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CONSTRUCTING A NEW LIBERAL CAPITALISM: CZECHOSLOVAKIAN LABOR LAW IN TRANSITION

Mark McLaughlin Hager*

INTRODUCTION

In late 1990 and early 1991 the National Assembly of the Czech and Slovak Federal Republic (CSFR) enacted several pieces of new legislation to govern employment relations. The Collective Bargaining Act of 1990¹ (the Act) and the revision of the comprehensive Labor Code² (the Code) are two fundamental items of the new legislation. The Act institutes rules for relationships between trade unions and employers and the revision of the Code governs a wide range of employment topics. This Article addresses both of these key pieces of legislation.

The new Code, which took effect on February 1, amends the previous Code³ dating from the period of Communist Party rule. The new Labor Code⁴ contains provisions pertinent to a wide range of topics, including but not limited to trade unions, individual and collective employment contracts, conditions for discharge, handicapped, female and young workers, overtime, vacations, work stoppages, parental leave and child care, safety, and disability compensation.⁵

The amended Code is worthy of close analysis for two reasons. First, pursuant to section 6, the Code will govern labor relations for foreign firms engaged in production within the CSFR.⁶ Accordingly, it is essential for foreign investors to familiarize themselves with the Code. Second, the Code represents a significant early effort to construct a liberal

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1. COLLECTIVE BARGAINING ACT, zákon č.12/1990 Sb.

2. LABOR CODE, zákon č.3/1991 Sb.

3. LABOR CODE, zákon č.6/1965 Sb. No. 32, Text 65.

4. LABOR CODE, zákon č.3/1991 Sb.

5. *Id.* §§ 18-20, 22 (addressing trade unions and collective agreements). *See generally id.* §§ 42-64 (discussing requirements regarding termination of employment); *id.* §§ 149-156 (setting forth standards regarding the employment of women and, specifically, pregnant women); *id.* §§ 163-168 (creating restrictions with respect to working conditions for adolescents); LABOR CODE, zákon č.3/1991 Sb. §§ 96-110c (creating standards for overtime, night work and vacations); LABOR CODE, zákon č.3/1991 Sb. §§ 157-160 (addressing rules regarding maternity leave); LABOR CODE, zákon č.3/1991 Sb. §§ 132-138 (setting forth standards regarding occupational safety).

6. LABOR CODE, zákon č.3/1991 Sb. § 6.

labor law for post-communist social democracy. It is expected that like much of Eastern Europe, the CSFR will move towards increasing private ownership of productive wealth. It is also anticipated that it will increasingly use market mechanisms to determine work relations and income levels. These emerging aspects of capitalism are coupled with widespread notions that successful economic transformation requires expansion of managerial authority to structure and control workforces. It is assumed that this authority is needed, along with sharpened work incentives, to promote efficient techniques and employment levels. At the same time, the country's socialist legacy may make it unacceptable to expose workers to the unbridled managerial tyranny frequently characteristic of western capitalism. Hence, the Code, as it presently stands, embodies a new and different variant of liberal compromise between ownership-management authority on the one hand, and workforce protection on the other.

The history of the Code is significant. Prior to its collapse, the old communist government launched the Labor Code amendment process. The initiative was carried over and was ratified by the new government. The amendments are especially interesting in light of this mixed origin. The vast bulk of the old communist Code is simply restated with very little change.⁷ Even significant changes can hardly be called revolutionary. Due to the law's origins in the bosom of communism, voices within the new government has already challenged the legitimacy of the amended Code. The government has already taken steps towards more far-reaching revisions in keeping with the new political regime and with the incipient economic order.⁸ It is uncertain as to when these modifications may reach fruition and what the nature and depth of the changes might be.

Two deletions from the old Code signal a change in social ideology within the new Code. In the old Code's chapter of Basic Principles, the first principle specified the right of all citizens to a job.⁹ The second principle specified that the Czechoslovakian social system "precludes the exploitation of man by man."¹⁰ The drafters of the amended Code omitted these exhortational principles possibly because their inclusion

7. *Cf. id.* at arts. I-IX (establishing that eight articles of the ten articles in the old code remained the same).

8. See Burback & Painter, *Restoration in Czechoslovakia*, 42 MONTHLY REV. 36, 43-47 (April 1991) (noting that the passage of the amended labor code combined with a heavy focus on economic development has led the Czechoslovakian government to pass legislation restricting labor union activities, and may lead the government to restrict the right to strike in the future).

9. LABOR CODE, zákon č.6/1965 Sb. § I.

10. *Id.* § II.

might prove symbolically embarrassing to the new order.¹¹ The concept of a right to a job may, arguably, seem incompatible with the tolerance and even encouragement of high unemployment levels in a transformed economy. Similarly the preclusion of "exploitation of man by man" may seem incompatible with the property and labor relationships foreseen for the new order.

This Article will examine several prominent features of the Code along with the novel labor relations system and philosophy it seems to construct. Though it is not feasible to comment on all of the Code's specific provisions, this Article explores the provisions that are most crucial to shaping enterprise power relations and worker welfare. Part I examines the Code's provisions that regulate worker discharge. Part II discusses an employee's liability for damages. Part III analyzes the Code's ban on certain vocations for women. Health and safety monitoring issues are surveyed in Part IV. Part V analyzes collective bargaining laws. Finally, Part VI concludes that the new legislation has the ability to significantly shape the CSFR's employment laws.

I. DISCHARGE BY REGULATION

Among the Code's most significant provisions are those regulating worker discharge. If these regulations are followed and enforced, they will strongly shape both worker power in enterprises and worker quality of life.

Unlike most of Europe, United States labor law still clings strongly to the doctrine of "employment at will."¹² Perhaps better labelled "discharge at will," the United States common law doctrine is not affected by federal statutory enactments concerning employment law. Consequently, employers are empowered to fire workers without notice at any time for any reason, unless employment contracts stipulate prerequisite conditions for discharge,¹³ or workers are engaging in activities for

11. See generally LABOR CODE, zákon č.3/1991 Sb. §§ III-X (noting that the new code has either repealed or significantly altered the former introductory sections from the Basic Principles of the 1965 Labor Code).

12. See Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 118-19 (1976) (explaining that the United States originally adopted English law, creating a presumption of long term hiring and reasonable notice of termination, but by the nineteenth century had adopted by the 'employment at will' doctrine whereby an employer may discharge an employee without notice and without cause unless otherwise specified or restricted by contract). One of the major reasons for the development and adherence to the 'employment at will' doctrine in the United States is that the doctrine embodies and supports the fundamental principles of a capitalist economy. *Id.* at 132.

13. See Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976)(exploring the history of the employment at will rule). See

"mutual aid and protection." Concomitant with its effect of maximizing worker insecurity, the discharge at will doctrine constricts worker power in enterprises by minimizing the capacity to challenge or resist managerial authority. For example, American firms frequently use their discharge power to rid themselves of union activity that might help improve worker living standards and on-the-job power.¹⁴ The CSFR's new Code repudiates discharge at will in favor of regulating the circumstances and procedures under which workers may be fired.¹⁵ Unless a contract specifies a term of employment, worker discharges must comply with detailed Code provisions.¹⁶ While regulating conditions for legal discharge, the Code leaves workers completely free to quit employment for any or no particular reason.¹⁷ Professor Richard Epstein has defended the United States' discharge at will rule by contending that without it workers could not be free to quit at will.¹⁸ The Czechoslovakian Code fortunately rejects Epstein's position, which rests on a logical *non sequitur*.

Though the new Code limits the conditions under which employers may discharge employees, it places only modest restrictions on a worker's freedom to quit a job. The Code plainly provides that "[a] worker may give notice to the organization on any ground or without stating the grounds."¹⁹ This freedom to quit approximates the law of the United States and confers worker power not enjoyed under the pre-amendment Code. Under the new Czechoslovakian Code, workers may leave a job two months after filing notice with an employer.²⁰ Under

also *Blades, Employment at Will vs. Individual Freedom on Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1401 (1967) (attacking the employment at will rule); *Forrer v. Sears, Roebuck & Co.*, 36 Wisc. 2d. 388, 153 N.W.2d 587 (1967) (following the employment at will rule).

14. See *Weiler, Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983) (noting that in 1983 the odds of a union member being fired for exercising rights guaranteed by federal law was one in twenty). Despite the fact that it is illegal to dismiss union employees for exercising their protected rights, American employers continue to use their discharge power unlawfully. *Id.*

15. See LABOR CODE, zákon č.3/1991 Sb. §§ 42-64 (presenting a variety of circumstances and procedures regarding the termination of employment, including agreements to terminate, notice, immediate termination, and termination during probation period).

16. See *id.* § 43 (addressing the issue of termination pursuant to an agreement).

17. *Id.* § 51.

18. See *Epstein, In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984) (maintaining that several factors, including a basic intrinsic fairness of the rule, its effect upon utility or wealth support, and its distributional consequences, support the continued utility of the at-will rule).

19. LABOR CODE, zákon č.3/1991 Sb. § 51.

20. *Id.* § 45(1).

the old code, workers could be held to jobs for six months after filing notice, unless the job departure stemmed from one of five specified reasons: 1) taking another job as part of an official recruiting scheme; 2) entering graduate education or posts filled through formal competition; 3) inability to perform a job or entitlement not to work because of medical disability, old age, pregnancy, or child-rearing; 4) employers' contractual or statutory breaches, or 5) relocation by women to live with husbands or by youths to live with parents.²¹

The provisions of the new Code provide for two main types of discharge: first, a predominant type that can be referred to as discharge by notice,²² and second, an exceptional type that can be referred to as discharge by immediate termination.²³ An employer may immediately terminate employment only if workers committed serious crimes or egregious breaches of work discipline.²⁴

A. DISCHARGE BY NOTICE

The termination by notice provisions constitute the basic regime for worker discharge under the Code. The provisions forbid discharge except under specified conditions. Even where specific conditions for discharge are met, if the employee can be placed in or retrained for an alternative job within the firm, the employee may not be fired unless he or she refuses such an alternative job.²⁵ The specified circumstances for allowable discharge are fivefold: 1) the enterprise or a department is abolished or relocated;²⁶ 2) the worker becomes unnecessary due to technological or organizational changes or efficiency-seeking staff reductions;²⁷ 3) the worker's health interferes with job performance or is endangered by the job;²⁸ 4) the worker's performance is substandard;²⁹ 5) the worker has seriously breached work discipline³⁰ or has been convicted of a serious crime.³¹

The Code's discharge by notice provisions undoubtedly confer broad employer authority to fire workers. They nevertheless promise to con-

21. LABOR CODE, zákon č.6/1965 Sb. § 51(1).

22. LABOR CODE, zákon č.3/1991 Sb. § 44.

23. *Id.* § 53.

24. *Id.*

25. *Id.* § 46(2). This provision does not operate in the case of a breach of work discipline or other satisfaction of the requirements for immediate termination. *Id.*

26. *Id.* §§ 46(1)(a)-(b).

27. *Id.* § 46(c).

28. *Id.* § 46(d).

29. *Id.* § 46(e).

30. *Id.* §§ 46(f), 53(1)(b).

31. *Id.* § 53(1)(a).

strain some of the most abusive discharge practices available to United States employers under the employment at will doctrine: discharges for union activism or to deter unionism,³² for "whistle-blowing" on dangerous or criminal practices,³³ or for asserting eligibility for employer-provided benefits.³⁴ The scope of actual protection against abusive discharge under the Code will turn on enforcement and interpretation, of course. Union activism and whistle-blowing vigilance may be chilled, for example, if employers can successfully characterize such activities as breaches of work discipline. Moreover, the success of these activities will be further eroded if employers are allowed to advance disingenuous allegations of substandard performance. It would be naive to expect such situations not to arise, especially if interpretation and enforcement are lenient.

Under termination by notice, workers discharged for reasons of health, substandard performance, or disciplinary breach may enjoy up to three months of employment between notice and final termination while those discharged for reasons of organizational change or abolition enjoy only two months.³⁵ The new Code's provisions for continued employment after employer notice differ from those found in the old Code. Under the old Code, periods of continued post-notice employment were gauged to the worker's age, rather than to the reasons for discharge as under the new Code. Hence, under the old Code discharged workers under thirty years old could work for one month after notice; those thirty to forty years old could work for two months; while those over

32. See, e.g., *Edward G. Budd Mfg. Co. v. Budd*, 138 F.2d 86 (3d Cir. 1943) (stating that an employer can discharge an employee for good reason or for poor reason, as long as the provisions of the National Labor Relations Act are not violated). See also *Mueller Brass Co. v. NLRB*, 544 F.2d 815, 819 (5th Cir. 1977) (stating that, absent a showing of anti-union animus, an employer may discharge an at will employee for no reason at all); see generally Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983) (arguing that current United States labor laws do not prevent employers from using coercive or illegal acts to prevent unionization of employees).

33. See *Geary v. United States Steel Corp.*, 456 Pa. 171, 319 A.2d 174 (1974) (dismissing the allegation of a former salesman who stated he was discharged for notifying his superiors of the unsafe conditions of some steel products being sold, where the complaint itself disclosed a legitimate reason for the discharge). But see *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A.2d 385 (1980) (holding that an employer is liable in damages to a former at will employee if the employee was terminated for failure to comply with the firm's illegal practices).

34. See *Price v. Carmack Datsun, Inc.*, 109 Ill. 2d 65, 485 N.E.2d 359 (1985) (concluding that firing an employee for filing a health insurance claim could not be considered an illegal retaliatory discharge since it did not violate a clearly mandated public policy).

35. LABOR CODE, zákon č.3/1991 Sb. § 45(1).

forty could work for three months.³⁶ Under both the old and new Codes, such privileges do not apply to workers subject to immediate termination upon conviction for a serious crime or commission of a grave disciplinary breach.³⁷

B. IMMEDIATE DISCHARGE AND SPECIAL PROTECTIONS AGAINST DISCHARGE

Under the new Code, workers convicted of serious crimes or implicated in gross breaches of work discipline may be subject to immediate discharge without notice.³⁸ Workers in certain circumstances, however, are given special protections against discharge. These special protections are somewhat complex. Women on maternity leave may not be terminated at all during the leave term, even if convicted of a serious crime or guilty of a grave disciplinary breach.³⁹ The old Code contained no such absolute protection against discharge.⁴⁰

Furthermore, the new Code states that immediate termination may not normally be applied against pregnant women or against a self-supporting male or female employee who lives alone and permanently attends to a child younger than three years.⁴¹ Termination by notice is available against an employee in these circumstances only if he or she has been convicted of a serious crime or else implicated in a grave disciplinary breach.⁴² The old code contained a comparable prohibition on immediate discharge that was coupled with a provision for discharge by notice for women implicated in serious crimes or grave disciplinary breaches.⁴³ In the old code, however, this limited anti-discharge protection for serious bad actors was somewhat broader because it protected a broader class of women. The old code protected all women permanently attending a child less than one year old.⁴⁴ It bears emphasizing, however, that the old code mentions and protects only women as primary child care providers, while the new Code offers protection to men as well.

36. LABOR CODE, zákon č.6/1965 Sb. at § 45(2)(a)-(c).

37. LABOR CODE, zákon č.3/1991 Sb. § 53(1); LABOR CODE, zákon č.6/1965 Sb. § 53(1).

38. LABOR CODE, zákon č.3/1991 Sb. § 53(1).

39. *Id.* §§ 49(b), 53(1), (3).

40. *See* LABOR CODE, zákon č.6/1965 Sb. § 53 (noting that the prior labor law contained no provisions which considered women separately).

41. LABOR CODE, zákon č.3/1991 Sb. § 53(3).

42. *Id.* §§ 53(1), (3).

43. *Id.* § 53(3).

44. *Id.*

The evident purpose of such provisions is to foster the well-being of small children, by protecting caretakers against sudden unemployment. The provisions are peculiar in that they saddle enterprises with part of the social burden of protecting small children from the consequences of unemployment. The provisions do this by forcing firms to retain for short periods of time what many would view as highly undesirable workers. The burden is brief because the maternity leaves and continued employment periods are no longer than a few months. It is not readily apparent, however, why private firms should shoulder society's child care responsibility.

It is difficult to discern whether the CSFR, in its transitional state at the moment, has adequate general protections for care of children whose parents or primary caretakers fall short in resources. A discharged worker could suffer a sudden and drastic drop in income, depending on whether basic provisions governing unemployment subsistence allowances and pensions apply.⁴⁵ If society has an adequate general mechanism for protecting small children against the effects of primary caretaker unemployment, burdening firms with such responsibility seems redundant. Firms might be required to shoulder more of this responsibility, however, if there is some bureaucratic reason why society's general protection mechanisms cannot be activated promptly after an immediate discharge. On the other hand, the anti-discharge provisions may reflect concern that society's general protection mechanisms for small children are inadequate, so that a burden must be thrown upon the discharging firm. If so, the protection offered by continued employment seems too brief. A few months of protection does not seem to foreclose serious possible harms to dependent small children. In this light, the anti-discharge protections seem pointless unless their purpose is simply to bridge an expected time lag between discharge and the onset of adequate social assistance measures.

Depending on the contours of social child care assistance, the anti-discharge provisions may or may not make sense as a child protection device. There may, however, be a different or additional purpose to the anti-discharge provisions, beyond concern for child well-being. The anti-discharge provisions may be designed to protect current or expectant child caretakers from the additional psychic stress of sudden job loss, even if that caretaker is highly unsatisfactory as a worker. If this is indeed the purpose of the special anti-discharge provisions, they

45. EMPLOYMENT LAW, zákon č.12/1990 Sb. art. 17 (establishing the mechanism for computing subsistence allowances).

would represent a uniquely humane manifestation of sentimentality toward primary child caretakers.

In addition to the child care restrictions on immediate discharge, the Code provides protections against routine discharge by notice. Although these protections do not apply for discharges due to enterprise or departmental abolition or relocation, they offer substantial freedom from insecurity over discharge due to a host of other reasons including: technological or organizational changes, efficiency-seeking down-staffing, health considerations, substandard performance, and disciplinary breaches. Workers in these categories of discharge may not be given notice: when incapacitated for illness or accident (unless the incapacity stems from the worker's drunkenness or his own willful act); when serving in the military or in the civil service; when given leave to serve in public office; or when pregnant or serving as a self-supporting primary caretaker for a child under three years of age.⁴⁶

Special protections for workers in these categories are difficult to implement in situations where the employing entity has become extinct. Hence, the Code confers no protection against routine dismissals in those cases.⁴⁷ The new labor law also omits protection in the related but distinct situation of relocation or organizational restructuring in the employing entity.⁴⁸ In such situations it may be merely inconvenient to confer ongoing employment on workers in protected categories. The omission of such inconvenient protection may reflect a notion that economic progress depends crucially on freedom to enact enterprise reorganization, even if such freedom inflicts substantial hardship on discharged workers. This notion may also be behind the provision mentioned above which requires three months notice prior to discharges due to health concerns, substandard performance, or disciplinary breach, but requires only two months notice for discharges due to organizational change.⁴⁹

The Code also saddles enterprises with responsibility for helping discharged workers secure alternative employment. The employer must, in cooperation with state agencies responsible for employment, assist the discharged worker in obtaining alternative appropriate employment.⁵⁰ The employer's responsibility in this regard, however, does not apply to discharges for substandard performance or disciplinary breaches.⁵¹

46. LABOR CODE, zákon č.3/1991 Sb. § 48.

47. *Id.* §§ 49(a), 46(1)(a).

48. *Id.* § 46(1)(b).

49. *Id.* §§ 45(1), 46(1)(a)-(c).

50. *Id.* § 47(1).

51. *Id.* §§ 46(1)(a)-(d), 47(1).

Moreover, the employer's assistance obligations are entirely unspecified. Depending on the eventual interpretation, this obligation may amount to no more than referring discharged workers to state employment agencies.

For certain classes of workers, the employer's obligation to secure alternate employment appears stronger. The stronger obligation applies with respect to handicapped workers protected by pensions, to workers discharged due to health risks, and to self-supporting workers with primary responsibility for care of children younger than fifteen years.⁵² This regulation provides emphatically that the employer "shall secure" appropriate alternative employment, with the assistance "if necessary" from the employer's "superior organ."⁵³ The language clearly suggests that location of alternative employment is mandatory for the valid discharge of employees in the specially protected categories. This implication is strengthened by the additional provision that the discharge is not final until the "aforesaid obligation" has been fulfilled.⁵⁴

It is difficult to predict whether these provisions will indeed be interpreted to mean that workers in the specified categories cannot be fired unless alternative employment has actually been located. It may appear excessively burdensome to saddle the discharging enterprises with an absolute duty to locate alternative employment. Rather, the situation may require shifting responsibility for such workers to state employment or social welfare agencies. A policy of ensured employment may be wise, however, if such agencies appear inadequate to protect the designated workers against unemployment. There is one additional source of puzzlement, which is why such protection should apply only to narrowly designated categories of workers and not to all workers who are specially disadvantaged by job loss.

In view of the CSFR's current economic transition, any absolute duty to locate alternative employment may have become obsolete. The language of the provision contemplates that any employing entity that discharges a worker may look to some "superior organ" to guarantee alternative employment.⁵⁵ This assumption makes sense in a strongly state-owned economy, like that of formerly communist CSFR: however, the necessary mechanism for employment guarantees assumed by the regulation may no longer exist. At least with respect to new or trans-

52. *Id.* § 47(2).

53. *Id.*

54. *Id.*

55. *Id.* See *supra* notes 35-38 (discussing termination provisions).

formed private enterprises, it may appear extravagant to impose an absolute requirement of locating alternative employment.

II. WORKER LIABILITY FOR DAMAGE

One use of the discharge at will rule in American law is to discipline workers for substandard or negligent job performance. Workers know that performance lapses may meet with a draconian sanction. The Czechoslovakian Code places limits on discharge as a disciplinary device. At the same time, however, the Code establishes severe financial penalties for substandard or negligent work. These penalties constitute a disciplinary regime comparable in harshness to the discharge at will scheme.

First, under a new provision not found in the old Code, workers who perform deficiently may be stripped of their wages for the deficient work at least in cases where the substandard work yields a "defective product."⁵⁶ Though this loss of wage applies explicitly only where the worker is "at fault", this limitation might often provide workers little protection against having the costs of substandard production shifted onto their backs. Moreover, in addition to wage loss, workers may face additional severe financial sanctions.

The basic penalty for substandard or negligent work performance is that the worker must reimburse the employer for the actual damage caused.⁵⁷ These penalty provisions are carried over unaltered in basic substance from the old code.⁵⁸ The reimbursement penalty applies against workers "for any damage they have caused to their organization by culpable breach of their duties in the performance of their work or in direct connection therewith."⁵⁹ The reimbursement provisions pose a deep threat to workers because there are numerous circumstances which might be treated as culpable breaches in work performance. At one end of the spectrum, we might imagine a drunken worker who destroys a tool or a product part through inept handling. At the other end, imagine a novice worker lost in a momentary daydream who calibrates a measuring instrument wrongly for a day's work. The miscalibration is not discovered until close of business, meaning that a day's worth of production and potential profit is lost. Imagine further that this lapse leads to a late delivery to customers, triggering contrac-

56. LABOR CODE, zákon č.3/1991 Sb. § 118.

57. *Id.* §§ 172, 179.

58. See LABOR CODE, zákon č.6/1965 Sb. §§ 172, 179 (outlining compensation liabilities for damages caused by substandard work).

59. LABOR CODE, zákon č.3/1991 Sb. § 172.

tual penalties and loss of future business promised by customers. For how much of this damage to the organization should the careless worker be held liable? Nothing in the language of the penalty provision prevents workers from incurring enormous penalties for relatively minor lapses. Moreover, the Code offers no hint that workers may avoid draconian penalties by simply quitting. Quitting workers would apparently carry their fines with them out the door.

The American tort system theoretically allows firms to sue workers for on-the-job negligence. It is rare, however, that such suits are brought or carried to success, except in cases of flagrant worker carelessness. The Czechoslovakian Code seems to authorize compulsory reimbursement for far less egregious forms of work deficiency, up to and including simple poor performance. American firms rarely try to measure and seek reimbursement for the damage attributable to poor employee performance. There is an interest in ignoring petty incidents of poor performance because reimbursement efforts entail costs. American workers who stand out as serious problems may come under a variety of disciplinary sanctions, including fines, legitimated within the regime of an employment contract. The worker who views such penalties as excessively onerous may escape by quitting the job. If that happens, a firm that is insistent on reimbursement must seek it in the cumbersome and perhaps unsympathetic forum of a court.

The Czechoslovakian Code may induce employers to seek a higher level of reimbursement than is common in the United States. Rather than treating mere poor performance as a routine cost, rational employers may treat it as a compensable harm. Employers might feel a strong incentive to monitor and seek recompense for substandard work, if a high proportion of such cases yielded actual reimbursement. This could occur if factfinders determining whether reimbursement should be paid are employer-sympathetic enough to impose broad recompense standards upon workers. The broad language of the reimbursement statute, in conjunction perhaps with an oversimplified ideology of seeking "efficiency" through stringent worker discipline, could produce such outcomes. An employer's prospects of securing actual reimbursement could be strengthened if penalties are imposed even after a worker quits. This would further enhance employer incentives to shift the costs of poor work onto the backs of individual workers.

Equally troubling are possible implications that the reimbursement provisions may carry for general workplace discipline. Workers may come to live in fear of penalties imposed for real or alleged work insufficiencies, especially if such penalties cannot be escaped even through the drastic step of quitting. Such fear could drive workers toward inor-

dinate subservience, passivity, and deference, to avoid the possible consequences of being seen as trouble-makers. Work performance penalties could provide employers with a powerful weapon against unionism and other forms of resistance against employer autocracy.

Several Code provisions deal in detail with work performance penalties. A general limit on worker liability is fixed at triple the monthly wage of the penalized worker. This limit, however, does not apply if the damage occurs under the influence of alcohol or drugs.⁶⁰ Workers under the maximum penalty are likely to experience severe hardship, although the three-month-wage ceiling may be better for workers than no ceiling at all.

A section on defective products provides that workers who through neglect cause a defect may lose up to a half-month's wage as penalty. The worker's penalty may include the costs of wasted materials, repair of the damaged product and any damaged machinery, and even the cost of wages paid by the employer in producing the defective product.⁶¹ Though the provision may not compel draconian penalties for minor lapses, it certainly seems to encourage them.

An alarming feature of the work performance penalties is that their imposition and severity is left primarily in the hands of the employer, rather than with a neutral tribunal.⁶² This arrangement maximizes the disturbing incentives and disciplinary implications discussed above. The Code hints vaguely that judicial review of employer-imposed penalties may be possible,⁶³ but the procedures and standards for such review are nowhere specified. In a gesture of leniency, the Code also provides for possible relaxation of the defective product penalty in situations where the defect stemmed from "excusable mistake" by an "otherwise conscientious worker."⁶⁴ Leniency is constrained, however, by the specification of minimum penalties: one third of actual damage.⁶⁵

60. *Id.* § 179.

61. *Id.* § 184(1).

62. *See id.* § 185(2) (stating that the amount of compensation is determined by the employer). *But see id.* at § 172(3) (requiring the employer to "prove the worker's culpability").

63. LABOR CODE, zákon č.3/1991 Sb. § 183(1) (allowing the amount of compensation to be reduced by the employer "or a court" to a level lower than that specified in the Code).

64. *Id.* § 184(3).

65. *Id.* The minimum penalty subsection also provides that a minimum penalty of one-sixth of the worker's monthly wages is to apply if actual damage exceeds a half-month's salary. *Id.* This additional portion is superfluous, because if the actual damage exceeds a half-month's salary, the basic penalty of one third the actual damage *could not be* less than one-sixth of a month's wages.

In some ways the most disquieting aspect of the work performance penalties lies in the general orientation and not in their specific provisions. Through these statutory provisions, the state enters a partnership with employers in the enforcement of work discipline. Such an orientation was alarming enough in a system of state socialist enterprise. There, it signalled an authoritarian and punitive focus on individual worker deficiencies as an approach to work discipline. The Code originated as a communist-regime legal initiative.⁶⁶ As such it highlights the disturbing failure of that regime to emphasize worker-controlled mechanisms of discipline and performance regulation. The Code's authoritarian and punitive stance retains its deeply alarming cast, however, when we imagine its application in a regime of private enterprise. There, the Code's orientation would function not in defense of public property in which workers themselves hold a stake, but in defense of the private property of enterprise owners, who might feel strong economic incentives to enforce punitive sanctions stringently. Concern over a system which pits workers against the power of private capital can only be deepened when we contemplate the heavy hand of the state so clearly poised to augment capital's power.

III. JOBS BARRED TO WOMEN

The new Code carries forward without significant modification the old Code's anachronistic and overbroad restrictions on performance of certain jobs by women. In the Fundamental Principles to the new Code, article VII articulates a complex but admirable vision of workplace equality for women:

Women are entitled to the same status at work as men. Women must be guaranteed working conditions enabling them to participate in work not only with regard to their physiology but in particular with regard to their role in society as mothers and in raising and attending to children.⁶⁷

The Code reneges woefully on this commitment in a section headed "Prohibition on Certain Kinds of Work" in a division entitled "Working Conditions of Women."⁶⁸ Paragraph one of the prohibition section bans women from all underground manual work involved in mining and

66. See *Czechoslovakia Announces Wide Legal Changes on Reform*, Reuters (July 6, 1987, A.M. Cycle), available in LEXIS, NEXIS library, REUTER file (reporting Communist Party Central Committee Secretary Miles Jakes' announcement that several laws including the labor code would be amended, issued, or abrogated in the wake of reforms in the Soviet Union).

67. LABOR CODE, zákon č.3/1991 Sb. art. VII.

68. LABOR CODE, zákon č.3/1991 Sb. § 150.

tunnelling.⁶⁹ Though one can only speculate as to the original rationale behind such a ban, one suspects that it stems from exaggerated perceptions of female incapacity to perform the hard labor involved and from sexist assumptions about the unsuitability for women of the dirty, dangerous, and unpleasant aspects of underground labor. Undeniably, there may be some forms of hard labor where women, on the average, are unable to perform as effectively as men. This should not be confused, however, with the notion that there are no women strong enough to perform as well as many or most men doing such work. The ban imposed by the Code makes precisely this assumption.

It is noteworthy that the provision bans women not from a broad spectrum of hard manual labor tasks, but only from those related to mining and tunnelling.⁷⁰ This reinforces a suspicion that the ban reflects not only concern about hard manual labor, but also the concern about the unsuitability of women to work in underground labor environments. If so, the provision is the more objectionable for its constricting sentimentalism as to qualities of the feminine.

Paragraph two of the prohibition reflects even more alarmingly such sentimentalism, which may severely limit opportunities for women in the workplace. This paragraph bars women from all work that may be deemed "physically inappropriate or harmful to their organism."⁷¹ The sexist assumptions and potential of such a prohibition emerge as soon as one wonders whether there are many jobs that would be specifically harmful to the female organism, but not to the male. If one posits a narrow purpose of protecting female reproductive capacities, one may prevent the broadest and most female-restrictive interpretations of such a prohibition. The paragraph highlights such a purpose with its particular prohibition on work which might endanger woman in "their role as mothers."⁷² Even applying this narrow interpretation, however, the prohibition could drastically curtail work opportunities for women.

The controversy surrounding the United States Supreme Court's decision in *International Union v. Johnson Controls, Inc.*⁷³ best presents the issue. The Court ruled that it is illegal for employers to ban all women of childbearing age from jobs that exposed them to toxics po-

69. *Id.* § 150(1).

70. *Id.*

71. LABOR CODE, zákon č.3/1991 Sb. § 150(2).

72. *Id.* The section also provides that central authorities shall issue lists of jobs and workplaces inappropriate for women who are pregnant or mothers to work. *Id.* The provision further requires that the lists be continuously supplemented and amended as science and technology advance. *Id.*

73. *International Union v. Johnson Controls, Inc.*, ___ U.S. ___, 111 S.Ct. 1196 (1991).

tentially harmful to reproductive organs and fetuses.⁷⁴ The Supreme Court found such bans to constitute sex discrimination, insofar as they apply to women with no intention of getting pregnant and even to women with fixed and stated intentions *not* to become pregnant.⁷⁵ The vice of employment prohibitions aimed to protect reproductive capacities is that such bans may treat a woman's capacity for reproduction and/or the hypothetical but as yet non-existent fetuses as more important than the actual and current human experience, ambition, and life plans of the woman herself. That is, such bans treat a woman's reproductive capacity entirely as a conservable public resource, ignoring her own intimate relationship with that "resource" and her personal interest in exercising control over it. It also slights all wider interests she may have as a worker with her own ambitions and economic needs. Hopefully, such prohibitions in the Code will retain only a narrow application and future amendments will significantly revise them.

IV. HEALTH AND SAFETY MONITORING

The old Code contained significant provisions as to responsibilities for monitoring and ensuring workplace health and safety.⁷⁶ The new Code amendments heavily revised this area. Strikingly enough, the new Code expands considerably on the old Code by detailing and specifying roles and responsibilities.⁷⁷ Hopefully, this expansion and specificity represents and reinforces a redoubled commitment to workplace health and safety.

The new Code specifies several types of enterprise responsibilities for work safety, among them: to make technical and organizational changes in response to both health and safety regulations and new technology capable of augmenting workplace health and safety;⁷⁸ to inform managers and work forces of health and safety regulations, to test such knowledge periodically, and to monitor compliance with the regulations;⁷⁹ to ensure protection for individual workers against health risks specific to them;⁸⁰ to record occupational dangers and harmful incidents, to report them to appropriate authorities, and to ameliorate their

74. *Id.* at 1207.

75. *Id.* at 1203-04.

76. LABOR CODE, zákon č.6/1965 Sb. §§ 132-138.

77. Compare LABOR CODE, zákon č.6/1965 Sb. §§ 132-138, with LABOR CODE, zákon č.3/1991 Sb. §§ 132-138.

78. LABOR CODE, zákon č.3/1991 Sb. § 133(1)(a).

79. *Id.* § 133(1)(b).

80. *Id.* § 133(1)(c). The section also applies to overtime and night work. *Id.*

causes;⁸¹ and to respect workers in their right to refuse work performance posing direct and serious dangers.⁸² The new Code also requires employers to supply safety equipment and anti-hazard wash-up aids and facilities,⁸³ and to ban smoking in the workplace.⁸⁴ If enforceable and enforced, these enterprise responsibilities will significantly improve workplace health and safety. Enforcement, of course, is the paramount question mark.

The Code provisions for worker and trade union participation in health and safety monitoring enhance the possibilities for enforcement. Here too, the new Code specifically and expansively details roles and responsibilities. Workers must report health and safety hazards to superiors within the enterprise and to regulatory officials.⁸⁵ Even more significant, trade unions receive statutory authority to supervise enterprise compliance with health and safety rules;⁸⁶ to inspect workplaces for hazards;⁸⁷ to inspect workplace accident investigations and to perform such investigations themselves;⁸⁸ to order enterprises to ameliorate unsafe conditions;⁸⁹ and to consult, where relevant, on hazard issues.⁹⁰ Alongside these provisions for worker and union participation in ensuring health and safety compliance, the Code lists worker duties that include compliance with all anti-hazard rules and guidelines;⁹¹ participation in anti-hazard instructional courses;⁹² abstinence from drugs, alcohol, and smoking;⁹³ cooperation with medical testing procedures;⁹⁴ and use of protective aids and facilities.⁹⁵ It is controversial that workers are required to submit to workplace alcohol and drug testing, ad-

81. *Id.* § 133(1)(e). The code requires that such elimination occur "without delay." *Id.*

82. LABOR CODE, zákon č.3/1991 Sb. § 133(1)(f). Such a right arises anytime a worker possesses a "justifiable suspicion." *Id.*

83. *Id.* § 133(2). This includes "free personal protective aids," cleaning supplies and disinfectants, protective beverages, food supplements, clothing and footwear. *Id.*

84. *Id.* § 133(3).

85. *Id.* § 133(2)(f).

86. LABOR CODE, zákon č.3/1991 Sb. § 136(1)(a-c).

87. *Id.* § 136(1)(a).

88. *Id.* § 136(1)(b).

89. *Id.* § 136(1)(c).

90. *Id.* § 132(1)(a-e).

91. *Id.* § 135(2)(a).

92. LABOR CODE, zákon č.3/1991 Sb. § 135(2)(d).

93. *Id.* § 135(2)(b). This section also requires workers to submit to testing to detect if under the influence. *Id.*

94. *Id.* § 135(2)(f). The provision mandates that workers also participate to the best of their ability in eliminating such defects. *Id.*

95. *Id.* § 135(2)(c). The Code also requires that workers care and maintain equipment in proper manners. *Id.*

ministered by enterprises or state agencies.⁹⁶ One is led to wonder whether this requirement to comply with testing has been adequately studied from the standpoints of privacy and civil liberty.

V. COLLECTIVE BARGAINING

In addition to amending the Labor Code, the Czechoslovakian legislature recently passed a collective bargaining law.⁹⁷ This new law is part of an envisioned transition in which labor relations will be freed of state administrative control, so that income distribution and employment relations may be governed by market forces and channelled through collective bargaining wherever unions are present. It is not clear how thoroughgoing the transition to a free market economy may be or should be. Until this is clear, the nature of Czechoslovakian employment relations will be difficult to analyze. The economy currently hovers in a no-man's land where there is neither a plan nor a market and where relations are determined through a murky mix of administrative command, custom, collective bargaining and individual contracting with enterprises. Unpredictable developments, both domestic and international, will decisively shape the nature of emerging economic power structures. In such a fluid context, it is disingenuously academic to discuss terms of the Collective Bargaining Act with a focus on how they will affect economic power. On the current Czechoslovakian scene, it is likely that envisioned power relations deliberately designed by law will be swamped and overwhelmed by the clash of interests and ideologies outside the legal world. With all these cautions firmly in mind, it is nevertheless thought-provoking to analyze the law in an effort to discern what power configurations it may tend to encourage.

The initial portions of the Act specify that collective bargaining agreements may be struck between unions or union federations and enterprise or enterprise federations.⁹⁸ The Act then specifies procedures for bargaining and filing agreements and for mediating and arbitrating disputes under such agreements.⁹⁹ The Act then proceeds to its most crucial power-allocative provisions: those governing strikes.¹⁰⁰ The power-allocative dimensions of these provisions may be highlighted by comparison with United States law.

96. *Id.* § 135(2)(g).

97. COLLECTIVE BARGAINING ACT, zákon č.1/1990 Sb.

98. LABOR CODE, zákon č.3/1991 Sb. §§ 2-4.

99. *Id.* §§ 10-15.

100. *Id.* §§ 16-26.

The availability and strength of the strike weapon is critical in determining work force bargaining power against enterprises. Strikes or threats thereof compel employers to grant satisfactory wages and conditions for their workers. In several respects the Czechoslovakian Act seems to confer strong strike power on work forces. Upon close inspection, however, that power may be less than at first it appears. Most importantly, the Act protects workers from losing their jobs if they strike. This protection frees workers from a critical fear that may inhibit willingness to strike and thereby sap work force bargaining power.

Though United States law purports by statute to bless striking workers with protections against job loss,¹⁰¹ the Supreme Court's notorious *Mackay Radio*¹⁰² decision grants enterprises the right to hire permanent replacements for workers striking over economic issues. This means that striking workers lose their jobs unless an employer has job openings, in the aftermath of a strike that are not occupied by replacements. In the past two decades United States employers have grown increasingly aggressive and sophisticated in deploying permanent replacements as an anti-strike weapon. As a consequence, workers are deterred from striking and if there is a strike, enterprises often successfully maintain pre-strike production levels. Hence, strikes have grown vanishingly rare in the United States. This has provoked severe deterioration in work force bargaining power and a weakening of workers' living standards. Initiatives in the United States Congress have recently been aimed at banning the hiring of permanent striker replacements.¹⁰³

The Czechoslovakian Act seems to thwart the spectre of job loss with a provision prohibiting enterprises from recruiting "other citizens to replace participants in the strike at the worksite."¹⁰⁴ This provision seems to embody a blanket ban on the U.S. style of permanent replacements. At least three major ambiguities with crucial importance for power configurations lay beyond this surface meaning, however.

First, the provision's ban is so blunt and emphatic as to suggest that it prohibits hiring not only permanent but temporary striker replacements as well. If so, this is good news for work forces because it means that strikes may not only proceed without provoking job loss, but may inflict meaningful damage on struck enterprises which cannot maintain normal production because they can hire no replacements. This strike veto power over production may greatly enhance work force bargaining

101. 29 U.S.C. §§ 157, 163 (1982).

102. *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938).

103. H.R. 5, 102d Cong., 1st Sess., 137 CONG REC. H5565-66 (daily ed., July 17, 1991).

104. COLLECTIVE BARGAINING ACT, zákon č.1/1990 Sb. § 25.

strength. If the Act indeed forbids even temporary replacements, it goes beyond current United States congressional bills, which prohibit use of permanent but not temporary replacements.¹⁰⁵

There is, however, a significant pro-employer ambiguity in the language of the provision, in the language that replacements are banned at the "worksite."¹⁰⁶ This could be interpreted as limiting language, allowing employers to hire even permanent replacements so long as the work is removed to another site. If this is indeed allowed, firms would retain considerable strike-breaking power. This would be especially true for firms with more than one production site in existence at the onset of the strike, allowing work to be transferred easily.

Another interpretation of the provision would limit job protection for strikers even more severely. The provision could be read to ban not the *employment* of striker replacements but merely their *recruitment* "at the worksite." Though possible, this interpretation seems implausibly narrow and could make sense only as a rather peculiar means of forestalling job site violence between strikers and potential replacements.

A second critical pro-employer ambiguity exists within this provision. The prohibition on replacements might seem to include within it a prohibition on the more drastic employer step of discharging strikers outright. Under United States law, replaced workers retain at least a potential right of reinstatement if job openings exist despite the hiring of replacements.¹⁰⁷ Thus, being replaced is potentially better than outright discharge. A provision to protect striker jobs would be of limited use if it protected workers only against replacement, but not against a more severe sanction of outright discharge. Therefore, it is noteworthy that the Czechoslovakian Act is drafted such that replacement hiring is forbidden during "the course of a strike."¹⁰⁸ If "course of a strike" is read as limiting language in the prohibition, enterprises might be deemed entirely free to make outright discharges of ex-strikers after the strike ends.

This would of course exert a major chilling effect on workers contemplating a strike. Workers who knew they could be discharged might risk a strike only if confident that the action would be powerful enough to coerce the struck enterprise into a contractual agreement not to dis-

105. See H.R. 5, 102d Cong., 1st Sess., 137 CONG. REC. H5565-66 (daily ed., July 17, 1991) (amending the National Labor Relations Act to prevent discrimination based on participation in labor disputes).

106. COLLECTIVE BARGAINING ACT, zákon č.1/1990 Sb. § 25.

107. See *Laidlaw Corp.*, 171 N.L.R.B. 1366 (1968) (holding that this right to reinstatement continues to exist as long as the strikers have not found other employment).

108. COLLECTIVE BARGAINING ACT, zákon č.1/1990 Sb. § 25.

charge ex-strikers. By the same token strikers would be reluctant to end work stoppages without first securing such contractual protection. This would have a tendency to make strikes longer than they would be if strikers knew their jobs would be secure as a matter of law at the close of a strike.

It is conceivable that employer power to discharge ex-strikers might be conferred in a misguided effort to restrain worker exercise of bargaining power through strikes. If so, the Act would augment worker power on the one hand, by protecting strikers against job loss and perhaps by allowing workers to force drastic curtailments in production. On the other hand, the Act would constrain worker power by signaling workers not to wield such power lightly or in vain, in situations where they lack power to enforce post-strike job retention through contract.

There is reason to conclude that the "course of the strike" language cannot be construed as limiting language in the prohibition. First, there is the sheer anomaly of protecting workers from discharge during a strike, only to leave them vulnerable once the strike is over. Second, the conditions for allowable discharge in the Labor Code discussed above do not include worker strike participation.¹⁰⁹ The most straightforward way to read the Code is that it prohibits discharge of strikers. Although it contains no specific prohibitions, perhaps under the rubric of disciplinary breach, the provisions could be read to allow discharge of strikers. If the Code indeed does not allow striker discharge, the "course of the strike" language in the Act's anti-replacement provision becomes superfluous. On the other hand, if the "course of the strike" language limits the Act's ban on replacements, the Act greatly modifies proper interpretation of the Code.

Workers sometimes have an interest in frustrating normal production while remaining on the job, rather than going out on strike, due to the hardships of wage loss imposed by strikes. Law in the United States offers no solace to workers who wish to frustrate production while avoiding the hardships of a strike. Under United States law, workers who engage in slowdowns or other partial work stoppages may be discharged.¹¹⁰ Here again, the new Czechoslovakian Act may confer a

109. See *supra* notes 26-43 and accompanying text (discussing grounds for termination with notice and for immediate discharge).

110. See *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477 (1960) (holding that since partial or intermittent strikes are illegal, the National Labor Relations Act allows an employer to properly discharge workers engaging in such activities). See also *NLRB v. Montgomery Ward & Co.*, 157 F.2d 486, 497 (8th Cir. 1946) (stating that the employee's refusal to obey reasonable instructions of the employer, given while employment continued and the employee was not on strike, was proper grounds for dis-

higher degree of worker power. The Act defines "strike" as including partial as well as complete work stoppages.¹¹¹ Any legal protections enjoyed by full strikers thereby apply equally to on-the-job or partial strikers.

If such legal protections are indeed as strong as some interpretations of the Act would make them, the Act confers upon workers very significant power to frustrate production while at least partially protecting income. The Act specifies that strikers are entitled to no wages during a strike; this provision presumably applies to on the job or partial strikers as well as full strikers. In this light it might seem self-defeating to engage in a partial strike, which would frustrate production less completely than a full strike, with the same loss of wages. On the other hand, partial strikes, slowdowns and other on-the-job tactics to frustrate production can often be practiced in a fashion so as to conceal the identities of participants, a possibility absent in a full strike. On-the-job tactics therefore present at least the possibility that workers may frustrate production effectively with lower income losses than full strikes would cost. Potential strikers may be more willing to run the risks of discovery and wage loss under the Code than under United States law, if they are protected at least against the risk of job loss.

In what first appears as a strong anti-worker provision, the Act empowers firms to lock out their work forces, under certain circumstances, in order to exert economic pressure.¹¹² If the ban on replacement workers applies to lock-outs as well as strikes, this lock-out power may provide employers with little or no advantage in many cases, since the locking-out employer would then suffer heavy production loss, due to inability to hire replacement workers. Under the Code, workers may even prefer lock-outs to strikes because they remain entitled to half wages in case of lock-out.¹¹³ Under United States law, employers may utilize a lock-out to pressure workers free of wage-payment obligations, and may perhaps maintain production through use of replacements.¹¹⁴

charge); *Elk Lumber Co.*, 91 N.L.R.B. 333 (1950) (holding that a concerted plan to effect a work slow down is not a "protected activity" under the NLRA).

111. COLLECTIVE BARGAINING ACT, zákon č.1/1990 Sb. § 16(2).

112. COLLECTIVE BARGAINING ACT, zákon č.1/1990 Sb. § 27(1).

113. COLLECTIVE BARGAINING ACT, zákon č.1/1990 Sb. § 30.

114. *Compare Loomis Courier Serv., Inc. v. NLRB*, 235 N.L.R.B. 534 (1978), *enforcement denied on other grounds*, 595 F.2d 491 (9th Cir. 1979) (finding a violation of the NLRA in discharging employees and thereafter treating them as new hires) *and Oshkosh Ready-Mix Co.*, 179 N.L.R.B. 350 (1969), *enfd sub. nom.*, *Inland Trucking Co. v. NLRB*, 440 F.2d 562 (7th Cir.), *cert. denied*, 404 U.S. 858 (1971) (finding an unfair labor practice in locking out employees and continuing to operate with substitutes after expiration of the collective bargaining agreement), *with Inter Collegiate Press*, 199 N.L.R.B. 177 (1972), *aff'd*, 486 F.2d 837 (8th Cir. 1972), *cert. denied*, 416

Under both the Act and United States law, the employer's main advantage in holding lock-out power is the chance to choose the timing for a confrontation, rather than letting the union choose. Choice of timing may be used strategically by a party to inflict maximum damage on the adversary and minimum damage on itself, as when a union calls a strike during a crucial rush order the employer is trying to fill. Aside from timing, there is little in either United States law or under the Czechoslovakian Act to induce employers to prefer a lock-out to a strike. Under United States law, employers stand a good chance of maintaining production throughout either lock-out or strike by means of the power to hire replacements. Under the Act, employers stand an equal chance of losing production under either lock-out or strike, if replacements are banned for both. Under both the Code and United States law, employers face certain disadvantages in choosing a lock-out over strike. Under United States law, the disadvantage is that the employer who locks out may be permitted to hire only temporary replacements while the struck employer may surely hire permanent replacements.¹¹⁵ Hence, production may be easier to maintain in a strike than in a lock-out because it is easier to hire replacements if they can be promised security of job tenure. Under the Act, lock-out has the disadvantage of allowing non-working employees to draw half wages, thus increasing their hold-out power. Hence under both sets of laws, lock-outs carry disadvantages and employers will use them only when the timing advantages outweigh those disadvantages. The significance of lock-out power may be greater under United States law than under the Act, however, because under United States law the employer may not need not to sacrifice production in order to pressure workers with a lock-out. On the other hand, even under the Act, where lockout pres-

U.S. 938 (1974) (permitting an employer to hire workers when motivated only by legitimate and substantial business reasons and not by desire to discourage employees from the exercise of their collective bargaining rights) and *Ottawa Silica Co.*, 197 N.L.R.B. 449 (1972), *aff'd*, 482 F.2d 945 (6th Cir. 1973), *cert. denied*, 415 U.S. 916 (1974) (condoning the hiring of replacement workers when expressly used only for the duration of the labor dispute and without the aim of discouraging union membership).

115. It is unclear whether employers engaged in lock-outs are permitted to hire permanent replacements because United States courts have scarcely addressed this issue. One decision on the issue seemed to rule the use of permanent replacements legal. *Johns-Manville Products Corp. v. NLRB*, 557 F.2d 1126 (5th Cir. 1977), *cert. denied*, 436 U.S. 956 (1978). The facts of the case were unusual, however, because they involved high levels of machinery damage and work interruption prior to the strike vote. *Id.* at 1129-32. According to the decision, this justified the employer in treating the situation as an unprotected in-plant strike, so that the employer was allowed to fire and permanently replace the entire work force. *Id.* at 1133. A clear Board position hostile to use of permanent replacements by employers who lock out may finally have been established in *Harter Equip.*, 293 N.L.R.B. 647 (1989).

sure probably comes at the cost of lost production, there may be situations where employers will be anxious to use it and workers would be better off if it were banned.

The Act's provisions on liability for damage may tend to discourage strikes. Wisely, the Act protects strikers from liability for damages an employer sustains due to work stoppage itself.¹¹⁶ More problematically, however, the Act makes strikers liable for "any damage due to an event occurring in the course of the strike."¹¹⁷ The scope of liability exposure for strikers under this provision could be breathtakingly broad. A provision of this type would be less objectionable if each striker's liability were confined to damage he or she caused during a strike. As drafted, however, the provision potentially makes each striker liable for damage caused by any striker. This would severely chill the propensity to strike, holding it hostage to worker fears of undisciplined members in their midst. Moreover, as drafted, the provision might apply liability to strikers even when no striker has directly caused damage. Suppose, for example, machinery maintenance has been neglected prior to a strike, but is further neglected during a strike and the machinery then fails. Read broadly, the liability provision could saddle all strikers with liability. Strikers might appeal to the provision protecting against liability for work stoppage damage, but that provision is drafted narrowly, offering protection against liability only for damage caused "solely" by interruption of work.¹¹⁸ Depending on how broadly or narrowly the liability and protection-against-liability provisions are read, workers could face severe financial risks from striking. The problem might be remedied by narrowing the liability provision, so that no striker would answer for damage he did not cause directly.

CONCLUSION

It is far too soon to predict the overall significance of the recent labor law legislation in the CSFR. Economic hard times, tension between the Czech Republic and the Slovak Republic, and the uncertain evolution of legal institutions are just some of the factors that could momentarily shape even the short-term future of employment relations in the CSFR. This Article does not speculate on these factors, but has merely explored interpretational issues posed by the enactments themselves, highlighting ambiguities and possible implications.

116. COLLECTIVE BARGAINING ACT, zákon č.1/1990 Sb. § 23(2).

117. *Id.* § 23(1).

118. *Id.* § 23(2).

The new Labor Code appears to offer workers greater protection against job dismissal than "at will" workers in the United States typically enjoy. In several respects, the new Code offers greater protections than did its predecessor, though in some respects the reverse is true and in others the two Codes are essentially similar. The main form of job security offered by the new Code is that, aside from exceptional circumstances involving criminal convictions or gross disciplinary breach, workers may be fired for one of several legally-enumerated reasons and with notice. The new Code also offers special, though perhaps poorly-designed, anti-discharge safeguards for workers involved in primary child care for small children. For additional worker protection, the new Code imposes difficult-to-interpret duties on firms to secure alternative employment for workers they discharge.

As a device to secure worker discipline and quality production, the new Code authorizes strikingly broad and severe damage payments for substandard work. These sanctions may unfairly penalize workers for events over which they exercise little or no control, and may unduly stifle work force activities designed to augment worker power against employers.

Despite protestations of concern for female equality, the new Code borrows, nearly unaltered, provisions from the old Code that ban women from occupations deemed dangerous for them. These provisions stem from outmoded and uncritical sentimentalism about the peculiar nature of the female body and the activities dangerous or inappropriate to it.

The new Code imposes substantially new responsibilities for monitoring and ensuring workplace health and safety, unmatched by both the previous Code and by prevailing United States law. Specified responsibilities for enterprises may help ensure vigorous health and safety protection, depending on the level of enforcement. Equally promising is the grant of worker and trade union authority to actively assist enforcement efforts through inspections, consultations, and orders requiring enterprises to ameliorate unsafe conditions.

The new Collective Bargaining Act sets out provisions on bargaining procedures and also the means for contract-enforcement and dispute resolution. The Act also lays out crucial but deeply ambiguous provisions for regulating bargaining power between employers and their work forces. Though such provisions seem stronger than comparable United States law in fostering worker bargaining power, some interpretations of those provisions might actually grant workers very little protection. The most critical ambiguities in this area concern the degree to

which the Act protects workers from the spectre of job loss if they strike.