

T h i r d E d i t i o n

Personnel Law



Kenneth L. Sovereign

THIRD EDITION

PERSONNEL LAW

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To my wife, Janet, who tolerates me

PREFACE

In all things, success depends upon previous preparation, and without such preparation there is sure to be failure.

CONFUCIUS

When the first edition of this book was published, U.S. Supreme Court Justice William Brennan stated that pregnancy was not sex related under Title VII (*General Electric v. Gilbert*, 429 U.S. 125 [1976]). There was no drug testing, a disabled person was not in the protected class under federal law, whistle-blowing was not a popular statute, and there was no legal definition of sexual harassment, it just happened. Statutes and court decisions have changed all this. The third edition includes these changes.

Since the publication of the second edition, many companies have realized the importance of safety and OSHA compliance. Chapter 15, "The Safety Law Connection," has been added to reflect this change. This chapter states the author's philosophy of a good safety program and OSHA compliance. The author has 18 years of experience as a safety director (one of many assignments as a personnel executive) and ten years as counsel representing man-

agement in OSHA cases. More than 18 years as a member and chair of the Minnesota OSHA Review Board are also reflected in this philosophy.

Commonly used personnel terms such as *man*, *attitude*, *probationary period*, *personality defects*, and *old* have different meanings under the law. These terms not only are obsolete but are now legally challengeable. Past practice must be reviewed, and many habits changed.

The book is a comprehensive and practical text. It tells what to do, how to do it, when to do it, and why. The author has been a personnel executive, consultant, and corporate counsel; has practiced law; and since 1979 has taught personnel law to managers. The text is unintentionally management oriented. With this background, it is difficult to be anything else.

Business failures, to a large extent, are caused by people's problems. Although the law prohibits discrimination, there is no law that prohibits good management. You can't legislate good management, but nothing prevents the employer from practicing it. In the "litigation-happy society" in the United States, a devastating lawsuit with high damage awards and large legal fees can have an important

effect on corporate profits. This book is a reference for practitioners who have the responsibility of the personnel function and for in-house counsel who deal with employment law.

This book is also designed for use in colleges and universities. A course in personnel law should be as important to a management and legal curriculum as business law. The trend in employee litigation will not cease unless preventive personnel law courses are required of future managers and lawyers.

The understandable, nonlegal language and humor will help the reader maintain an interest in the subject matter. The book will put the college student into the real world. It is especially useful to the beginner in personnel work who lacks training in the law when performing the personnel function.

Although there is an increasing intrusion of the law into the personnel function, it is better not to be a lawyer to be successful in human relations. A real danger would exist if the contributions of the personnel function to corporate goals were replaced by legal counsel. A strictly legal approach to the solution of a personnel problem is devastating to organizational survival and employee well-being. The legal counsel must understand the employee relations consequences of a decision. The manager must have some knowledge of the law before making a decision. Unless the manager and legal counsel recognize their roles, employee litigation will continue to increase.

The third edition of *Personnel Law* recognizes the term *human resource manager* as the most common title for the person performing the personnel function. This modern title is as controversial as the previously used terms *industrial relations director*, *personnel director*, and *employee relations manager*. The term *personnel* as used throughout this book includes past, present, and future job titles of persons who are assigned the personnel or human resource responsibility. It is also recognized that the term *personnel* is a dated term that did not include employment law.

The objective of *Personnel Law*, third edition, is to find an economical way for the personnel function to live with its law partner. It is not

concerned with the "latest fad" of the proper job title for the personnel function. The "bottom line" is best protected by preventing exposure to lawsuits. Good employee relations and legal practices are more important to corporate survival than the job title of the person performing the personnel or human resource function.

The third edition of *Personnel Law* continues the second edition's focus on trying to solve the turmoil in the workplace caused by the courts attempting to balance management interests with employee rights granted by Congress. It is impossible for the reader to comprehend and apply all the existing legal principles. Setting priorities is necessary.

The text is not intended to replace the legal counsel, but to help the manager know the permissible activity and make economic use of counsel.

The book is the author's interpretation of the subjects covered. It is not intended to constitute legal advice or consulting services. The cases cited are illustrative of the legal principles developed by the courts and their interpretation of the existing statutes. Editing and production schedules prevent research beyond July 1, 1993.

ACKNOWLEDGMENTS

The author is deeply indebted to personnel practitioners, legal associates, clients, and employees for their suggestions and encouragement. The combining of the law with the personnel function is a task that involves many different backgrounds and training. Special thanks to the 1000 or more personnel practitioners and attorneys who attended seminars conducted by the author, sponsored by management associations or educational institutions. The participants' practical suggestions and questions when field-testing in this complicated area were most helpful. Special recognition is given to Sue Moro, whose work habits and expertise in the use of the computer made the author's job easier.

The author takes full responsibility for any selection of the wrong case law or legal princi-

ples. Reaching the wrong conclusions from often confusing case law and statutes and setting wrong priorities is a risk that the author must accept.

The references are as current, accurate, and authoritative as possible. The unrestricted use of the State of Minnesota Law Library and University of Minnesota Industrial Relations

Reference Library was most helpful. The extensive research required by the subject matter would not have been possible if the writer had not had the cooperation of excellent staff from these two libraries.

Kenneth L. Sovereign

EMPLOYMENT LAW ABBREVIATIONS

ADA	Americans with Disabilities Act
ADEA	Age Discrimination in Employment Act
ADR	Alternative Dispute Resolution
B.R.	Bankruptcy Reporter (West)
BFOQ	bona fide occupational qualification
CDC	Centers for Disease Control
CEO	chief executive officer
COBRA	Consolidated Omnibus Budget Reconciliation Act
CRA91	Civil Rights Act of 1991
EEOC	Equal Employment Opportunity Commission
EPA	Equal Pay Act
ERISA	Employee Retirement Income Security Act
et al.	and others
et seq.	first page and section that follows
FLSA	Fair Labor Standards Act
INS	Immigration and Naturalization Service
IRCA	Immigration Reform and Control Act
IRC	Internal Revenue Code
IRS	Internal Revenue Service
LMRA	Labor Management Relations Act
MBO	management by objectives
NIOSH	National Institute for Occupational Safety and Health
NLRA	National Labor Relations Act
NLRB	National Labor Relations Board
OFCC	Office of Federal Contract Compliance
OSHA	Occupational Safety and Health Act
OSHA	Occupational Safety and Health Administration
OSHRC	Occupational Safety and Health Review Commission
OWBPA	Older Workers Benefit Protection Act
RIF	reduction in force
VPP	voluntary protection program
WAB	Weighted Application Blank
WARN	Work Readjustment and Retraining Notification Act

ABBREVIATIONS USED IN CITATIONS

A.2d	Atlantic Reporter, Second Series
BNA	Bureau of National Affairs—a looseleaf service
Cal.Rptr.	California Reporter
CCH	Commerce Clearinghouse—a looseleaf service
CFR	Code of Federal Regulations
EPD	Employment Practices Decisions (CCH)
F.2d	Federal Reporter, Second Series
F.Supp.	Federal Supplement
FEP Cases	Federal Employment Practices Cases (BNA)
FRD	Federal Rule Decisions
IRE	Individual Employment Rights
LA	Labor Arbitration Reports (BNA)
Lexis	Research data base that contains Federal and State court reports that relate to individual employment rights
LRRM	Labor Relations Reference Manual
N.E.2d	Northeastern Reporter, Second Series
N.W.2d	Northwestern Reporter, Second Series
NLRB	National Labor Relations Board Decisions and Orders
NLRB No. ____	National Labor Relations Board Decisions and Orders Advance Citations
NYS	New York Supplement
NYS2d	New York Supplement, Second Series
OSHA	Occupational Safety and Health Act
OSHRC	Occupational Safety and Health Review Commission
P.2d	Pacific Reporter, Second Series
P.L.	Public Law
RIA	Research Institute of America
S.Ct.	Supreme Court Reporter
S.E.2d	Southeastern Reporter, Second Series
S.W.2d	Southwestern Reporter, Second Series
So.2d	Southern Reporter, Second Series
U.S.	United States Reports (U.S. Supreme Court Reporter)
USC	United States Code
USCA	United States Code Annotated
WH	Wage and Hour Cases (BNA)

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