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Book Reviews

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BOOK REVIEWS

Investigating Employee Conduct

by William E. Hartsfield
Callaghan & Company
155 Pfingster Road
Deerfield, IL 60015
\$85

The rapid development of employment law (to which the Spring 1989 issue was devoted) has been marked by the publication of increasingly specialized treatises and practice manuals, including the two volumes under review. By coincidence, both were written by Texans.

Investigating Employee Conduct, by William E. Hartsfield is a concise, thorough and scholarly work, which reflects the author's attempt "to balance respect for the personal dignity of the employee and the reasonable business needs of the employer." The scope of the book is impressive: Hartsfield addresses current issues surrounding the investigation of employees, provides suggested answers, and speculates upon probable future problems. Issues are examined from the point of view of both the employer and employee. The discussion includes public and private employers, union and nonunion employees, state and Federal law.

Part I (a brief introduction to the book) lists seventeen investigative tools available to employers and describes twenty-six avenues of legal redress open to employees. Part II deals with employer investigations, discussing searches (When is a search by a governmental employer exempt from the Fourth Amendment? When is the Fourth Amendment implicated in searches by private employers?), medical examinations, interviews, polygraphs, surveillance, wire taps, eavesdropping, credit reports, arrest and conviction records, fingerprints and pen registers. It discusses the employer's right of discharge, its obligation to rehabilitate offending employees, and its liability for violating employees' rights. It concludes with a selection of forms and checklists to be used by employers.

The final section of the book (Part III) describes various employee rights and causes of action: anti-discrimination laws, unemployment compensation, wrongful discharge, arbitration, and others. An appendix containing twenty-six subdivisions

summarizes the applicable Federal and state laws. The book concludes with a table of cases and a workable index.

In this reviewer's opinion, Investigating Employee Conduct is a nearly ideal research tool. It encompasses almost every important issue in this rapidly expanding area of the law. Leading U.S. Supreme Court and other Federal cases, including the most recent, are cited and explained. Federal regulations, executive orders and arbitrators' awards are analyzed. Most significantly, the very difficult task of identifying and summarizing the important issues of state law has been accomplished with accuracy and precision.

The text is short and scholarly; the citations are well selected. In accordance with the book's purpose as a counseling guide, it is replete with specific suggestions for employer and employee action. Its looseleaf format implies that it will be kept current. Investigating Employee Conduct, by William Hartsfield is highly recommended.

Employee Non-Competition Law

by Donald J. Asperlund and
Clarence E. Eriksen
Clark Boardman Company, Ltd.
435 Hudson Street
New York, NY 10014
\$85

Employee Non-Competition Law, by the late Donald J. Asperlund is a longer book on a narrower (albeit important and difficult) topic. The law in this area is largely non-statutory, and the author draws heavily on Texas precedents. Authority from most American jurisdictions is cited, but the treatment is uneven. For example, the author quotes Community Counseling Services, Inc. v. Reilly, 317 F.2d 239 (4th Cir. 1963) as follows (Section 5.03):

Employment as a sales representative demands of the employee the highest duty of loyalty. . . . Until the employment relationship is finally severed, however, the employee must prefer the interests of his employer to his own. During such a period, he cannot solicit for himself future business which his employment requires him to solicit for his employer. If prospective customers undertake the opening of negotiations which the employee could not initiate, he must decline to participate in them. Above all, he should be candid

with his employer and should withhold no information which would be useful to the employer in the protection and promotion of its interests.

However, the recent New York case of Mal Dunn Associates, Inc. v. Kranjac, --A.D.2d--, 535 N.Y.S.2d 430 (2nd Dept., 1988), decided after the book was published, adheres to a rather different line of authority:

As noted by the Appellate Division, First Department, in the case of Scott & Co. v. Scott, 186 App. Div. 518, 524, 174 N.Y.S. 583:

"[a]s early as 1799 in a case (Nichol v. Martyn, 2 Esp. 732) in which a traveling salesman on the occasion of his last trip and while still in the plaintiff's employ, informed the customers from whom he had been soliciting orders for the plaintiff that then he would shortly go into the same business for himself and that he would be pleased to accept their orders for himself, the complaint was dismissed, Lord Kenyon saying: 'A servant while engaged in the service of his master, has no right to do any act which may injure his trade or undermine his business; but everyone has a right if he can to better his situation in the world; and if he does it by means not contrary to law, though the master may be eventually injured, it is damnum absque injuria. There is nothing morally bad, or very improper in a servant, who has it in contemplation at a future period to set up for himself, to endeavor to conciliate the regard of his master's customers and to recommend himself to them so as to procure some business from them as well as others.'"

Other objections of a similar nature may be raised against Employee Non-Competition Law, which was written during Donald Asperlund's terminal illness, and completed by another attorney.

Covenants not to compete constitute the heart of employee non-competition law. The context in which such contracts are made (in connection with the sale of a business or ordinary contract of hire or otherwise), their temporal and geographic scope, and the nature and extent of the activities prohibited may affect their construction or enforceability. These frequently litigated questions are given due coverage in the book.

Restrictions against the use of trade secrets, customer lists, and the like, standing as they do as an impediment to an employee's entrepreneurial initiative and pursuit of a livelihood, pose extremely difficult questions, the resolutions of which frequently turn upon the court's perception of economics and other global issues. The author recognizes the problem (Section 16.04):

As Mr. Justice Burrough noted in 1824:

I, for one, protest . . . against arguing too strongly upon public policy;--it is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail.

Asperlund's treatment of this issue is one of the more interesting aspects of the book. The publishers claim that Employee Non-Competition Law is "the first complete study of covenants not to compete." Whether it is complete or not, the book should certainly be consulted by those attorneys, particularly in the southwest, who are seriously concerned with this challenging legal topic.