

LABOR AND EMPLOYMENT ARBITRATION (LAW 227.1)

SYLLABUS, SPRING 2022

Instructor Information:

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Communications: Refer to bCourses for class updates, specific assignment comments, and materials distribution.

Office Hours: As scheduled by phone or via video conference. Please text before calling.

Course Information:

Class Sessions: Mondays for seven weeks between January 10 and March 7, 2022
(No class January 17 and February 21, 2022)

Room Location: TBA

Prerequisites: There are no prerequisites. Some students may find it helpful to have had, or to be taking, Labor Law, Employment Law, and Evidence. These subjects, however, are not required.

Credit Hours: This is a one unit, credit-no credit course, without an examination or grades.

Course Description:

This class, offered on a credit-no credit basis, is based on practical experience and simulation exercises, including, for the final class session, a mock arbitration hearing presented to professional arbitrators. The exercises are similar to those used in professional legal education programs developed by the instructors for advocates and arbitrators. Brief writing assignments also will be used to sharpen student skills. As background for the class, attention will be paid to the historically important role of arbitration in labor and employment law. This area of law has been the source of many principles governing all types of arbitration as it has evolved in the past 70 years. At the outset of the class, students will become acquainted with basic arbitration law and practice in the fields of union and non-union employment, including decisions reflecting the continuing debate over compelling arbitration of statutory discrimination claims for individuals. A few readings will cover key legal principles arising under the National Labor Relations Act, as amended, and the Federal Arbitration Act. There is no prerequisite for the course. Some students might find past or current study of courses

such as Labor Law, Employment Law, and Evidence to be helpful, but they are not required.

Two co-instructors will teach the course. One is Barry Winograd. He has maintained a dispute resolution practice since 1988 as an arbitrator and mediator of labor and employment cases, as well as business and other civil disputes. He is a past president of the National Academy of Arbitrators. Previously, Winograd served as an administrative law judge for the California Public Employment Relations Board and as an attorney for the United Farm Workers of America. He has been a lecturer at Berkeley Law since 1985, teaching courses on labor law, arbitration, and mediation. He also has taught on the adjunct law school faculty at the University of Michigan, and has written a number of articles in professional journals in the labor and employment field.

The other instructor is Andrea Dooley. She began her arbitration practice in 2014 and works throughout California, Nevada, and Alaska. Prior to becoming an arbitrator, Arbitrator Dooley was in private practice, representing unions and trust funds in arbitrations and litigation, collective bargaining, and elections. She also practiced as management counsel to labor organizations and non-profits. After leaving her practice, she led labor-management programs, participated in national contract bargaining and interest-based bargaining, designed and implemented occupational safety and health programs, and advised managers and leaders on operational and regulatory issues. Arbitrator Dooley is a Faculty Member with the Labor Arbitration Institute and is the author of *The Beginner's Guide to Labor Arbitration Practice*.

Course Materials: There is no textbook for this class, but materials are available in three parts. First, students will use a specially prepared online Arbitration Practice Guide (APG) that contains subject area outlines and practice exercises that will be reviewed for class sessions and also used as a resource outside of class. Second, students will be assigned relevant cases and arbitration rules by using citations that are available online. Students also will volunteer to report on cases for discussion in class. Third, students can review arbitration and practice articles that are compiled in an online set of Extra Handouts. The articles, although not required readings, are offered as additional references for various topics during the semester.

Learning Outcomes:

- (a) Knowledge and understanding of substantive and procedural law;
- (b) Legal analysis and reasoning, legal research, problem-solving, and written and oral communication in the legal context;
- (c) Exercise of proper professional and ethical responsibilities to clients and the legal system;
- (d) Other professional skills needed for competent and ethical participation as a member of the legal profession; and,
- (e) Using the law to solve real-world problems.

Students in the course are expected to achieve these Learning Outcomes in preparing assignments during the semester. Overall, students who complete the course should be ready for “real world” positions and assignments in the field. This includes, sooner rather than later, serving as advocates in arbitration.

Course Schedule, Assignments and Exercises:

The weekly schedule, required readings, and written exercises that are due are set out below. A brief description is provided for each session.

Date

Subject/Reading

January 10

Introduction to Labor and Employment Arbitration

APG 1, 23

This class session will introduce students to basic concepts in arbitration, including several myths about arbitration. At the outset, we will focus on a special type of contract between labor unions and employers known as a collective bargaining agreement.

For this class, students will read three cases to understand basic legal rules governing judicial enforcement and review of labor and employment cases.

Labor arbitration involving unions and employers is the “grandparent” of arbitration as practiced in the U.S. It exists under a statute unique to the field of labor-management relations; a statute that does not mention arbitration. We will study how this happened by examining key Supreme Court decisions. These decisions paved the way to compel arbitration of collective bargaining disputes, and to enforce the results. By analyzing the cases, you can trace this development to the present era. The labor cases to be read are: *Warrior & Gulf*, 363 U.S. 574 (1960) and *Enterprise Wheel*, 363 U.S. 593 (1960).

Labor arbitration was solidly in place in U.S. jurisprudence by 1960. Three decades passed before courts began enforcing arbitration in a non-union setting when arbitration was required as a condition of employment. A legal tug-of-war has marked the development of the governing doctrine under the Federal Arbitration Act. An important non-union employment arbitration case will be reviewed in class: *Gilmer*, 500 U.S. 20 (1991).

January 17

No Class

January 24

Labor Arbitration - Discipline Cases

APG 2-3

Disputes can arise when workers are disciplined in a unionized environment, leading to grievances and arbitration. In this class, students will examine basic principles that are applied when discipline is challenged in a labor arbitration proceeding, and will advocate for or against discipline in several case examples. For the next class session, students will prepare opening statements for what seems like a simple case, but one that has more layers than an onion.

Assignment for January 31: Opening Statement: The Case of the Missing Money (APG, p. 20, and Sec. 16)

January 31

Labor Arbitration - Contract Cases

APG 4-5

The second major category of labor arbitration disputes involves the interpretation of contract terms, such as those dealing with pay and hours of work. Is the text plain and unambiguous? If not, what principles govern how contracts should be construed? Students will review case examples raising these issues. As the next assignment, students will prepare closing statements for a hypothetical dispute over a pay claim.

Assignment for February 7: Closing Statement: The Case of the Early Employee (APG, pp. 35-36, and Section 20)

February 7

Labor Arbitration - Procedural Issues

APG 6-9

AAA Labor Arbitration Rules:

<https://www.adr.org/sites/default/files/Labor%20Rules.pdf>

Code of Professional Responsibility For Labor-Management Arbitrators: <https://naarb.org/code-of-professional-responsibility>

Labor arbitration is governed by a series of steps from the initiation of grievance proceedings through a final outcome in arbitration. Students will study details of the typical case, common procedural variations, the special language that applies, and ethical standards to be followed by advocates

and arbitrators. Examples of the issues considered are how to start an arbitration and select an arbitrator, what happens during an arbitration, and the content of arbitration awards. Student understanding will be sharpened by considering a series of procedural knotty problems that can confront advocates and arbitrators. This class also will provide insight into the distinct procedural framework for individual employment arbitration cases.

February 14

Labor Arbitration - Evidence and Witness Issues

APG 10-14

Evidence Problems:

Do rules of evidence apply in labor arbitration? That depends. But depends on what? In this class students will review basic principles of evidence in labor arbitration cases, such as relevance, privilege and hearsay. Students also will consider potential evidence objections responding to issues arising in a challenging dismissal case. Student understanding gained in this session also will carry over to individual employment cases.

Assignment for February 28: The Case of the Indicted Installer (handout)

February 21

No Class

February 28

Employment Arbitration Case Management, APG 21-22

AAA Employment Arbitration Rules:

<https://www.adr.org/sites/default/files/Employment%20Rules.pdf>.

JAMS Employment Arbitration Rules:

<https://www.jamsadr.com/rules-employment-arbitration/>

NAA Professional Responsibility Guidelines for Mandatory Arbitration: <https://naarb.org/guidelines/>

Historically, employment arbitration as a body of work followed the development of labor arbitration, and now covers millions of U.S. employees. Given this background, there are many similarities between the two types of arbitration. But employment arbitration also resembles traditional civil litigation, and blends aspects of that framework. By studying case management disputes arising in an employment arbitration scenario, students will become

familiar with issues that are not typically present in labor proceedings, such as legal arguments over discovery and motion practice.

An important California case establishing principles for employment arbitration is *Armendariz*, 24 Cal.4th 83 (2000). We will discuss it in class.

What happens when labor law and employment law collide, particularly when individual civil rights are at stake? Is protection of individual rights paramount, enforcing arbitration agreements with employees according to their terms, or do collective interests prevail, including reliance on class actions? The following case will shed light on these questions: *Epic Systems*, 584 U.S. ____, 138 S.Ct. 1612 (2018).

Class on February 28 will be in two parts. The first half will discuss the key cases noted above and will consider several of the Employment Case Management Problems found in the APG at pp. 88-90.

The second half of the class will focus on sharpening your skills to present a case in arbitration. Students representing labor and management in a model scenario will discuss their “story of the case,” and identify principal themes, witnesses to call, and documents to introduce. Students also will practice direct and cross-examinations. To prepare, please review APG 15-20.

Assignment for March 7: Students will be provided mock arbitration materials for the next class. Teams will be formed to prepare for the mock arbitration.

March 7 Mock Arbitration

Professional arbitrators will attend the class for the team presentations.

Grading/Evaluation: There is no grade for this course, nor for the student assignments and class presentations during the semester.

School-wide Policies:

1) A “credit hour” at Berkeley Law is an amount of work that reasonably approximates three to four hours of work per week for the length of the course,

including: a) classroom time, b) time spent preparing for class, c) time spent studying for, and taking, final exams, d) time spent researching, writing, and revising papers and other written work, and e) time spent preparing for and completing any other final project, presentation, or performance. For the purposes of these calculations, 50 minutes of classroom instruction counts as one hour. You can expect to spend this amount of time per unit per week on in-class and out-of-class, course-related work as described above.

2) Students who need classroom accommodations or want to discuss implementation of their accommodations in this class are advised to contact Kyle Valenti, Director of Student Services at kvalenti@law.berkeley.edu as soon as possible. Any student who seeks an accommodated or reschedule class activity for documented medical reasons or for religious observance should contact Student Services in 280 Simon Hall, 510-643-2744.

3) The Academic Honor Code governs the conduct of all students in all academic and pre-professional activities at Berkeley Law.

4) If you need economic, food or housing support, you can find help at basicneeds.berkeley.edu. You may be eligible for money to buy groceries via calfresh.berkeley.edu or our Food Assistance Program. If you are in need of food immediately, please visit our UC Berkeley Food Pantry at pantry.berkeley.edu.

Course Policies:

This course places a high value on student attendance and participation. Please attend the class even if you are unprepared as there is much to be learned simply by being present. Please advise the instructor with an email message if you know you will be missing a class. If you miss a class, you will be responsible for contacting another student for notes or other information from the class. After the first week of the course, if a student misses three classes in the semester, a make up assignment will be required.

Students are expected to volunteer from time-to-time for portions of our class discussions; for example, serving periodically as a lead reporter, usually with another student, for the cases or exercises that are assigned. Students also are expected to participate in class discussions, including requests to share your insights or to advocate for a position that might be taken by a party in a case scenario we are studying. Class participation is intended to improve effective analytical skills, including your ability to articulate a view you hold, and to listen and respond to opposing perspectives. Written exercises prepared for classes during the semester also will enhance these skills.

Students are expected to attend class. Attendance is required by Rule 7 of the Academic Rules, which states in part:

In accordance with ABA accreditation standards, Berkeley Law requires regular and punctual class attendance in order to receive course credit. To meet these standards, students may not enroll in courses that have overlapping meeting

times. Further, instructors have the discretion to announce more specific and/or restrictive attendance requirements than this at the beginning of the semester. When, in the opinion of an instructor, a student enrolled in his or her course has failed make a good faith effort at regular and punctual class attendance and, after reasonable warning and opportunity to make up and/or correct the deficiencies, continues to fail to make a good faith effort, the instructor may, in his or her discretion, request, in agreement with the Dean of Students, that the student be dropped from the class.

The remainder of the law school's academic rules can be found here:

<https://www.law.berkeley.edu/academics/registrar/academic-rules/>. _

The applicable law school guidance on the use of laptops or other electronic devices is the following: *You may use a laptop or other device to access reading assignments during class. However, we strongly encourage you to take hand-written notes. (Research shows that students absorb information better this way.) Further, accessing the internet (or apps) during class—except for class-related activities—is prohibited. You cannot check your Facebook page and successfully make meaningful contributions to class.*