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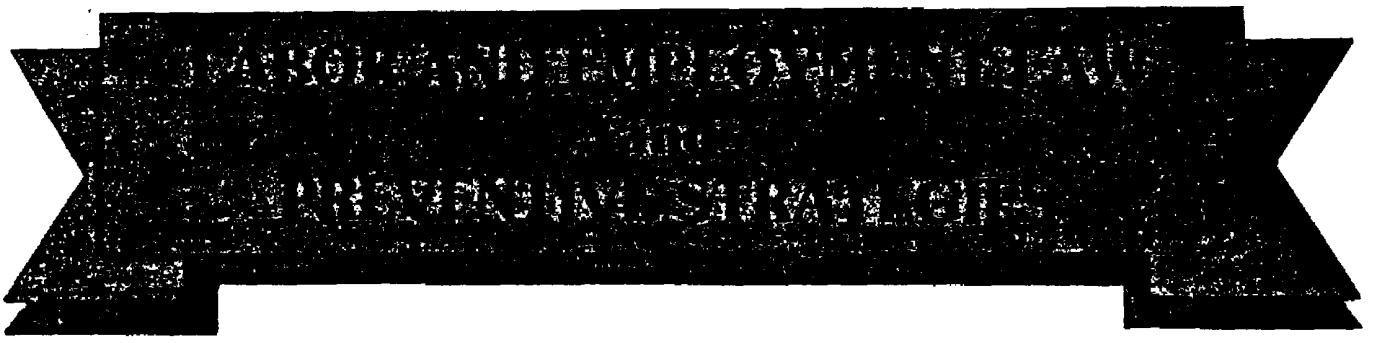

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December 31, 1984 **KEY INFORMATION POINTS** *Volume 7, Number 2*

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THE CASE OF THE PURLOINED PAPERS

The "disappearance" of an employer's confidential records and their eventual "reappearance" in the hands of a union is not uncommon during organizing drives or contract renegotiation. The question that often arises in such situations is what disciplinary action, if any, can be meted out to the guilty employee. In a recent case the Labor Board has ruled that the discharge of an employee for passing his employer's business records to a union was warranted.

Roadway Express had, for many years, been a party to a collective bargaining agreement with Local 560 of the International Brotherhood of Teamsters. The collective bargaining unit included all drivers and dockmen but did not cover the position of porter.

The union was successful in obtaining a signed authorization card from the porter, Richard Erbacher. At a meeting with the company, the union requested that it be recognized as Erbacher's bargaining representative. The company refused and the subject was dropped. The union then claimed that the company was assigning bargaining unit work to non-unit employees, including Erbacher, and produced copies of company bills of lading signed by non-bargaining unit employees. The documents supported the union's claim and the company agreed to cease such practices.

After the meeting, the company conducted an investigation to determine how the union obtained copies of the company's documents. The documents were kept in unlocked files in the terminal office with access only to supervisors, clerical employees and Erbacher. Erbacher was confronted by the company and accused of giving the bills of lading to the union. He admitted taking the documents, copying them and giving the copies to the union. He was immediately discharged. Charges were filed with the Labor Board alleging his discharge to be unlawful.

A hearing was held before an Administrative Law Judge (ALJ). The ALJ found the discharge to be a violation of the Act. In finding Erbacher's activity to be protected, the ALJ noted that the company had no rule

prohibiting the dissemination of bills of lading. The ALJ concluded, therefore, that there was no reason for Erbacher to assume the documents were confidential, particularly as Erbacher was unaware that the ICC prohibited the disclosure of bills of lading. The ALJ further relied on the fact that the bills of lading were relevant to the union's claim that the contract was being breached. The ALJ ordered Erbacher's reinstatement with back pay.

The employer appealed the decision to the Board, which reversed. Finding Erbacher's activity to be unprotected, the Board noted that the bills of lading were the company's private business records, kept in areas of limited access and were not obtained by Erbacher in the normal course of his work activity. The Board differentiated this case from others where employees used information openly available to them during the normal course of their work. The Board rejected the ALJ's emphasis on the absence of a company rule prohibiting the dissemination of the records, noting that this was of little significance where the documents were private business records and were taken from files to which the employee had no legitimate access.

Similarly, the Board rejected the ALJ's alternative rationale for finding Erbacher's activity to be protected. It held that Erbacher's ignorance of ICC rules, the fact that his activities were conducted in good faith to aid the union, and that the documents were relevant to the union's grievance, could not excuse the manner in which he obtained the information. The Board stated that an employer "...has a right to expect its employees not to go into its files and take its business records for whatever purposes they wish, and it is not unreasonable for an employer to consider such conduct as justifying discipline." [*Roadway Express, Inc.*, 271 NLRB No. 198 (1984).]

[Editors' Note: The use of employer records to embarrass a company, or to aid a union's organizing drive or contract enforcement, is not unusual. To prevent such occurrences, employers should restrict access to business records and issue work rules prohibiting the dissemination of confidential information. Not only will this deter employees from engaging in this offending activity, but will make disciplinary action easier to sustain should it occur.]

NEW LAW ON WOMEN'S PENSION RIGHTS WILL REQUIRE AMENDMENT OF MOST PLANS

Recently, Congress enacted the Retirement Equity Act of 1984. The new law is designed to strengthen pension benefits for women, but it will have a profound effect on the retirement entitlements of both sexes. As such, this new law is of pressing importance to every union or nonunion employer who maintains a tax-qualified retirement plan.

What does the new law provide? The Act sets forth new rules governing (1) when employees can vest in pension benefits; (2) when earned pension credit can be lost as a result of a prolonged absence from work, including maternity anad paternity leave; (3) the extent to which plans must now provide "survivorship" benefits for the spouses of retirees and vested employees; (4) the allocation of pension benefits upon a divorce; and (5) diverse matters such as pension benefit "cutbacks" and "cashouts." Here are some highlights.

MINIMUM PARTICIPATION AND VESTING RULES

Congress felt that many women begin paid employment at a younger age than men. Consequently, the new law lowers from 25 to 21 the minimum age which an employee must attain before becoming eligible to participate in most pension plans. The Act also lowers from 22 to 18 the age which an employee must attain before the employee's years of service are required to be taken into account for vesting purposes.

"BREAK-IN-SERVICE" RULES

The new law has also limited the circumstances

under which employees of both sexes can lose pension credit for vesting and participation purposes due to an extended absence from work.

Prior law generally permitted pension plans to disregard an employee's years of service prior to a "break-in-service" for vesting and participation purposes. For example, if the number of consecutive one-year "breaks-in-service" equaled or exceeded the number of years which the employee worked prior to such break, the employee would lose all credit for pre-break years.

Under the new law, an employee cannot lose prior service for vesting and participation under a plan unless the "break-in-service" equals or exceeds the *greater* of (i) five years, or (ii) the total number of years worked before the break.

MATERNITY AND PATERNITY LEAVE

In addition to protecting employees from a loss of pension credit due to a "break-in-service", the new law provides for credited service while employees are absent on unpaid maternity or paternity leave.

Under prior law, a pension plan was not required to provide any vesting or accrual credit during periods for which the employee was absent due to unpaid maternity or paternity leave.

Under the new law, an absence by an employee due to pregnancy, birth, adoption, or certain child care, must be credited for participation and vesting purposes. Specifically, an employee absent on maternity or paternity leave is now entitled to receive up to 501 hours of credited service, or just enough credited time to prevent a one-year "break-in-service" which might otherwise result in a loss of pension credit.

SURVIVOR BENEFITS

The Act also provides new and comprehensive protection for the spouses of employees with earned pension entitlements by insuring the payment of pension benefits to the spouses of employees who die either before or after retirement.

Under the Act, if a vested employee dies before the date pension benefits are to begin, the employee's surviving spouse is entitled to receive payments from a "qualified pre-retirement survivor annuity." These survivor benefits are payable, even if the employee was not working for the plan sponsor at the time of death.

In addition, the new law broadens the number of retirement plans that must provide automatic survivor benefits to the spouses of plan participants who die after retirement. Thus, many more pension plans will have to be amended to provide for "qualified joint survivor annuities."

Significantly, unless a pension plan subsidizes the cost of survivorship coverage, the benefit which a married participant receives at retirement will be reduced. To avoid any such reduction, a participant many elect to forego survivorship coverage. However, such an election is invalid unless it is consented to in a witnessed writing by the participant's spouse. Thus, a participant's spouse may "veto" an employee's election to decline survivorship benefits.

In order to implement that election procedure, the plan administrator must provide employees with a written statement which explains survivor benefits, the effect of any waiver, and the rights of the participant's spouse.

Finally, the new law requires that statements given to employees which describe accrued benefits, or any statement given to separated vested employees, must contain a notice that certain benefits may be forfeited in the event the employee dies before a particular date.

[Editors' Note: As noted by Congressman Conable, one of the principal architects of the new law, "much of the bill is quite technical in nature and, like many such measures, makes for dry reading." While the bill may indeed make for "dry reading," it is nevertheless important for all employers to immediately consider the Act's implications with counsel. In fact, the Act's new provisions will take effect as early as the first plan year beginning in 1985, although this date may be delayed for collectively-bargained plans or due to special rules.]

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NEWSWORTHY

NEW EEOC POLICY CALLS ALL CASES "LITIGATION WORTHY"

Under Title VII, after it has concluded processing a discrimination charge, the EEOC may commence suit against the employer to obtain relief for what the Commission believes are discriminatory employment practices. In the past, the EEOC's policy generally was to designate for litigation only those charges with class-wide implications or which presented novel legal issues. Consequently, the EEOC filed suit in only a small minority of the cases it processed even though in many other cases it found reasonable cause to believe that discrimination occurred. (In 1983, for example, the EEOC brought suit in only 191 cases.)

This policy subjected the Commission to much criticism from Congress and others. The critics contended that the agency was operating like a "claims adjustment agency" rather than an enforcement agency. They argued that employers were holding out for "soft settlements" because they knew the EEOC generally would not litigate.

Recently, in response to such criticism, the EEOC announced that it was changing its policy. Under the new policy, which is intended to put "teeth" in its enforcement power, the EEOC will consider as litigation worthy *every case where it finds reasonable cause.* This new approach could mean that the EEOC would be bringing nearly 1,000 lawsuits each year. Practically speaking the figure could be lower, since the increased threat of litigation may induce more employers to settle.

CHANGES MADE TO AGE DISCRIMINATION IN EMPLOYMENT ACT

In October, 1984, Amendments were made to the Age Discrimination in Employment Act (ADEA) raising from $27,000 to $44,000, the retirement income level needed for the executive exemption to apply and extending the Act's coverage to all United States citizens employed by American companies doing business abroad. These ADEA changes, included as part of the Older Americans Act Amendments of 1984, were effective as of October 9, 1984, the date they were signed by President Reagan.

With respect to the first amendment, a provision in the ADEA provides that an employer may require the retirement at age 65 of an employee working in an executive or high policy-making position, if that employee is entitled to an immediate, nonforfeitable annual retirement benefit from a pension, profit-sharing, or compensation plan which amounts to at least $44,000. This amendment does not apply to an individual who retires or is compelled to retire before the date of the enactment of the ADEA changes.

The amendment extending ADEA coverage to Americans abroad "will close a loophole recently created by several court decisions," according to Senator Charles Grassley (R-Iowa), the sponsor of the legislation. There have been questions, due to ambiguities in the ADEA, as to whether the Act extended to Americans working abroad for American companies. In the past year, two federal appellate courts ruled that Americans working abroad are not covered by the Act. The Equal Employment Opportunity Commision took the position that the court rulings correctly interpreted the Act as not applying to overseas workers. However, the EEOC believed that achievement of the Act's goal of eliminating discrimination in employment justified the amendment.

PRESSURE BUILDS ON STATE LEGISLATURES TO CONSIDER COMPARABLE WORTH PROPOSALS

During the past year, supporters of the "comparable worth" concept have mounted a strong lobbying effort to win support for the issue of equal pay for comparable work. Pressure to support the concept is being applied to state legislatures by unions, women's and civil rights groups. Within the past year, at least 20 states have considered the issue, with three states adopting measures requiring comparable worth pay plans for public employees. In addition, several states are examining legislation covering private employees as well. In a recent article in the Legal Times, Martin F. Payson, a partner at Jackson, Lewis, Schnitzler & Krupman, who has been closely following such legislation, said "it's more than inevitable" that some such measure will be enacted in coming years.

If Mr. Payson's prediction proves correct, companies which do business in several states having different comparable worth statutes may find themselves dealing with conflicting requirements affecting their pay practices. What effect, if any, this would have in prompting federal legislation is not yet known. It seems certain that the comparable worth movement is gathering strength, and pushing for comparable worth legislation to be enacted both at the state and federal levels.

SMOKE-RINGS IN THE WORKPLACE

(The following is excerpted from a speech given by James R. Williams, a partner at Jackson, Lewis, Schnitzler & Krupman, at the firm's recent New York Client Symposium.)

I. INTRODUCTION

During this segment of today's program, I would like to discuss with you the issue of smoking in the workplace, the extent to which that activity is being regulated and your obligations and potential liabilities as an employer of both smoking and non-smoking employees.

* * * *

Historically, the social controversy between smokers and non-smokers has been with us for as long as we have had smokers. Restrictions on smoking actually reached their zenith in this country around the turn of the century. In 1901, 12 states had laws restricting or forbidding altogether the sale or use of cigarettes. These statutory provisions were based almost exclusively on the public's perception of smoking as a social evil which was reprehensible and immoral.

By 1927, however, all of the no-smoking laws had been repealed, due to changing public attitudes. This was the prevailing opinion until the early 1970's when the Surgeon General issued a report which warned that cigarette smoking clearly endangered one's health and, just as significantly, was dangerous to non-smokers who involuntarily inhaled the smoke.

In the years following this report, many states and local governments proceeded to enact laws and regulations giving protection to non-smokers, first in public places and then in the workplace. Due to increased awareness of the serious effects of smoking and the popularity of restrictions placed on that practice, there has been a surge of interest in the last few years with respect to the regulation of smoking in the workplace.

This awareness has also resulted in a number of detailed studies which have confirmed the following troublesome statistics:

(1) Over 19% of all absenteeism from work is attributable to smoking-related illnesses.

(2) Over 12% of the workforce is particularly sensitive to secondhand or passive smoke.

(3) More than 80 million workdays are lost each year due to smoke-related illnesses.

(4) Finally, smoking adds $6 billion a year to direct health costs paid by employers.

Confronted with this background, state legislatures, local governments and the courts have recently acted to protect, in most instances for the first time, non-smoking employees.

* * * *

II. METHODS OF REGULATION

Recently, Minnesota, Nebraska and Utah have enacted Clear Indoor Acts which require either the restriction or prohibition of smoking whenever non-smokers in a work environment are exposed to a detrimental amount of smoke. It should be noted that these laws do not apply to private, enclosed offices where smokers work, even if non-smokers visit there. Other states, such as Wisconsin, Connecticut and Montana, have enacted weaker versions of this type of legislation which either requires the implementation of a non-defined smoking policy for employees or simply requires an employer to arbitrarily designate areas of its entire facility as smoking or non-smoking locations. Still others, such as New Jersey, Maine and Hawaii, are presently considering proposals to regulate smoking in the workplace.

Even in the absence of state regulation, many cities, counties and towns have enacted their own ordinances restricting smoking in the workplace. The cities of San Francisco and Los Angeles, as well as Suffolk County on Long Island, are examples of localities which have undertaken such action. San Francisco's ordinance is the most notable of these local laws since it is the most restrictive. That regulation requires all employers to try to accommodate the respective preferences of smokers and non-smokers, *but* if such an accommodation cannot be reached, then smoking must be prohibited in the non-smokers' workplace.

With respect to constitutional issues, the assertion of constitutional rights by non-smokers in the workplace has proven to be an unqualified failure. Courts have routinely rejected claims based on the First, Fifth and Fourteenth Amendments, on the ground that there is no constitutional right to a healthy environment under the Constitution.

From the standpoint of *litigation*, adversely affected non-smokers have successfully instituted cases in court concerning their right to a smoke-controlled or smoke-free working environment. In doing so, they have sought relief under one of two alternative theories: that smoke sensitivity constitutes a handicap which the employer must accommodate, or that the employer is breaching its duty to provide a reasonably safe workplace by allowing its employees to be exposed to cigarette smoke.

As a general rule, non-smokers have been less successful in court when they have sought relief as a

"handicapped" individual. This result is based upon a number of reasons, such as: the fact that federal laws protecting the handicapped have been interpreted in many instances as not being applicable to the private employment sector; lack of proof that the complaining employee was discriminated against because of his or her handicap and, proof by the employer that it either tried to accommodate the affected individual or cannot do so because it would result in undue hardship to the company's business.

Smoke sensitive employees have been more successful when they have relied upon the common law duty of an employer to furnish his or her employer with a safe place to work. In 1976, New Jersey, in the case of *Shimp v. New Jersey Bell Telephone*, was the first state to hold that an employer had a duty to provide a smoke-free environment for smoke-sensitive employees. In doing so, the *Shimp* court held that the affected smoke-sensitive employee was entitled to such relief since (a) scientific studies proved that tobacco smoke was a health threat to all workers, and (b) filling the air with tobacco smoke was not deemed necessary to the employer's business and, therefore, the employee had not assumed such a hazard an as occupational risk. Due to the proven health hazard and the fact that ten percent of the general population was allergic to tobacco smoke, the court issued an injunction enjoining New Jersey Bell from permitting smoking in common offices and an adjacent customer service area of the facility where the affected employee worked. Otherwise, smoking was restricted to the non-work area used as a lunchroom.

Similar judicial decisions restricting or prohibiting smoking in the workplace were issued last year in Massachusetts and Missouri. The courts in California have held that although an individual could not require his employer to control smoking in its facility, he could not be discharged for attempting to obtain a smoke-free work environment. Further, three years ago, a Minnesota jury composed of three smokers and three non-smokers awarded an employee $4,500 in compensatory and punitive damages for having been fired after she complained to her department head about the amount of smoke in her workplace. It is also noted that courts in Oklahoma, Washington, and the District of Columbia have refused to require employers to insure a smoke-free environment, stating that such action should be properly left to the state legislature to control.

* * * *

III. EMPLOYEES' REMEDIES AND EMPLOYERS' POTENTIAL EXPOSURE

As we have already seen, smoke-sensitive employees, under the right circumstances, can successfully institute an action in court for monetary damages and injunctive relief. What other remedies can they seek or be awarded?

In New Jersey, a secretary who was forced to resign from her job because she suffered severe eye irritation and headaches from constant exposure to second-hand smoke, was found to have good cause for leaving her job and thereby entitled to unemployment compensation. Although an award for workers' compensation is more difficult to obtain, since most adverse effects of tobacco smoke on non-smokers are cumulative in nature, substantial awards have been granted. For example, an employee in the Social Security Administration's Baltimore office was awarded 75% of his weekly salary as permanent compensation for physical ailments caused by passive smoking. In California, an airline stewardess sensitive to second-hand smoke was given a permanent disability indemnity of $3,600, plus all expenses and attorney's fees, because she sustained an industrial injury caused by an allergic reaction to the tobacco smoke in the in-flight cabin air.

If your company has a union contract with a clause ensuring the provision of a reasonably safe workplace for employees in the bargaining unit, you may find yourself defending a grievance by a smoke-sensitive individual. If your employees are represented by a union and you are not located in a state or locality which requires such action, it could be an unfair labor practice for you to unilaterally develop a smoking policy or change an existing smoking policy without first negotiating with the union or at least implementing that change only after you reached an impasse on that issue.

* * * *

IV. COMPLIANCE WITH REGULATIONS AND AVOIDING POTENTIAL LIABILITY

Depending on their location, employers must check to ensure that they are in compliance with state laws and local regulations, which, again depending on the location, can require separate smoking and non-smoking areas, the accomodation of non-smokers and the development and publication of a smoking policy. Even if an employer is not situated in an area which is

so controlled, it is strongly recommended that it develop and implement a smoking policy in order to protect itself as much as possible against lawsuits by smoke-sensitive employees.

This policy should:

(1) State that it is the company's intention to accommodate the desires of both non-smoking and smoking employees.

(2) State that the purpose of the policy is not to regulate the personal habits of any individual.

(3) State that, instead, it is the employer's policy to ensure the comfort of all employees in the plant or office.

(4) Specifically designate smoking and non-smoking areas, such as in the lunchroom, coffee room, common halls and areas.

(5) Advise employees that they can freely voice any objections they have to smoke in their workplace, to a certain designated member of management without fear of retaliation.

(6) State that the company will make attempts to accommodate either the preferences of all concerned, or, at the company's choice, that of the non-smoking employee.

The wise employer is one which responds quickly and seriously to such complaints, in the same manner as it would, say, to complaints of sexual or other harrassment.

Finally, due to an increasing awareness of potential problems in this area and high corporate costs related to the employment of workers who smoke, many companies are developing alternatives for smokers and are rewarding them for kicking the habit. For example, they are encouraging smokers to enroll in smoke-free courses and reimbursing them for the expense of attending such programs, paying bonuses to people who do not smoke on the job, giving awards to people who quit or offering life insurance to non-smokers at lower than standard rates.

V. THE FUTURE

We can expect further governmental regulation on state and local levels, more litigation, and as a result, more emphasis by employers on the development of a smoke-restricted environment.

OSHA NOISE AMENDMENT FAILS COURT REVIEW

The United States Circuit Court of Appeals at Richmond, Virginia has struck down a hearing conservation amendment to the Occupational Safety and Health Administration's (OSHA) workplace noise standard.

In 1971, OSHA adopted an occupational noise exposure standard establishing a permissable workplace limit of 90 decibels (db). If the 90 db exposure limit was exceeded, the employer had to reduce noise to or below that level using feasible engineering controls or hearing protectors such as ear muffs or plugs to reduce employee noise exposure. Subsequent studies, however, began to reveal that employees suffered hearing impairment at noise levels below 90 db and in 1983, as an interim measure prior to issuing a new regulation, OSHA adopted a hearing conservation amendment.

The amendment required an employer to determine which of its employees were exposed to noise at or above 85 db. Employees so exposed had to be given an initial hearing test to determine their hearing level and thereafter an annual hearing test to determine whether the employee suffered a loss of hearing of 10 db. If there had been such a loss, the employer was required to take follow-up measures including fitting the employee with hearing protectors, instituting a training program and retaining records of employee exposure measurements and hearing tests for OSHA inspection. It was estimated by OSHA that compliance with the amendment would cost in excess of $254 million annually.

The Forging Industry Association challenged the amendment as exceeding OSHA's authority under the Occupational Safety and Health Act. The case went to the court of appeals which held the amendment subjected employers to requirements and penalties based on non-workplace hazards, and that this exceeded OSHA's authority under the Occupational Safety and Health Act.

The court stated that Congressional history of the Occupational Safety and Health Act and Supreme Court decisions interpreting the Act made it clear that Congress authorized the agency to adopt standards relating to health and safety *at the workplace*. Thus, according to the court, a standard was invalid if it required an employer to take actions with respect to

hazards existing outside the workplace.

Examining the hearing amendment provisions, the court held that the amendment clearly subjected employers to penalties as a result of non-workplace hazards. The court noted that the amendments remedial requirements were triggered whenever an employee suffered a 10 db hearing loss and the amendment did not differentiate if such loss resulted from occupational or non-occupational exposure. The court stated: "Under the amendment, an employer whose workers are unaffected by workplace noise may be subject to numerous requirements simply because its workers choose to hunt, listen to loud music or ride motorcycles during their non-working hours. Hearing loss caused by such activities is regrettable, but it is not a problem that Congress delegated OSHA to remedy." The court vacated the amendment and remanded to OSHA for the creation of a valid standard. [*Forging Industry Association v. Secretary of Labor*, 12 OSCH 1041 (4th Cir.1984).]

[Editors' Note: Employers should not wait for OSHA to knock on the door to deal with noise in the workplace. Periodic reviews of the work environment should be made to insure proper compliance. Employers should not overlook employee radios, which in many workplaces result in an extensive amount of noise.]