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Update on Unemployment Compensation

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UPDATE ON UNEMPLOYMENT COMPENSATION

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First of all, as a resident of our fair city, I would like to welcome all of you to New Orleans and assure you that if we can be of any assistance to you personally in trying to give you any ideas as to where you should go and what you should do, we would be most happy to do so. I might just add for those of you who might be interested in a sort of busman's holiday by foot, which would take you very little time, that the United States Fifth Circuit Court of Appeals is located within two blocks of the hotel here in a very impressive old building, which architecturally I think you would find interesting, and some of the arguments and comments of the Fifth Circuit might also prove interesting. It is a rather forceful bench.

The subject that we have been asked to discuss this morning involves the imposition of the Federal Unemployment Tax, through the states, on church-related elementary and secondary schools. I think for the benefit of those of you who perhaps have not been directly involved in this situation, a brief historical overview of how this has come about might be appropriate.

The Federal Unemployment Tax Act,[1] sometimes referred to as FUTA, was amended by the Congress in 1976. Specifically, the Congress amended what is codified in Title 26 as sections 3301 through 3309. These sections were amended to remove exemptions that had heretofore existed for educational institutions below the level of higher education. Thus in 1976, by reason of this amendment, Congress for the first time attempted to extend the scope of coverage of Federal Unemployment Compensation to employees of elementary and secondary schools.

There was, however, retained in section 3309(b) of the Act, the previously existing and still existing exemption of "persons in the employ of a church, or convention or association of churches, or in the employ of an

[1] 26 U.S.C. §§ 3301-3311 (1976).

organization that is operated, supervised, controlled or principally supported by a church or convention or association of churches."[2]

The effect of these congressional enactments was to attempt to broaden the coverage of state unemployment programs through the vehicle of threatened withdrawal of federal certification of any state that failed to adopt conforming amendments to their respective state unemployment laws. The practical effect of such decertification by the Secretary of Labor, would be to cut off certain federal funding to state programs, and, more significantly, to deny a tax credit against federal unemployment payroll taxes paid by employers in the several states on behalf of their employees. Therefore, under the federal statutory scheme, the states, to some degree, were financially compelled, under the threat of withdrawal of federal financial support, to enact conforming legislation by January 1, 1978.

While most states, including Louisiana, have enacted such amendments in order to conform their state unemployment laws to the Federal Act, some have failed or refused to do so, I think most notable of which is New Hampshire, which is now engaged in a confrontation with Secretary Marshall over decertification.

Subsequent to the amendments Secretary of Labor Marshall promulgated an interpretive opinion construing section 3309(b) as requiring state unemployment coverage to extend to employees of all private nonprofit elementary and secondary schools, including church-related or church-sponsored elementary or secondary schools. As a result thereof, many states, fearing decertification, have followed the mandate of Secretary Marshall's opinion and have required church-related elementary and secondary schools of all denominations to file informational forms with the State Department of Labor and to begin the payment of unemployment tax on either a basis of direct payment or on the basis of a reimbursable method which is optional to nonprofit corporations. The reimbursable method is a system whereby the entity does not have to pay in advance an estimated or fixed percentage of the tax, but rather is obligated to reimburse the state for any sums which the state may have to pay out to an employee who has been given the benefit of unemployment compensation.

Consequently, this spectre of substantial, continuing, and additional costs to the private church-related school has compelled a number of dioceses to consider a litigational challenge to the imposition of this tax on church-related schools. Over the past year and a half, I think there has surfaced substantial lack of unanimity on the question of whether the Church should take a position in opposition to the payment of unemploy-

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[2] 26 U.S.C. § 3309(b) (1976).

ment tax. Most of this opposition, as I appreciate it, has been directed toward the social justice argument that churches and schools ought to be giving these kinds of social benefits and not attempting to escape from such a governmental mandate. I think that argument, however, overlooks the basic problem that we envisage in the legislative scheme which does not concern itself as much with the social aspect of whether employees should be compensated after termination of their employment during a period of unemployment, but basically the extent to which the government, through a state department of labor or other state agency, will be allowed to interject itself into the determination of whether a terminated employee is or is not entitled to unemployment benefits on the basis of the justification of the termination of that employee, or perhaps also whether the state, through this mechanism, can justifiably impose a financial burden and penalty on a private church-related school which desires to terminate one or more members of its faculty, and the resulting chilling effect which that may have on the freedom of that school to determine, for a variety of religiously-oriented reasons that a particular teacher or teachers should be terminated.

On those premises, the Louisiana Catholic Conference, comprising the five dioceses in the state, determined that the Catholic Conference would initiate litigation. This was not done, however, without a great deal of soul searching, as well as conference and consultation with George Reed's office and others who were involved in a similar problem.

I would like now to turn to a consideration of the litigational challenge and what we perceived immediately to be rather substantial procedural obstacles to the initiation of this challenge. Initially, I think the "knee jerk" reaction of any constitutional trial attorney is to respond to this type of challenge with a federal court suit seeking declaratory or injunctive relief against the Secretary of Labor on first amendment theories. Those of us who were tempted to plunge into this legal abyss were blessed, however, with the benefit of recent case law that made it obvious to us that there were formidable procedural obstacles to such a federal challenge to Public Law 94-566. We had the benefit of the decision in December, 1977 of the Federal District Court for the District of Columbia in the case of *County of Los Angeles v. Marshall.*[8] This suit was filed by seven states and over a thousand counties and municipalities challenging the amendment with which we were concerned, but it sought to broaden the coverage of unemployment insurance to state, municipal and county workers, heretofore exempt from the law, as were our elementary and secondary schools. Plaintiffs in that suit sought injunctive relief.

Ruling on preliminary motions to dismiss, District Court Judge

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[8] 442 F. Supp. 1186 (D.D.C. 1977).

Charles Richey found that the Federal Anti-Injunction Act barred injunctive relief against the implementation of the statute, specifically finding under Title 26 of the U.S. Code section 7421, a prohibition against any suit in the federal courts to restrain the collection of a tax. This alerted us to the fact that we were engaged in litigation which primarily and fundamentally involved a challenge to the imposition of a tax at either the federal or state level. This aspect of the case, therefore, immediately made it evident that we were faced with these same procedural difficulties.

Research into the matter disclosed that the only exceptions to the rule are in circumstances where it could be established preliminarily that the government would have no chance to prevail as a matter of law, or where there would be no other adequate legal access to judicial review by any other mechanism in any other forum. Judge Richey, in *County of Los Angeles,* found that there was such redress and remedy through other vehicles, and therefore dismissed the plaintiffs' suit on jurisdictional grounds.

To further complicate the matter, we were also faced with a bar to declaratory relief by reason of section 2201 of the Federal Declaratory Judgment Act.[4] This section specifically prohibits declaratory relief in any suit involving federal taxation except in certain isolated tax matters such as a qualification review of 501(c)(3) corporations or the review of a jeopardy assessment, none of which fit the mold of our case. The only apparent exception that could be discerned by those of us who were looking into this matter of the federal forum was the premise that there is no other adequate access to judicial review. This argument perhaps could be made to sustain federal standing to sue under the concept which was basically announced in a district court case involving the National Restaurant Association which attempted to and successfully obtained injunctive relief against the Internal Revenue with respect to the declaration of income by employee waiters who were not declaring income by way of tips. We in Louisiana, however, decided not to go to federal court because of the obstacles involved and opted instead to go to state court. There were, however, additional procedural obstacles to overcome. I mention this for the benefit of those of you who may be considering litigation in this area in your own state forums.

The Louisiana State constitution contains an article which specifically prohibits any injunctive relief against the collection of any state tax. There is corresponding language contained in our Revised Statutes. The statutes, however, provide a remedy for redress against the imposition of any tax, if the tax is paid under protest to the State Department of Reve-

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[4] 28 U.S.C. §2201 (1976).

nue. Subsequently a suit may be filed to recover, by way of refund, the tax paid and also to have a declaratory judgment as to whether the tax has been rightfully imposed.

A further dilemma confronting us in the early part of 1978, however, was that all of the dioceses in Louisiana already were brought under the aegis of the state unemployment law by reason of Secretary Marshall's opinion and were required to file informational forms with the State Department of Labor, under protest, indicating the number of schools, the number of employees, etc., and further were required to opt for either the direct tax payment or the reimbursable method of taxation. All of the schools had, therefore, opted for the reimbursable method, which meant that we were not going to be in a position to pay any tax until such time as, during an appropriate quarter of 1978, some teacher had been dismissed and had, in fact, collected unemployment benefits, which only then would be reimbursable to the State Department of Labor. The chronology and timing therefore was such that it was not until the third quarter of 1978 that such an event actually occurred. We therefore finally had a viable taxpayer in the form of one or more elementary or secondary schools which had been assessed a tax which could be paid under protest to trigger the filing of a state court suit. So it was not until the fall of last year that we were finally able to get into a state court, and that suit now has been filed in the state district court against the State Department of Labor and a trial is pending.

In the meantime, out of an abundance of precaution, we had filed a protest with the State Department of Labor, and had requested an administrative review and hearing on the matter. We went through the pro forma hearing and got the State Secretary of Labor to issue an opinion following Secretary Marshall's opinion to the effect that we were indeed covered by the state unemployment law by reason of the amendments previously adopted by the legislature. So we made sure, before we initiated the suit, that we had exhausted all of our administrative remedies as set forth in our state Administrative Procedure Act. And I would commend to you who are contemplating suit to review your state's Administrative Procedure Act, if such exists, to ascertain whether you must go through that process prior to the filing of suit.

Let us now consider briefly the litigational challenge, the constitutional arguments and the substantive issues which perhaps can or should be made. As we envisage the approach to the first amendment religion clauses challenge, it may be a dual, or perhaps a threefold, approach. Initially, from the statutory language of section 3309(b), there is still in the statutes, both state and federal, a specific exemption for organizations that are "operated, supervised, controlled or principally supported by a church," and Catholic elementary and secondary schools, therefore, would fit this mold. It was on the basis of that concept that a Chancery Court in

Mobile, Alabama, has recently held that the imposition of unemployment compensation laws in the state of Alabama is not valid because of the exemption which is specifically granted in the state and federal law. The court's finding was that there is, in fact, a substantial identity between the school and the church entity which operates and controls it.

While there is ample precedent to support this proposition in such cases as *Waltz, Lemon, Nyquist, Meek* and *Wolman,* and I think the argument should certainly be made as a part of the challenge, nevertheless, we feel this approach involves perhaps some inherent dangers that would persuade us to place less emphasis on it as forming the primary constitutional basis for a decision than other arguments in support thereof. The first danger is that the argument must be articulated with care and precision so as to avoid, as much as possible, placing the court in a position of being given either opportunity, or perhaps being compelled, to define what the term "church" involves. I think we should not attempt to try and persuade the court that the ultimate definition of the term "church" must necessarily include elementary and secondary schools.

Secondly, when confronted with the problem of fitting nondiocesan private secondary schools such as those operated by religious orders of women and men into this mold, we perhaps fall short of the mark when we talk about "primarily supervised, operated and controlled by the church." I would think that we ought to stay clear of that argument as much as possible with that category of school, having in mind principally the federal decision of several years ago in the Christian Brothers Winery case[5] where the court looked at the nature of the Brothers of the Christian Schools and said that for purposes of federal taxation on the winery, you are not a church. So, if you happen to be in a location where you have a Christian Brothers high school that forms a part of your litigational challenge, you are going to have to handle that issue with some delicacy.

Perhaps the less difficult approach appears to be an establishment or religion clause argument premised on the excessive entanglement theory in the light of the very recent *NLRB v. Catholic Bishop of Chicago*[6] decision. In any argument based on the lack of legislative intent to include church-related schools in the statutory scheme, the entanglement argument should be made so as to avoid the issue of the religious nature of the school itself. Rather, it should concentrate on what really becomes more of a free exercise argument, which I suppose, would be bottomed on *Wisconsin v. Yoder*[7] and its progeny, as applied to the teacher in the Catholic school setting. By that I mean that, as the Amish were granted their free exercise right to reject materialistic, formal education in its en-

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[5] De La Salle Inst. v. United States, 195 F. Supp. 891 (N.D. Cal. 1961).
[6] 440 U.S. 490 (1979).
[7] 406 U.S. 205 (1972).

tirety, so also do church-related schools have an analagous right to structure Catholic education along broad Judeo-Christian lines, which particularly and most importantly requires not so much curricular content, but rather personal commitment on the part of teachers and faculty to those moral and social values consistent with the Catholic philosophy of education. The particular nexus between the first amendment principles in this regard and the challenged unemployment law lies principally in the administrative scheme of the determination of entitlement of the terminated employee to benefits.

For the most part, under state laws, the employee is entitled to unemployment benefits only in those instances where his or her termination has been without justifiable cause. There is a substantial body of jurisprudence and case law, at least in Louisiana, involving judicial review of a Department of Labor's decisions as to whether or not an employee has been terminated for cause, and *ergo* is entitled to unemployment benefits. Therefore, the state must, if the law applies to elementary and secondary Catholic schools, inevitably involve or substantially entangle itself with school policy in reaching that particular issue as to entitlement. In situations where the termination was premised on religious, moral or personal lifestyle grounds, it would require the reviewing authority to substitute its judgment for that of the school administration in such very delicate matters as to specifically whether the termination of employment was based upon religious or moral grounds, or whether the termination of employment was consistent with the moral principles or the religious principles of the particular faith, or perhaps was an unreasonable or unjustifiable interpretation or application of those principles by the school's governing authority. I think we can find ample language in almost any of these recent church-state cases to give rise to great concern over the kind of involvement of the state in determinations by a church-related school of its operation and policies.

Furthermore, I think we can make an argument that the mere prospect of the extension of unemployment benefits to terminated teachers has the obvious result of creating a serious chilling effect on the free exercise rights of the school to terminate its faculty when faced with the spectre of substantial financial impact as a result of such termination. Finally, and perhaps most effectively, the argument should be made that there is nothing in the legislation or the legislative history of the 1976 amendments by the Congress, or in state legislation, to indicate that either the Congress or the states ever intended that these changes in the unemployment law result in coverage of church-related school employees. The amendment, as originally adopted, simply deleted the negative exclusion of the prior law which said that unemployment would not extend to employees of other than higher educational institutions. There is no language whatsoever to indicate the scope or breadth of the intent of the

Congress. Our research indicates that the legislative history of the 1976 amendments, in terms of the debates before the Senate Finance Committee and House Ways and Means Committee, contain no enlightenment as to the intent of Congress in this regard. This approach was initially made, I think, or suggested by U.S.C.C. as one of the many arguments that can be made in support of the exclusion of our schools prior to the *NLRB* case.

However, with the advent of the *NLRB v. Catholic Bishop of Chicago* decision, this approach perhaps takes on some special significance. The Court in the *NLRB* decision, and I have to confess that I have not thoroughly analyzed it but only given it somewhat of a cursory reading, appears to adopt an approach that is very analogous to reading an Alfred Hitchcock mystery novel. You think you're going to find out who the villain is, and everything tends to make you believe that you know exactly who it is, until you get to the last chapter, and it turned out to be the maid instead of the butler. The Court leads you down a path of nine or ten pages of agreeing with the circuit court of appeals as to their analysis of all of the problems attendant to the entanglement of the National Labor Relations Board in the affairs of the Church in collective bargaining. Then it adroitly evades a collision with the claims that were made on the basis of the religion clauses. The Court concluded that it need not reach these delicate issues since it found "no clear expression of an affirmative intention of Congress that teachers in church-operated schools should be covered by the Act."[8] The Court simply concluded that, and again I quote from the Burger majority opinion: "Our examination of the statute and its legislative history indicates that Congress simply gave no consideration to church-operated schools."[9]

Therefore, after nine and one-half pages of *dicta* leading to what one would surely anticipate to be a significant first amendment pronouncement, the Burger majority opinion suddenly fell short of that mark and concluded with this brief statement: "Accordingly, in the absence of a clear expression of Congress' intent to bring teachers in church-operated schools within the jurisdiction of the Board, we decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses."[10] Affirmed.

This language may be of considerable comfort to us in the unemployment cases since neither the legislative history of the 1970 FUTA amendments nor that of the 1976 amendments gives any explanation or indication that Congress had in mind the coverage or the absence of coverage of

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[8] 440 U.S. at 504.

[9] *Id.*

[10] *Id.* at 507.

church-related schools within the federal unemployment scheme. Since the legislative history gives no enlightenment, I think we ought to make that argument. We have, looking at the *NLRB* case, some reservations that we ought to make as to whether we can simply plunge in to a facial attack on a state or federal unemployment act premised entirely on the language of the *NLRB* decision. I say that because, at first blush, it would appear to me that what the Court has done initially, as a fundamental basis to its conclusion that we ought to keep hands off here, is to make a sort of backwards finding that there would be the potential of significant excessive entanglement of government with the affairs of church if the Act were to be implemented. The first nine pages of the opinion substantially express the concern of the Court, and clearly, in many instances, indicate that the Court believes that this statutory scheme has the potential of creating real first amendment problems which they are not inclined to rule on. By that I mean I do not know, at this time, whether we simply could go in such a suit as the unemployment case and, relying upon the language of the Burger opinion, seek summary judgment on the basis of affidavits or exhibits, claiming that it fit the mold of the *NLRB* case, without first demonstrating factually that the imposition of unemployment laws on church-related schools would have at least the potential of excessively entangling the state and the federal government with the affairs of church. I say that because I cannot really believe that the Court is going to be willing to extend this logic of the *NLRB* case to all federal legislation, and, I would presume, to state legislation as well because of what the Court has said in the *Cantrell*[11] case, applying the first amendment to the states. That is, in all instances of federal and state legislation where there is no clear and evident indication that either Congress or a state legislature intended church-related schools to be covered, they are going to be excluded. It would seem to me that the Court is going to have to stop short of that kind of a conclusion, because if we go to that extreme, we are talking about perhaps questioning the right of the state to control elementary and secondary nonpublic education in such fundamental areas as health and safety, minimum standards of education, and compulsory attendance laws. I know there are some substantial body of legal scholars who would contend perhaps that the government does not have the right to get into that area, but recent opinions suggest the contrary.

I think the Court would likewise have difficulty in extending this logic to Title VI, section 1981 civil rights claims involving federal funding of church-related schools. The Court would undoubtedly have difficulty reconciling that concept with what they have said already in this area

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[11] Cantrell v. Forest City Publishing Co., 419 U.S. 245 (1974).

under section 1981 civil rights claims in *Runyon v. McCrary.*[12] It would appear that the *Runyon* case, although it involved private nonsectarian schools, would have to be squared with that concept. It would seem to me that what the Court is perhaps saying in *NLRB* is that you need a fact case giving rise to first amendment entanglement concerns before it would be willing to adopt this approach.

Now, finally, as an update on what has occurred, I think I should give you a little bit of background on the state of litigation pending elsewhere than Louisiana. As I say, this case is pending in the district court and hopefully we will have a hearing on the matter before the end of the summer, after we decide how we will present our case. In January of this year, the Alabama Circuit Court of Mobile County did render a very favorable and well-reasoned opinion in the case of *Trinity Lutheran Church v. Alabama Department of Labor.* I would commend that opinion to you for reading and analysis if you are involved in this kind of litigation.

There was a federal court suit filed by the Baptists in Memphis, Tennessee. That case, however, was dismissed on jurisdictional grounds because of the Anti-Injunction Act and Anti-Declaratory Judgment Act or perhaps on grounds of prematurity.

There was another state court suit filed in Tennessee, in Chattanooga, and this resulted in a favorable decision in favor of another denominational group. I understand that the Diocese of Nashville has likewise filed a suit in Tennessee. So Tennessee apparently is very active in this area.

There are also suits, as I understand, by the Lutherans in Iowa, the Baptists in Georgia, and there is a very favorable opinion by the Attorney General in Michigan, and a favorable administrative appeal decision by the Department of Labor in Oregon, all of which tends to support the theory that we can prevail in this case, although it is going to be rather touchy as to how the constitutional argument is presented. I feel that all of us who have studied this matter are very much concerned that the issue of the identity of the church-related school with the church itself be handled with some delicacy because a judicial definition in this area may have farreaching impact in other areas of church-state relations, particularly in the area of how, when, and where church-related schools can be the beneficiaries of financial aid.

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[12] 427 U.S. 160 (1976).