77
      iv. Detailed Job Descriptions .................................... 13-78
      v. Assignment of Work Within or Outside of Job
         Classification .................................................... 13-78

10. Hiring of Employees .............................................. 13-81
    A. Arbitral Recognition of Management’s Rights .......... 13-83
    B. Seniority Provisions .......................................... 13-84
    C. Union-Security Clauses ........................................ 13-85

11. Determination of Size of Crews ............................... 13-86
A. Does a Crew in Fact Exist? ........................................ 13-88
B. Limiting Contract Provisions ..................................... 13-89
C. Technological and Process Changes ........................... 13-90
D. Changes in Type of Operations, Methods, and Procedures ........................................ 13-91
E. Market Changes ......................................................... 13-92
F. Production Needs and Reduced Operations ................. 13-93
G. Workload and Idle Time ............................................ 13-93
H. Use of Supervisors or “General Help” ......................... 13-94
I. Safety or Health Hazard ............................................. 13-95

12. Vacancies ................................................................. 13-97

13. Scheduling Work ....................................................... 13-100
   A. Shifts and Workweek .............................................. 13-102
   B. Work Schedule Changes to Avoid Overtime ............... 13-107
   C. Changes in Work Schedule Due to Emergency .......... 13-108
   D. Reporting Pay ....................................................... 13-109
   E. Emergencies ......................................................... 13-111
   F. Giving Notice of Work Schedule Changes in Emergencies ........................................ 13-114
   G. Acts of God .............................................................. 13-115
   H. Condition Beyond the Control of Management ........ 13-116
   I. Holidays ................................................................. 13-117

14. Overtime ................................................................. 13-117
   A. Right to Require Overtime ...................................... 13-117
   B. Equalization of Overtime ....................................... 13-120

15. Right to Subcontract ................................................ 13-123
   A. Scope of the Right .................................................. 13-123
   B. Standards for Evaluating Propriety of Subcontracting ........................................ 13-126
   C. Notice of Intent to Subcontract; Duty to Bargain .... 13-133

   A. Determining Whether the Assignment Is Permissible ........................................ 13-136
   B. Plant Removals ....................................................... 13-143

17. Workplace Rules ...................................................... 13-144
   A. Management’s Unilateral Right to Establish Work Rules ........................................ 13-144
   B. Challenging the Rules .............................................. 13-145
   C. Management-Promulgated Work Rules and the Statutory Duty to Bargain .......... 13-146
   D. Reasonableness of the Rules .................................... 13-150
   E. Changing the Rules .................................................. 13-152
   F. Subject Matter of Workplace Rules ......................... 13-153
      i. Rules Governing Attendance ................................. 13-153
      ii. Rules Governing Smoking ................................. 13-156
      iii. Drug and Alcohol Policies ............................... 13-158
      v. Rules Relating to Off-Duty Conduct .................... 13-162
vi. Other Rules Governing Employee Conduct .......... 13-164
G. Posting of Rules ................................................................. 13-164
18. Seniority ........................................................................... 13-165
19. Layoff of Employees .......................................................... 13-165
A. Principal Issues Involved ................................................. 13-165
B. Downgrading ..................................................................... 13-167
C. Temporary/Emergency Layoffs ....................................... 13-168
D. Reducing the Workweek ..................................................... 13-169
E. Other Factors Affecting Layoffs ........................................ 13-169
F. Bumping ............................................................................. 13-171
20. Promotion and/or Transfer of Employees ....................... 13-175
A. Promotion of Employees ................................................. 13-175
i. Definition ........................................................................... 13-175
ii. Seniority ......................................................................... 13-177
B. Transfer of Employees ...................................................... 13-180
i. Management’s Right to Transfer .................................... 13-180
ii. Disabled Employees ....................................................... 13-181
iii. Seniority ......................................................................... 13-182
iv. Pay Rate .......................................................................... 13-183
21. Demotion of Employees ................................................... 13-183
A. Management’s Right to Demote .................................... 13-183
B. Management’s Right to Demote Contracted Away ........ 13-184
C. Disciplinary Demotions ..................................................... 13-184
D. Nondisciplinary Demotions: Lack of Qualifications ... 13-186
E. Seniority ............................................................................. 13-189
22. Discipline and Discharge .................................................. 13-189
23. Merit Increases .................................................................. 13-189
24. Bonuses ........................................................................... 13-193
25. Compulsory Retirement .................................................. 13-195
26. Disqualifying Employees for Physical or Mental
   Reasons ............................................................................. 13-196
   A. Management Rights .................................................... 13-196
   B. Application of Federal Statutes ..................................... 13-198
   C. Significance of Workers’ Compensation Disabilities and Costs ........................................................................... 13-204
   D. Excessive Absences Due to Illness ............................... 13-205
   E. Right to Require Physical Examination ...................... 13-208
   F. Drug and Alcohol Testing .............................................. 13-210
27. Selection and Control of Supervisors ................................. 13-214

Chapter 14. Seniority ................................................................. 14-1

1. Recognition of Seniority .................................................. 14-2
   A. Definition of Seniority ................................................... 14-3
   B. Competing Interests ...................................................... 14-4
   C. Source of Seniority “Rights” ......................................... 14-6
2. Interaction of Seniority Systems With Federal
   Statutes .............................................................................. 14-9
A. Civil Rights Act ...................................................... 14-9
   i. Discrimination Resulting From the Operation of a Bona Fide Seniority System 14-9
   ii. Discrimination Intended to Be Achieved by a Seniority System .................. 14-10
   iii. Discrimination That Is Perpetuated by a Bona Fide Seniority System .......... 14-11
   iv. Seniority Systems and the Arbitral Enforcement of Antidiscrimination Clauses Resulting in “Reverse Discrimination” Claims 14-14
B. Age Discrimination in Employment Act .......................... 14-20
C. Americans with Disabilities Act ................................... 14-22

3. Seniority Determinations ........................................ 14-27
   A. Seniority Rights and Seniority Units .................................. 14-27
   B. Seniority Standing .......................................................... 14-28
      i. Determining Length of Service ...................................... 14-29
   C. Seniority Lists ............................................................... 14-30
   D. Service Outside the Seniority Unit ................................... 14-31

4. Extension of Seniority Rights to Different Plant or Successor Employer ................. 14-34
   A. Closing or Relocation of Plant ........................................ 14-34
   B. Merger or Sale of Company ............................................. 14-36

5. Merger of Seniority Lists ........................................... 14-39


7. Use of Seniority and Ability Provisions and Layoffs .................. 14-44
   A. Modified Seniority Clauses ............................................ 14-45
      i. Relative Ability Clauses ............................................ 14-46
      ii. Sufficient Ability Clauses ......................................... 14-48
      iii. Hybrid Clauses .................................................... 14-49
   B. Determination of Fitness and Ability ................................ 14-50
   D. Factors Considered in Determining Fitness and Ability ....................... 14-54
      i. Use of Tests .............................................................. 14-56
         a. General Support for Testing ..................................... 14-56
         b. Four Requirements That Tests Must Meet .................. 14-58
            (1) Related to Job Requirements ............................... 14-58
            (2) Fair and Reasonable ........................................ 14-60
            (3) Administered in Good Faith and Without Discrimination 14-60
            (4) Properly Evaluated ........................................ 14-61
         c. Consideration of Other Factors in Addition to the Test .................. 14-61
      ii. Experience ............................................................... 14-63
      iii. Training or Trial or Break-In Period on the Job ....................... 14-66
         a. Use of Trial Period to Demonstrate Ability .... 14-66
### Detailed Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>b. Length of Trial Period</td>
<td>14-68</td>
</tr>
<tr>
<td>c. Circumstances When a Trial Period Is Not Required</td>
<td>14-69</td>
</tr>
<tr>
<td>d. Training Period Distinguished From Trial Period</td>
<td>14-69</td>
</tr>
<tr>
<td>iv. Opinion of Supervision</td>
<td>14-72</td>
</tr>
<tr>
<td>v. Merit Rating Plans</td>
<td>14-74</td>
</tr>
<tr>
<td>vi. Educational Background</td>
<td>14-77</td>
</tr>
<tr>
<td>vii. Production Records</td>
<td>14-80</td>
</tr>
<tr>
<td>viii. Attendance Records</td>
<td>14-81</td>
</tr>
<tr>
<td>ix. Disciplinary Record</td>
<td>14-82</td>
</tr>
<tr>
<td>x. Employee's Physical and Psychological Fitness</td>
<td>14-84</td>
</tr>
<tr>
<td>xi. Gender as a Factor</td>
<td>14-87</td>
</tr>
<tr>
<td>xii. Personal Characteristics of Employee</td>
<td>14-91</td>
</tr>
<tr>
<td>xiii. Age as a Factor</td>
<td>14-93</td>
</tr>
<tr>
<td>xiv. Drug Abuse as a Factor</td>
<td>14-96</td>
</tr>
<tr>
<td>xv. Interview Results</td>
<td>14-96</td>
</tr>
</tbody>
</table>

### Chapter 15. Discharge and Discipline ................................ 15-1

1. Introduction ........................................................................ 15-2
2. Management Right to Discipline ...................................... 15-3
   A. Discipline Pursuant to a Collective Bargaining Agreement ......... 15-3
      i. Collective Bargaining Agreement Without a Just-Cause Provision .. 15-3
      ii. Collective Bargaining Agreement With a Just-Cause Provision .... 15-4
         iii. Probationary Employees ........................................ 15-6
   B. Discharge Versus Resignation ........................................ 15-9
3. Arbitral Principles in Discipline and Discharge Cases ............. 15-12
   A. Off-Duty Misconduct ................................................................ 15-12
      i. Off-Duty Misconduct Away From Employer’s Premises .............. 15-12
      ii. Off-Duty Misconduct on Company Premises ....................... 15-14
      iii. Off-Duty Misconduct Prior to Employment ...................... 15-16
      iv. Off-Duty Misconduct in the Public Sector ...................... 15-17
   B. Effect of Criminal Proceedings Against the Employee ............. 15-18
   C. Types of Penalties Imposed by Management ........................... 15-21
   D. Burden and Quantum of Proof ........................................... 15-25
      i. Burden of Proof ................................................................ 15-25
      ii. Quantum of Proof .................................................... 15-26
         a. Proof in Ordinary Discipline Cases ............................. 15-26
         b. Proof in Group Discipline Cases ............................... 15-30
   E. Review of Penalties Imposed by Management ........................... 15-32
      i. Judicial Recognition of Arbitral Discretion ...................... 15-32
ii. Express Contractual Authority of Arbitrator to Modify Penalties or Withdrawal of Such Authority ............................................................... 15-35
iii. No Express Contractual Authority Concerning Modification of Penalties .............................................................. 15-37
iv. Mitigation Versus Leniency ...................................................... 15-43
F. Factors in Evaluating Penalties ........................................... 15-44
i. Nature of the Offense: Summary Discharge Versus Corrective Discipline .............................................................. 15-44
ii. Due Process and Procedural Requirements .............. 15-47
iii. Confrontation and Cross-Examination ..................... 15-50
iv. Last-Chance Agreements ....................................................... 15-52
v. Weingarten Violations .............................................................. 15-58
vi. Consideration of Post-Discharge Misconduct or Charges and Post-Discharge Discovery of Pre-Discharge Misconduct ..................................................... 15-62
vii. Double Jeopardy ................................................................. 15-65
viii. Grievant’s Past Record .......................................................... 15-69
ix. Length of Service With Company ......................... 15-74
x. Knowledge of Rules ............................................................... 15-77
xi. Warnings .......................................................... .......................... 15-79
xii. Lax Enforcement of Rules ...................................................... 15-81
xiii. Unequal or Discriminatory Treatment ..................... 15-83
xiv. Charges of Anti-Union Discrimination ...................... 15-86
xv. Management Also at Fault ..................................................... 15-87
4. Persona Non Grata Adverse Employment Actions ............. 15-89

Chapter 16. Safety and Health ................................................. 16-1
1. Introduction ............................................................................ 16-2
2. Management Rights and Obligations in Safety and Health Matters ................................................................. 16-3
A. Alcohol and/or Drug Use and Testing ......................... 16-3
i. “Reasonable Suspicion” Alcohol and Drug Testing ............................................................ 16-8
ii. Random Alcohol and Drug Testing .............. 16-9
iii. “Zero Tolerance” Policies ....................................................... 16-14
iv. Refusal to Test and Adulteration of Test Samples ............................................................... 16-18
B. Other Safety Violations .......................................................... 16-19
C. Occupational Safety and Health Act Considerations ............................................................... 16-21
3. Safety and Health Rules ......................................................... 16-24
A. Issuance of Safety and Health Rules ......................... 16-24
B. Employee Violations ............................................................... 16-26
C. No-Smoking Policies ............................................................... 16-27
D. Workplace Violence ............................................................... 16-30
E. Dangerous Conditions ................................................................. 16-32
4. Employee Obligations in Safety and Health Matters ........ 16-33
5. Refusal to Obey Orders—The Safety and Health Exceptions ................................................................. 16-35
   A. Safety and Health Exception to the Obey Now—Grieve Later Doctrine ........................................ 16-35
   B. The Range of Arbitral Reasoning ..................................... 16-37
   C. The “Reasonable Person” Approach ................................ 16-39
   D. Must Employees Explain Their Refusal to Perform an Assigned Task? ........................................... 16-40
   E. The Statutory Picture: LMRA Section 502, the OSH Act, NLRA Section 7, and the STAA .......... 16-41
      i. Section 502 of the Labor Management Relations Act ................................................................. 16-41
      ii. The OSH Act .......................................................... 16-43
      iii. Section 7 of the National Labor Relations Act .... 16-44
      iv. The Surface Transportation Assistance Act (STAA) ................................................................. 16-48
   F. Compatibility of Arbitration Award With Employee Statutory Rights ............................................... 16-49
6. Employee Complaints of Specific Hazards ......................... 16-51
   A. Air Quality ............................................................................ 16-52
   B. Employee Job Performance Capability ............................... 16-54
   C. Equipment ............................................................................. 16-55
   D. Job Sites ................................................................................. 16-56
7. Employee Physical or Mental Condition as a Safety Hazard ................................................................................. 16-57
   A. Management Action: Transfer, Demotion, Layoff, Leave of Absence, or Termination .......... 16-59
   B. Protecting the Employee ......................................................... 16-61

**Chapter 17. Employee Rights and Benefits** ........................................ 17-1

1. Scope of Employee Rights and Benefits ..................................... 17-2
2. Vacations .................................................................................... 17-3
   A. Scheduling Vacations ............................................................. 17-6
      i. In Accordance With Operational Needs ..................... 17-8
      ii. During Layoffs and Shutdowns ................................. 17-11
      iii. Fixed by Contract .................................................... 17-13
      iv. Remedy for Improperly Forced Vacations ................. 17-14
   B. Calculation of Vacation Pay .................................................. 17-15
   C. Vacation Benefits: Deferred Wages or “Refresher” .................. 17-15
   D. Strikes or Lockouts and Vacation Benefits ....................... 17-17
   E. Retirement and Vacation Benefits ....................................... 17-19
   F. Layoffs and Vacation Benefits .............................................. 17-19
   G. Sick Leave and Vacation Benefits ...................................... 17-21
H. Maternity Leave and Vacation Benefits ..................... 17-22
I. Industrial Injury Leave and Vacation Benefits .......... 17-22
J. Family and Medical Leave Act Eligibility and
    Vacation Benefits ............................................. 17-23
3. Holidays .................................................................. 17-24
   A. Work Requirements.......................................... 17-26
   B. Part-Day Absence or Tardiness on Surrounding
       Day ................................................................. 17-29
   C. Holidays Falling During Layoff ........................... 17-30
   D. Vacation or Leave and Holiday Pay ...................... 17-32
   E. Holidays on Nonworkdays ................................. 17-35
   F. Strikes and Holiday Pay .................................... 17-37
   G. Loss of Holiday Pay as Penalty for Misconduct ...... 17-39
   H. Other Holiday Issues ...................................... 17-40
4. Leaves ..................................................................... 17-41
   A. Leaves of Absence............................................ 17-41
   B. Sick Leave ..................................................... 17-45
   C. Maternity or Maternity-Related Leave ................. 17-52
   D. Leave for Union Business ................................ 17-57
   E. Leave for Jury Duty ......................................... 17-63
   F. Funeral Leave ................................................ 17-66
   G. Leave for “Personal Business” ............................ 17-68
   H. Family and Medical Leave Act Issues .................. 17-72
5. “Moonlighting” and Outside Business Interests .......... 17-73
6. Personal Appearance: Hair and Clothes .................... 17-78
   A. Overview ..................................................... 17-78
   B. Grooming and the Employer’s Image .................... 17-83
   C. Grooming and Safety and Health Considerations .... 17-86
7. Non–Safety-Related Accommodation of Employee
   Religious Beliefs .................................................. 17-91
8. Protection Against Sexual Harassment ...................... 17-99
   A. What Constitutes Sexual Harassment in the
       Workplace ....................................................... 17-99
      i. Hostile Environment Harassment ..................... 17-103
      ii. Distinguishing Between Acceptable and
           Inappropriate Conduct ................................ 17-106
      iii. Burden of Proof ....................................... 17-109
      iv. Penalties ............................................... 17-110
   B. Harassment in Schools ..................................... 17-112
   C. Same-Sex Harassment ..................................... 17-114
9. Fraternization, Intermarriage of Employees,
    Employment of Relatives, Married Employees .......... 17-115
10. Same-Sex Marriage and Domestic Partnership ............ 17-119
11. Privacy, Dignity, and Peace of Mind ....................... 17-120
    A. Disclosure of Information to Employer ............... 17-120
    B. Observing Employees at Work ......................... 17-123
C. Clocking In and Out for Personal Reasons .................. 17-126
D. Employer Inspection of Employee Belongings .................. 17-127
E. Misuse of E-Mail .................................................. 17-130
F. Social Media .......................................................... 17-132
12. Dangerous Weapons on Company Property .................. 17-133
13. Company Liability for Employee's Damaged or Stolen Property .......................................................... 17-137
14. Union Bulletin Boards .............................................. 17-141
15. Change in Time or Method of Pay ................................. 17-148
16. Unilateral Changes in Health Insurance Terms ................. 17-150
17. Retiree Health Insurance ........................................... 17-155
18. Intellectual Property Protection .................................... 17-156
19. Union Recognition ................................................... 17-156

CHAPTER 18. REMEDIES IN ARBITRATION ....................... 18-1

1. Scope of Remedy Power ............................................. 18-2
   A. Should an Available Remedy Be Imposed? ................. 18-6
   B. Scope of Remedy Power When the Agreement Is Silent .......................................................... 18-8
   C. Scope of Remedy Power Limited by the Agreement .... 18-9
2. Injunctions by Arbitrators .......................................... 18-11
3. Principles of Damages ................................................. 18-14
   A. Compensatory Damages: Make-Whole Awards ............. 18-15
      i. Monetary Awards ............................................. 18-15
      ii. Other Types of Awards ................................... 18-18
      iii. Awards Denied or Reduced .............................. 18-20
      iv. Interim Back-Pay Awards ................................ 18-20
      v. Future Loss .................................................. 18-21
      vi. Additional Employer Requirements ..................... 18-22
      vii. Proving Damage Claims .................................. 18-23
   B. Speculative Damages ............................................. 18-23
   C. Mental Distress Damages ....................................... 18-25
   D. Damages Payable to Employer or Union ...................... 18-25
      i. Union Violations ............................................ 18-26
      ii. Employer Violations ....................................... 18-26
   E. The “De Minimis” Rule .......................................... 18-28
   F. Punitive Damages ................................................... 18-29
   G. Interest on Award .................................................. 18-31
   H. Attorneys’ Fees and Arbitration Expense .................... 18-34
      i. Attorneys’ Fees ............................................. 18-34
      ii. Arbitration Expense ....................................... 18-36
   I. Mitigating Damages—Deduction of Outside Compensation .......................................................... 18-37
   J. Other Avoidable Damages; Delayed Arbitration ............ 18-40
   K. Remedies for Mistake. .............................................. 18-41
How Arbitration Works

i. Mutual Mistake .......................................................... 18-41
  ii. Unilateral Mistake ................................................. 18-43
  iii. Calculation Error .................................................. 18-44

L. Remedies for Unjust Enrichment .................................. 18-45

4. Scope of Arbitral Remedies in Discipline and Discharge Cases .......................................................... 18-46
  A. Formulating a Remedy .................................................. 18-46
     i. Reducing the Penalty Imposed ................................. 18-47
     ii. Back-Pay Awards .................................................. 18-49
     iii. Reinstatement of Discharged Employee .................. 18-51
  B. Reinstatement in Drug and Alcohol Use Cases ............... 18-56
  C. Reinstatement in Sexual Harassment Cases ................... 18-57

5. Arbitral Remedies in Specific Situations ......................... 18-58
  A. Improper Subcontracting ............................................. 18-58
  B. Improper Deprivation of “Work Opportunities” ............... 18-59
  C. Violation of Right to Overtime ................................... 18-60
  D. When the Employer Violates the Agreement in Jurisdictional Disputes .............................................. 18-63
  E. The Back Pay Act ...................................................... 18-63


1. Introduction ................................................................... 19-2
2. First Amendment .......................................................... 19-3
3. Procedural Due Process .................................................. 19-6
  A. Predisciplinary Due Process: Notice and an Opportunity to Be Heard .............................................. 19-8
     i. The Loudermill Rule .................................................. 19-8
     ii. Oral or Written Notice ............................................. 19-10
     iii. Predisciplinary Hearing .......................................... 19-13
         a. Situations Where a Predisciplinary Hearing Is Not Required .................................................. 19-15
     iv. Application to Other Management Actions .......... 19-16
     v. Adequacy of the Process Provided ......................... 19-17
     vi. Protection Against Compelled Self-Incrimination .......................................................... 19-19
  B. Due Process and the Right to Union Representation During an Investigatory Meeting ....................... 19-25
     i. Substance of the Right to Union Representation .......................................................... 19-25
     ii. Limitations on the Right to Union Representation .......................................................... 19-28
     iii. Situations Where the Right to Union Representation Exists .............................................. 19-29
     iv. Need for the Employee to Exercise This Right ... 19-30
v. Arbitral Remedies for Employer Breach of This Right ........................................... 19-31
5. Double Jeopardy .................................................. 19-38

CHAPTER 20. LEGAL STATUS OF ARBITRATION IN THE FEDERAL SECTOR ........................................ 20-1
1. Primary Observations: Federal and Private Sectors Compared ................................................. 20-2
2. The Executive Orders and the Civil Service Reform Act of 1978 ............................................. 20-3
3. The Agencies and Their Roles .................................................. 20-5
   A. Office of Personnel Management (OPM) ........................................................................ 20-5
   B. Merit Systems Protection Board (MSPB) ........................................................................ 20-5
   C. Federal Labor Relations Authority (FLRA) ............................................................... 20-6
   D. Equal Employment Opportunity Commission (EEOC) ............................................. 20-6
   E. Government Accountability Office (GAO) ............................................................... 20-7
   F. Federal Service Impasses Panel (FSIP) ............................................................... 20-7
4. Channels for Processing Federal-Sector Grievances ........................................................... 20-8
   A. Federal-Sector Bargaining ....................................................................................... 20-8
      i. Role and Scope of the Federal-Sector Grievance Procedure and Arbitration .... 20-8
      ii. Scope of Federal-Sector Bargaining and Management-Rights Safeguards ... 20-13
         b. Management Rights—Permitted Bargaining Items ..................................... 20-17
         c. Governmentwide Rules or Regulations .................................................... 20-23
         d. Nongovernmentwide Rules or Regulations ............................................ 20-25
5. Review of Arbitration Awards .................................................. 20-27
   A. Review by the Federal Labor Relations Authority ............................................. 20-27
      i. Grounds and Standards for Review ................................................................ 20-27
      ii. Review by the Courts ..................................................................................... 20-31
      iii. Examination of Arbitrators’ Decisions by the FLRA ..................................... 20-32
      iv. Review of Remedies ....................................................................................... 20-34
   B. Review by the Merit Systems Protection Board and the Equal Employment Opportunity Commission 20-35
   C. Review of Merit Systems Protection Board Decisions or Arbitration Awards in Adverse Action Cases 20-35
   D. Comptroller General’s Role .................................................................................. 20-37

CHAPTER 21. ISSUES IN STATE AND LOCAL GOVERNMENT SECTOR ARBITRATION ................................. 21-1
   A. Scope of Grievance Arbitration .............................................................. 21-7
   B. Labor Relations Agency Deferral to Arbitration ................................. 21-10
   C. Misconduct
      i. Sexual Activity ............................................................................. 21-12
      ii. Illicit Drug Use and Possession .................................................... 21-14
      iii. Non–Drug-Related Off-Duty Criminal Offenses.............................. 21-15
   D. Special Assignments for Coaching Sports and Advising Extracurricular Activities ........................................... 21-17
   E. Issues of Academic Freedom .............................................................. 21-19
   F. School Takeovers and Reconstitution ................................................. 21-24
3. Arbitration Issues Involving Firefighters, Police Officers, and Their Departments ............................................ 21-26
   A. Scheduling and Overtime Issues Involving State or Local Government Firefighters .............................................. 21-26
   B. Residency Requirement Issues Involving Police and Firefighters ................................................................. 21-31
   C. Misconduct by Police Officers and Firefighters ..................................... 21-34
   A. Mandatory, Prohibited, and Permitted Subjects of Bargaining ................................................................. 21-40
   B. Express Statutory Removal of Matter From Bargaining ............................................................... 21-41
   C. Contractual Terms Versus Statutory Law Covering Similar Matters ............................................................ 21-42
   D. Matters Sometimes Held Nonbargainable ............................................. 21-43
5. Relationship Between Contractual and Statutory Grievance Channels ......................................................... 21-47
6. Determining Arbitrability and Compelling Arbitration .......................................................... 21-47
   A. The Rules of Arbitrability ..................................................................... 21-47
   B. Applying the Rules and Compelling Arbitration ...................................... 21-48
   A. Statutory and Common Law Grounds for Review ..................................... 21-51
   B. Vacation of Arbitration Awards in State and Local Government Employment on “Public Policy” Grounds ......................... 21-58

Chapter 22. Arbitration of Interest Disputes .................................................................................. 22-1
1. Purpose and Subjects of Interest Arbitration ........................................................ 22-2
2. Interest Arbitration and Contract Clauses ................................................................ 22-9
   A. Specific Provision for Interest Arbitration ............................................... 22-9
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>B. Clauses Equivocal as to Interest Disputes</td>
<td>22-11</td>
</tr>
<tr>
<td>3. The Arbitrator's Function in Interest Disputes</td>
<td>22-12</td>
</tr>
<tr>
<td>4. Special Considerations in Public-Sector Interest Arbitration</td>
<td>22-16</td>
</tr>
<tr>
<td>5. Public-Sector Interest-Arbitration Legislation</td>
<td>22-20</td>
</tr>
<tr>
<td>A. Scope of Public-Sector Arbitration Legislation</td>
<td>22-20</td>
</tr>
<tr>
<td>B. Dispute Resolution Procedures</td>
<td>22-22</td>
</tr>
<tr>
<td>i. Nonbinding Mediation</td>
<td>22-22</td>
</tr>
<tr>
<td>ii. Factfinding</td>
<td>22-22</td>
</tr>
<tr>
<td>iii. Binding Interest Arbitration</td>
<td>22-22</td>
</tr>
<tr>
<td>iv. Last Best Offer</td>
<td>22-23</td>
</tr>
<tr>
<td>C. Features of Arbitration Statutes</td>
<td>22-24</td>
</tr>
<tr>
<td>D. State-by-State Summary of Public-Sector Impasse-Resolution Statutes</td>
<td>22-26</td>
</tr>
<tr>
<td>6. Constitutionality of Binding Interest Arbitration</td>
<td>22-27</td>
</tr>
<tr>
<td>7. Sources of Standards of Interest Disputes</td>
<td>22-29</td>
</tr>
<tr>
<td>8. Timeliness of Submission</td>
<td>22-32</td>
</tr>
<tr>
<td>9. Standards in Public-Sector Disputes</td>
<td>22-33</td>
</tr>
<tr>
<td>10. Standards Applicable in Both Private-Sector and Public-Sector</td>
<td>22-36</td>
</tr>
<tr>
<td>Interest Arbitration</td>
<td></td>
</tr>
<tr>
<td>A. Prevailing Practice</td>
<td>22-36</td>
</tr>
<tr>
<td>B. Differentials and “Minor” Standards</td>
<td>22-47</td>
</tr>
<tr>
<td>i. Skill and Training</td>
<td>22-48</td>
</tr>
<tr>
<td>ii. Responsibility</td>
<td>22-48</td>
</tr>
<tr>
<td>iii. Steadiness of Employment</td>
<td>22-48</td>
</tr>
<tr>
<td>iv. Hazards and Other Undesirable Conditions of Work</td>
<td>22-48</td>
</tr>
<tr>
<td>v. Geographic Differentials</td>
<td>22-49</td>
</tr>
<tr>
<td>vi. Fringe Benefits</td>
<td>22-49</td>
</tr>
<tr>
<td>vii. Wage Leadership</td>
<td>22-50</td>
</tr>
<tr>
<td>viii. Historical Differentials</td>
<td>22-51</td>
</tr>
<tr>
<td>C. No Prevailing Practice</td>
<td>22-51</td>
</tr>
<tr>
<td>D. Wage “Patterns”</td>
<td>22-52</td>
</tr>
<tr>
<td>E. Cost of Living</td>
<td>22-55</td>
</tr>
<tr>
<td>F. Escalator and Wage Reopening Clauses</td>
<td>22-59</td>
</tr>
<tr>
<td>G. Living Wage</td>
<td>22-61</td>
</tr>
<tr>
<td>H. Ability to Pay</td>
<td>22-62</td>
</tr>
<tr>
<td>i. Proof of Inability to Pay</td>
<td>22-65</td>
</tr>
<tr>
<td>ii. Public Utilities’ Ability to Pay</td>
<td>22-66</td>
</tr>
<tr>
<td>iii. Other Public-Sector Entities’ Ability to Pay</td>
<td>22-67</td>
</tr>
<tr>
<td>I. Competition</td>
<td>22-71</td>
</tr>
<tr>
<td>J. Productivity</td>
<td>22-71</td>
</tr>
<tr>
<td>K. Take-Home Pay</td>
<td>22-74</td>
</tr>
<tr>
<td>L. Past Practice and Bargaining History</td>
<td>22-75</td>
</tr>
<tr>
<td>M. Pre-Arbitration Negotiations</td>
<td>22-76</td>
</tr>
<tr>
<td>N. Public Interest</td>
<td>22-77</td>
</tr>
<tr>
<td>i. Public Utility Disputes and the Public Interest</td>
<td>22-78</td>
</tr>
</tbody>
</table>
ii. Governmental Wage Stabilization ............... 22-79
11. Standards Applicable in Private-Sector Interest
   Arbitration ........................................................................ 22-80
   A. Competition ................................................................ 22-80

Titles of NAA Proceedings, 1948–2015 ................. NAA-1
Table of Arbitrators .................................................... TA-1
Table of Arbitration Decisions ............................... TD-1
Table of Cases ............................................................... TC-1
Index .............................................................................. IN-1