

Public-Sector-Labor-Negotiations-and-Private-Sector-Labor-La...

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SPEAKERS

Emily Martin, Amanda Clark

- E** Emily Martin 00:09
Understanding the National Labor Relations Act, the NRLA and private sector, labor law benefits state and local public sector labor negotiators. To talk about this topic, I've invited Amanda Clark to be my guest on this episode. Amanda is a shareholder with Asher, Gittler, & D'Alba, a labor and employment law firm based in downtown Chicago. The bulk of her work is advocating for both public and private sector unions, and individual employment plaintiffs. Her work particularly includes representing firefighters in negotiations, interest arbitrations, and disciplinary proceedings. Amanda is the union co-chair of the American Bar Association's section of Labor and Employment Law's State and Local Government Bargaining and Employment Law Committee.
- E** Emily Martin 01:03
Good morning, Amanda, how are you?
- A** Amanda Clark 01:04
Good. How are you, Emily?
- E** Emily Martin 01:06
I'm great. I'm really glad you can join us here today. So today, I want to talk to you about how understanding the National Labor Relations Act, the NRLA and private sector labor law benefits state and local negotiators. So does it? Is there a benefit?

A Amanda Clark 01:09

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Amanda Clark 01:22

In my opinion, there's a huge benefit to understanding the National Labor Relations Act or the NLRA and its private sector application, because I think most if not all, public sector, labor law sort of grew out of the NLRA. It's really the granddaddy of them all, as far as labor law goes. So I think it gives you an incredibly valuable footprint and roadmap to start looking at issues in the public sector. It's the background information that makes your life a lot easier, I guess, is the best way to put it.

E

Emily Martin 01:55

Yeah, that's so true. And stepping back from that, it seems like there's a benefit for negotiators to understand labor law itself. Do you agree? Do you think it's useful for negotiators to have a sense of what labor law is and how that might help them as they, as they negotiate, and they work with their clients?

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Amanda Clark 02:12

Yeah, so I think that with labor law, in particular, you know, every area of law is really kind of specialized and unique, I'm not going to be able to jump into criminal law and be an effective advocate for a client. I think labor law is exactly the same. It is very specialized, it does have its own unique body of law that has been built around it. And you know, the National Labor Relations Act was passed in the 30s. And you're seeing your different public sector laws passed at various points after that. You operate in this realm that, you know, traditional contract law, even though we're dealing with contracts, right, we're negotiating collective bargaining agreements, which people often refer to as contracts, they aren't the same as your, I'm going to sign a contract with, you know, a general contractor to build a building, or I'm going to sign a contract for a car loan or that sort of situation. You know, your contracts basics from law school, are not the same as negotiating a collective bargaining agreement. And so understanding those differences, how labor contract law works versus, you know, your general contract law, I think is very important for practitioners going in.

E

Emily Martin 03:26

Yeah. And I think even it gets even more specific, because I suspect, unlike other areas of law, and we we have a lot of areas of law, like what is good faith bargaining? Like, what, what does that negotiations look like? And there's not a lot of areas of negotiations that have such a defined body of law and norms and terms of art, that talk about expectations at a bargaining table and coming to the table and what you should be talking about what you have to talk about what you can't talk about, all of those things are about negotiations itself. And there's a lot of a lot of norms, but there's also, that get developed in these case laws. That's important to understand.

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Amanda Clark 04:05

Yeah, and it does. I mean, labor law has, exactly as you said, its own terms of art. So you have regressive bargaining, what is regressive bargaining that doesn't really exist in your normal contract? Your your general contract law, and the NLRA can talk about that you have your

contract? For your general contract law, and the NLRA can talk about that you have your mandatory and permissive subjects of bargaining? And what do those mean? And what are the implications of those? And, you know, has a party stumbled into an unfair labor practice or ULP? What what does that mean at the negotiating table? What behavior constitutes a ULP? So for a practitioner, one, you need to know what you're doing. And understanding the NLRA can be very helpful with that, but also understanding the NLRA and the body of law that's been produced around it and being able to translate that into public sector bargaining. It also helps manage client expectations. So, you know, being able to explain to your client, why the opposing party, saying no to your proposals doesn't automatically constitute a ULP. Because they're bargaining in bad faith, understanding what conduct arises to the level of a ULP, or what conduct is acceptable or unacceptable at the bargaining table. That's very important for practitioners both to be able to perform your job and manage client expectations.

E Emily Martin 05:29

Yeah. And I also imagine they also helps understand what the other side might be thinking. If they're using certain terms, or if they're getting upset about certain things, or they're sensing some sensitivities. Maybe they're not even upset yet, but what they might likely get upset by. What might be considered normal? And like, no, not okay.

A Amanda Clark 05:50

Yeah, exactly. And managing expectations for everything. You know, it helps. It helps if both sides fully understand what the law is around the area that they're negotiating. But it does help to be able to say, because negotiations, you're looking at the long game, right? Like your goal is to get to a contract between the parties. And so having that framework, and being able to manage expectations for everybody involved, being able to predict to some extent, you know, what the parameters of the law mean, the other side might come back with, it gives you a way to keep that big picture within the frame of reality, I guess, is the best way to put it.

E Emily Martin 06:36

So you represent public sector and private sector. So when you're working in the private sector, it's clear how the NLRA applies. But when you're representing public sector, how does the NLRA help you to research if you're working on an issue? Because it's not the law. It doesn't, it's not directly applicable to, for example, maybe a firefighter bargaining unit in Chicago. But how does that help you as a researcher?

A Amanda Clark 07:03

Sure, so for legal research, I would say that, you know, the kind of well known purveyors of legal research platforms, their case law history on the NLRA, that's available through their programs is much more robust than their date, public sector level database, I would say, I will say they do have it accessible for the state level, which is very helpful in doing research, but how it's organized and kind of ease of access, I think, is much cleaner under the NLRA and the NLRB, National Labor Relations Board precedent decisions. And so what's helpful about that is at least in Illinois, and I think most public sector states, while NLRA decisions are not

controlling, they can be very persuasive. And so having that as a resource for research allows me to either find terms of art that I might need to be looking at, or standards that I can see if have been applied at the state level. I think it just lends a good gateway to being able to take what you find in the more easily searchable, NLRA history to apply it to your public sector databases if you have them available.

E Emily Martin 08:20

Yeah, it's certainly persuasive. And it seems like especially when an issue never arose in Washington state before, that's a great place to go look. Is that the same way in Illinois, when it's a case in first impression? Do you go and check and see what's happened under the under the NLRA?

A Amanda Clark 08:36

Yes, that is a really great resource for us in Illinois, and is how so we have two public sector labor boards actually, in Illinois. We have the Illinois Labor Relations Board, which handles all public sector except for schools and universities and colleges. And then we have the Illinois Educational Labor Relations Board, which handles those, obviously, educational employers. And so both of those boards, if it's a matter of first impression, will very closely examine what the NLRB has done. So what precedent is coming out of the NLRA cases, and to some extent, they will just borrow whole cloth from board decisions. So for example, in Illinois, we use the same deferral standards for a ULP to arbitration that the NLRB has used. So your Spielberg, your Dubo and your Collyer, deferral standards are the same for our two state labor boards as they are under the NLRA.

E Emily Martin 09:34

So certainly, when things are similar, it's super, super useful or when it hasn't been figured out yet. It could follow that path. But what about when things are different? Are there big differences between the state level and the NLRA?

A Amanda Clark 09:45

Yeah, so when Illinois, Illinois labor law, both the public sector labor laws were passed in the early 80s. So there were decades of lessons to be learned from the NLRA and so we do have a lot of similarities, but we also have a lot of differences. So for example, we have very specific situations in which you get interest arbitration for your contract. So any first contract in Illinois, for a public sector union is subject to interest arbitration, for your protective services. So police fire and correctional facilities, they do not have the right to strike under our state labor law. So therefore, they have interest arbitration on every contract if the parties reach impasse. And that's not something that's provided for under the NLRA. So that's its own special area of law that has been developed within the state, and is different. Different, but similar in our education setting for Illinois is they're very specific our teachers can strike here, but there are very specific rules about how they have to do it, that I think are more reflective of, say, a health care unit under the NLRA. So they're not exactly the same. And the differences are probably

enough that I don't know that you would be able to directly use the case law under the NLRA as a reference for an education unit striking here. But kind of the idea of here are your pre strike checklist items that you have to get done here, the restrictions on you know, when strikes may happen, those sort of reflect each other. So the differences I think, are key to recognize, but you can still find some relevance in the NLRA, even under those differences.

E Emily Martin 11:29

I think that's a key thing to mention, especially when it comes to things like the right to strike. That's a really important thing to understand the differences between the states and the differences and what might apply in your local jurisdiction and what might not, I'm guessing it's useful if you're coming up with an idea as you're doing research that applies under the NLRA to then look locally to figure out has this been followed? Is this similar? Does this feel like it's a different kind of system?

A Amanda Clark 11:55

Yes. And it's very important, I think, to re-emphasize, just to be clear, is that a lot of the state laws based off of the NLRA have very big differences. And so, yes, never wholesale borrow from the NLRA or an NLRB decision and say this is applicable here, because you may have an area in your state in particular, that treats that subject a very different way. So the NLRA is a great place to start your research. But by no means is that the end of your research?

E Emily Martin 12:26

Yeah, it seems like for me, I've really found that sometimes looking at the NLRA was useful and like understanding what, what are the terms of art? And what are the words I should be looking for at the state level? Because sometimes it's hard to figure out how do you, you know, what is this idea called in labor law? And since there's so much more infrastructure and support and resources about the NLRA, that can often be a better way to find an explanation of the concept and then figure out how that concept applies in Washington State, or not apply.

A Amanda Clark 13:01

Yes, I think that's a great point, is you do have decades more, for the most part of case law coming out of the NLRA than you do out of state. So it is very helpful to exactly look at the definitions of terms of art, because most likely the states have borrowed those when looking at their public sector labor law. I think that's a great resource for the NLRA.

E Emily Martin 13:24

When I see the NLRB in the news, you know, sometimes it's like, oh, they changed the standard or the change in standard back. What, what's going on there? Because I don't, I mean first of all, we don't have that much news coverage on Washington state labor. So let's talk about the sways. And then what that, what about the sways are useful for the negotiators to understand?

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Amanda Clark 13:47

Sure. So with the NLRA, its enforcement agencies, the NLRB, the National Labor Relations Board, and the five member panel, and appointments to the panel change with each new presidential administration. So if you have a swing from a Republican administration to a Democratic administration, or vice versa, you tend to see the decisions coming out of the board, and they're recommended rulemaking, very much reflecting those swings. And you know, the general rule of thumb is that a democratic board is much more friendly to unions, and a Republican board is much more friendly to management. And so you can get these huge swings in board decisions and how they're looking at issues. I would say a big one right now, the past few administrations has been like joint employer status, for example, or tests for independent contractors, those sorts of things. You see those change and so when you're a practitioner in the private sector, I think it's fair to say you assess cases based on also what the board that you're operating under is. So what is their view of this issue right now, and is the case that you have one with strong enough facts and a likelihood of success for the outcome that you're looking for that is something you're going to pursue with the board at that time. So the sways play into legal strategy, I think, for a lot of unions and management firms as well. And that sway is very well known and kind of a little bit of a joke among labor lawyers, I would say that, you know, you never know what your precedent is going to be from one four year period to the next. And I don't, I would say I don't see that same thing at the state level. Illinois boards are set up, the the Educational and the Labor Board are set up very similar to the NLRB and that we have gubernatorial appointments for our board members, we also have five board members, the breakdown of appointment is the same as at the NLRB. So your majority is appointed from the party of the governor, the minority is appointed from the obviously opposite party as the governor, we don't tend to get those big sways quite like you see, at the National Labor Relations Board level, we do get some sway depending on who the current controlling party is. But we don't have the same sort of very drastic sways. I would say.

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Emily Martin 16:22

In Washington we have a three member board, there's traditionally a neutral position, employer position, a union position, but there isn't that kind of formality about that. And it's not tied to party or anything like that. So I think that's an example what's different. And also, I'm thinking, sometimes the NLRB is in the news, because the General Counsel makes an announcement, you know, and it's often about those issues that sway back and forth. So if you hear Jennifer Bruce's name in the news, that that might be how you your clients are learning about labor law. But first of all, we don't have a general counsel, similar kind of structure. We have parties file their ULPs. And then they put on their own cases, it's a different kind of structure than the NLRB uses in terms of how cases are processed. But it also seems like sometimes those news events are less about the bedrock and more about the stuff that affects the private sector.

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Amanda Clark 17:14

Yes, I would agree. I think the stuff that you're seeing in the news right now with the NLRB, in particular, where they're making changes or indicating they want to make changes to certain areas is sort of the the leading edges of labor law, I guess, I would say, or the areas where you see the sway the most. You aren't seeing changes in bedrock principles, you aren't seeing

changes in kind of your mandatory or permissive subject of bargaining analysis. So I think a lot of what you're seeing in the news might not necessarily translate directly to your public sector units. So for example, you don't often see a joint employer status situation in the public sector, that very unique situation that would arise in the public sector. So there may be big moves happening at the NLRA level on that issue, the private sector level, but that's not something that you're really going to see come up in the public sector.

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Emily Martin 18:10

So what are some good ways to learn about the NLRA? How do you how do you keep up to date? How do you figure out where the bedrock stuff is?

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Amanda Clark 18:16

I think that the National Labor Relations Board has one of the most useful websites out of all the federal government agencies that I deal with in my practice, the NLRB website has, you know, great case flowcharts, great, kind of very approachable explanations of the different terms of art that we've talked about. And I think the reason for that is I believe the NLRB is very focused on being accessible to employees. So it's not just for attorneys, but it makes it very helpful for us. I would also suggest, under the National Labor Relations Board website, they have a section for manuals, they have case handling manuals for unfair labor practice proceedings, representation proceedings and compliance proceedings. Again, those might be very different or very similar to what's happening in your state. But it is helpful to sort of get a general idea of how those things are looked at. In particular, I think what is helpful is they have an outline of law and procedure about different areas of developing law under the NLRA. And so those I think, are also very helpful to kind of keep up to date about where the board the National Labor Relations Board law, body of law is headed, so I would highly recommend the NLRA's website for various information from your basic to your more detailed information about how the law works, and I will also take a chance to plug the Developing Labor Law publication from the ABA. The ABA, Labor and Employment Law Section has a developing Labor Law Committee, and they put out a very thorough publication about exactly what it's titled Developing Labor Law, I think that's a very good resource as well.

E

Emily Martin 20:03

An old copy of Developing Labor Law can go a long way to help look up general concepts, the stuff that doesn't change very often. But speaking of the ABA, that's that's actually what inspired today's episode, I saw that you and some other people from the section of, of Labor and Employment Law, we're gonna do a webinar on the fundamentals of labor law. Tell me about the section and why it's so awesome.

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Amanda Clark 20:26

Yeah. So I think that if you end up practicing in labor law in the area of labor, law, public or private sector, you become a true labor law geek. I think it is very hard to not become a labor law geek. When you practice in this area. It's so interesting, every case is different. Even if

you're looking at the same, you know, general idea of law, every fact of every case changes what you're what you're dealing with. And you know, you end up with really great cocktail party stories. And so the ABA section of labor and employment law gives you a chance to geek out with practitioners from across the country. And you can really kind of focus down into specific areas of labor and employment law that you like. So for example, I'm currently the union co-chair of the, what we shorthand to, State and Local Government Committee. So we deal with collective bargaining and employment issues in the public sector. And so it's a chat with people like Emily or people from New York or Florida or Alaska, about what's happening in public sector labor law, and it helps keep me up to date and gives me people to geek out with.

E

Emily Martin 21:30

Oh, I so agree. Full disclosure, I am the agency co-chair. And Amanda and I get to work together on some really great things like planning an amazing midwinter every year. So it's a great way to get involved and meet people from around the country and geek out and learn together and and just have a sense of what's going on in other places to help me understand and make sense of what goes on in Washington and what might change. So I really appreciate that. Thank you so much for coming on to the podcast. I really appreciate it. It was so wonderful to talk to you today, Amanda!

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Amanda Clark 22:05

Well, thank you so much for having me. I really enjoyed it. Like I said, I love geeking out about labor law. So this is, this is great!