

Rediger, McHugh & Hubbert, LLP

Representing Management in Labor, Employment and Unfair Competition Litigation

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IN THIS ISSUE

Employee Arbitration Agreements: Are You In Compliance?	1
Legislation Concerning Employment Issues 2003/2004	1
Implementing The Decision To Discharge An Employee	2
Rediger, McHugh & Hubbert, LLP Presents Employment Law "Essentials" for 2004	3
Case Notes	5
AB 276: Increased Wage And Hour Penalties – Will You Have To Re-Vamp Payroll?	6
Upcoming Events	8

Legislation Concerning Employment Issues 2003/2004

By E. A. Hubbert, Jr.

Once again, the California legislature has proposed, and in many cases passed, numerous bills that would dramatically affect the employer-employee relationship in the State. All employers would be well advised to become aware of these proposals and communicate their position on these issues to their representatives.

In January 2004, Rediger, McHugh & Hubbert, LLP will again present a briefing for our clients regarding all the new laws and court decisions which affect employment in California. See page 3 of this newsletter for details on this half-day seminar.

Meanwhile, all employers in California should be aware of these proposed bills:

1. **AB 1527 - Frommer - Coverage for Health Insurance** - Under this bill, which Governor Gray Davis has signed, employers with 200 or more employees will be required to subsidize health care for individuals and families, or pay into a new state fund to cover their employees starting on January 1, 2006. On January 1, 2007, employers with 50 to 200 employees must cover workers, but not dependents. The bill further provides that coverage will eventually extend to employers with as few as 20 employees.

2. **AB 795 - Nunez - Wages** - This bill would prohibit employers who contract with state agencies for personal services from paying their employees more than 125% of the wage earned by the state workers performing similar work.

(Continued on page 7)

Employee Arbitration Agreements: Are You In Compliance?



If you have an agreement with your employees to arbitrate discrimination or other statutory claims that arise under the California Fair Employment and Housing Act, or common law claims for wrongful termination in violation of public policy, under California law, such arbitration agreements must meet the requirements set forth in 2000 by the California Supreme Court in the case of *Armendariz v. Foundation Health Psychcare Services, Inc.* to be enforceable.

Under *Armendariz*, such agreements must (See *Employee Arbitration Agreements* on page 6)

Discipline And Discharge (Part 2): Implementing The Decision To Discharge An Employee

By: Robert L. Rediger

Following is the second of a three part series of articles on the infamous topic of discipline and discharge. All articles provide employers with “nuts-and-bolts” suggestions when dealing with the uncomfortable, but necessary situation of having to administer corrective action and/or sever the employment relationship with an employee. Part 2, entitled “Implementing The Decision To Discharge An Employee,” focuses on the logistics of implementing an employer’s decision to sever the employment relationship with an employee.

Once the decision to discharge an employee has been made, an employer should take all necessary steps to insure the smooth implementation of its decision. The emphasis an employer places on various safeguards may depend upon the personality of the soon-to-be-discharged employee and on the reasons behind its decision to sever the employment relationship.

Who should inform the employee of the discharge?

At least two representatives of the employer should be present when the employee is informed that his or her employment is being terminated. Ideally, the two individuals should include the employee’s immediate supervisor (or the individual who possesses the actual authority to terminate the employee’s employment) and a representative from the employer’s human resources department. In the case of a volatile or emotional employee, at least one additional person, located outside of the room where the meeting is taking place, should be ready to summon the police or call for other assistance if such is required.

May the employee insist that a person accompany him or her to the meeting?

If a private nonunion (or union) employer directs an employee to attend a meeting where it intends on conducting an investigation that the employee reasonably believes might result in disciplinary action, and the employee makes a specific request to have a witness present, the employee has a right to have a *coworker* (or union representative) accompany him or her to the meeting. An employer who directs an employee to a meeting

only to inform him or her of its discharge decision, however, is not conducting “an investigatory interview,” and under such circumstances, the employee would not be entitled to have a coworker (or union representative) present at the meeting.

Should the employee be informed of the reason(s) for the discharge?

An employee must be informed of his or her *status* with the employer, *i.e.*, leave of absence, lay off, discharge, etc. An employer is not required to provide or explain the reasons behind its discharge decision to the employee at the time of discharge, but the employee must be informed that the employment relationship is ended.

A prudent employer, however, will not predicate its decision to discharge an employee solely on its avowed right to “at-will” the employment relationship. An employer’s decision to discharge should always be based on one or more business-related reasons, such as the employee’s poor job performance or misconduct, or on events beyond the employee’s control that require a reduction in force. Unless special circumstances exist, the maxim “honesty is the best policy” should be followed and *all* the reasons behind the employer’s decision to sever the employment relationship should be disclosed to the employee. Ideally, the employer will have followed its well-written personnel policies and procedures leading up to the discharge, ensuring that “all of its ducks are in a row.” (See “Discipline and Discharge (Part 1): How To Discipline”). In the case of discharge due to an employee’s poor job performance, for example, an employer should

(continued on page 4)

Rediger, McHugh & Hubbert, LLP Presents
Employment Law “Essentials” For 2004

Friday, January 9, 2004 – 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 person
(Cost includes seminar, breakfast, written materials and parking)

Is your company prepared to deal with the new employment laws that will become effective in 2004? As part of our continuing commitment to our clients, the attorneys of Rediger, McHugh & Hubbert, LLP will present an annual seminar that will provide business owners, human resource professionals, supervisors and managers with the knowledge and tools they will need to deal with the new employment-related laws and the typical personnel-related matters that arise on a daily basis.

Topics To Be Addressed

- **New California Employment Laws for 2004**
Important decisions of the California courts, paid family leave, employer liability for harassment by *non*-employees, employer paid health benefits, “bounties” paid to employees who sue for Labor Code violations, gender identity protection, the Domestic Partner Rights and Responsibilities Act, and more.
- **New Federal Employment Laws for 2004**
Important decisions of the federal courts, including the Ninth Circuit, and administrative agencies.
- **Model Forms, Posters, Notices, Brochures, Etc.**
Employee reprimands and terminations, *all* required notices that must be posted, leave of absence request form and employer response, certification of health care provider for medical-related absences, confidential information agreement, written waiver of meal period, model timecard, request for “flex” time, mandatory “arbitration in-lieu of court” agreement, *new* discrimination brochures and more.

In November, this seminar will be offered to the public at a higher cost. Due to the popularity of our 2003 seminar, we have reserved a larger room for 2004. Seating will be limited. Preference will be given to clients of our firm who register early. Register now to ensure that you are prepared for the new employment laws in 2004!

Please print information and 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.

Company: _____ Phone: _____

Address: _____

Attendees: 1.) _____

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

Did you know that past issues of the *Labor and Employment Law Reporter* are available on our firm's website?

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(continued from page 2) “at-will” the employment relationship and *remind* the employee of all the documented work-related deficiencies he or she has failed to correct.

Must the discharged employee be given a final paycheck?

At the time of discharge, an employee must be given his or her final paycheck representing all compensation owed the employee, including any pro-rated vacation or Paid Time Off if the employer has a policy providing for accrued paid vacation or PTO. Depending on the time of the employee's workday the discharge is effectuated, the employer may also have to include “reporting time pay” to the employee's final paycheck. An employer is required to pay an employee for half of his or her usual or scheduled days work, from two up to four hours, for each work day that the employee is required to report to work, but is not put to work or is furnished less than half of his or her usual or scheduled days work.

Extreme caution must be exercised if the employer desires to withhold all or a portion of wages concededly owed the discharged employee. The California Wage Orders provide specific narrow exceptions authorizing an employer to engage in “self help” where the employee has engaged in dishonestly, *gross* negligence, or the willful destruction of the employer's property. Under certain circumstances, and with a prior written authorization executed by the employee, an employer may deduct for losses where the employee fails to return a uniform or equipment as a result of the employee's theft or culpable negligence. In most cases, like any other creditor, an employer must sue the employee who owes it money.

Should the employee be given any documentation at the time of discharge?

If the employer provided group coverage

insurance, it should provide the discharged employee with pertinent information regarding his or her option to remit premiums to maintain such insurance for him or herself and family for a limited period of time pursuant to the Consolidated Omnibus Budget Reconciliation Act (COBRA) or Cal-COBRA. An employer should not present the discharged employee with a release of all claims form and request that he or she sign it, especially if the employee has not broached the subject of employment-related litigation. The employee should be directed to return all property of the employer (a checklist itemizing the property may be used). Finally, the discharged employee should be provided with a copy of any document referencing his or her obligation to maintain the confidentiality of certain sensitive information belonging to the employer.

How should the discharge meeting be concluded?

Under most circumstances, an employer who has discharged an employee will not want that employee to remain on the premises longer than is necessary. In the case of a discharge for misconduct, for example, the private meeting should be short in duration and to the point. Unless an agreement has been reached to permit the employee to continue working for a specific amount of time, the decision to discharge should be effective immediately, especially where the employee has engaged in misconduct. The discharged employee should be given a semi-supervised opportunity to remove his or her personal belongings, and requested to exit the premises without incident.

*Part 3 of the series of articles on **Discipline And Discharge** will conclude with “Post-Discharge Pitfalls” in our Winter 2003 edition of the *Labor and Employment Law Reporter*.*

Answers To Your Employment Related Questions

We are sometimes asked the same labor and employment law question by several people. With the inquiring person's permission, we will reprint such questions in this column for the benefit of all of our readers.

Question: What are the rules for employee meal periods in California?

Answer: For meal periods, 1) No employee may work more than five (5) hours without an unpaid meal period of not less than thirty (30) minutes, except that when a work period of not more than six (6) hours will complete the day's work, the meal period may be waived by mutual consent of employer and employee, 2) Unless the employee is relieved of all duty during a thirty (30) minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked, and 3) An "on duty" meal period shall be permitted only when it is agreed to in a written agreement between the parties and the nature of the work prevents an employee from being relieved of all duty.

Case Notes

Agreement To Arbitrate As Condition of Employment Upheld By Ninth Circuit

EEOC v. Luce, Forward, et al,

The Ninth Circuit Court of Appeal removed the final impediment to arbitration agreements by rejecting an applicant's contention that he was unlawfully retaliated against for refusing to sign an arbitration agreement that was a non-negotiable condition of employment. The Defendant law firm had declined to hire the applicant because he refused to sign an agreement stating that all claims regarding his employment would be resolved by arbitration. The Ninth Circuit by a nine-two vote overruled its decision in *Duffield*, which had been at odds with decisions of the California State court and federal circuits permitting employers and employees to enter arbitration agreements provided that there are minimal safeguards in place.

Workers' Compensation Act Did Not Bar Employee's Invasion of Privacy Claim

Operating Engineers Local 3 v. Johnson

A jury awarded damages to an employee for invasion of privacy and mental stress based on a supervisor's announcing of discipline to other employees with no interest in the matter. The employer argued that workers' compensation barred the employee's claims. A California appellate court disagreed, finding that the supervisor's dissemination of private information exceeded the known and inherent risks of the workplace.

Firing At-Will Employee For Fighting In Self-Defense Did Not Violate Public Policy

Escalante v. Wilson's Art Studio, Inc.

A jury awarded damages to an at-will employee who was terminated for violating employer's policy against fighting after he turned around to confront a coworker who had physically attacked and was pursuing him. The employer appealed and the California Court of Appeal reversed, finding that any public policy based on the Constitutional right of self-defense did not extend to a situation where the employee could have retreated.

Employees Should Have Been Paid For Time Spent Getting Into And Out Of Protective Gear

Alvarez v. IBP, Inc.

The Ninth Circuit upheld a lower court's order finding that meat-packing employees of IBP, Inc. were entitled to compensation for time spent putting on and taking off protective gear that was unique to their work at IBP (e.g., liquid-repelling sleeves, aprons and leggings, Kevlar gloves, mesh aprons, etc.) and for time walking between the dressing area and work station, but *not* for the minimal time spent donning and doffing non-unique protective gear such as hardhats and safety goggles. Since IBP was on notice of FLSA requirements, its violation was "willful," resulting in a three year statute of limitations and liquidated damages.

AB 276: Increased Wage And Hour Penalties . . . Will You Also Have To Re-Vamp Payroll For Non-Exempt Employees?

On September 6, 2003, Governor Gray Davis signed AB 276, a bill which doubles civil penalties for such wage and hour violations as failing to timely pay wages, unlawfully withholding wages, and paying less than the minimum wage. AB 276 becomes effective on January 1, 2004 and amends several sections of the Labor Code. The intent behind AB 276 was to increase low fines and to deter employers from violating wage and hour laws.

AB 276 seems simple enough, and it would be, were it not for one word, which has possible onerous implications for employers. The word is “accurate” and it will be found in amended Labor Code section 226.

Currently, Labor Code section 226 requires employers, semimonthly or at the time of each payment of wages, to furnish their employees “with an itemized statement in writing” (*i.e.*, a pay stub) showing things such as gross wages earned, total hours worked, all deductions, net wages, etc. Effective January 1, 2004, section 226 will be amended in pertinent part to read, “with an *accurate* itemized statement in writing.”

What Are The Implications Of Requiring “Accurate” Pay Stubs?

Many employers pay their *non-exempt* employees on a semimonthly basis, for 86.67 hours worked per pay period. (This number is reached by dividing the number annual hours worked (2080) by 12 months in the year, and then dividing that number (173.3333) by 2 to reach the semi-monthly amount of 86.67.) The 86.67 hours worked number is an average and is not necessarily an “accurate” account of hours worked. Arguably, under the new law, employers will be required to itemize the exact “accurate” hours worked per pay period.

Unfortunately, there is little guidance on how this new language should be interpreted. The stated purpose of the bill focuses on the increases in penalties and also states that the bill “would also make other technical, nonsubstantive changes to existing law.” As such, it could be argued that the

use of the word “accurate” was not meant to create a substantive change to section 226. In May 2003, the AFL-CIO issued an informational bulletin, calling the change “minor” and “technical,” stating that such “is needed since some judges allow the employer to escape penalties so long as they provide ‘a pay stub.’” Since the new law is not effective until January 1, 2004, we have time for guidance as to what is meant by the word “accurate.” Meanwhile, come January 1, 2004, to play it safe, prudent employers should provide their non-exempt employees with “accurate” itemized pay stubs of actual hours worked per pay period._

Employee Arbitration Agreements

(continued from page 1)

satisfy the following “minimum safeguards”:

1. Require neutral arbitrators;
2. Allow for more than minimal discovery;
3. Require a written decision by the arbitrator;
4. Allow for all types of relief otherwise available in court; *and*
5. Not require employees to pay either unreasonable costs or arbitrators’ fees or expenses as a condition of access to the arbitration process.

In addition to complying with *Armendariz*, your arbitration agreements must satisfy the requirements for a valid and enforceable contract under state law. Thus, your agreements must be supported by consideration and executed absent fraud, duress, mistake or lack of capacity, and must not be procedurally or substantively “unconscionable.”

If your arbitration agreement does not comply with the law, it is likely that the court will either strike the non-complying provisions, in which case the dispute may still be arbitrable, or find that the agreement is wholly unenforceable, in which case the dispute will likely end up in court. Thus, it is important for you to make sure your agreements are in compliance with the current law, which may require some updating on your part.

(continued from page 1)

3. *SB 57 - Burton - Minimum Wage* - This bill would adjust the minimum wage on January 1, 2004, and annually thereafter, to maintain employee purchasing power. The automatically adjusted minimum wage would be calculated using the California Consumer Price Index for all urban consumers.

4. *AB 1715 - Committee on Judiciary - Arbitration* - This bill would invalidate agreements that require the arbitration of Fair Employment and Housing Act claims. It further establishes that 1) it is an unlawful practice to require an employee to waive his or her rights or otherwise available procedures under the Fair Employment and Housing Act, 2) a waiver of rights and procedures under the Fair Employment and Housing Act must be knowing, voluntary, and not made as a condition of employment or continued employment, and 3) a waiver of rights or procedures under the Fair Employment and Housing Act required as a condition of employment or continued employment prior to January 1, 2004 may be deemed involuntary as to a claim under the Fair Employment and Housing Act that arises on or after January 1, 2004.

5. *AB 76 - Corbett - Harassment By Third Parties* - Under this bill, which Governor Gray Davis has signed, it is unlawful under the Fair Employment Housing Act for an employer to fail to take immediate and appropriate corrective action to prevent harassment of an employee by any person once the employer knows, or should have known, of the conduct. The California Supreme Court is currently considering a case wherein a lower court held that an employer's duty to prevent harassment did not extend to harassment by an employer's customers or clients.

6. *AB 1582 - Koretz - Abusive Work Environment* - This bill would make it an unlawful employment practice under the Labor Code to subject an employee to an abusive work environment. Abusive conduct is defined as repeated infliction of verbal abuse, such as the use abusive derogatory remarks, insults and epithets, verbal or

physical conduct that a reasonable person would find threatening, intimidating or humiliating; or the gratuitous sabotage undermining of a person's work performance.

7. *AB 205 - Goldberg - New Rights for Domestic Partners of Employees* - This bill, which Governor Davis signed, enacts the California Domestic Partner Rights and Responsibilities Act of 2003. Effective January 1, 2005, any law or employer policy that provides a right or benefit to employees with spouses must afford those same rights and benefits to employees with domestic partners.

8. *SB 2 - Burton - Universal Health Care for Employees* - This bill, which Governor Davis signed, creates a State Health Purchasing Program, to be administered by a Managed Risk Medical Insurance Board, and requires that specified health benefits be provided directly by employers or through the Program. SB 2 requires the Board to arrange health plan coverage for certain employers who would be required to pay a fee for employee health coverage, except employers who provide health care coverage directly to their employees would receive a credit against the fee. Beginning on January 1, 2006, employees and dependents of large employers must be covered and on January 1, 2007, subject to certain conditions, employees of medium sized employers must be covered.

9. *AB 268 - Mullin - Public Employer Supervisory Training Expanded* - This bill, which Governor Davis signed, requires supervisory employees employed by the State to be provided with a minimum of 80 hours of training that now must include employment law relating to persons with disabilities.

10. *AB 846 - Vargas - Smoking Prohibited Near Public Buildings* - This bill, which Governor Davis signed, prohibits smoking within 20 feet of a main exit, entrance or operable window of a public building. AB 846 also allows any county, city or state agency to adopt and enforce additional smoking and tobacco ordinances, regulations or policies that are more restrictive.

Upcoming Events

January 9, 2004 – Rediger, McHugh & Hubbert, LLP will host a half-day seminar from 8:30 am to 12:00 noon entitled “Employment Law Essentials for 2004” at the Sutter Club in Sacramento. The seminar will focus on the new labor and employment laws that will become effective in California in 2004. Attendees will receive copies of the new laws and will also be provided with Human Resource Forms for immediate use for employee reprimands, leaves of absence requests and employer response, certification of health care provider, protection of confidential information, arbitration of disputes, waiver of meal period, language safeguards for inclusion on time cards, etc. The cost for our clients is \$100.00 for the first person and \$75.00 for each additional person from your organization and includes the half-day seminar, continental breakfast, parking at the Sutter Club, and a binder containing the written materials. (See enclosed registration form.)

For additional information regarding upcoming events, please call Sara Mauzac at (916) 442-0033 or email her at swood@rmlaw.net

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