Guide to Understanding
The Farm Laborers' Fair Labor Practices Act

This document is not intended to provide legal advice. In the event of any conflict between this document and the State Employment Relations Act ("SERA")/Farm Laborers' Fair Labor Practices Act ("FLFLPA") or the Board's Rules of Procedure, the Statute or Rules shall govern.

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Overview

This guide examines key provisions and procedures of the Farm Laborers' Fair Labor Practices Act[1] ("FLFLPA"), which amends several portions of the New York State Labor Law, including the State Employment Relations Act[2] ("SERA"). It provides a summary of excerpted sections designed to facilitate an understanding of SERA and FLFLPA, and is not comprehensive. Please see the SERA law for more specific and detailed information. Click on the SERA Rules button on this page for SERA and FLFLPA Rules.

Prior to 2010, the State Labor Relations Board ("SLRB") administered SERA. Some of their decisions are cited here. Since 2010, cases under SERA have been under the jurisdiction of the NYS Public Employment Relations Board[3] ("PERB"). FLFLPA amended SERA.

State Employment Relations Act

In broad terms, SERA (previously known as the State Labor Relations Act) governs the rights of private sector employees[4]:

- to form or assist labor organizations[5];
- to join (or not join) labor organizations;
- to collectively bargain through representatives of their own choosing;
- to seek mediation and arbitration under certain circumstances; and
- to do so free of unlawful employer discrimination, coercion, interference, retaliation, restraint, or other improper action.

SERA also protects the right of employees to engage in "concerted activities," even absent membership in a union, "for the purpose of collective bargaining or other mutual aid or protection." This includes the right to act together to raise group concerns to their employers.

Farm Laborers' Fair Labor Practices Act

FLFLPA extends to agricultural workers the same organizing and collective bargaining rights and protections as those established under SERA, with some notable differences, which are also covered in this guide.

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[1] NY Laws 2019, ch. 105.
[2] Labor Law Art. 20, §§ 700-718.
[3] NY Laws 2010, ch. 56, pt. O, § 3.
[4] § 703.
[5] The terms "labor organization," "employee organization," and "union" are used interchangeably.

Coverage

Employers

Under FLFLPA, the term "employer" includes agricultural employers.[6]

"Agricultural employer" shall mean:

- any employer engaged in cultivating the soil or raising or harvesting any agricultural or horticultural commodity, including custom harvesting operators, and
- employers engaged in the business of crops, livestock, and livestock products as defined in section 301 of the Agricultural and Markets Law, or other similar agricultural enterprises.

Employees

Under FLFLPA, the term "employee" includes farm laborers.[7]

Farm laborers shall mean "any individual engaged or permitted by an employer to work on a farm," except "members of an agricultural employer's immediate family who are related to the third degree of consanguinity or affinity" if they "work on a farm out of familial obligation and are not paid wages or other compensation based on their hours or days of work."

The board has found that farm laborers on H-2A visas are included in the definition of "employees" under FLFLPA.[8]

Jurisdiction of PERB:

For cases under SERA, PERB has jurisdiction over only those New York State private sector employers/employees not covered by the National Labor Relations Act or the Railway Labor Act.

For cases under FLFLPA, PERB has jurisdiction over all agricultural employers and farm laborers in New York State.

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[6] § 701.2(b).
[7] § 701.3(c).
[8] *Eg*, *Porpiglia Farms, Inc*, 57 PERB ¶ 3402 (2024); *A&J Kirby Farms, LLC*, 57 PERB ¶ 3403 (2024); *Wafler Farms, Inc*, 57 PERB ¶ 3404 (2024); *Lynn-Ette & Sons, Inc*, 57 PERB ¶ 3405 (2024).

Certification

General Process[9]

1. A petition for certification may be filed with the Director of Private Employment Practices and Representation ("PEPR") to resolve a "question or controversy" concerning the representation of employees. Petitions for certification may be filed to obtain certification of an exclusive bargaining representative with or without an election.

2. After a petition for certification is submitted, the Respondent must provide the following:

- A response to the petition;
- A list of employees employed as of the pay period immediately preceding the date the petition was filed who remained employed as of the date of filing; and
- A statement of position, including an offer of proof, setting forth any objections to the certification.

3. A petition for certification must be accompanied by a showing of interest, which will be kept confidential. FLFLPA outlines a "card check" (submission of signed dues authorization cards or evidence attesting to the same) as a means of certification when a single employee organization petitions for certification as the exclusive representative.

- If the showing of interest demonstrates that a majority of employees in the bargaining unit support a single labor organization being designated as their representative, the Board may certify the labor organization as the exclusive bargaining representative *without* an election.

- If the showing of interest demonstrates that at least thirty percent of employees in the bargaining unit support a single labor organization being designated as their representative, the director of PEPR will conduct an election to ascertain the employees' choice.

Elections[10]

The board, or its agent, determines whether an election is conducted. The mechanics of an election, such as the date, time, place, and method, are left to the discretion of an election supervisor, hearing officer, or other designee of the board.[11] No election need be directed by the Board solely because of the request of an employee organization, an employer, or employees prompted to do so by their employer. Misconduct around an election may constitute an unfair labor practice.[12]

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[9] See Rule § 263.19 – 263.24 for certification requirements under FLFLPA.
[10] § 705.
[11] *See Brooklyn Eye and Ear Hospital*, 32 SLRB 34, 119, 121 (1969).
[12] § 705.3.

Appropriate Bargaining Unit[13]

In order to insure that employees are afforded the full benefits of their rights under FLFLPA, the Board shall decide in each case the unit appropriate for the purposes of collective bargaining. Parties may petition for unit clarification in accordance with Rule § 263.32.

The Board shall decide whether any supervisory employees shall be excluded from any negotiating unit that includes rank-and-file farm laborers. The language of FLFLPA also provides that nothing shall limit or prohibit any supervisory employee from organizing a separate negotiating unit.

Investigations[14]

If a party alleges that there is a "question or controversy" concerning the representation of employees, a hearing officer, acting as a delegate of the Board, shall investigate and determine all legal and factual issues.

During an investigation, a hearing is necessary and appropriate only when there are material issues of disputed fact that must be resolved.[15] In that case, the hearing officer shall provide for a hearing upon due notice. A hearing officer may also order that an election by secret ballot of employees be conducted, or use any other suitable method to determine the representative (either before or after the hearing). After an investigation, the hearing officer will certify in writing to all persons concerned the name of the representative(s) designated or selected.

If either party provides to the Board, prior to the designation of a bargaining representative, clear and convincing evidence that dues deduction authorizations, or other evidence upon which the board would otherwise rely to ascertain the employees' choice, are fraudulent or were obtained through coercion, the Board shall promptly conduct an election.[16]

The Board shall also investigate and consider a party's allegations that the dues deduction authorizations and other evidence submitted in support of the designation of a

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[13] §§ 705.1-b and 705.2.
[14] § 705.3.
[15] *See Id*; *Satur Farms*, 55 PERB ¶ 3403, 3412 (2022); *Paumanok Vineyards and Palmer Vineyards*, 55 PERB ¶ 3401, 3407 (2022); *The Long Island College Hospital*, 34 SLRB 324, 327 (1971), *revd sub nom. Matter of the Long Island Coll Hosp v NYS Labor Relations Bd*, 39 AD2d 913 (2d Dept 1972), *revd* 32 NY2d 314 (1973).
[16] § 705.1. In New York State "clear and convincing evidence has been treated as . . . an intermediate burden of proof, resting somewhere between [the civil standard of] preponderance of the evidence and the higher [criminal standard of] beyond a reasonable doubt." *Paumanok Vineyards*, 55 PERB ¶ 3401 (2022), citing *Currie v McTeague*, 83 AD3d 1184, 1185 (3d Dept 2011) ("Clear and convincing standard requires the party bearing burden of proof to adduce evidence that makes it highly probable that what he or she claims is what actually happened.").

representative *without an election* were changed, altered, withdrawn, or withheld as a result of employer fraud, coercion, or any other unfair labor practice (ULP).

Additionally, if the board determines that a representative would have had a majority interest *but for* the employer's fraud, coercion, or unfair labor practice, it shall designate the representative without the conduct of an election.[17]

Union Access to Employer's Property

Labor organization representatives may need to be provided access to an employer's property for the purpose of organizing employees or to meet with employees they represent where employees might otherwise not be reasonably accessible. An example of such employees is farm laborers who reside on the farm's property.[18]

One or both parties may contact PERB's Director of Conciliation and request that a mediator be assigned to assist the employer and the union in reaching an agreement that will provide reasonable access to employees and minimize potential disruption to the farming operations.

[17] § 705.1.

[18] *Nat'l Lab Relations Bd v Babcock & Wilcox Co*, 351 US 105, 112 (1956) ("[W]hen the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize."); *see also NLRB v S&H Grossinger's Inc, 372 F2d 26 (2d Cir 1967)*; *Albany Medical Center*, 29 SLRB 122 (1966); *St. Joseph's Hospital*, 30 SLRB 142 (1967).

Unfair Labor Practices

Unfair Labor Practices of Employers Under SERA:[19]

1. Spying/Surveilling

    - To spy upon or keep under surveillance, whether directly or through agents or any other person, any activities of employees or their representatives in the exercise of the rights guaranteed by § 703.

2. Blacklisting

    - To prepare, maintain, distribute, or circulate any blacklist of individuals for the purpose of preventing any of such individuals from obtaining or retaining employment because of the exercise by such individuals of any of the rights guaranteed by § 703.

3. Domination or Interference with Formation, Existence, or Administration of a Union

    - To dominate or interfere with the formation, existence, or administration of any employee organization or plan which exists, in whole or in part, for the purpose of dealing with employers concerning terms or conditions of employment, labor disputes, or grievances; or to contribute financial or other support to any such organization, by any means, including but not limited to the following:
        (a) by participating or assisting in, supervising, or controlling (1) the creation of any such employee organization or plan; or (2) the management or operation of any such employee organization or plan.
        (b) by urging the employees to join any such employee organization or plan;
        (c) by compensating any individual for services performed in behalf of any such employee organization or plan; or by donating free services, equipment, meeting space, or anything else of value for the use by any such employee organization. This section does not prohibit employers from conferring with employees during working hours without loss of time or pay.

4. Requiring an Employee to Join/Not Join a Union as a Condition of Employment

    - To require an employee or one seeking employment, as a condition of employment, to join any company union or to refrain from joining, forming, or assisting a labor organization of the employee's own choosing.

5. Encouraging/Discouraging Union Membership by Discriminating in Regard to Hire/Tenure

    - To encourage membership in any company union, or discourage membership in any labor organization, by discrimination in regard to hire or tenure or in any term or condition of employment.

[19] See §§ 704.1 - 11 for the statutory language. This guide provides a summary only.

- Nothing in this article shall preclude an employer from making an agreement with a labor organization requiring as a condition of employment membership therein, if such labor organization is the representative of employees as provided in § 705.

6. Refusal to Bargain Collectively in Good Faith

    - To refuse to bargain collectively with the representatives of employees, subject to the provisions of § 705.
    - SERA imposes a duty to bargain in good faith to avoid industrial strife. Good faith bargaining means that parties approach negotiations with an open and fair mind, with a sincere resolve to make an effort to arrive at agreement.[20]

7. Refusal to Discuss Grievances

    - To refuse to discuss grievances with representatives of employees, subject to the provisions of § 705.

8. Discharge or Discrimination Against Employees

    - To discharge or otherwise discriminate against an employee because he has signed or filed any affidavit, petition, or complaint or given any information or testimony under this article.

9. Blacklisting

    - To distribute or circulate any blacklist of individuals exercising any right created or confirmed by exercising any right created or confirmed by this article, or of members of a labor organization, or to inform any person of the exercise by any individual of such right or of the membership of any individual in a labor organization, for the purpose of preventing any individuals so blacklisted or so named from obtaining or retaining employment.

10. Any other acts which Interfere with, Restrain, or Coerce Employees

    - To do any acts, other than those enumerated in this section, which interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by § 703.

11. Using State Funds to Discourage Union Activity

    - To utilize any state funding (appropriated for any purpose) to train personnel regarding methods to discourage union organization or to discourage an employee from participating in a union organizing drive.

[20] *NYS Labor Relations Bd v Montgomery Ward & Co*, 179 Misc 298 (Sup Ct Queens Co 1942), affd, 266 AD 878 (2 d Dept 1943).

Unfair Labor Practices of Employers Under FLFLPA:[21]

a. Lockout Laborers

- A "lockout" is a refusal by an agricultural employer to permit farm laborers to work as a result of a dispute with such farm laborers or employee organization representing such farm laborers that affects wages, hours, and other terms and conditions of employment of such farm laborers.

- A lockout is not a termination of employment for good cause that does not involve the terminated laborers' exercising any rights guaranteed by SERA.

b. Refusal to continue all the terms of an expired contract until a new agreement is negotiated

c. Discouraging union organizing or protected activities. [Note: § 704-b.2(c) is currently enjoined and therefore not being enforced.[22]]

Unfair Labor Practices of Employee Organizations or Employees Under FLFLPA:[23]

1. Strike: The term "strike" shall mean, for the purposes of this section, any strike or other concerted stoppage of work or slowdown by farm laborers. It shall be an unfair labor practice for a farm laborer or an employee organization representing farm laborers to strike any agricultural employer.

Hearings

PERB's hearing officers try to facilitate a settlement between parties to avoid the need for a hearing. For cases that do not settle, a hearing officer may conduct a hearing at which both parties present their case. Non-attorneys may appear before the hearing officers.

The hearing officer will write a decision which lays out the facts, analyzes those facts under SERA and FLFLPA, and determines whether a violation of the law has occurred. If no violation is found, the hearing officer will dismiss the charge. If a violation is found, the hearing officer will issue a recommended remedial order, including such things as a cease-and-desist order, an order to undo unilateral changes and to make employees whole for any loss of pay or benefits, or reinstatement with backpay for unlawfully terminated employees.

[21] § 704-b.2. Per § 704-b.3, nothing in § 704-b.2 shall be construed as to bar any proceeding brought pursuant to § 704 or § 705 of this article.
[22] *NYS Vegetable Growers Assoc v James*, 57 PERB ¶ 7501, 2024 WL 1161115 (WDNY 2024).
[23] § 704-b.1.

Board's Authority

The Board and its agents shall, at all reasonable times, have access to, for the purposes of examination, and have the right to examine, copy, or photograph, any evidence, including payrolls or lists of employees, of any person being investigated or proceeded against that relates to any matter under investigation or in question.[24]

The Board may issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation or in question before the Board or its agent conducting the hearing or investigation. Any member of the Board, or any agent designated by the board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence.[25]

Any person who shall willfully resist, prevent, impede, or interfere with any member of the Board or any of its agents or agencies in the performance of duties pursuant to this article, or who shall in any manner interfere with the free exercise by employees of their right to select representatives in an election directed by the Board, shall be punished by a fine of not more than five thousand dollars or by imprisonment for not more than one year, or both.[26]

Proving a Charge of Discrimination, Discouragement, or Interference

In interpreting § 704 of SERA, the Court of Appeals explained:

> The policy of the statute is that employees shall be free to join a union of their choice or, if they prefer, to join no union. The statute confers upon the Board power to prevent discrimination by the employer which interferes with such freedom of his employees. The Board may not command an employer to retain in his employ a discharged employee who is a member of the union unless it appears that the discharge was influenced by the employee's membership in the union and was calculated to interfere with the freedom of choice guaranteed by the Act to all employees.[27]

Under § 704, a charging party must establish that the employer had knowledge of the employee's protected activity prior to the adverse action alleged to be discriminatory.

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[24] Rule § 263.74.
[25] § 708.1.
[26] § 709.
[27] *Stork Restaurant, Inc v Boland*, 282 NY 256, 270 (1940).

The Board discussed the burden of proving the charge:

> The burden of proving a charge against an employer of unlawful discrimination or discharge rests upon the [charging party]. After a full hearing the Board considers and sifts all of the evidence, including that offered by an employer to establish that a discharge was for cause. While the evidence produced by the [charging party] standing alone may be enough to establish a *prima facie* case, its effect in proving a causal relationship may be dissipated by the evidence produced by the respondents. At this stage the Board's task is to determine the real reason for the employer's action. Having considered the evidence produced by the [charging party] in connection with, and in light of, the evidence produced by the respondent, the Board then determines from the record as a whole whether the respondent's actions were motivated, in whole or in part, by reasons prohibited by [SERA]. If we decide that his actions were so motivated, we find that the employer has violated [SERA]. However, if the evidence, considered as a whole, reveals that the discharge was not motivated by union membership or activity, we will dismiss the complaint irrespective of the justice of the cause alleged for the discharge.[28]

The evidence presented may be direct or circumstantial in nature. Under SERA, close proximity in time between the protected activity and the adverse action is sufficient to establish a *prima facie* case. If the discharge is motivated, even in part, by prohibited reasons, including anti-union animus, the employer will be found to have violated the Act.[29]

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[28] *Celia Camhi (New Garden Theatre)*, 13 SLRB 242, 243 (1950). *See, e.g., 1165 Fulton Avenue Tenants Corp*, 49 SLRB 174 (1994); *Milton M Hollander*, 43 SLRB 276, 287 (1980), quoting *Marlene Transp Co, Inc*, 17 SLRB 391, 393-94 (1954), *enforced*, *NYS Labor Relations Bd v Marlene Transp Co, Inc*, 1 AD2d 1002 (1st Dept 1956); *310 85th Street Corp*, 37 SLRB 568, 587 (1974), *Our Lady of Lourdes High School (Zenz)*, 49 PERB ¶ 3401 (2016).

[29] *See Milton M Hollander*, 43 SLRB at 286; *Stork Restaurant*, 282 NY at 268; *Bernard Levine (Broadway Realty Associates)*, 46 SLRB 526, 533 (1985) (citing additional cases); *3554 Dekalb Realty Corp*, 48 SLRB 321, 329 (1990).

Dispute Resolution

Mediation

The Board may, when necessary, appoint or designate special mediators who shall have the authority and power of members of the Board with regard to such matter so assigned to them.[30]

Any employee, employee organization, or employer subject to SERA may request a special mediator from the Director of Conciliation to resolve a labor dispute, or to prevent a labor dispute from arising, or to seek to negotiate an agreement to facilitate the exercise of any rights under this article in a mutually acceptable manner.

Such special mediators can be assigned to resolve any controversy between employers and employees or their representatives even before a petition or declaration of impasse is filed or an unfair labor practice is alleged.[31]

Settlement

The board may take such steps as it may deem expedient to effect a voluntary, amicable, and expeditious adjustment and settlement of the differences and issues between employer and employees which have precipitated or culminated in, or threatened to precipitate or culminate in, such labor dispute.[32]

To this end, the duties of the board include:

(a) To arrange for, hold, adjourn, or reconvene a conference or conferences between the disputants and/or their representative(s);

(b) To invite the disputants and/or their representatives to attend such conferences and submit, either orally or in writing, the grievances of and differences between the disputants;

(c) To discuss such grievances and differences with the disputants and their representatives, and in the course of such proceeding and upon consent of all, appoint fact-finding boards and to arbitrate such grievances and differences; and

(d) To assist in negotiating and drafting agreements to settle such grievances and differences.

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[30] § 702.
[31] Rule § 263.18.
[32] § 702-a.1.

Arbitration

The Board shall have the power, at the request of the parties to a collective bargaining agreement between an employer and its employees, to arbitrate such grievances and differences as may arise thereunder.[33]

Impasse Resolution Under FLFLPA

Under § 702-b, an impasse may be deemed to exist if the parties fail to achieve agreement by the end of a forty-day period from the date of certification or recognition of an employee organization or from the expiration date of a collective bargaining agreement.[34]

Upon impasse, agricultural employers or recognized employee organizations may request that the Board render assistance. If the Board, through the Director of Conciliation, determines an impasse exists in the course of collective negotiations, the Board shall aid the parties in effecting a voluntary resolution of the dispute:

a. The Board shall appoint a mediator from a list of qualified persons maintained by the Board;

b. If the mediator is unable to effect settlement of the controversy within thirty days, either party may petition the board to refer the dispute to a neutral arbitrator;

c. The Board shall then refer the dispute to a neutral arbitrator.

Arbitration process overview:[35]

- The neutral arbitrator shall be appointed jointly by the employer and union within ten days after receipt by the board of a petition for arbitration.
- Each party shares equally the cost of the neutral arbitrator.
- If the parties cannot agree on the neutral arbitrator within seven days after the mailing date of the petition, the board shall send to the parties a list of qualified, disinterested persons for the selection of a neutral arbitrator.
- Each party shall alternately strike one of the names from the list, with the order of striking determined by lot, until the remaining one person is designated as the neutral arbitrator.

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[33] § 702-a.2.
[34] See Rules § 263.80 – 263.106 for conciliation and impasse resolution procedures under FLFLPA.
[35] § 702-b.3(c)(i)-(ii).

- This process shall be completed within five days of receipt of the list.
- The neutral arbitrator shall hold hearings on all matters related to the dispute, whereby the parties may present evidence, witnesses, and arguments.
- The arbitrator shall have the authority to require production of additional evidence as desired. A full and complete record of the hearing(s) shall be provided upon request of either party, who shall bear the cost of such record.
- The arbitrator shall make a just and reasonable determination of the matters in dispute, and shall specify the basis for the findings.
- The determination of the neutral arbitrator shall be final and binding for a period prescribed by the arbitrator but not to exceed two years from the date of the decision.
- The arbitrator's determination is subject to review by the court.

In making a decision, the arbitrator shall take into consideration such factors as:[36]

- A comparison of the wages, hours, and terms of employment of the employees involved in the arbitration proceeding with those of similarly situated employees.
- The interest and welfare of the farm laborers and the financial ability of the agricultural employer to pay.
- A comparison of peculiarities in regard to other trades and professions, including hazards of employment, job training, skills, and qualifications.
- The terms of past collective bargaining agreements.
- The impact on the food supply and commodity pricing.
- Any other relevant factors or factors stipulated by the parties.

[36] § 702-b.3(c)(iii).

Processes and Procedures

Rules

PERB's Rules Parts 250–262 govern the administration of SERA as it applies to non-agricultural employers and employees.

PERB's Rules Part 263 pertain to FLFLPA only.

Filing Under SERA / FLFLPA

Documents filed with the Office of Conciliation must be filed via email.

Certification petitions, unfair labor practice charges, and all associated documents filed with the Office of Private Employment Practices and Representation may be filed via email, hard copy, or fax.

See www.perb.ny.gov/how-file for submission information and service requirements.

PERB permits individuals to file charges. A Guide for Parties Representing Themselves can be found on the PERB website at https://perb.ny.gov/office-private-employment-practices-and-representation.

Appeals

The decisions of hearing officers in both certification/representation and unfair labor practice cases are reviewable by the Board upon the filing of an objection or exceptions. Regardless of whether a violation of SERA or FLFLPA is found, a party that disagrees with the ALJ's decision may appeal to the Board.

Per Rule § 263.29, the board will grant review of a hearing officer's certification decision only under "compelling circumstances."

When cases are appealed, the Board reviews the record and the hearing officer's decision in light of the parties' arguments, and issues its own decision, affirming or reversing the hearing officer's decision and occasionally remanding back to the hearing officer for further proceedings.

Researching FLFLPA

For more information about SERA and FLFLPA, see PERB's website at About > Office of Private Employment Practices and Representation.

All decisions under SERA and FLFLPA are available for research in hard copy volumes in PERB's Albany office and online through various sources listed here. Go to the PERB website and click About > Office of Private Employment Practices and Representation > Research Resources. The direct link to access the Research Resources tab is https://perb.ny.gov/office-private-employment-practices-and-representation.

The document entitled **Index of Decisions Decided Under the SERA** lists all topics for Board decisions and court decisions starting in 1937, when the law was enacted. This document is useful to find the topic(s) being researched and the year(s) those topics were introduced by the Board in its Annual Report.

As the introduction to the SERA Index explains, the Index is to be used in conjunction with the Table of SERA Resources found at About > Office of Private Employment Practices and Representation > SERA and FLFLPA Decisions. This table provides access to SLRB/PERB decisions for specific years as required.

PERB decisions under SERA from 2010 on, and under FLFLPA from 2020 on, are published on Westlaw.