

# Rediger, McHugh & Hubbert, LLP

*Representing Management in Labor, Employment and Unfair Competition Litigation*

## LABOR AND EMPLOYMENT LAW REPORTER

Fall 2006

### Firm Relocates To Suite 1240 In Same Building

Rediger, McHugh & Hubbert, LLP has moved from Suite 1540 to Suite 1240 in 555 Capitol Mall. The law firm has traded its view of the Tower Bridge for one of the Capitol. It continues its steady growth by adding highly qualified professionals who represent employers in labor and employment law.



In September the firm added a law clerk and in October, an experienced litigator will be joining its ranks. The new suite also includes a second conference room for caucus during collective bargaining negotiations.

Clients of the firm are welcome to stop by at any time to see our new offices.

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### **Governor Signs Bills Increasing California Minimum Hourly Wages**

**By Robert L. Rediger**

On September 12, 2006, Governor Schwarzenegger signed Assembly Bill 1835 into law, raising California’s hourly minimum wage from \$6.75 to \$7.50 on January 1, 2007 and to \$8.00 on January 1, 2008. The increase in the hourly minimum wage will also impact employees who enjoy various exemptions from specified sections of the California Wage Orders.

Among the criteria that must be satisfied for an executive, administrative and professional employee to be considered “exempt,” for example, he or she must earn a monthly salary of not less than two times the minimum wage for full-time employment. An inside salesperson who is compensated on the basis of commissions must earn at least 1.5 times the minimum wage for all hours of work to maintain a partial exemption. Finally, an employer that is signatory to a collective bargaining agreement with a labor union that provides for premium wage rates for all overtime hours worked, and a regular hourly rate of pay of not less than 30 percent more than the minimum wage, is entitled to a limited exemption from the overtime provisions of the Wage Orders.

## Law Clerk Todd M. Ratshin Joins RM&H

**Todd M. Ratshin** has joined our firm as a law clerk while he awaits bar examination results. Mr. Ratshin is a 2006 graduate of the University of the Pacific McGeorge School of Law in Sacramento. He has served as a law clerk at the Commission on State Mandates and the Public Employment Relations Board. Before joining our firm, he worked with the Conflict Criminal Defenders assisting in the trial defense of criminal homicide cases. Mr. Ratshin received his B.A. in History from the University of Oregon in Eugene. He is an avid baseball fan, and enjoys cooking and reading on his time off.



Todd M. Ratshin

## Supreme Court Speaks: Wages Immediately Due When Short-Term Job Assignment Ends

By Laura C. McHugh

On July 10, 2006, the California Supreme Court ruled unanimously in *Smith v. Superior Court (L'Oreal)* that wages are immediately due to employees who are released without being fired after completing short-term assignments. In *L'Oreal*, a talent scout had recruited Smith, a hair model, for \$500 for a day's work of having her hair colored and styled at a hair show. L'Oreal waited over 60 days to send her a check. Smith sued for \$15,000 in waiting time penalties under Labor Code sections 201 and 203 (\$500 per day x 30 calendar days), claiming that L'Oreal willfully failed to pay her.

The issue presented was whether employees like Smith should be considered "discharged" under Labor Code 201, which requires immediate wage payment to employees who are "discharged." The high

court concluded that they should. The court noted, "Excluding employees like plaintiff from the protective scope of sections 201 and 203... would [expose them] to economic vulnerability from delayed wage payment" while at the same time, "employees who are fired for good cause would be entitled to immediate payment of their earned wages."

**Impact on Employers:** Final paychecks must be ready not only when employers discharge an employee, but also when a job simply ends. **Note:** The rules for *quitting* are different. Under Labor Code section 202, if an employee quits, wages must be paid within 72 hours thereafter, unless the employee gave 72 hours' notice of quitting, in which case the wages are due at the time of quitting.

## NLRB Clarifies (And Expands) The Definition of "Supervisor"

By Robert L. Rediger

On September 29, 2006, the National Labor Relations Board issued a trilogy of decisions setting forth its new interpretations of the terms used to determine who is a supervisor under section 2(11) of the NLRA, including the meaning of "assigning" other employees, responsibly "directing" others, and using "independent judgment." (*Oakwood Healthcare, Inc.*, *Golden Crest Healthcare Center* and *Croft Metals, Inc.*) The Board's new decisions will have an immediate impact in the context of union organizing, where the law protects the right of "employees" to join or not join a labor organization and allows an employer to demand "100% loyalty" from its "supervisors." It is likely that much litigation will ensue over the fact-sensitive analysis that must be undertaken when a union attempts to organize an employer's workforce that includes "foremen" or "lead persons." Some members of Congress have already promised legislation to overturn the Board's decisions.

Rediger, McHugh & Hubbert, LLP Presents  
**Employment Law “Essentials” For 2007**

Friday, January 5, 2007 – 9:00 a.m. to 12:00 p.m.  
The Sutter Club – 1220 9th Street, Sacramento

Registration begins at 8:30 a.m. with a continental breakfast  
Client cost: \$100.00 for the first person, \$75.00 for each additional person from your company  
(Cost includes seminar, breakfast, written materials and parking)

**Is your company in compliance with the employment laws that became effective in 2006? As part of an ongoing commitment to our clients, Rediger, McHugh & Hubbert, LLP will provide business owners, human resource professionals, supervisors and managers with the information they need to understand recent changes in the federal and state employment-related laws. The attorneys will also provide sample forms and required notices to assist employers when dealing with typical personnel-related matters.**

Topics To Be Addressed

- **Developments In California Employment Law in 2006**  
Decisions handed down by the California courts including in the areas of sexual harassment, whistleblower protection, retaliation, wage and hour including charge backs on commissions, at-will employment, workplace violence, privacy in the workplace, regulations regarding Sexual Harassment Training For Supervisors (AB 1825), noncompetition agreements, and more.
- **Developments In Federal Employment Law in 2006**  
Decisions handed down by the federal courts and administrative agencies, including legal and illegal provisions in an employee handbook, discrimination, retaliation, “no-match” social security number letters, minimum standards owed employees covered by a collective bargaining agreement, decisions of the NLRB that affect union and nonunion employers, and more.
- **Sample HR Forms and Policies, Required Posters And Notices For Use in 2007**  
Sample forms to discipline and discharge, permit make-up time, an on-duty meal period agreement, leave of absence request form, Certification of Health Care Provider, model timecard, required posters including Summary of Amendments To Wage Orders, and more.

In December, we will offer our half-day seminar to the public at a higher cost. Due to the popularity of our past annual seminars, preference will be given to clients of our firm who register early. Register now to ensure that you and your managers are prepared for employment-related issues that may arise in 2007! Please print information. Mail with a check for \$100.00 for the first attendee and \$75.00 for each additional attendee to Rediger, McHugh & Hubbert, LLP, 555 Capitol Mall, Suite 1540, Sacramento, CA 95814.

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Company: \_\_\_\_\_ Phone: \_\_\_\_\_

Address: \_\_\_\_\_ Email: \_\_\_\_\_

Attendees: 1) \_\_\_\_\_

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Park in The Sutter Club Garage located at 824 L Street - Downtown Sacramento

## Recent Developments

### **High Court Makes it Easier To Prove Retaliation Under Federal Law**

On June 22, 2006, the United States Supreme Court in *Burlington Northern and Santa Fe Railway Company v. White* held that an employee may succeed in a claim of retaliation under the federal anti-discrimination law (Title VII) where she shows that she was subjected to an action by her employer that would have been “material adverse” to a reasonable employee and was “harmful to the point that such actions could well persuade a reasonable worker from making or supporting a charge of discrimination.” In *Burlington*, after the plaintiff had complained that her immediate supervisor made insulting and sexual demeaning comments to her, she was assigned to dirtier and more arduous duties and suspended without pay for 37 days. Even though the employer reimbursed her for wages lost, the Supreme Court found that “a month without a paycheck is a serious hardship” and that “employer retaliation was not limited to actions that occur in the workplace.”

### **Employer Must Engage In The Interactive Process With An Employee It “Regards As” Disabled**

On June 2, 2006, a California Court of Appeal in *Gelfo v. Lockheed Martin Corp.* held that an employer has a duty to engage in an informal “interactive process” with an employee it “regards as” disabled. Reversing a lower court’s judgment, the *Gelfo* court held that whether or not an employee has an *actual* disability is irrelevant to an employer’s duty to engage in the interactive process. An employer’s focus must be on whether the employee is able to remain employed, despite his or her actual or perceived medical problem, and it must provide a necessary and reasonable accommodation to an applicant or an employee it regards as disabled.

### **Attorney May Verify DFEH Complaint For His Or Her Client**

On July 17, 2006, a California Court of Appeal in *Blum v. Superior Court* held that an administrative complaint of discrimination signed by a plaintiff’s *attorney* and filed with the Department of Fair Employment and Housing was sufficient to satisfy the “exhaustion” requirements of the California Fair Employment and Housing Act. The *Blum* court held that the “verification requirement” contained in the FEHA should be interpreted liberally so as to promote the resolution of potentially meritorious claims.

### **Employer’s Offer Letter To Employee Was Not Ambiguous As To Their “At-Will” Relationship**

On August 3, 2006, the California Supreme Court in *Dore v. Arnold Worldwide, Inc.* held that an employer’s offer letter to an employee indicating that “your employment is at-will” was not ambiguous as a matter of law even though the employer had defined at-will to mean that that either party could terminate the employment relationship “at any time.” The *Dore* court rejected the employee’s attempt to introduce verbal statements, conduct and documents to show that the employer had promised it would not discharge him “without good cause” and reinstated the trial court’s order granting the employer’s motion for summary judgment.

### **Discrimination Because Of Sexual Orientation In State Programs And Activities Prohibited**

On August 28, 2006, Governor Schwarzenegger signed Senate Bill 1441 into law, making it illegal for state-funded service providers, such as police and fire departments and state universities, to discriminate against homosexuals, bisexuals and transgendered persons. Day care centers, businesses and nonprofits that contract with the state or accept state vouchers will also have to refrain from discriminating against a person because of such enumerated characteristics in their operations and in their work forces, or forfeit state funding. The bill adds “sexual orientation” to the classes of characteristics protected under existing law and also expands the definition of discrimination to include “a perception” that a person has any of said enumerated characteristics, or is associated with another who has, or is perceived to have such characteristics.

### **California Court Declines To Make It Easier To Prove Retaliation Under State Law**

On August 29, 2006, a California Court of Appeal in *McRae v. Department of Corrections* reversed a judgment entered in the favor of an employee who alleged that she was the victim of discrimination and retaliation in

violation of the Fair Employment and Housing Act. The *McRae* court found that the evidence did not support of the jury's verdict because she had not been subjected to an "adverse employment action" and she had failed to demonstrate that the legitimate business reasons advanced by the employer to support its actions were a pretext for discrimination and retaliation. Interestingly, the *McRae* Court distinguished the United States Supreme Court's recent decision in *Burlington* (see above) by stating, "as *McRae*'s claims are based on employment-related acts and harm we need not consider whether the Supreme Court's analysis of Title VII has any effect on California law."

### **Overly Broad Non-Competition Agreement Not Enforceable Under California Law**

On August 30, 2006, a California Court of Appeal in *Edwards v. Arthur Andersen* ruled that a non-competition agreement between an employee and employer, prohibiting the employee from performing services for certain former clients, was invalid under California law. Unless the terms of a non-competition agreement "fall within the statutory or 'trade secret' exceptions," the *Edwards* court stated that such provisions are unenforceable and it further rejected the "narrow restraint" exception that the Ninth Circuit Court of Appeal had applied permitting non-competition agreements under California law where the restrictions were narrowly drawn and left a substantial portion of the market available to the employee.

### **Delivery Drivers Were "Employees" Not "Independent Contractors"**

On September 11, 2006, a California Court of Appeal in *JKH Enterprises, Inc. v. Department of Industrial Relations* affirmed the issuance of a stop work order by the Department of Industrial Relations against an employer that claimed its delivery drivers were "independent contractors," and not required to be covered by workers' compensation. The *JKH* court affirmed a trial court's decision noting that the employer retained "necessary control over the operations as a whole" even though it did not retain control over the details over its drivers' work and the drivers used their own vehicle and paid for their own fuel and insurance.

## **Announcements**

**Robert L. Rediger** prevailed before the California Unemployment Insurance Appeals Board where it affirmed a decision of an Administrative Law Judge that denied an employee's application for benefits. The claimant had gone on a stress-related leave of absence, which she extended several times. She alleged that she was unable to return to work as the result of being subjected to a hostile work environment, but the CUIAB agreed with the employer that the claimant had filed her claim for unemployment benefits after her leave had ended. Accordingly, the cause of her unemployment was her failure to return to work at the end of the leave, not an alleged hostile work environment (*Cuevas v. Wright Motors*, CUIAB Case No. A0-132117, July 14, 2006).

**Laura C. McHugh** prevailed in a labor arbitration, representing a transit operator that had discharged a vehicle operator for insubordination. After learning that the vehicle operator had deviated from his assigned route, the employer warned him in writing against doing so in the future. The very next two work shifts, however, the vehicle operator deviated from his route and failed to call dispatch when he had more than 10 minutes of unscheduled time, as required by the parties' collective bargaining agreement. The employee was tracked on the employer's global positioning system, which showed where the employee's bus went and how long it stayed at various locations. The arbitrator discredited the employee's testimony that he was not given proper notice that he was not performing his routes correctly, after the employee was impeached with inconsistent testimony he gave at an unemployment hearing (*Paratransit, Inc. and ATU Local 256*).

**Robert L. Rediger** withdrew recognition from the Painters Union District Council No. 16 and three of its affiliated locals on behalf of a shower door company in the Bay Area. A majority of employees covered by the parties' expired labor agreement informed the company that they no longer wanted to be represented by said Union. The employer then declared itself "nonunion" and refused to continue bargaining with the Union.

## Upcoming Events

**November 2, 2006** – Lorman Educational Services will present a seminar entitled “Employment Law from A to Z in California” from 9:00 a.m. to 4:30 p.m. in Sacramento. Five employment law attorneys will speak at the seminar. Robert L. Rediger will speak during the afternoon session on “Leaves of Absence in California” and “How to Discipline and Discharge.” Clients of Rediger, McHugh & Hubbert, LLP are eligible for a discount off the registration fee by identifying themselves as a client of the Firm. For more information, please contact Mary Lane at Lorman at (630) 540-1368.

**January 5, 2007** – Employment Law “Essentials” for 2007 – The Sutter Club from 8:30 a.m. until 12:00 p.m. See page 3 for more information.

**February 20, 2007** – National Business Institute will present a seminar entitled “Employment Law in California” from 9:00 a.m. to 4:30 p.m. in Sacramento. Four employment law attorneys will speak at the seminar. Robert L. Rediger will address “Legal Aspects of the Hiring Process” and “How to Discipline and Discharge.” Clients of Rediger, McHugh & Hubbert, LLP are eligible for a discount off the registration fee by identifying themselves as a client of the Firm. For more information, please contact Rhonda Olson at NBI at 800-777-8707 ext. 234.

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