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NOTES

Unemployment Compensation for Employees on Required Vacation Without Pay

The Social Security Act of 1935[1] created a federal-state system of unemployment compensation which permits the states to establish their own standards of qualification for unemployment benefits. All states have enacted statutes pursuant to this system and have established three basic conditions which a claimant must meet before he is entitled to benefits.[2] First, he must be unemployed. Second, he must remain able to work and available for work. Third, he must be free from disqualification for such acts as voluntarily leaving work without good cause attributable to the employer or employing unit,[3] discharge for conduct connected with the work,[4] or refusal of suitable work.[5]

Since the basic purpose of these state statutes is to limit unemployment compensation to those workers who are "unemployed primarily as a result of economic causes,"[6] the courts have generally limited benefits to those whose unemployment is a result of conditions in the claimant's industry.[7] Thus, if the employer closes his plant and the employee is temporarily laid off, there is sufficient "economic cause" for recovery to be allowed.[8] A similar result is reached even if the temporary layoff is a customary annual occurrence in the industry.[9] On the other hand, claimants have generally

1. 49 Stat. 620, as amended, 42 U.S.C. §§ 301-1394 (1964).

2. See, *e.g.*, N.Y. LAB. LAW § 591; OHIO REV. CODE ANN. § 4141.29(D)(2) (Page 1965); PA. STAT. ANN. tit. 43, §§ 801-02 (1964). The states have also set various procedural standards. Thus, a claimant may be required to register for work at an employment office, to serve a waiting period before he becomes eligible for benefits, or occasionally to undergo a period of vocational retraining. See, *e.g.*, MICH. COMP. LAWS § 421.28 (Supp. 1961).

3. See, *e.g.*, MICH. COMP. LAWS § 421.29(1)(a) (Supp. 1961); N.J. STAT. ANN. § 43:21-5(a) (1962).

4. See, *e.g.*, ILL. ANN. STAT. ch. 48, § 223 (Smith-Hurd 1950); PA. STAT. ANN. tit. 43, § 802(e) (1964).

5. See, *e.g.*, MASS. GEN. LAWS ANN. ch. 151A, § 1(r)(2) (1957); OHIO REV. CODE ANN. § 4141.29(D)(2)(b) (Page 1965). The extent of disqualification for any one of these three causes varies considerably among the states. Thus, the disqualification may be a postponement of benefits for some prescribed period, a cancellation of benefit rights, or a reduction of benefits otherwise payable. For a thorough comparison, see BUREAU OF EMPLOYMENT SECURITY, U.S. DEP'T OF LABOR, COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS 89-120 (1964).

6. *Id.* at 89; S. REP. No. 628, 74th Cong., 1st Sess. 11-12 (1935); H.R. REP. No. 615, 74th Cong., 1st Sess. 3, 7 (1935).

7. See Haynes v. Unemployment Compensation Comm'n, 353 Mo. 540, 183 S.W.2d 77 (1944).

8. See, *e.g.*, Copper Range Co. v. Unemployment Compensation Comm'n, 320 Mich. 460, 31 N.W.2d 692 (1948); Claims of Spinella, 282 App. Div. 974, 125 N.Y.S.2d 853 (1953).

9. Texas Employment Comm'n v. Huey, 161 Tex. 500, 342 S.W.2d 544 (1961).

not been awarded benefits if they are on vacation. If the vacation is paid or partially paid by the employer, the worker is not unemployed;[10] if the vacation is requested by the employee, he is off work "voluntarily without good cause attributable to the employer or employing unit" and is consequently disqualified from benefits.[11] However, there is one vacation situation with which the courts have had a great deal of difficulty—the employee who is on vacation without pay because of a provision in his employment contract.

Many industrial employers prefer to have all employees take their vacations simultaneously so that production operations will not be affected by vacations staggered throughout the year. Consequently, negotiations are carried out with the employees' collective bargaining agent for a provision in the employment contract establishing an annual period during which the plant may or must be closed for vacation.[12] Since most employees receive vacation pay during this period, they are not "unemployed" and are thus ineligible for unemployment compensation.[13] However, the seniority system in many plants prevents employees hired within the past year from receiving any vacation pay.[14] Admittedly, these employees could be said to be "voluntarily" off work in the sense that they accepted the vacation provision by agreeing to work under the contract. On the other hand, the agreement was probably reached by the collective bargaining agents before the employees with low seniority even began to work. Faced with these facts, courts have been uncertain whether to treat such employees like other workers who agree to a compulsory vacation period or to recognize that their position is essentially identical to that of the employee who has been temporarily laid off.

Since the statutory provisions were apparently not drafted with this type of problem in mind, judicial interpretation has resulted in decisions which are difficult to reconcile. Furthermore, these decisions have generally shown little awareness of the relevant policy

10. Jones v. California Employment Stabilization Comm'n, 120 Cal. App. 2d 770, 262 P.2d 91 (1953); Oglebay Norton Co. v. Industrial Comm'n, 15 Wis. 2d 396, 113 N.W.2d 35 (1962).

11. See, *e.g.*, Naylor v. Shuron Optical Co., 281 App. Div. 721, 117 N.Y.S.2d 775 (1952), *aff'd mem. sub nom.* In the Matter of Naylor, 306 N.Y. 794, 118 N.E.2d 816 (1954); Bennett v. Hix, 139 W. Va. 75, 79 S.E.2d 114 (1953).

12. For example, the collective bargaining agreement in Moen v. Director of the Div. of Employment Security, 324 Mass. 246, 247, 85 N.E.2d 779, 780 (1949) provided in part: "It is understood and agreed that a period of temporary shutdown in any department for any reason between June 1 and October 1, unless other periods are mutually agreed upon, may be designated as comprising the vacation period . . . ."

13. Workers who are receiving remuneration are not unemployed, even if they are not working. See note 16 *infra* and accompanying text.

14. The contract in Employment Security Comm'n v. Vulcan Forging Co., 375 Mich. 374, 134 N.W.2d 749 (1965), allowed employees with ten years seniority an amount equal to 5% of their year's earnings during the two weeks, while employees with less than one year's seniority were entitled to no vacation pay.

considerations. Several courts have simply stated that the claimants were not entitled to benefits because they were not unemployed "within the meaning of the act."[15] In so doing, however, these courts have completely ignored the statutory provision which stipulates that a worker is unemployed "during any week with respect to which no remuneration is payable to him."[16] Thus, unless a person has another source of income, he must be considered to be unemployed when he is on vacation without pay.

Other courts have recognized that the claimants were temporarily unemployed, but have found them ineligible for benefits, on the ground that they were not "able to work and available for work," since they planned to return to their regular employment when the vacation ended.[17] To circumvent the fact that these employees were clearly willing to work, the courts have had to interpret "available for work" to mean available for work on a job other than the one to which they hope to return at the end of the vacation. This view has been deservedly criticized for reading improper qualifications into the statutory language.[18]

In most of the cases, however, the courts have found that these workers are unemployed and available for work. Consequently, the basic issue has been whether an employee should be disqualified for having left work "voluntarily, without good cause attributable to the employer or employing unit,"[19] if his plant closes pursuant to a provision in his collective bargaining agreement.

"Good Cause"

Although it seems clear that the claimant is to be denied benefits only when he has left his employment both voluntarily *and* without good cause attributable to the employer, the courts have generally ignored the "good cause" provision and have dealt only with the question whether the unemployment is voluntary.[20] This failure to

15. See, *e.g.*, Mississippi State Employment Security Comm'n v. Jackson, 237 Miss. 897, 116 So. 2d 830 (1960); Philco Corp. v. Unemployment Compensation Bd. of Review, 175 Pa. Super. 402, 105 A.2d 176 (1954); Unemployment Compensation Case, 164 Pa. Super. 36, 63 A.2d 429 (1949).

16. See, *e.g.*, MICH. COMP. LAWS § 421.48 (Supp. 1961).

17. See, *e.g.*, Shadowens Unemployment Compensation Case, 177 Pa. Super. 49, 110 A.2d 258 (1954); Mattey Unemployment Compensation Case, 164 Pa. Super. 36, 63 A.2d 429 (1949); *cf.* Adams v. Review Bd. of the Ind. Employment Security Div., 237 Ind. 63, 143 N.E.2d 564 (1957).

18. See Schettino v. Administrator, 138 Conn. 253, 261, 83 A.2d 217, 221 (1951): "to be 'available for work' . . . [does not] necessarily mean available for some other work than the [former] employer's." *Accord*, Golubski Unemployment Compensation Case, 171 Pa. Super. 634, 91 A.2d 315 (1952).

19. All states disqualify an employee who has left work voluntarily without good cause; twenty-four states have now restricted this to good cause connected with the work or attributable to the employer. See generally BUREAU OF EMPLOYMENT SECURITY, *op. cit. supra* note 5.

20. See, *e.g.*, Beaman v. Bench, 75 Ariz. 345, 256 P.2d 721 (1953); Bridges v. Cavalier Corp., 212 Tenn. 237, 369 S.W.2d 548 (1963); Texas Employment Comm'n v. Amlin,

follow the statutory language appears to be based on the courts' inability to discern the intended meaning of "good cause attributable to the employer."[21] Without specific legislative guidance, the courts have been greatly influenced by a general policy statement, contained in the unemployment act of every state, that a public purpose of unemployment compensation is to provide relief for "involuntary unemployment."[22] In fact, this over-emphasis on voluntariness has been encouraged by commentators who suggest that the unemployment compensation program is basically insurance legislation[23] and that sound actuarial principles of insurance dictate that recovery of benefits should not be allowed when the unemployment is voluntary.[24]

"Voluntary"

Since the courts have generally disregarded the "good cause" provision, their decisions in cases involving required vacation without pay have been based on their interpretation of the term "voluntary." The earliest decisions all held that any employee who gave his employer the contractual right to close the plant was voluntarily unemployed and could not receive unemployment compensation.[25]

161 Tex. 606, 343 S.W.2d 249 (1961); In the Matter of the Employees of Buffelen Lumber & Mfg. Co., 32 Wash. 2d 205, 201 P.2d 194 (1948).

21. See Flournoy v. Brown, 140 So. 2d 729 (La. Ct. App. 1962); Dawkins Unemployment Compensation Cases, 358 Pa. 224, 56 A.2d 254 (1948). Generally, the courts have found "good cause attributable to the employer" only when the employer has obviously endangered the employee's health, Department of Indus. Relations v. Chapman, 37 Ala. App. 680, 74 So. 2d 621 (1954), or physical well-being, Rafferty v. Iowa Employment Security Comm'n, 247 Iowa 896, 76 N.W.2d 787 (1956), or when the employee was fired, Intertown Corp. v. Unemployment Compensation Comm'n, 328 Mich. 363, 43 N.W.2d 888 (1950). In one case, however, the court held that there was "good cause attributable to the employer" when work conditions were substantially less favorable than those prevailing for similar work in the locality. Brown v. Brown, 153 So. 2d 190 (La. Ct. App. 1963). In states where the good cause need not necessarily be attributable to the employer or employing unit, the courts have given the provision a somewhat wider application. See, *e.g.*, Filchock Unemployment Compensation Case, 164 Pa. Super. 43, 63 A.2d 355 (1949). *But see* Woodmen of the World Life Ins. Soc'y v. Olsen, 141 Neb. 776, 4 N.W.2d 923 (1942).

22. This policy statement originally appeared in the Draft Bills for State Unemployment Compensation of the Pooled Fund and Employer Reserve Account Type, issued by the Federal Social Security Board, Jan. 1, 1936, revised Sept. 1936. Large portions of these bills, which were intended to serve as models for the state unemployment compensation provisions, were in fact incorporated into most state acts. See generally Harrison, *Eligibility and Disqualification for Benefits*, 55 YALE L.J. 117, 118 (1945).

23. See, *e.g.*, Young, *Employment Security in Michigan—Procedure and Practice*, 38 Mich. S.B.J., Feb. 1959, pp. 31, 32: "The act is neither a welfare nor charity program; it is in the nature of an insurance program; its tax and benefits provisions are based an actuarial principles."

24. See PATTERSON, ESSENTIALS OF INSURANCE LAW 221 (2d ed. 1957): "[I]t is implied in every insurance contract that the insured event is a fortuitous one, *i.e.*, one not designedly brought about by the insured."

25. *E.g.*, Beaman v. Bench, 75 Ariz. 345, 256 P.2d 721 (1953); Moen v. Director of the Div. of Employment Security, 324 Mass. 246, 85 N.E.2d 779 (1949); Jackson v. Minneapolis-Honeywell Regulator Co., 234 Minn. 52, 47 N.W.2d 449 (1951); In the Matter of the Employees of Buffelen Lumber & Mfg. Co., 32 Wash. 2d 205, 201 P.2d 194 (1948).

More recent decisions, however, indicate a greater awareness of the plight of the "captive worker," who finds upon obtaining work that he is "bound . . . under union and company agreements contracted without his knowledge, participation or consent."[26] As a result, courts have begun to scrutinize more carefully the provisions of the collective bargaining agreement to determine whether the unemployment should, in fact, be deemed "voluntary." For example, several courts have differentiated between collective bargaining agreements which *require* the employer to close and those which merely *permit* him to do so. Recovery has never been granted in the former situation,[27] but has in the latter because the agreement leaves the final decision to close entirely to the employer.[28] Recovery has also been allowed because the employer, after promising to try to find work for employees while the plant was closed, was unsuccessful in his efforts.[29] The court found that because the employer failed to find work, the employees were "involuntarily" unemployed.

Although these distinctions have given the courts a means of granting recovery in cases where they have apparently felt strongly that recovery should be allowed,[30] the validity of the distinctions seems questionable. It would appear difficult to consider an employee's unemployment more "voluntary" simply because the collective bargaining agreement requires his employer to shut down rather than providing that he *may* shut down. Similarly, it is difficult to understand the relevance of a promise by the employer to find temporary employment to the voluntary acceptance by the employee of a condition in his employment contract requiring a vacation shutdown. Apparently, the courts have once again been confused by a legislative declaration of policy—that benefits are intended for persons unemployed

26. Michigan Employment Security Comm'n v. Appeal Bd. of the Mich. Employment Security Comm'n, 1959 BENEFIT SERIES SERVICE—UNEMPLOYMENT INS. § TPU 80.2-87, -88 (Mich. Cir. Ct. 1958). See generally cases cited notes 28 and 29 *infra.*

27. See Bridges v. Cavalier Corp., 212 Tenn. 237, 244, 369 S.W.2d 548, 551 (1963), where the court stated that for recovery to be allowed in such a case, "it is up to the legislature to change the terms or form of the act to meet such a holding." *Accord,* Adams v. Review Bd. of the Ind. Employment Security Div., 237 Ind. 63, 143 N.E.2d 564 (1957); Shadowens Unemployment Compensation Case, 177 Pa. Super. 49, 110 A.2d 258 (1954).

28. Dahman v. Commercial Shearing & Stamping Co., 170 N.E.2d 302 (Ohio C.P. 1960); Piestrak Unemployment Compensation Case, 404 Pa. 527, 172 A.2d 807 (1961); Texas Employment Comm'n v. Amlin, 161 Tex. 606, 343 S.W.2d 249 (1961); General Time Corp. v. Cummins, 1957 BENEFIT SERIES SERVICE—UNEMPLOYMENT INS. § TPU 80.2-75 (1955), *aff'd,* Ill. Cir. Ct., 1956 (unreported). *But see* In the Matter of Irwin, 9 App. Div. 2d 352, 193 N.Y.S.2d 978 (1959); Bridges v. Cavalier Corp., 212 Tenn. 237, 369 S.W.2d 548 (1963).

29. Yobe v. Sherwin-Williams Co., 1954 BENEFIT SERIES SERVICE—UNEMPLOYMENT INS. § TPU 80.15-27 (Ohio C.P.).

30. See, *e.g.,* American Bridge Co. v. Review Bd. of the Ind. Employment Security Div., 121 Ind. App. 576, 98 N.E.2d 193 (1951); Teichler v. Curtiss-Wright Corp., 24 N.J. 585, 133 A.2d 320 (1957); Dahman v. Commercial Shearing & Stamping Co., 170 N.E.2d 302 (Ohio C.P. 1960); Yobe v. Sherwin-Williams Co., *supra* note 29; Bennett v. Hix, 139 W. Va. 75, 79 S.E.2d 114 (1953).

"through no fault of their own."[31] Thus, by viewing vacation-shutdown cases in terms of "fault," some courts have come to the illogical conclusion that no separation from employment is compensable unless it is traceable to fault on the part of the employer.[32] Even the courts which have recognized that there is no statutory basis for such a conclusion have continued to seek at least some unilateral action by the employer attributable entirely to his volition[33] or wrongdoing before they will grant recovery.[34]

Because of the pervasive notion of fault, no court has been willing to expand the concept of "involuntariness" far enough to encompass the situation in which the collective bargaining agreement clearly states that the plant *must* close for vacation, since such a contract leaves the employer no option.[35] It appears, however, that courts may soon be willing to go this far, even in the absence of employer culpability. Three decisions not involving vacation shutdowns have held that a collective bargaining agreement is irrelevant in determining whether unemployment is voluntary.[36] Furthermore, the prevailing judicial attitude is that "voluntary" connotes intended, if not necessarily desired, consequences.[37] This required finding of employee intent is difficult to locate if a union negotiates a contract provision neither of the employee's making nor of his liking. Thus, some courts may soon abandon their tenuous factual distinctions and hold that all employees who are ineligible for vacation pay while their plants are closed are involuntarily unemployed and eligible for benefits.

Such a conclusion would ignore the realities of the collective bargaining process. The negotiations between unions and management result in what the United States Supreme Court has called a "trade agreement, rather than . . . a contract of employment."[38]

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31. This policy statement appeared in the Draft Bills for State Unemployment Compensation. See note 22 *supra* and accompanying text.

32. See Gatewood v. Iowa Iron & Metal Co., 251 Iowa 639, 102 N.W.2d 146 (1960); John Morrell & Co. v. Unemployment Compensation Comm'n, 69 S.D. 618, 13 N.W.2d 498 (1944).

33. See cases cited note 28 *supra*.

34. See Yobe v. Sherwin-Williams Co., 1954 BENEFIT SERIES SERVICE—UNEMPLOYMENT INS. § TPU 80.15-27 (Ohio C.P.).

35. See cases cited note 27 *supra*.

36. See Douglas Aircraft Co. v. California Unemployment Ins. Appeals Bd., 180 Cal. App. 2d 636, 4 Cal. Rptr. 723 (Dist. Ct. App. 1960); Myerson v. Board of Review, 43 N.J. Super. 196, 128 A.2d 15 (1957); Smith Unemployment Compensation Case, 396 Pa. 557, 154 A.2d 492 (1959). These cases all involved women whose collective bargaining contracts required them to leave work upon reaching a certain stage of pregnancy. In allowing recovery, all three courts held that the collective bargaining agreement was not a factor in determining whether the women left work voluntarily.

37. See Olechnicky v. Director of the Div. of Employment Security, 325 Mass. 660, 92 N.E.2d 252 (1950); MacFarland v. Unemployment Compensation Bd. of Review, 158 Pa. Super. 418, 45 A.2d 423 (1946). See generally Sanders, *Disqualification for Unemployment Insurance*, 8 VAND. L. REV. 307, 317-18 (1955).

38. J. I. Case Co. v. NLRB, 321 U.S. 332, 335 (1944).

This agreement by itself gives rise to no rights or obligations;[39] these can result only from the individual contract between employer and employee.[40] Although an employee may be forced to accept the terms of a previously negotiated contract or lose his job, his agreement to the contract is not thereby made any less "voluntary." Consequently, there appears to be no justification for courts to increase the scope of unemployment compensation by expanding the concept of "involuntary" unemployment.

Vulcan

Although it does not resolve the problem of statutory uncertainty, a recent Michigan Supreme Court decision, *Employment Security Comm'n v. Vulcan Forging Co.*,[41] has arrived at a more logical way of granting recovery in these cases. In *Vulcan* the collective bargaining agreement clearly stated that there would be a shutdown for vacations and that employees with less than a year's seniority would receive no vacation pay.[42] Nevertheless, the court held that even if these employees were off work voluntarily because they had accepted the terms of the collective bargaining agreement, the action of the employer in closing the plant pursuant to the agreement was "good cause attributable to the employer or employing unit." Apparently, the court based its reasoning on the idea that the unemployment resulted from a contract between two parties—employer and employee—and that the necessary and intended consequences of the contract (the temporary closing) are voluntary consequences vis-à-vis the employee, since they can be attributed directly to his voluntary action in making the contract. However, by a "parity of reasoning," the same consequences can be attributed just as readily to the employer or employing unit for *its* voluntary action in making the contract. The final result of the employer's voluntary action is what the court finds to be "good cause" for the temporary unemployment.[43]

The court's decision in *Vulcan* reflects an awareness of two basic

39. *Ibid.*

40. This does not necessarily require a signed document or even verbal agreement. In large companies, acceptance by the employee is usually implied from his continued service. Likewise, he may manifest his refusal of the contract conditions by quitting work.

41. 375 Mich. 374, 134 N.W.2d 749 (1965). *Vulcan* overruled prior state law. In I. M. Dach Underwear Co. v. Employment Security Comm'n, 347 Mich. 465, 80 N.W.2d 193 (1956), the court had held that employees unemployed and unpaid during a plant shutdown for vacations were not entitled to unemployment compensation because they were not "involuntarily unemployed." The court did not consider the "good cause" provision in *Dach*.

42. Section 64 of the contract provided: "Employee must be on seniority list on July 1 of the vacation year to be eligible for vacation pay . . . . Plant will close for vacation period of one or two weeks during July or August . . . ."

43. Employment Security Comm'n v. Vulcan Forging Co., 375 Mich. 374, 380, 134 N.W.2d 749, 752-53 (1965).

realities about the statutory language. First, it seems to recognize that, notwithstanding sound insurance principles, state unemployment compensation provisions do not prevent a man who has left work voluntarily from receiving unemployment compensation unless he has also left "without good cause attributable to the employer or employing unit." Second, the decision recognizes that the disqualification section neither mentions fault nor contains any provision requiring that an employee prove employer culpability.[44] Yet, while the parity of reasoning used in *Vulcan* may provide a more satisfactory basis for a result which many courts now consider desirable, it also serves to magnify the inadequacy of the statutory language. The argument simply recognizes that unemployment based on a contract cannot be attributed to only one contracting party. What is voluntary action by the one can logically be considered "good cause" attributable to the other. Under this line of reasoning, there cannot be a situation where unemployment based on the contract is voluntary, but without good cause attributable to the employer or employing unit. However, it is doubtful that any court will be willing to grant recovery in *every* case in which unemployment results from a contractual arrangement.[45]

Legislative Clarification Needed

The need for legislative clarification of the benefit rights of the worker whose contract requires an unpaid vacation is clear. A number of states have already recognized this need and have enacted specific statutory provisions dealing with the problem. Although a few of the provisions have disqualified employees,[46] the majority of these provisions have expressly excluded them from the operation of the disqualification section.[47] On the whole, the latter provisions

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44. West Virginia is the only state in which the disqualification provision for voluntary leaving is couched in terms of fault or wrongdoing. W. VA. CODE ANN. § 2366(78)(1) (Supp. 1965) declares that an employee is disqualified if he left work "voluntarily without good cause involving fault on the part of the employer." However, West Virginia has also enacted a statutory provision to protect the worker on vacation without pay, unless his employer had "no other alternative" than to shut down. See W. VA. CODE ANN. § 2366(78)(9) (Supp. 1965).

45. See *In re* Malaspina's Claim, 309 N.Y. 413, 131 N.E.2d 709 (1956); Lybarger Unemployment Compensation Case, 418 Pa. 471, 211 A.2d 463 (1965); O'Donnell v. Unemployment Compensation Bd. of Review, 173 Pa. Super. 263, 98 A.2d 406 (1953).

46. Two states have enacted provisions which explicitly disqualify the employee. ARIZ. REV. STAT. ANN. § 23-775(4) (1956); VA. CODE ANN. § 60-46 (Supp. 1964). Two others have greatly limited the period for which he can recover. GA. CODE ANN. § 54-609(c) (1961); N.C. GEN. STAT. § 96-13(3) (Supp. 1965).

47. ILL. ANN. STAT. ch. 48, § 440 (Smith-Hurd Supp. 1965); ME. REV. STAT. ANN. tit. 26, § 1192(3) (1964); MD. ANN. CODE art. 95A, § 4(c) (1964); MASS. GEN. LAWS ANN. ch. 151A, § 1(r)(2) (1957); N.Y. LAB. LAW § 591; OHIO REV. CODE ANN. §§ 4141.29(D)(2), .31(A)(7) (Page 1965); PA. STAT. ANN. tit. 43, § 753(u) (1964). Some states allow recovery unless the vacation shutdown is the result of the employee's own action rather than a result of collective bargaining. NEB. REV. STAT. § 48-627(2) (1960); N.J. STAT. ANN. § 43.21-4(c) (1962); R.I. GEN. LAWS ANN. 28-44-21(a) (1956).

seem to be based on sounder policy considerations. In the first place, they eradicate distinctions based solely on the terms of collective bargaining contracts. At the present time, in most states an employee whose plant customarily suspends operations for an unpaid vacation or layoff each year can receive unemployment compensation if, but usually only if, the suspension is not designated in his collective bargaining agreement.[48] While none of the workers has sought the shutdown, they all know that their temporary unemployment will occur. Furthermore, the plants close not in an attempt to benefit the employees, but for reasons dictated basically by the employer's desire for efficient production. Consequently, the present distinctions based on provisions in collective bargaining agreements seem to serve no purpose and should be removed. Second, the provisions give a measure of financial security to workers who might otherwise begin a job only to find themselves temporarily off work without even the income they might have had if they had remained on unemployment relief. Third, such provisions give needed protection to the bargaining interests of employees who are not safeguarded by the seniority system. As noted earlier, vacation pay is generally based on the length of an employee's service; while employees with seniority receive almost full wages, employees hired within the past year are often totally ignored by the union and company bargaining agents. Employers will not be able to continue to ignore the interests of these employees, however, if they are receiving unemployment benefits, since unemployment compensation is financed in all states by employer contributions.[49] Each employer contributes a percentage of the wages he has paid to employees during the year to the state unemployment fund. This percentage is flexible, and is determined by the total amount of unemployment benefits paid to workers who have become or have remained attached to the labor market through service with the particular employer. Consequently, the financial loss suffered by the employer depends on his ability to keep his workers from becoming unemployed and eligible for benefits.

From the employer's standpoint, legislation allowing employees unemployment compensation during vacations may seem unduly burdensome. If the employer denies vacation pay, he must pay indirectly for unemployment benefits. If he attempts to give new employees a paid vacation, he may destroy some of the incentive of the seniority system, and may not be able to persuade union bargaining agents to accept such a provision. He would also be faced with the possibility of employees accepting a job just for the vacation, and then quitting rather than returning to work at the end of the vaca-

48. See cases cited in notes 10, 11, & 27 *supra*.

49. Several states also collect from employees. There are numerous differences among the provisions in each of the states. See BUREAU OF EMPLOYMENT SECURITY, U.S. DEP'T OF LABOR, COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS 17-46 (1964).

tion period. Furthermore, the employer gets no benefit from the money he is required to pay into the state unemployment compensation fund. Nevertheless, an annual unpaid vacation shutdown appears to be the type of industrial condition against which the unemployment compensation act was designed to protect the employee. The shutdown is generally not sought by the employee, but is rather a device used by the employer to increase production efficiency. Were it not for the decreased efficiency, the employer could simply stagger vacations and allow the employees not entitled to vacation to work during the entire year. Consequently, the shutdown may be deemed attributable to "economic causes."[50]

In addition, such legislation would allow a practical solution which is beneficial both to the employer and the employee. Since shutdowns are usually times for general maintenance work, the employer may be able to avoid the effect of the recommended legislation by giving the new employees an opportunity to work during the vacation shutdown. Of course, complaints might be registered by senior employees who also want to continue working. Furthermore, there will be instances in which no work is available or when union contracts prevent production workers from performing maintenance work. If these difficulties cannot be overcome, such a solution is probably infeasible. Usually, however, the companies that close for vacation have small factories without large maintenance crews. Since the number of new employees in such factories is customarily small, these companies should be able to provide most or all of their new employees with unskilled maintenance work while production operations are closed. By providing the new employees with this work, employers can receive beneficial service for their money and can avoid the unsatisfactory alternatives of financing unemployment compensation or attempting to grant all employees vacation pay.

Conclusion

Despite the recent judicial trend toward granting unemployment benefits to workers for periods of required vacation without pay, the ability of an employee to recover in any given situation still remains uncertain. Since the statutes have generally not been drafted with this problem in mind, the courts have been forced to draw distinctions which are difficult to justify under the statutory language. Furthermore, their conclusions lack a sound policy basis. To serve best the policies of the unemployment compensation acts and to give needed protection to the interests of the employee, all states should enact legislation permitting eligible workers to recover unemployment compensation while their plant is temporarily closed pursuant to a collective bargaining agreement.

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50. See authorities cited note 6 *supra.*