

Labor, Employment and Workers' Compensation Law

Monica R. Lenahan, Esq. Laura H. Delaney, Esq. Martin Minkowitz, Esq. New York State Bar Association publications are intended to provide current and accurate information to help attorneys maintain their professional competence. Publications are distributed with the understanding that NYSBA does not render any legal, accounting or other professional service. Attorneys using publications or orally conveyed information in dealing with a specific client's or their own legal matters should also research original sources of authority.

We consider the publication of any NYSBA practice book as the beginning of a dialogue with our readers. Periodic updates to this book will give us the opportunity to incorporate your suggestions regarding additions or corrections. Please send your comments to: Publications Director, New York State Bar Association, One Elk Street, Albany, NY 12207 or publications@nysba.org.

Copyright 2024
New York State Bar Association
All rights reserved
ISBN: 978-1-57969-316-9
Product Number: 41025

CONTENTS

PART ONE: LABOR AND EMPLOYMENT LAW

Monica Lenahan, Esq. Laura H. Delaney, Esq.

§ 1.1	Introduction					
§ 1.2	Employment at Will and the Just Cause Doctrine					
§ 1.3	Employment Discrimination					
	[A] Overview of Applicable Statutes					
	[B] Issues Relating to Scope of Statutes					
	[1] Disparate Impact Discrimination					
	[2] Bona Fide Seniority Systems					
	[3] Mixed Motivation					
	[4] After Acquired Evidence					
	[5] Evidence of Alleged Discrimination Against Other Individuals 1					
	[6] Taxability of Verdict or Settlement					
	[7] Ministerial Exemption to Anti-Discrimination Laws					
	[C] Analyzing Individual Discrimination Claims Lacking Direct Evidence					
	[1] Step One: Establishing an Inference of Disparate Treatment					
	Discrimination					
	[2] Step Two: Employer's Non-Discriminatory Reason					
	[3] Step Three: Refuting the Employer's Reason					
	[D] Electronic Communications, Social Media, Artificial Intelligence, and					
	Employment Discrimination					
	[E] Sex Discrimination and Sexual Harassment					
	[F] Age Discrimination					
	[G] Discrimination on the Basis of Disability					
	[H] Discrimination Based on Religion and the Duty to Accommodate					
	[I] Race and Religious Discrimination Based on Hair Restrictions					
	[J] Discrimination on the Basis of Height and Weight					
	[L] The Application of Title VII to Criminal Record Exclusions					
	Law					
	[N] Discrimination Based on Conviction Records Under New York Law					
	[O] Inquiries Concerning a Prospective Employee's Salary History and Salary					
	Transparency Laws					
§ 1.4	Enforcement of Anti-Discrimination Laws					
3	[A] Procedures, Administration and Judicial Forums					
	[B] Arbitration as a Forum for Discrimination Claims					
§ 1.5	Collective Bargaining Laws					
Ü	[A] Representation					
	[1] Bargaining Unit					
	[2] Elections					
	[3] Interference with Employee Rights—Coercion					

		[4] Interference with Employee Rights—Discrimination and Retaliation	52
		[5] Retaliation Claims Under the NLRA, SERA, and the Taylor Law	53
		[6] Interference with Employee Rights—Social Media and Other Protected	
			54
	[B]	Collective Bargaining	55
			55
			55
		[3] Good Faith	56
		[a] Nature of Demands	56
		[b] Scope of Negotiations	56
		[c] Conduct of Negotiations	57
		[4] Unilateral Action	58
		[5] Strikes and Other Concerted Activity	59
		, ,	61
		[7] Remedies for Unfair Labor and Improper Practices	61
		[8] Injunctive Relief	62
		[9] Third-Party Assistance	63
			63
		[b] Public Sector	63
	[C]	Enforcement of Contracts	64
			64
		L J	65
			66
		r 1	67
		[5] Successorship	68
§ 1.6			69
			69
		V 1	69
	[C]	•	72
			72
§ 1.7			73
			73
		1	75
			76
§ 1.8		1	76
§ 1.9			78
§ 1.10			80
		E	80
	[B]	C	82
			82
	[D]	1	82
	[E]		84
	[F]		84
		\mathcal{E}	84
§ 1.11		, and the second se	85
	IAl	Hours of Work	85

	[B] '	Time Off for Voting				
	[C]	Minimum Wages				
		Child Labor Provisions				
§ 1.12		iling Wage				
§ 1.13		nployment Insurance				
§ 1.14		Statutes				
§ 1.15	_	slative and Administrative Responses to the COVID-19 Pandemic				
§ 1.16	Conc	lusion				
Appendi	x A	Charge Against Employer (NLRB-501)				
Appendi	x B	Charge Against Labor Organization or Its Agents (NLRB-508)	•••			
Appendi	x C	NYS PERB Improper Practice Charge (PERB-579)	•••			
Appendi	x D	NYS PERB Unfair Labor Practice Charge (ULPC)				
Appendi	x E	EEOC Instructions on Filing a Charge	•••			
Appendi	x F	NYS Division of Human Rights Complaint Form				
Appendi	x G	N.Y.C. Division of Human Rights Complaint Process				
PART To Martin N		ORKERS' COMPENSATION LAW vitz, Esq.				
§ 2.1		duction				
		Who Is Covered				
		Exclusive Remedy Doctrine				
		Illegal Employment of Minors				
		Payment for Benefits				
		Counsel and Counsel Fees				
		Aliens				
		Record and Report of Injuries				
		Board Members				
§ 2.2	Accio	lent Arising Out of and in the Course of Employment	•••			
§ 2.3		e Under WCL §§ 18 and 28				
§ 2.4		al Relationship				
§ 2.5		cal Benefits				
		Medical Care and Treatment				
806		Preferred Provider Organizations				
§ 2.6	Occupational Disease					
§ 2.7		ters' Compensation Benefits Compared to Disability Benefits				
		Benefit Rates				
		Waiting Period				
		Liability for Payments				
		Self-Insurance				
		Variant Plans				

	[G] Coverage	139		
	[H] Eligibility for Coverage	139		
	[I] Payment of Benefits	139		
	[J] Medical Treatment	139		
	[K] Authorized Doctors	140		
	[L] Paid Family Leave	140		
§ 2.8	Temporary Payment of Compensation			
§ 2.9	Workplace Safety and Loss Prevention			
	[A] Safety and Loss Prevention Program	141		
	[B] Safety Incentive Program	141		
	[C] Premium Credits for Safety Investment	142		
§ 2.10	Administrative Hearings and Appeals	143		
	[A] Administrative Hearings	143		
	[B] Appeals	144		
	[C] Stop-Work Orders	145		
§ 2.11	Third-Party Actions	145		
§ 2.12	Fraud	146		
	[A] Penalties for Fraudulent Practices	146		
	[B] Disqualification for False Representation	147		
	[C] Insurance Fraud.	147		
§ 2.13	Determination of Claims for Compensation by Officials of the WCB	147		
§ 2.14	Advocates for the Injured Worker and Business	148		
§ 2.15	Voluntary Withdrawal From Labor Market	148		
Appendix	A Client Interview Checklist	151		
Appendix	Overview of Compensation Forms and Their Uses	153		
Part Two	Part Two: Workers' Compensation Forms Index			
Table of	Table of Authorities			
About the Authors				

LAURA H. DELANEY, ESQ.

Ms. Delaney became General Counsel of the Public Employment Relations Board in 2024. Before that time, she was senior counsel for the New York State United Teachers and worked for fifteen years representing public and private sector unions and their members on a wide range of labor and employment issues in state and federal court and administrative agencies.

MONICA R. LENAHAN, ESQ.

Ms. Lenahan is a partner at Whiteman Osterman & Hanna LLP. She joined the Firm in 2011 and is a member of Firm's Labor and Employment and Education Law practice groups. She represents public and private schools, colleges, and other employers in a wide range of labor, employment, and education law matters. She regularly counsels employers to help avoid legal issues, conducts confidential employee investigations, and defends employers in discrimination actions and other complex litigation. She negotiates collective bargaining agreements, and regularly drafts board resolutions, memoranda of agreement, policies, and regulations for employers. Ms. Lenahan has been a speaker at many continuing legal education and other training programs on a variety of school law and employment law topics. More information about her can be found here: https://www.woh.com/attorneys/75/monica-r-lenahan/.

MARTIN MINKOWITZ, ESQ.

Mr. Minkowitz practiced with the law firm of Stroock & Stroock & Lavan, concentrating in insurance regulation and workers' compensation regulatory practice. He was a partner from 1988 to 2009. He was Deputy Superintendent and General Counsel of the New York State Insurance Department for seven years; prior to that, he was General Counsel of the New York State Workers' Compensation Board for five years. He has a Master of Laws degree from Brooklyn Law School. He served as the Treasurer of the New York Bar Foundation and serves as a member of its Board. He is a former chair of the General Practice Section and has chaired many NYSBA committees as well, including the Committee on Professional Discipline and the Committee on the Unlawful Practice of Law. He is a member of the NYSBA's House of Delegates and was a member of the Board of Directors of the New York County Lawyers' Association.

Mr. Minkowitz writes the Commentaries to McKinney's New York Workers' Compensation Law and has often been cited by the Appellate Division and the Court of Appeals in New York. He was a member of the Recodification of the New York Workers' Compensation Law Project. He has written extensively on a broad range of topics, and his articles have appeared in several American Bar Association, Practising Law Institute and New York State Bar Association publications. He is also the coauthor of several legal texts, including *Workers' Compensation Insurance Law and Practice: The Next Generation*, and the author of West's *New York Practice Series, New York Workers' Compensation*. He is an Adjunct Professor of Law at Brooklyn Law School and New York Law School, where he teaches workers' compensation. He has been a frequent lecturer on a variety of topics for the American Bar Association; Continuing Legal Education programs of the New York State Bar Association; the Practising Law Institute; and numerous professional, labor and industry organizations. Additional information can be found in *Who's Who in America*, *Who's Who in American Law* and *Who's Who in the World*.