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Foreward

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FOREWORD

Health in the Workplace

Barbara J. Fick*

In 1984, there were 3,740 work-related deaths,¹ 5.3 million work-related injuries² and 125,000 cases of occupational illness.³ These workplace deaths and injuries can occur not only in those occupations considered high risk, such as construction⁴ and mining,⁵ but also in relatively safe jobs, such as office work.⁶ Moreover, the concept of occupationally caused illnesses continues to expand; we have only recently recognized that work-related stress which induces either physical or mental illness may be accepted as a compensable claim under workers' compensation laws⁷ and that exposure to environmental tobacco smoke may deleteriously affect a non-smoker's health.⁸ Economic losses due to work-related accidents in 1984 amounted to \$30.8 million.⁹ The overwhelming human and monetary costs associated with unsafe and unhealthful work environments mandate a serious consideration of the issues involved in securing health in the workplace, the focus of this symposium issue.

An initial question for consideration is who should regulate and enforce health and safety requirements—federal, state or local government. One of the causes for the Occupational Safety and Health Administration's delay in promulgating national field sanitation standards was its attempt to prod the states to develop their own standards.¹⁰ Conversely, defendants who have been prosecuted pursuant to state criminal laws for deaths at the workplace argue that the Occupational Safety and Health

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1 OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, U.S. DEP'T OF LABOR, REPORT OF THE PRESIDENT TO THE CONGRESS ON OCCUPATIONAL SAFETY AND HEALTH FOR THE CALENDAR YEAR 1985 92 (1986). This is an approximate figure as it includes only workers employed by private sector employers with 11 or more employees. *Id.*

2 *Id.* at 91.

3 *Id.* at 92.

4 On April 23, 1987, a high-rise apartment building under construction in Bridgeport, Connecticut, collapsed, killing 28 construction workers. N.Y. Times, May 8, 1987, § B, at 2.

5 On December 19, 1984, 27 miners died in an underground fire at the Wilberg Mine, in Orangeville, Utah. N.Y. Times March 25, 1987, § A, at 12.

6 Studies indicate that there may be some link between video display terminals and the threat of miscarriage or birth defects as well as an increase in vision problems. 4 Employee Rel. Wkly. (BNA) 413, 650, 1226, 1349 (1986). See also Ashford and Ayers, *Changes and Opportunities in the Environment for Technology Bargaining*, 62 NOTRE DAME L. REV. 810 (1987).

7 Cook, *Workers' Compensation and Stress Claims: Remedial Intent and Restrictive Application*, 62 NOTRE DAME L. REV. 879 (1987).

8 Rothstein, *Refusing to Employ Smokers: Good Public Health or Bad Public Policy?*, 62 NOTRE DAME L. REV. 940 (1987).

9 INSURANCE INFORMATION INSTITUTE, 1986-87 PROPERTY/CASUALTY FACT BOOK 92 (1986). This figure includes direct costs such as lost wages and medical expenses, as well as indirect costs such as damage to equipment, production delays and time lost by workers not involved in the accident. *Id.*

10 50 Fed. Reg. 42,660 (1985).

Act (OSHA) preempts the enforcement of state criminal laws for conduct regulated by federal health and safety laws.¹¹ Indeed, serious policy questions are raised when considering whether criminal laws are appropriate mechanisms for enforcing health and safety requirements in the workplace.¹² The battle over who should regulate is currently being fought on the issue of requiring employers to inform employees of potentially hazardous materials in the workplace—does OSHA's Hazard Communication Standard preempt state and local right-to-know laws or can these laws coexist with the standard?¹³

A corollary to this question of who should regulate is who should have responsibility for ensuring compliance with health and safety laws. OSHA itself provides that both employers and employees have responsibilities with respect to achieving safe and healthful working conditions¹⁴—the employer is required to provide a place of employment free from recognized safety and health hazards as well as to comply with OSHA standards;¹⁵ the employee is also required to comply with OSHA standards, rules and regulations.¹⁶ In those workplaces which are unionized, labor organizations can also play a role in ensuring workers' safety and health. Those workplace safety and health issues impacting on terms and conditions of employment are mandatory subjects of bargaining which the employer must negotiate in good faith with the union.¹⁷ The Supreme Court recently noted that "[u]nder the common law . . . it is the employer, not a labor union, that owes the employees a duty to exercise reasonable care in providing a safe workplace."¹⁸ The Court suggested, however, that a union may assume a responsibility for worker safety by accepting a duty of care in the collective bargaining agreement.¹⁹

In some situations, the methods used by employers in fulfilling their responsibilities to provide safe and healthful work environments (and in attempting to lessen their economic losses due to workplace injuries and illnesses) create problems. Abuse of drugs and alcohol by workers whether on or off the job, may affect their ability to safely and efficiently perform their duties, resulting not only in injuries to themselves, but also harming coworkers and the public.²⁰ In response to this problem, em-

11 See Magnuson and Leviton, *Policy Considerations in Corporate Criminal Prosecutions After People v. Film Recovery Systems, Inc.*, 62 NOTRE DAME L. REV. 913 (1987).

12 *Id.*

13 See Tyson, *The Preemptive Effect of the OSHA Hazard Communication Standard on State and Community Right to Know Laws*, 62 NOTRE DAME L. REV. 1010 (1987).

14 29 U.S.C. § 651(b)(2) (1982).

15 *Id.* § 654(a).

16 *Id.* § 654(b).

17 See Ashford and Ayers, *supra* note 6.

18 *IBEW v. Hechler*, 107 S. Ct. 2161, 2167 (1987) (emphasis in original; citations omitted) (An injured employee's state law negligence claim that the union breached its duty to determine whether she had the necessary training to perform the work before assigning her to an inherently dangerous workplace is preempted by federal labor law.).

19 *Id.* at 2167. See generally Drapkin and Davis, *Health and Safety Provisions in Union Contracts: Power or Liability?*, 65 MINN. L. REV. 635 (1981); Segal, *The Wrong Pocket: Union Liability for Health and Safety Hazards*, 4 INDUS. REL. L. J. 390 (1981); Note, *Responsibility for Safe Working Conditions: Expanding the Limits of Union Liability*, 32 SYRACUSE L. REV. 681 (1981).

20 A drug test performed on an engineer and brakeman operating Conrail locomotives involved in the January 4, 1987 fatal crash with an Amtrack passenger train showed traces of a key ingredient

ployers are increasingly implementing drug and alcohol screening tests for workers and applicants. This practice has raised concern because of the intrusive nature of the test itself,²¹ accuracy problems with test results both in terms of false-positives as well as the inability of the results to show impairment on the job,²² and privacy interests of the employee both as to his off-duty behavior as well as to the personal nature of information (other than the presence of drugs or alcohol) which can be obtained from blood and urine samples.²³ Employers, employees and the courts are currently struggling with the problems raised by such testing and are attempting to resolve the conflicts.²⁴

Other employer attempts to provide healthful environments and lessen economic costs raise similar problems implicating not only employee privacy interests but also legal protections granted to workers under federal labor laws. For example, employer refusals to hire smokers raise serious policy questions concerning the monitoring of off-work behavior as well as the possibility of violating, *inter alia*, handicap and age discrimination laws, Title VII of the Civil Rights Act, and constitutional rights to privacy.²⁵ Other employers may refuse to hire applicants who present a greater than average risk of incurring a serious illness, or discharge workers who suffer an injury or illness. Such a policy may conflict with ERISA's prohibition of employer discrimination against participants in, or beneficiaries of, a health or disability plan because they have exercised a right to which they are entitled under the plan.²⁶

When work-related deaths, injuries and illnesses do occur, the question arises as to how the worker and his family should be compensated for the injury and the type of liability which should be imposed on the employing entity.²⁷

The articles in this Symposium discuss these issues from both legal and policy perspectives, adding new insights into the ongoing battle to secure health in the workplace.

of marijuana, suggesting the two workers had used marijuana within several weeks of the accident. Sixteen people were killed in the crash, including an Amtrak engineer, and over 170 people were injured. N.Y. Times, January 15, 1987, § A, at 1. See Cecere and Rosen, *Legal Implications of Substance Abuse Testing in the Workplace*, 62 NOTRE DAME L. REV. 859 (1987).

21 5 Employee Rel. Wkly. (BNA) 529, 530 (1987).

22 See Note, *Drug Testing in the Workplace: A Legislative Proposal to Protect Privacy*, 13 J. LEGIS. 269, 273-74 (1986).

23 *Id.* at 276-80.

24 See Cecere and Rosen, *supra* note 20; Note, *Drug Testing of Government Employees and the Fourth Amendment: The Need for a Reasonable Suspicion Standard*, 62 NOTRE DAME L. REV. 1063 (1987).

25 See Rothstein, *supra* note 8.

26 See Vogel, *Containing Medical and Disability Costs by Cutting Unhealthy Employees: Does Section 510 of ERISA Provide a Remedy?*, 62 NOTRE DAME L. REV. 1024 (1987).

27 See Cook, *supra* note 7; Magnuson and Leviton, *supra* note 11; Stillman and Wheeler, *The Expansion of Occupational Safety and Health Law*, 62 NOTRE DAME L. REV. 969 (1987).