

Rediger, McHugh & Hubbert, LLP

Representing Management in Labor, Employment and Unfair Competition Litigation

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Fiduciary Liability: What is Your Role in Your Company's 401K Plan?

By Daxs A. Stadjuhar, AIF®

In the wake of headlines announcing wrongdoing on the parts of Enron and Worldcom, the U. S. Department of Labor is encouraging employers to review fiduciary duties imposed by the Employee Retirement Income and Security Act (ERISA). While the Enron case may present an extreme example of blatant negligence by executives, a breach of a fiduciary's duties may be caused by simply not understanding obligations under a 401K plan. More importantly, prosecutors do not confine the application of ERISA rules to Fortune 500 companies. Small-to medium-sized business cannot ignore their fiduciary responsibilities to a company's employees and their beneficiaries. (Continued on page 2)

Non-Union Employees Do Not Have a Right to Have a Witness Present During An Investigatory Interview

By Jessavel Y. Wong

The National Labor Relations Board (NLRB) recently held in *IBM Corp.*, 341 NLRB No. 148 (2004) that *non-union* employees do not have the right to have a witness attend an investigatory interview. In so holding, the NLRB overruled *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000) which had extended the rule of *NLRB v. Weingarten* (1975) 420 U.S. 251 to the non-union setting. In *Weingarten*, the United States Supreme Court affirmed an NLRB decision that a *union* employee had a right to have a union representative attend an interview the employee reasonably believed might result in disciplinary action.

In *IBM Corp.*, the employer conducted an investigation after a former contract employee made allegations of sexual harassment. The employer interviewed three non-union employees. Following an initial interview and after being placed on leave, these employees requested to have a coworker present during subsequent interviews. The employer denied the employees' requests and the employees filed unfair labor practice charges, alleging that the employer violated the National Labor Relations Act (NLRA) by denying their *Weingarten* rights.

Although the NLRB acknowledged that *Weingarten* could be interpreted to apply to non-union workers, it concluded that, in light of ever-increasing requirements to conduct workplace investigations, incidents of corporate abuse and fiduciary lapses, and new security concerns raised by incidents of national and workplace violence, an employer in a non-union setting should be allowed to conduct its required investigations without the presence of a coworker. (Continued on page 4)

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Who is a Fiduciary?

Many of the actions involved in operating a plan make the person performing them a fiduciary. Using discretion in administering a plan or controlling the plan's assets may qualify a person as a fiduciary. Fiduciary status is based on the actions performed, not the title of the individual. A fiduciary may *include the company's owner, trustee, committee member, controller, book-keeper, investment advisor, attorney or accountant.*

What are the Fiduciary's Standards of Conduct?

Fiduciaries have important duties because they act on behalf of participants. Sections 401 through 412 of ERISA are intended, among other things, to provide a basis for standards of conduct for fiduciaries. In summary, these standards are:

- 1) Policies and Procedures (Investment Policy Statement) should be in writing.
- 2) Investment decisions must be made against a "prudent expert" standard.
- 3) Plan assets must be diversified.
- 4) Prohibited investment transactions must be avoided.
- 5) Duties must be discharged for the exclusive purpose of providing benefits to participants and to defray reasonable administration expenses.

Procedural Prudence

Establishing procedures to track and evaluate decisions, and documenting those decisions, are of paramount importance for a fiduciary. While a fiduciary is not expected to be an expert in ERISA law, they should be knowledgeable enough to grade the competency of their advisors and make sure they are using standards to protect the participants of the plan. The following are a few crucial questions that should be addressed in accordance with the Standards of Conduct:

- 1) Is there an Investment Policy Statement that describes the policies and procedures for selecting, monitoring, and benchmarking investment options?
- 2) Are plan fiduciaries and trustees named in the Summary Plan Description and do they know their duties?
- 3) Are individuals who handle plan assets bonded?
- 4) How often are investment options rated against their peers and benchmarks to identify underperforming managers?
- 5) Are fees for administration and expense charges reasonable?
- 6) Are employees receiving necessary information to allow them to make prudent investment decisions?
- 7) Has a limitation of liability under Rule 404c been requested and disclosed to all participants?

Liability and Exposure under ERISA:

While many fiduciaries may believe they are doing a fine job offering a 401K plan to their employees, they may not have a formal plan in place to ensure compliance with the Standards of Conduct. Since plan assets represent the most significant savings most employees have set aside for their retirement years, participants may bring suit alleging that a fiduciary failed to properly fulfill their duties. It is crucial that a fiduciary take a proactive stance in the maintenance of a plan. Knowing the rules, selecting experienced advisors, and following established procedures, are the keys to a successful plan. Remember, a plan is not graded on investment performance, but on procedural prudence.

Daxs A. Stadjuhar is an Accredited Investment Fiduciary™ with Stadjuhar Wealth Strategist, a local Investment Advisory Firm that provides a full suite of services to business owners on plan design, cost-efficient 401K plans, and fiduciary compliance. He can be reached at 916-721-1000.

Rediger, McHugh & Hubbert, LLP Presents **Employment Law “Essentials” For 2005**

Friday, January 7, 2005 – 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, CD and parking)

Is your company in compliance with the employment laws and court decisions that became effective this past year? As part of its ongoing commitment to its 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 employment-related laws. The attorneys will also provide advice and tools to help employers deal with typical personnel-related matters that arise on a daily basis.

Topics To Be Addressed

- **Developments In California Employment Laws**
Important decisions by the California courts, paid family leave (PFL), an employer’s defense to sexual harassment, changes to the “Bounty Hunter” law, the new Domestic Partner law, wrongful termination lawsuits by unionized employees, class action lawsuits alleging the failure to pay overtime, and more.
- **Developments In Federal Employment Laws**
Important decisions by the federal courts and agencies, including decisions by the Bush NLRB that affect nonunion employers, efforts by the EEOC to circumvent an employee’s agreement to proceed to arbitration, the DOL’s new “white collar” exemptions (including a 1 hour seminar on CD), and more.
- **Model Forms and Policies, Posters, Notices, Etc.**
Model form to reprimand and terminate, new posters including Whistle Blower Protection and Workers’ Compensation, how to process a leave of absence request and use a Certification of Health Care Provider for medical-related absences, model timecard, mandatory arbitration agreement, and more.

In December, this half-day seminar will be offered 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 are aware of the employment developments that took place in 2004 and that you are prepared for 2005!

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: _____ Email: _____

Attendees: 1.) _____

2.) _____

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

Looking Beyond the “Cat’s Paws” To Find Retaliatory Animus

By Jessavel Y. Wong

When a personnel decision is based on the recommendation of lower level actors, unlawful animus by one actor may be sufficient to establish employer liability. In *Reeves v. Safeway Stores* (Cal.App.Dist. 6 July 29, 2004), William Reeves reported what he believed constituted sexual harassment of female employees to his supervisor, Fred Demarest. Demarest did not investigate Reeves’ reports. Thereafter, Demarest instigated an investigation of a separate incident wherein Reeves allegedly pushed another employee. This investigation led to Reeves’ discharge. Reeves filed a complaint against Safeway alleging that he was discharged in retaliation for his complaints about sexual harassment.

Safeway brought a motion for summary judgment, asking the court to dismiss the case on the ground that Reeves could not establish retaliatory motive since the district manager who made the decision to discharge him did not know about his sexual harassment complaints. Safeway also argued that Reeves’ discharge was based on a legitimate, non-retaliatory reason, *i.e.*, a belief that he had engaged in misconduct warranting dismissal. The lower court granted Safeway’s motion.

The appellate court reversed, holding that to conclusively negate the element of causation and retaliatory motive, Safeway must show that *all* corporate actors who contributed materially to the adverse employment action were ignorant of Reeve’s protected activity and not motivated by retaliatory animus. The court concluded that a rational fact-finder could find from the evidence and reasonable inferences that Demarest was motivated by a desire to get rid of Reeves for complaining about sexual harassment and that the district manager acted as Demarest’s “cat’s paw” when she rubber-stamped the recommendation to terminate.

Practical Impact of Reeves: The *Reeves* court was troubled that the district manager’s decision to discharge Reeves was based entirely on what a security officer had told her in a 20-minute telephone

conversation. The court noted that although the district manager knew Reeves had worked for Safeway for almost 30 years, she did not review his personnel file and did not know of the many commendations he received. Also, she failed to interview Reeves or corroborate the investigation. Had she done so, she may have discovered his recent complaints of sexual harassment to another supervisor, who may have been acting with unlawful animus.

Decision-makers should not merely rubber-stamp recommendations to discharge or discipline. Managers should conduct an independent investigation before making a disciplinary decision and scrutinize any investigative reports concerning the incident-giving rise to a recommendation to discipline or discharge.

Non-Union Employees Do Not Have a Right to Have a Witness Present During An Investigatory Interview

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In so holding, the NLRB found that, unlike a union representative, a coworker does not represent the interests of the entire workforce, is often unskilled in facilitating an investigation or resolving issues, may compromise the confidentiality of information disclosed at an investigatory interview, and may inhibit candid responses to questioning by the employer.

Implications For Employers: Union employees still have a right to request that a representative attend an investigatory interview that might result in discipline. However, non-union employees no longer have such right. Following the NLRB’s decision in *IBM Corp.*, employers are in a better position to conduct workplace investigations without compromising the confidentiality of their investigations related to non-union employees.

Recent Developments

Employees Who Were Misclassified as “Exempt” May Bring A Class Action To Recover Overtime Compensation

On August 26, 2004, the California Supreme Court in *Sav-on Drugs v. Superior Court* held that employee’s who were compensated by Sav-on Drug Stores as “salaried managers,” could maintain an action on behalf of themselves and other similarly situated employees to recover unpaid overtime compensation, damages and other injunctive relief. The high court rejected the employer’s arguments that the individual and fact sensitive determination that is required when determining whether an employee is exempt or non-exempt from the overtime requirements of California’s wage and hour law were enough to defeat the plaintiff’s motion to certify a class of “managers” at Save-on Drugs.

Federal “White-Collar” Exemption Rules Take Effect

As stated in the Summer 2004 *Labor and Employment Law Reporter*, the US Department of Labor’s new regulations defining the white-collar exemptions under the federal Fair Labor Standards Act went into effect on August 23, 2004. Congress is considering bills that could change the regulations, but for now, covered employers must ensure that they comply with the new regulations that can be found at 29 Code of Federal Regulations Part 541. The “grace period” has ended.

“Bounty Hunter” Law Modified

By E. A. Hubbert, Jr.

The so-called “Bounty Hunter” law that became effective during the Davis administration has been substantially modified by the recent passage of SB 1809. The law had allowed employees to sue their employers for Labor Code violations and to recover penalties for each violation during each pay period as well as attorney’s fees.

SB 1809 is now in effect with some of its provisions being retroactive to January 1, 2004. Lawsuits for most violations of posting, notice, agency reporting or filing requirements are now excluded from the penalties in private enforcement actions except those relating to mandatory payroll or workplace injury reporting. A judge must now review and approve penalties in connection with any settlement agreement.

Before a lawsuit can now be filed, an employee must give notice of the alleged violation to the employer and to the Labor and Workforce Development Agency. The notice must state the Code provisions alleged to have been violated and supporting facts and argument. If the Agency states it will not investigate, or no notice is provided to the parties in 33 calendar days, the employee may file a lawsuit. If the Agency notifies the employer and employee within 33 calendar days that it intends to investigate, it has up to 120 calendar days to complete its investigation. The employee may file a lawsuit if the Agency does not cite the employer or it fails to issue a citation against the employer within 158 calendar days.

Violations relating to safety are covered by slightly different procedures. If the Division of Occupational Safety and Health receives a notice as referred to above, it must investigate. If it issues a citation, no lawsuit may be filed. If it fails to investigate, the employee may proceed with a lawsuit. A lawsuit may not be filed when the employer and Cal-OSHA are parties to an agreement for a long-term abatement of conditions or a consultation agreement with regard to a condition at a particular worksite.

Upcoming Events

September 29, 2004 – National Business Institute will present a seminar entitled, “California Wage and Hour Update” from 9:00 a.m. to 4:30 p.m. in Sacramento. In the morning session, Robert L. Rediger will provide an overview of wage and hour laws and discuss “exempt” employees under California law, the new federal overtime regulations, and “special” issues that arise under wage and hour laws. Clients of Rediger, McHugh & Hubbert are eligible for a \$50.00 discount of the registration fee by identifying themselves as a client of the firm. Call Susan Zukowski at NBI at **1 (800) 770 8707**, ext. 311.

October 20 and 21, 2004 – The Council on Education in Management will host a two-day seminar entitled Public Sector Employment Law Update for 2004 in Sacramento. Laura C. Mc Hugh will provide an update on EEOC/Discrimination issues. Robert L. Rediger will address the federal Fair Labor Standards Act (FLSA) and the new federal overtime regulations. Call CEM at **(704) 561-0215** to register.

November 10, 2004 – Lorman Education Services will present a one day seminar in Folsom, California entitled “Employment Law from A to Z in California.” Robert L. Rediger will address Leaves of Absence Under California Law and Employee Discipline And Discharge. Call Lorman at **(888) 678-5565**.

January 7, 2005 – Rediger, McHugh & Hubbert will present its annual half-day seminar on Employment Law “Essentials” starting at 8:30 am at the Sutter Club in downtown Sacramento. *See page 3 for details.*

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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