

Rediger, McHugh & Hubbert, LLP

Representing Management in Labor, Employment and Unfair Competition Litigation

LABOR AND EMPLOYMENT LAW REPORTER

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Rediger, McHugh & Hubbert, LLP Welcomes New Partner Jeff Owensby

The firm is pleased to announce that Jeff Owensby has joined the firm as a partner. Mr. Owensby took his law degree from the University of California Davis School of Law in 1982. Since then he has represented employers in all types of employment cases and has litigated and tried a variety of cases in courts in the region as well as before administrative agencies. He also advises employers on employment practices and policies including: discrimination and harassment issues, drug testing, employee rights of privacy, wage and hour practices, discipline and dismissal, various statutory leave rights and responsibilities, interactive processes with disabled employees, plant closings and myriad other issues.



Mr. Owensby also has a traditional labor law practice in which he represents employers in matters related to management/union relations. He has taught numerous classes to human resource professionals, hospital personnel and lawyers on various employment and workplace issues. In recent years he has been retained by labor lawyers in the region and local courts to serve as mediator or arbitrator in employment cases. Finally, he has also served on boards of directors of several community and non-profit organizations and has dedicated many years to serving the community. The firm and Jeff look forward to jointly helping our clients.

IN THIS ISSUE

New Partner Jeff Owensby	1
Overly Broad Work Rules in Employee Handbooks May Violate Federal Law.....	1
Announcements.....	2
Interactive Process: A Recurrent Minuet.....	3
Recent Developments	4
Checklist of Leaves of Absence Required by Law in California	6
Upcoming Events.....	8
Employment Law “Essentials”	Insert

Overly Broad Work Rules in Employee Handbooks May Violate Federal Law

By Sarah R. Lustig and Robert L. Rediger

Two recent decisions may impact employers’ personnel policies. In *Guardsmark, LLC v. NLRB* and *Cintas Corporation v. NLRB*, the employer’s work rules at issue were found unlawful, even though they contained neutral language and were never intended or enforced to prohibit employees from engaging in protected labor activities.

In reviewing decisions of the NLRB, two different courts of appeal enforced the Board’s orders and findings with respect to the chain-of- (Continued on page 7)

Firm Wins Wrongful Termination Jury Trial

Robert L. Rediger and Laura C. McHugh won a jury trial in Sacramento Superior Court against an employee who alleged that she had been discharged in violation of California public policy. During the two-week trial, the Plaintiff alleged that she had been discharged from her employment in retaliation for her complaining about safety and wage and hour issues. Evidence was presented on behalf of the employer, however, showing that the former employee had been discharged for excessive absenteeism, insubordination and challenging her supervisor. The jury rejected the Plaintiff's contentions and returned a verdict after three hours of deliberations in favor of the Defendant. In post-trial proceedings, the Plaintiff's motions seeking a new trial and to set aside the jury's verdict were denied, and the employer's motion seeking to be awarded its costs in excess of \$24,000.00 from the Plaintiff was granted. *Cruickshank v. PDQ Automatic Transmissions Parts, Inc.*

Robert L. Rediger prevailed at a labor arbitration on a grievance filed by the District Council of Painters and three affiliated locals alleging that the employer had not made proper contributions to the Union-affiliated Pension and Health and Welfare Trust Fund during the term of the parties' five-year Collective Bargaining Agreement. The Employer first argued that the Union's grievance was "untimely" and second, that it was entitled to rely upon the annual schedule of wages and benefits the Union had provided to it each year under the CBA. The arbitrator agreed with the employer that it had "overcome the presumption of arbitrability on the merits" and denied the Union's grievance on the procedural ground that the grievance was "untimely." *Western Shower Door Co. (District Council of Painters No. 16), __ LA __ (Riker, Arb., 2007).*

The firm congratulates **Linda Deavens** who was recently appointed as the new permanent Chief Executive Officer/Executive Director of **Paratransit, Inc.**, a non-profit transportation agency that provides transit services to the eligible persons with disabilities and seniors. The firm also congratulates **Bill Durant**, Paratransit's long-time Executive Director, and one of the founders of the agency in 1978, who is moving on to do other things in the transportation agency.

The California Unemployment Insurance Appeals Board denied an employee's appeal from the decision of an administrative law judge that had held the employee was disqualified for unemployment insurance benefits. **Laura C. McHugh** had represented the employer in the unemployment hearing that resulted in the administrative law judge's ruling. The employee claimed that he was forced to resign his job because he did not want to engage in activity that he thought was unethical, but he never complained and did not resign for several months, so the judge found that he did not have good cause to resign.

Sarah Lustig Joins Firm as Law Clerk

Sarah Lustig has joined Rediger, McHugh & Hubbert, LLP as a law clerk. She graduated from University of California at Davis School of Law in May 2007, and sat for the July 2007 bar exam. During law school, Ms. Lustig interned at the California Department of Fair Employment and Housing, Disability Rights Advocates and Protection & Advocacy, Inc. Ms. Lustig earned her B.S. in Genetics from University of California at Davis, and her M.S. in Regulatory Affairs from San Diego State University. Before law school, she worked as a research assistant at The Scripps Research Institute and for Johnson & Johnson.



Sarah Lustig

Interactive Process: A Recurrent Minuet

By Jeff Owensby

As every Human Resource professional and many employers know, the Americans With Disabilities Act and FEHA's disability discrimination provisions create a complex landscape in which there are several pitfalls that are not so obvious. Having once figured out the rights and obligations of the parties, conducted an interactive dialogue and implemented an accommodation plan, one might be lulled into thinking that the work is done and the file can be closed. Not so fast.

In several disability discrimination cases, the courts describe extensive efforts to evaluate and implement solutions. Some courts have lauded employers for doing so much to change things so as to allow a disabled employee to work. The same courts then often strike down the employer's arguments that they did enough when the same employee later asserts that the employer failed to provide reasonable accommodation when circumstances changed or the first solution did not work. When courts do this they often cite the absences of a resurrected interactive process as the basis upon which the court strikes down a lower court's ruling in favor of the employer. More specifically, the courts suggest and sometimes hold that even if early accommodation efforts are successful, when those efforts lose effectiveness or things change, the employer is obligated to start the "minuet" (my term, not theirs) anew.

In recent years many Human Resources professionals have called and described similar situations. They chronicle amazing chronologies of efforts

and communications with employees seeking accommodation. They plead that they have tried lots of things and they cannot achieve stability in the employee's work. They sound like they are on the verge of tearing out their hair. As often as not I have to dash their hopes of a quick fix and send them out to re-establish or continue the interactive process. The exasperated sighs come through the phone and the looks of disbelief punctuate our meetings. Nevertheless, even if an employer has tried several different forms of accommodation and each accommodation has been designed through a separate interactive process, neither the courts nor the legislatures give employers a safe-harbor escape from another round of the interactive process. I am also often constrained to remind employers of the pragmatic realization that no matter how frustrating and time-consuming the interactive process may seem, another round of dialogue is quicker, cheaper and less risky than litigation.

As a risk avoidance strategy and in an effort to afford employees all rights due them, I err on the side of advising as many rounds of the process as are necessary to exhaust reasonable options. Here at the firm our partners invite your calls when you reach the point of cutting off the interactive process or discharging a disabled worker so that we can help you identify strategies while preserving your rights and sanity. Often another set of experienced eyes can help you design win/win strategies and save a valuable employee and reduce the risks of claims against your company.

ALERT: New Legislation Regarding Computer Software Professionals

Governor Arnold Schwarzenegger signed legislation reducing the hourly wage rate required for computer software professionals to be exempt from overtime. Effective January 1, 2008, a professional employee in the computer software field who is primarily engaged in work that is intellectual or creative, and who meets the other requirements for the exemption, will be exempted from the overtime requirements of the Industrial Welfare Commission Wage Orders if he or she is paid an hourly wage rate of at least \$36.00. The current exemption for information technology (IT) professionals requires that they be paid an hourly wage rate of not less than \$49.77.

Recent Developments

Union Employees' Claim for Travel Time Pay Not Preempted by Federal Law

On June 20, 2007, the Ninth Circuit Court of Appeal in *Burnside v. Kiewit Pacific Corp.* reversed a federal district court's grant of summary judgment to an employer, holding that claims brought by construction industry employees who were covered by a collective bargaining agreement, were not preempted by federal law. The *Burnside* Court agreed with the employees that their right to be compensated for time spent in compulsory round-trip travel existed under state law and that there was no provision in the CBA that would need to be interpreted to decide the employees' travel pay claims.

Employer May be Held Strictly Liable for Harassment by its "Lead" Employee

On August 7, 2007, in *Almanza v. Walmart Stores, Inc.*, the United States District Court for the Eastern District of California denied an employer's motion for summary judgment, permitting the plaintiff to proceed to trial on her assertion that her employer was "strictly liable" for the harassing conduct of a "lead employee." The plaintiff had produced evidence showing that the lead employee was really a "supervisor" as defined by under the California Fair Employment and Housing Act. The *Almanza* court rejected the employer's contentions that, as a matter of law, the lead person was an "employee" and the plaintiff therefore had to prove that it "knew or should have known of the harassing conduct and failed to take appropriate corrective action."

Employer May Withdrawal Recognition from a Union after Three Years of its CBA

On August 10, 2007, the National Labor Relations Board in *Shaw's Supermarkets, Inc.* held that an employer that receives objective evidence that a union no longer enjoys support of a majority of employees in the appropriate bargaining unit may withdraw recognition from that union after three years, if the collective bargaining agreement ("CBA") to which the parties are signatory exceeds three years. The Board in *Shaw's* rejected the argument that the union enjoyed an irrebuttable presumption of majority status during the term of the CBA. The Board held that where a CBA exceeds three years in duration, a "balancing" of rights favored upholding employee free choice over enforcing contractual obligations of employers and unions.

Claims Adjusters Not Exempt from Overtime and Suit May Proceed as Class Action

On August 17, 2007, a California Court of Appeal in *Harris v. Superior Court* held that that insurance company claims adjusters were not exempt from the overtime compensation requirements under California law and permitted their lawsuit to proceed as a class action. The *Harris Court* rejected the defendants' claim that the "administrative exemption" from overtime applied to the plaintiffs because the claims adjusters were "not primarily engaged in work that is directly related to management policies or general business operations."

Employer's Bonus Plan was Not Made Illegal by Offsets Made by an Employer

On August 23, 2007, the California Supreme Court in *Erachasaisoradej v. Ralph's Grocery Company, Inc.* decided, in its words, "a significant question of California wage law." Reversing the decision of a California Court of Appeal, the Supreme Court in *Erachasaisoradej* held that the bonus program Ralphs had made available to certain employees was legal, despite the fact that the amount of "profit" to be distributed under the plan was determined by the employer by first subtracting store operating expenses from store revenues. The Supreme Court rejected the contention that the plan "charged back" cash shortages, merchandise damage and employer-mandated costs for workers' compensation to employees and held that the bonus plan consisted of "supplementary compensation designed to reward employees, over and above their regular wages."

Plaintiffs Must Prove that They are "Qualified Individuals" Under FEHA

On August 23, 2007, the California Supreme Court in *Green v. State of California* resolved a conflict between two Courts of Appeal and held that under the California Fair Employment and Housing Act, employees alleging that they were the victims of disability discrimination must prove that they are "qualified individuals" under the

State law, just as they would have to prove such under the federal Americans with Disabilities Act. The *Green* court noted that the California FEHA did not include the term “qualified individual,” as did the federal ADA, but that both laws permit an employer to discharge an employee with a disability when that employee is unable to perform the essential duties of the job, even with a reasonable accommodation.

NLRB Finds Employers’ Lawsuit Against Unions is Not an Unfair Labor Practice

On September 29, 2007, the National Labor Relations Board in *BE&K Construction Co.* ruled that an employer did not commit an unfair labor practice by filing and maintaining a lawsuit against several unions that had engaged in disruptive actions after the employer received a contract to refurbish a steel mill. The employer and the mill operator sued several unions alleging illegal secondary boycott, violations of the Sherman Anti-Trust Act and other claims, but the suit was eventually dismissed. Following a remand from the United States Supreme Court, the NLRB in a 3-2 decision held that the filing and maintenance of a reasonably based lawsuit does not violate the Act, regardless of an employer’s motive for bringing it.

NLRB Limits a Union’s Ability to Organize by “Salting” an Employer

On September 29, 2007, the NLRB in *Toering Electric Co.* ruled that for an “applicant” to be protected against unlawful discrimination, it must be shown that he or she was “genuinely interested in seeking to establish an employment relationship with the employer.” In a 3-2 decision, the Board noted that in some hiring discrimination cases, particularly those involving “salting” campaigns, unions have submitted batched applications on behalf of individuals who were not even aware of the applications or interested in employment with the employer, and individuals have submitted applications solely to create a basis for filing unfair labor practice charges and inflicting litigation costs on a targeted employer. The two Board members in dissent bemoaned the perceived end to the era of salting as a union organizing tactic.

NLRB Modifies its Recognition and Contract Bar Doctrines

On September 29, 2007, the National Labor Relations Board in *Dana Corp.*, modified its recognition and contract bar doctrines as such relate to voluntary recognition granted by an employer to a union. In a 3-2 decision, the Board held that an employer’s voluntary recognition of a union does not bar a decertification or rival union petition that is filed within 45 days of the affected employees’ receiving notice of the voluntary recognition. In a Memorandum dated October 22, 2007, the Board’s Associate General Counsel set forth the new procedure that the Board’s Regional Offices will follow when a party to a voluntary recognition agreement asks the Board to provide notification to employees.

Employer May Reimburse Employee Through Increased Wages or Commissions

On November 1, 2007, the California Supreme Court in *Gattuso v. Harte-Hanks Shoppers, Inc.* held that an employer may satisfy its duty to indemnify employees for expenses they incur in the discharge of their duties by paying employees enhanced compensation in the form of increases in salary or commission rates. In *Gattuso*, an outside salesperson had brought a class action seeking indemnification on behalf of himself and others for expenses incurred when using their own automobiles for work. After reviewing the legislative, judicial and administrative treatment of Labor Code section 2802, the *Gattuso* court held that an employer may use a “lump-sum method” to reimburse employees for expenses, provided that the amount paid is sufficient to provide full reimbursement for actual expenses necessarily incurred and a method is used to identify the amounts that represent payment for labor and that which represents reimbursement for expenses.

Employment Law “Essentials” For 2008

Friday, January 4, 2008—9:00 a.m. to 12:00 p.m.
The Sutter Club—1220 9th Street, Sacramento

Registration begins at 8:30 a.m. with Continental Breakfast. Client cost: \$100.00 for the first person, \$75.00 for each additional persons, and includes seminar, breakfast, written materials and parking.

SEE INSERT FOR ADDITIONAL DETAILS REGARDING THE SEMINAR

Checklist of Leaves of Absence Required by Law in California

By Robert L. Rediger

What follows is an alphabetical list of reasons an employee may give when requesting time off from work. Whether an employer will be required by law to “excuse” the employee from his or her scheduled work time requires a review of the statute that establishes the right to the particular leave and answers to the following questions: a) Is the employer covered by the law? b) Is the employee eligible for the leave? and, c) Are there any conditions to granting the leave or any bases for denying it?

- ✓ **1. Alcohol or Drug Treatment**—A private employer that employs 25 or more employees may have to grant a leave to an employee who expresses a desire to voluntarily enter or participate in an alcohol or drug rehabilitation program. (Cal. Labor Code Section 1025 et. seq).
- ✓ **2. Crime Victims**—An employer may have to grant a leave to an employee who is the victim of a crime, an immediate family member of a victim, a registered domestic partner of a victim, or the child of a registered domestic partner of a victim, to attend judicial proceedings related to that crime. (Cal. Labor Code Section 230.2).
- ✓ **3. Disability-Related Leaves**—An employee injured on the job may be entitled to a workers’ compensation leave. (Cal. Labor Code Section 132a). If an employee suffers from a physical or mental disability or condition, an employer that regularly employs five or more employees may be obligated to grant him or her a leave as a reasonable accommodation. (Cal. Gov’t Code Section 12940(a) and (m)).
- ✓ **4. Domestic Violence and Sexual Assault**—An employer may have to grant a leave to an employee who is the victim of domestic violence or a sexual assault and who needs time off to seek relief, including to appear in court to obtain relief, to ensure the health, safety and welfare of the employee or his or her child. (Cal. Labor Code Section 230.1).
- ✓ **5. Family Care**—An employer that employs 50 or more employees may have to permit an employee who has been employed for more than 12 months and who has worked at least 1250 hours during said time, to take up to 12 unpaid workweeks off in a 12-month period for the birth of a child, placement of a child for adoption or foster care, a serious health condition of the employee, or a serious health condition affecting the employee’s spouse, child or parent, and it may have to continue any group health care insurance for the employee during the leave. (29 U.S.C. section 2601 et seq. and Cal. Gov’t. Code section 12945.2).
- ✓ **6. Jury Duty**—An employer may have to grant time off to an employee to serve as a juror in federal or state court. (28 U.S.C. Section 1875(a) and Cal. Labor Code Section 230).
- ✓ **7. Literacy Assistance**—A private employer that employs 25 or more employees may have to assist and permit an employee who reveals that he or she has a problem with literacy to take a leave and enroll in an adult literacy education program. (Cal. Labor Code Section 1041 et seq.).
- ✓ **8. Military and National Guard Service**—An employer may have to provide a leave to a member of the military of California or the United States to serve. (38 U.S.C. Sections 201 et seq., 4301-33 and Cal. Military and Veterans Code Sections 394, 394.5).
- ✓ **9. Military Spouse Leave**—An employer employing 25 or more employees may have to grant up to 10 days of leave to an employee whose spouses is on a leave from certain types of active military service. (Cal. Military and Veterans Code Section 395.10).
- ✓ **10. Pregnancy, Childbirth or Related Medical Condition**—A private employer that employs five or more employees may have to grant a female employee, who is disabled because of pregnancy,

childbirth or related medical condition, a leave up to four months. (Cal. Gov't Code Section 12945).

✓ **11. School Visits**—An employer may have to grant a leave to an employee who is requested to appear at school because his or her child has been suspended. (Cal. Labor Code Section 230.7). An employer that employs 25 or more employees may also have to allow an employee to take up to 40 hours off each school year per child to permit the parent or guardian of a child in kindergarten up through grade 12 to participate in activities at the school. (Cal. Labor Code Section 230.8).

✓ **12. Sickness of Family Member**—An employer who provides sick leave for employees may have to permit an employee to use a portion of his or her accrued sick leave to attend to an illness of a child, parent, spouse or domestic partner of the employee. (Cal. Labor Code Section 233 et seq.).

✓ **13. Subpoenaed Witness**—An employer may have

to grant time off to an employee to appear in court to comply with a subpoena or other court order as a witness in any judicial proceeding. (Cal. Labor Code Section 230).

✓ **14. Volunteer Firefighting, Reserve Peace Officer or Emergency Rescue Personnel**—An employer may have to grant a leave to an employee to perform emergency duty as a volunteer firefighter, reserve peace officer or emergency enforcement training. (Cal. Labor Code Section 230.4).

✓ **15. Voting and Election Observing**—If an employee does not have sufficient time outside of his or her scheduled working hours to vote in a statewide election, the employer may have to provide up to two paid hours off at the beginning or end of the employee's regular work shift to enable the employee to vote. (Cal. Elections Code Section 14000). An employee serving as an election observer on Election Day may request a one day leave for election observing. (Cal. Elections Code Section 12312).

“Overly Broad” (continued from page 1)

command, solicitation rules, and confidentiality rules, and disagreed with the Board findings with respect to the fraternization rule. The courts have held that the work rules at issue were “overbroad” and interfered with employees’ right under the National Labor Relations Act. The NLRA protects the right of employees to communicate among themselves and with others about the terms and conditions of their employment.

In *Guardsmark*, the court first held that a “chain-of-command” rule, which barred employees from seeking client assistance with any aspect of their employment, violated the Act because it failed to expressly limit its application to work time. Second, the employer’s “no solicitation” rule violated the Act because it restricted the employees’ protected off-duty distribution of union literature. Third, the court found that the rule prohibiting a guard’s on- or off-duty “fraternization” with clients violated the Act because it failed to distinguish between union fraternizing and social fraternizing.

Another seemingly innocuous rule was at issue in *Cintas* where the employee handbook used by a uniform company contained a work rule that stated: “We recognize and protect the confidentiality of any information concerning the company, its business plans, its partners, new business efforts, customers, accounting and financial matters.” As part of an effort to unionize the workers, UNITE HERE challenged the employer’s work rule by filing unfair labor practice charges with the NLRB. The Board held that because “partners” is the company’s term for employees, the rule violated the workers’ protected right to discuss the terms and conditions of their employment with each other.

Employers should review their employee handbooks, work rules and other personnel policies and procedures in light of the *Guardsmark* and *Cintas* decisions. Overly broad work rules and policies may unlawfully restrict or interfere with employees’ rights under federal law, regardless of an employer’s innocent intention when promulgating such.

Upcoming Events

December 13, 2007—Jeff Owensby will present a seminar entitled, “Meeting the Challenges of Employment Practices Liability” at the Sacramento Hilton from 8:30 a.m. until 3:30 p.m. Pre-registration required through CHI/Optima Insurance Services. For more information, please contact Millie Mastromattei at mmastromattei@optimahealthcare.com.

January 1, 2008 through December 31, 2008—Anti-Harassment Training. As of January 1, 2006, employers in California that regularly employ 50 or more employees anywhere in the U.S. were required to provide two hours of anti-harassment training to their supervisors and managers. An employer covered by the law must provide such training to each supervisory employee once every two years. (AB 1825). To schedule a two hour training at your Sacramento facility or at our law firm at a total cost of \$1,000.00 (including materials for all attendees), call Sara at our firm (916) 442-0033 or email us at info@rmlaw.net.

January 4, 2008—Employment Law “Essentials” for 2008—The Sutter Club in downtown Sacramento from 8:30 a.m. until 12:00 p.m. See insert for more information.

February 20, 2008—Lorman Educational Services will present a seminar entitled “Employee Discharge and Documentation” from 8:30 a.m. to 4:30 p.m. in Sacramento. Four employment law attorneys will speak at the seminar. Robert L. Rediger will address “Ending the Employment Relationship.” For more information, please contact Tobey Gunther at Lorman at 800-678-3940.

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Happy Holidays!