

Rediger, McHugh & Hubbert, LLP

Representing Management in Labor, Employment and Unfair Competition Litigation

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Who funds the leave? Your employees fund the program, through payroll deductions, which will average about \$25 a year, depending on income level. Participating employees, who will be required to provide medical certification of their FTDI eligibility, will receive 55% of their salary, and the payments will not be taxed.

May an employer require that employees exhaust vacation pay while on leave? Yes. Employees may be required to utilize up to 2 weeks of earned, but unused vacation pay prior to receiving FTDI pay.

Does the new law apply to my organization if I have less than 50 employees? Yes. Unlike the federal Family and Medical Leave Act (“FMLA”) and California Family Rights Act (“CFRA”), an employer does not need to have 50 employees to be covered by this law. An individual who is entitled to FMLA and CFRA leave must take FTDI leave concurrent with the FMLA and CFRA leave.

What does this mean to me as an employer? With paid leave, employees will likely maximize their time off and be less motivated to return to work. Costs will rise in terms of replacement workers, additional overtime, training and loss of productivity. Smaller employers who are not required to provide FMLA or CFRA leave may have a more difficult time managing their workforce. For example, an employer with 10 employees will lose 10% of its workforce if one employee takes FTDI leave. If employers deny the leave, workers can quit and still get payments.

Governor Davis Signs New Laws

By Laura C. McHugh

New Paid Family Leave Law

On September 23, 2002, Governor Gray Davis signed Senate Bill (“SB”) 1661, making California the first state in the nation to offer paid family leave. This bill establishes, within the state disability insurance program, a family temporary disability insurance (“FTDI”) program that provides up to 6 weeks of wage replacement benefits to workers who take time off work for the employee’s own illness, injury or pregnancy, or for the employee’s need to care for a seriously ill child, spouse, parent, domestic partner, or to bond with a new child. The new law will become effective July 1, 2004 and employers will be responsible for providing notice to employees of their FTDI rights.

New Two-Year Statutes of Limitations Law

On September 10, 2002, Davis signed SB 688, extending the time from one year to two years for a plaintiff to bring a civil action for assault, battery, or injury to, or for the death (*continued on page 7*)

Are Your Exempt Employees Really Exempt?

By Robert L. Rediger

The consequences of categorizing an employee as “exempt,” when he or she does not satisfy the legal definition for an exemption, can be financially devastating to an employer. A complaint for wages not paid in a timely manner may seek the payment of back pay, interest, waiting time penalties and attorney’s fees. Individual claims for back wages, however, pale in comparison to class-action lawsuits that may seek millions of dollars in damages and penalties on behalf of “all similarly situated” misclassified employees.

To be considered “exempt” from the minimum wage and maximum hour provisions of the law, a person must perform duties that satisfy the definition for an exemption in accordance with applicable federal and state laws. In California, the most common exemptions are for employees employed in an executive, administrative or professional capacity. In addition, other persons, including public and unionized employees, outside or commissioned salespersons, certain health care workers and employees in the computer software field, and certain individuals related to the employer, may also qualify for a full or partial exemption from the minimum wage and/or maximum hour provisions of a particular California wage order.

Strategies For Avoiding Wage Claims From “Exempt” Employees

Draft, update and use accurate job descriptions – Employers should have accurate and well-written job descriptions that set forth the duties, qualifications and responsibilities for each position in their organization. The job description should indicate whether the position is “exempt” or “nonexempt” and the employer should be able to demonstrate that the employee’s actual day-to-day job performance establishes *each* of the criteria needed to prove an exemption under the law. For example, if the employer believes that a particular position is exempt because the employee performs

executive-type duties, the job description must reference that the employee (a) performs duties and responsibilities that involve the management of the enterprise in which he or she is employed or of a customarily recognized department or subdivision of it, (b) customarily and regularly directs the work of two or more other employees, (c) exercises the authority to hire or fire employees or effectively suggests and recommends hiring, firing, advancement, promotion or any other change of status of other employees, (d) customarily and regularly exercises discretion and independent judgment, (e) performs “exempt” duties at least 51% of his or her time, and (f) earns a monthly salary greater than two times the California minimum wage rate (currently \$6.75 per hour) for 40 hours per week.

The determination of whether an employee is exempt or not is *highly fact sensitive*, focusing on the employee’s actual duties and not his or her title. An employer representative entrusted with auditing or creating job descriptions may wish to obtain information from the employee who actually performs the job as to his or her job duties. Once the auditing person has a clear understanding of all of the employee’s duties and responsibilities, a competent professional should give a legal opinion as to whether the proposed exemption is defensible.

Do not destroy an exempt employee’s exemption—An exempt employee must receive his or her full salary for any workweek in which he or she performs any work for the employer, without regard to the number of days or hours actually worked. An employer need not pay for any workweek where the exempt employee performs *no work*. Adjustments in compensation and/or benefits to an exempt employee’s salary are also permitted where other statutory requirements are met. Hourly or daily deductions from an exempt employee’s weekly salary, however, may convert or transform him or her into a nonexempt employee. For example, an employer should not impose (*continued on page 3*)

Would You Like To Receive Our Newsletter By Email?

Several clients of our firm have inquired whether it is possible to also receive an electronic version of our **Labor and Employment Law Reporter** to pass on to friends or co-workers, or to reprint articles easily.

We would be happy to email our law firm's newsletter to you or to add an interested colleague to our email list on request. Simply call Sara B. Wood at (916) 568-2855 or email your request to info@rmlaw.net and we will put you and/or your colleague on our electronic mailing list to receive our newsletter four times a year.

a one-day unpaid suspension on an exempt employee as a disciplinary measure. The payment of a proportionate amount of the exempt employee's salary in initial and terminal weeks will not convert him or her into a nonexempt employee.

Strategies For Avoiding Wage Claims From All Employees

Post all notices required by law – Numerous federal and state laws require employers to post notices in conspicuous places informing employees of their employment-related rights. The U. S. Department of Labor and the California Industrial Welfare Commission require covered employers to post specific notices regarding wage and hour laws. (See Section 22 of Wage Order No. 4-2001, the Pay Day Notice, the Summary of Amendments to Wage Orders 1-13, 15 and 17, the California Minimum Wage Notice and the poster entitled “Your Rights Under the Fair Labor Standards Act”).

Ensure that your employee handbook contains legal wage and hour policies and other policies that protect the employer – The vast majority of the legal requirements that regulate wages and hours in the workplace are set forth in the government-issued notices that must be posted at a location where such may be read easily by employees. An employer's employee handbook should address matters not proscribed by law, such as restrictions on working overtime without permission, prohibitions on punching another employee's time card, a “cap” on the accrual of paid vacation, a procedure for the reimbursement of work-related expenses, etc.

When determining whether an employee's wage-related complaint has merit, a Deputy Labor

Commissioner will inquire first whether there has been a statutory violation and second whether there has been “a breach of a promise to pay.” Accordingly, ambiguous, contradictory and/or overly generous wage-related policies in an employee handbook may provide the basis for an award in favor of the employee when the employer is otherwise in compliance with the wage and hour laws. As in the case of all provisions contained in an employee handbook, the wage and hour related policies should not provide a disgruntled employee with a *sword* to attack an employer in litigation. Rather, well-written wage and hour related policies should provide the employer with a *shield* to defend against allegations from a disgruntled employee that he or she is owed wages.

Ensure accurate time keeping by nonexempt employees – Employers must have reliable procedures in place for recording the time its employees work and to ensure the prompt and timely payment of wages due. Nonexempt employees must log starting and ending times, meal periods and split shifts accurately. The time card should also state on it that by signing such, the employee acknowledges that he or she received all meal periods and rest breaks as required by law, and that if not, the employee must note and initial such on that time card. The employees should be required to verify the correctness of their entries by signing their time card and to submit their completed time card to their supervisor in a timely manner. Any discrepancies or problems with the time card should be addressed at the time the employer reviews the time card. An employee who fails or refuses to comply with the employer's wage and hour policies should be disciplined. His or her wages should not be docked for the time he or she was permitted or suffered to work. ■

“Union May Have Lost Fight Over Capitol Painters”

The following is a reprint of an article written by Staff Writer Kathy Robertson that appeared in the July 12, 2002 edition of the Sacramento Business Journal (Reprinted with permission).

The pickets are gone. Dual gates are in place to allow painting crews to enter and leave the Capitol grounds away from lawmakers and visitors. But there's no union contract.

Painters Union Local No. 487 had tried for months to organize the crew that's painting the Capitol. The 20 to 25 painters hired by River City Painting, Inc. for the \$3 million job are nonunion. It appears likely they'll remain so, especially since they're being paid prevailing union wages of \$31 per hour without having to pay union dues.

While the crew was greeted by hundreds of pickets when it commenced work April 13, there's been no union election. The Union demanded the company proceed directly into contract negotiations, but River City says it's up to the workers to decide by secret ballot election. Work on the project will be done soon, rendering moot the high-profile union fight at the Capitol.

“We established dual gates and offered an election - and they stormed outta here,” said Bob Rediger, a Sacramento attorney who represents River City Painting. “It looks like we beat them. They're stone-walling and we'll be done in September.”

Blame it on the state budget. Lawmakers are bogged down by the debate over how to trim \$23.5 billion from the state spending plan next year. The union engaged both Assembly Speaker Herb Wesson and Democratic Assemblyman Macro Firebraugh in initial discussions over the contract, but lawmakers are now tied up by the budget deficit and haven't been involved for weeks.

“At this point, we're monitoring to make sure they are meeting the specifications of the contract,” said Tom Caster, an organizer for Painters Union Local No. 487. “We feel that, as low as the contract was at the time of the bid, there's no way (River City) can paint the building and make a profit.” There

were two bids on the project, according to River City president Glenn Brown. His was \$3 million, while the other bid came in at \$3.8 million and involved a subcontract to out-of-town painters.

“We're a local company that specializes in high-rise and commercial painting projects,” Brown said. “We've painted 11 projects around the Capitol. This is what we do - and we're good at it.” Although the project was expected to run through mid-November, painters are ahead of schedule and will probably be done in September, Brown said.

The union tried a number of approaches to bring the company directly to the bargaining table, Brown said. State health and safety officials were called in. So was the state Labor Board. Letters were sent to employees to see if they were paid correctly and getting proper break times...

River City's Capitol painters, like others on government jobs, are paid the prevailing wage. “We said we'd go to our people and see if they wanted to vote. They said ‘Yes,’ but the union wants us to sign a contract without one,” Brown said. “Our guys have been with us 10 to 15 years. If they want to do it, we are all for it. If not, we don't want to push it on them.”

Union reps met with the employer this spring, Caster said, but “these discussions didn't really move forward, so we stopped all lines of communication.” ■

Note- As of the date of publication of this Newsletter, the Painters Union has abandoned its efforts to organize River City Painting, Inc. which continues to perform restoration and painting work at the State Capitol and other prominent locations in Sacramento.

Rediger, McHugh & Hubbert, LLP To Host “Essentials” Seminar For Clients in 2003

On January 15, 2003, our firm will present a half-day seminar from 8:30 a.m. to 12:00 p.m. for our clients at the Sutter Club in downtown Sacramento. Save the date! See Upcoming Events on page 8 for more information.

Employee Evaluations: Avoiding Claims for Emotional Distress

By Komal Chaddha*

Although employee evaluations are a beneficial way for employees to receive feedback about their job performance, some employers worry that honest feedback may lead to a lawsuit for emotional distress. Under California law, however, employers have significant liberty to comment on an employee's performance without fear of a lawsuit.

The performance review is a vehicle for informing the employee of what management expects, how the employee measures up, and what he or she needs to do to obtain wage increases, promotions or other recognition. *Jensen v. Hewlett-Packard* (1993) 14 Cal.App.4th 958. Thus, employers should continue to give evaluations to employees despite the fear of a lawsuit. Indeed, an honest evaluation may provide an employer with protection should it later fire the employee. The employer may benefit by providing written notice to a weak performer before resorting to termination.

An employee alleging the intentional infliction of emotional distress must show 1) outrageous conduct, 2) with the intention to cause or reckless disregard of the possibility of causing, 3) severe emotional suffering, and 4) actual and proximate cause of the suffering. *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal.3d 148.

Many cases in this area of law focus on what constitutes “outrageous” conduct. General personnel management decisions do not warrant a claim for intentional infliction of emotional distress. Refusal to promote or give a raise is insufficient as well. Courts are especially likely to side with the employer if the employee's behavior warrants

criticism (*i.e.* the evaluation is not arbitrary). Even faulty reasoning on the part of the employer is insufficient to support an employee alleging intentional infliction of emotional distress since bad conduct is not always synonymous with outrageous conduct.

Conduct that amounts to harassment because of an employee's protected status, such as race, gender or sexual orientation, however, has been found to constitute “extreme and outrageous conduct.” Furthermore, the employee's susceptibility to harm (if known by the employer), is a factor courts may rely on to determine whether an employee is able to establish a claim for emotional distress.

An employer should take precautions when giving evaluations. It should ensure that the criteria it uses to assess an employee's job performance is work related and applied equally. An evaluator must also be aware that numerous laws protect employees and comments or criticism that may violate these laws should be avoided. Done right, employee evaluations are a useful tool and a means of opening up the lines of communication between the employer and employee. ■

* **Komal Chaddha** was a Summer Fellow who clerked at our firm through a program administered by the Sacramento County Bar Association. She has returned to her second year of law school at UC Davis. While at our firm, Ms. Chaddha performed legal research, observed collective bargaining negotiations, attended hearings before the Labor Commissioner and wrote various legal memoranda for attorneys of the firm. It was a very enjoyable experience for all of us!

Increase In Union Activity

By E.A. Hubbert, Jr.

For several decades, there has been a steady and continuous decline in the percentage of private sector employees represented by organized labor. This decline has been true nationwide as well as in Sacramento. It is fairly clear that this decline has been prompted to a large degree by the increase in governmental regulations of the employer-employee relationship to the extent that labor unions have become unnecessary to protect employees. It is somewhat ironic that organized labor's lobbying efforts for increased governmental regulations of the workplace has rendered unions irrelevant.

However, occasionally some Unions, including some here in Sacramento, mount an organizing effort that may be supported and financed by their international organization. Some unions will target certain cities for special funding for organizing activity. We have seen signs recently that union-organizing activity has increased in Sacramento during the Summer and Fall of 2002.

SEIU Local 1877 is continuing its well-publicized "justice for janitors" campaign in an attempt to organize building maintenance employees with some success. Recently, the Machinists Union Local 2182 has directed its organizing efforts at car dealerships. Teamsters Local 150 is attempting to organize employers in the ready mix industry. Any employer who has employees is a potential target for union organizing. Unions attempt to organize groups as small as five or six employees, so the fact that you do not employ a lot of employees, or that your employees are office clericals as opposed to skilled trades people, should not lead you to assume that your company is immune from the attention of organized labor.

All employers should be prepared for at least the potential of an approach by organized labor and know the fundamental steps that must be taken to protect themselves. An employer's rights and responsibilities during a union organizing campaign are set forth in the National Labor Relations Act and in the decisions of the NLRB and the courts. ■

New Restrictions on Use of Social Security Numbers

By Sunny Lee*

As of July 1, 2002, new confidentiality protections apply to the use of an individual's social security number in California. This new law (SB 168) is designed to prevent individual identity theft. These restrictions apply to all individuals and entities, including employers. State and local government agencies are exempt.

Employers may continue to use social security numbers for administration or internal verification. For compliance purposes, the following recommendations may be helpful:

- Eliminate social security numbers from job applications;
- Keep social security numbers confidential and restrict access to necessary administration of benefit information, payroll records and processing of W-2's;
- Eliminate public display or posting of social security numbers;
- Eliminate social security numbers from employee ID badges;
- Eliminate social security numbers as passwords;
- If you use social security numbers to transmit payroll information over the internet, make sure that the numbers are encrypted or use a secure connection;
- Social security numbers should not be printed on payroll checks, but should be printed on paycheck stubs in accordance with Labor Code section 226;
- Social security numbers should not be printed on information mailed to employees unless required by law, *i.e.* a W-2 form.

Providers of health care have staggered implementation dates commencing with January 1, 2003 and ending July 1, 2005. With the exception of health care providers, an individual has the right to object to the use of his or her social security number and the usage must be stopped within 30

days of receipt of a written request. Otherwise, the use may be continued if uninterrupted and the individual has been provided with an annual disclosure. No fee may be charged to an individual and he or she may not be denied access to products or services. ■

** Ms. Lee is a former partner of two principals of Rediger, McHugh & Hubbert, LLP and is currently of counsel to the firm. She is a Senior Labor Law Advisor to the California Chamber of Commerce Helpline. Ms. Lee practices employment law with offices in Santa Barbara, CA and Phoenix, AZ.*

Answers To Your Commonly Asked Employment Law Questions

With permission, we will print your commonly asked labor and employment law questions in this column.

Question: Does an employee who is told that he or she is being laid off have any recall rights?

-Kris Holmes, Econco (Woodland, CA)

Answer: An employee who is informed that he or she is being “laid off,” as opposed to “discharged,” may have a legitimate expectation of recall. No law specifically requires an employer to recall a laid-off (although an employer is required by law to provide *advance notice* of a mass layoff under certain circumstances). If the laid off employee is covered by a collective bargaining agreement, the agreement *may* require his or her recall employee when work becomes available during a specified period. Similarly, a non-union employer may have imposed recall obligations on itself through a policy or procedure contained in its employee handbook. Finally, an employer who has made a verbal promise of recall may be required to honor such a commitment before hiring someone new, especially where the laid off employee foregoes other employment. Care must be exercised in the language used by management when severing employment.

New Laws *(continued from page 1)*

of a person caused by the wrongful act or neglect of another. The bill also specifies a two-year statute of limitations for a civil action for injury or death to a terrorist victim of September 11, 2001.

What employment-related claims are affected? In addition to assault and battery claims (raised sometimes in sexual harassment lawsuits), the new two-year statutes apply in actions for “injury to, or for the death of, a person caused by the wrongful act or neglect of another.” This includes claims for wrongful termination in violation of public policy, intentional infliction of emotional distress, negligence (negligent infliction of emotional distress, negligent misrepresentation, negligent hiring), invasion of privacy, federal civil rights violations that “borrow” the statutes of limitations of pertinent state laws (42 U.S.C. secs. 1981, 1983, 1985(3)), and possibly ERISA retaliation claims.

Why were the statutes of limitations extended? SB 688’s stated reasons for extending the above statutes of limitations include giving California victims of the September 11, 2001 terrorist attacks more time to consider their remedies before filing suit prematurely and to “ensure fairness” to Californians. The Legislature noted that a “vast majority of states provide for a longer time [than one year] to resolve claims short of litigation.”

What does this mean to me as an employer? Starting January 1, 2003, employers will have to wait two years, not one, from the date a potential claim arises to see whether an action will be filed. Although the Legislature suggests that the extended time limits will allow matters to be resolved “without the need to resort to litigation,” there is a likelihood that employers will find themselves defending more actions, since plaintiffs will have more time to file lawsuits. ■

Upcoming Events

October 23, 2002 - Sacramento Employers Advisory Council will present a day-long seminar on “Legal Pitfalls Cause Business Shortfalls - (Learn How To Survive In 2003)” at the Radisson Hotel in Sacramento. Call SEAC Membership Chair Vanessa Haines at (916) 484-4647 for more information.

December 5, 2002 - Sterling Education Services will sponsor an “Employment Law Update for 2002” at this day-long seminar to be held in Sacramento. Robert L. Rediger will address “Recent Developments at the NLRB” and “How to Deal with Claims of Retaliation and Threats from an Employee Accused of Misconduct.” Call Sterling at (715) 855-0495 for more information.

January 15, 2003 – Rediger, McHugh & Hubbert, LLP will host a half-day seminar from 8:30 to 12:00 noon for its clients entitled “Employment Law Essentials for 2003” at the Sutter Club in Sacramento. The Seminar will address such topics as New Labor and Employment Laws in 2003, Are you in Compliance with the California Wage Orders? and Model Forms to be used for employee reprimands, leaves of absence requests and employer response, certification of health care provider, protection of confidential information, arbitration of disputes, waiver of duty free meal period, language safeguards for inclusion on time cards, etc. More information will be provided to you regarding this seminar in the future. The cost will be \$50.00 for the first person enrolled from your organization and \$25.00 for each additional person and includes the seminar, continental breakfast, written materials and parking.

For additional information regarding upcoming events, please call Sara Wood at

(916) 568-2855 or email her at swood@rmlaw.net.

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