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Recent Statutes

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KICK-BACK OF WAGES PROHIBITED.—The legislature of New York State, in an attempt to strengthen its laws with respect to the payment of contract wages and prevailing rates of wages, has seen fit to amend Section 962 of the Penal Law.[1] The practice of workers giving surreptitious "rebates" or "refunds" is not new in the law.[2] It is merely another form of indirection employed by unscrupulous persons seeking to evade the spirit of the law and yet remain within its letter. The situation with respect to the so-called "kick-back" of wages is like that which has faced the government when called upon to enforce fixed rates and uniform prices in various industries. Formerly it was the general practice of many purchasers of large quantities of goods to demand "special discounts" from their vendors. After the passage of the statutes prohibiting such "discounts", they demanded a "rebate" of a portion of the purchase price. The vendor, in many instances who was almost entirely dependent upon one or two large customers, would often, when faced with the alternative of complete economic ruin, accede to the demand. The resulting evil did not confine itself to the mere loss of some profits by the vendor. It also wrought havoc upon other purchasers who were then forced to compete with a larger company favored by these "special rates". In the case of the wage "kick-back" the employee is offered the same alternatives, *viz:* economic ruin or submission to the demand. Again the second course is often chosen. In this case also the resultant evil is not confined to the party directly subjected to the "threat". Persons who will not accede to these demands must compete against this "cheap labor".[3] Employers

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1. N. Y. Laws 1939, c. 851.

2. The question of surreptitious rebates seems to have arisen whenever the government has attempted to fix the price at which a person or corporation must sell his or its wares and services. The question first came into prominence in the latter half of the 19th century when, because of abuses and monopolistic tendencies on the part of certain private industries the government declared them to be "public utilities" or "fused with a public interest" and therefore subject to government regulation and control. See 41 STAT. 484, 49 U. S. C. § 13 (4) (1934) and opinion of Mr. Justice Hughes in Simpson v. Shepard, 230 U. S. 352 (1913). Various rates for the services of these particular industries were fixed by duly appointed commissions. Even this failed to check the evils at which they aimed. As late as June 1936 it was necessary for Congress to amend the Clayton Act, 38 STAT. 730-740 (1914), 15 U. S. C. § 12-27 (1934) by prohibiting the practice of giving rebates, discounts, allowances and special services to one competitor over another. 38 STAT. 730 (1911), 15 U. S. C. § 13 (1934); 49 STAT. 1526-1528 (1936), 15 U. S. C. §§ 13, 13a (Supp. 1938). This was done in order "to force price discrimination out into the open where they would be subject to the scrutiny of those interested, particularly competing buyers." Biddle Purchasing Co. v. Federal Trade Commission, 96 F. (2d) 687, 692 (C. C. A. 2d, 1938). This type of legislation, prohibiting rebates is beginning to appear in almost every instance where the legislature has decided upon a course of strict enforcement of rates fixed either by contract or by law. 48 STAT. 1070 (1934), 47 U. S. C. A. § 203 (1938) (prohibiting rebates by telephone and telegraph companies engaged in interstate commerce); 41 STAT. 479 (1920), 49 U. S. C. § 2 (1934) (by transportation companies engaged in interstate commerce). N. Y. PUBLIC SERVICE LAW (1907) § 31; (1930) § 65; (1913) § 79 (2); (1931) § 89b (2); (1910) § 91 (2) (prohibiting rebates by transportation companies, railroads, common carriers, gas and electric light companies, water supply companies and telephone and telegraph companies).

who do pay the required wage must also suffer in that they must compete with other employers in the particular industry who are having the same work done for them by employees working, in effect, at a lower wage.[4]

Prior to the recent economic depression, little was heard of this particular evil. While it is true that even during prosperous years many employees were paid appallingly low salaries, it was not necessary for the unscrupulous employer to resort to the kick-back method to accomplish his purpose. The employer had merely to refuse to pay the employee any more salary than that which he desired to pay. It was not necessary to resort to indirection until the legislature enacted statutes providing for "prevailing" and "minimum" wage rates.[5]

With the enactment of this legislation many employers themselves pressed on the one side by lack of business resulting from the economic depression, and on the other side by compulsory wage levels, attempted to reduce the actual cost of their payroll by compelling their employees to return a portion of their salary. While it is true that in many instances employers were seriously handicapped by the wage legislation, it is also true that many employers who could afford to pay the prevailing or minimum wage, were adamant in their refusal to do so. The evil was immediately recognized and the law enforcement officers searched for a controlling statute.

Since the compulsion to return a portion of the employees' salary usually took the form of a threat of discharge, the penal statutes most nearly applicable were those relating to "Extortion"[6] and "Coercion".[7] In December 1933 the Grand Jury of New York County indicted one Joseph Cuddihy, charging him with "extortion" and "coercion" in that he had secured a rebate of $17.50 from an employee by a "threat of unlawful injury to Flynn's [the employee's] property, to wit, to discharge Flynn and (*sic*) cause him to be discharged." A motion made to dismiss the indictment was granted[8] on the ground that the employee was a "free agent" and had no "property interest" in his position.[9] Despite the argument by the people, that the word "prop-

3. It will be noted that the major purpose of the wage statute *viz*: to bring about and maintain high standards of living becomes frustrated. The relative merits and demerits of the practice of fixing wage rates by statute or by contract is an interesting question. For excellent discussions of this topic see: Comment, *The Federal Wages and Hours Act* (1939) 52 HARV. L. REV. 646; Comment, *The Fair Labor Standards Act: Evils and Burdens in Interstate Commerce* (1939) 25 VA. L. REV. 341; Comment, *The Minimum Wage Law* (1936) 11 ST. JOHN'S L. REV. 78; Comment, *The Proposed Federal Legislation on Minimum Wages and Hours* (1938) 12 ST. JOHN'S L. REV. 292.

4. It is not only the employer who has engaged in this practice of forcing employees to turn back a percentage of fixed amount of his or her salary. It is also prevalent among unscrupulous labor unions and employment agencies. In these cases however, the injury falls not only upon the particular employees, but the employer may also suffer from the general let-down and possible sabotage by the disgruntled employees.

5. See for example: N. Y. LABOR LAW (1937) § 220 subd. 3 and § 550 *et seq.*; 52 STAT. 1062, 29 U. S. C. A. § 206 (1938).

6. N. Y. PENAL LAW (1917) §§ 850, 851.

7. N. Y. PENAL LAW (1882) § 530.

8. People v. Cuddihy, 151 Misc. 318, 271 N. Y. Supp. 450 (Gen. Sess. 1934).

9. Extortion is defined as being the "obtaining of *property* from another . . . with his consent, induced by a wrongful use of force or fear, or under color of official right." N. Y. PENAL LAW (1917) § 850. The fear induced "may be by an oral or written threat: 1. To do any unlawful injury to the person or property of the individual threatened. . . . " N. Y. PENAL LAW (1917) § 851. A person is guilty of coercion "who with a view to compel an-

erty" as used in the Penal Law with respect to the crime of extortion meant "any type or species of valuable right and interest no matter how small[10] and that under subdivision 3 of Section 530 of the Penal Law," the element of an injury to a *property right* is not necessary.[11] The Appellate Division affirmed without opinion and sustained the motion to dismiss.[12]

Immediately after the decision of the lower court, Section 962 of the Penal Law was passed.[13] This section provided that " . . . whenever an agreement for the performance of *personal services* required that that workmen engaged in its performance shall be paid the *prevailing rate* of wages, it shall be unlawful for any person, either for himself or any other person, to request, demand or receive either before or after such workman is engaged, that such workman pay back, return, donate, contribute or give any part or all of said workman's wages, salary or thing of value, to any person, upon the statement, representation or understanding that failure to comply with such request or demand will prevent such workman from procuring or retaining employment . . . ".[14]

This statute was, however, rather limited in scope[15] and its language faulty.[16] The courts held that the statute was limited to "personal service contracts" providing for the payment of the "prevailing rate of wages".[17] Although the court, in the case of *People v. Brill*,[18] indicated that the statute would cover contracts for *personal services* at the *prevailing rate of wages*, made by a labor union on behalf of its members, with the employer, the statute itself was none too clear on the subject.

In 1938 a bill was introduced[19] substituting the language: " . . . whenever any workman *engaged* to perform *personal services* shall be promised an *agreed rate of wages* for said services, etc." This bill passed both houses of the legislature but was vetoed by the Governor. The Court in the *Brill* case construed the fact that this bill failed to be enacted into law as evidence that the statute as first enacted "was intended to apply only where a contract for personal services", contained "a provision for the payment of the *prevailing rate of wages*."[20]

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other person to do or abstain from doing an act which such other person has a *legal right* to do or abstain from doing, wrongfully and unlawfully . . . uses violence or inflicts injury upon such other person or his family or a member thereof, or upon his *property* or *threatens* such violence or injury; or . . . uses or attempts the intimidation of such person by threats or force." N. Y. PENAL LAW (1882) § 530. (Italics inserted.)

10. Citing People *ex rel.* Short v. Warden of City Prison, 145 App. Div. 861, 863, 130 N. Y. Supp. 698, 699 (1st Dep't 1911).

11. Appellant's brief, p. 21.

12. People v. Cuddihy, 234 App. Div. 694, 277 N. Y. Supp. 960 (1st Dep't 1935).

13. N. Y. Laws 1934, c. 171.

14. Italics inserted.

15. People v. Brill, 255 App. Div. 452, 7 N. Y. S. (2d) 949 (1st Dep't 1938).

16. People v. Desowitz, 166 Misc. 1, 2 N. Y. S. (2d) 87 (Mag. Ct. 1938).

17. See People v. Brill, 255 App. Div. 452, 458, 7 N. Y. S. (2d) 949, 954 (1st Dep't 1938), Callahan, J. concurred in the ruling that the statute applied only to contracts for the "prevailing rate of wages"; but held that it applied to any such contract and not merely to one for personal services.

18. *Ibid.*

19. N. Y. Senate Bill, No. 398 (1938).

20. People v. Brill, 255 App. Div. 452, 455, 7 N. Y. S. (2d) 949, 953 (1st Dep't 1938). (Italics inserted.)

Oddly enough, the amended statute[21] entirely omits any limitation to "personal services" and uses the all inclusive term "labor". Further, the phrase "prevailing rate of wages" is also omitted and in its stead we have "an agreed rate of wages". Thus it is unlawful for a person, either for himself or any other person, to request, demand or receive, either before or after such workman is engaged, a return, donation of contribution of any part or all of said workman's wages, salary or thing of value, upon the statement, representation or understanding that failure to comply with such request or demand will prevent such workman from procuring or retaining employment, whenever any workman who is engaged to perform *labor* shall be promised an *agreed rate of wages* for his service, whether the promise be directly to the employee[22] or to a bona fide labor organization.[23] While the term "prevailing wage contract" is omitted from the new amended statute, nevertheless it is sufficiently broad to include such contracts within its purview, since a provision in contracts promising payment of the prevailing rate of wages[24] necessarily constitutes "a promise" of "an agreed rate of wages". Most salutary however, is the fact that no longer is the statutes confined to contracts providing for payment of the prevailing rate of wages,[25] but includes every contract for wages regardless of the rate agreed upon. The "rate agreed upon" must however, conform to the established minimum wage laws of the state.[26]

21. N. Y. Laws 1939, c. 851.

22. N. Y. PENAL LAW (1939) § 962 (2).

23. N. Y. PENAL LAW (1939) § 962 (3).

24. Public and Government contracts must contain such a provision. N. Y. LABOR LAW (1939) § 220 (3).

25. See People v. Brill, 255 App. Div. 452, 7 N. Y. S. (2d) 949 (1st Dep't 1938).

26. N. Y. LABOR LAW (1937) § 550 *et seq.*