

Rediger, McHugh & Hubbert, LLP

Representing Management in Labor, Employment and Unfair Competition Litigation

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Leaves of Absence Required by Law In California (Part 1)

By Robert L. Rediger

The basic labor law maxim that "an employee must be to be ready, willing and able to work as scheduled" has been eroded over the years. Federal and state lawmakers have passed numerous laws "excusing" an employee's absence from work for specific reasons. Leave of absence laws embody legal determinations that have been made that an employee's need to be absent from work takes precedence over an employer's right to require the employee to be at his or her job or face discipline or discharge.

Employers and their managers who grant and deny requests for time off *must* be aware that when an employee bases his or her request for a leave of absence on certain

reasons, the law may *require* that the request for the leave of absence be granted, regardless of any employer policy or rule to the contrary. The erroneous denial of a leave of absence allowed by law could subject the employer (and sometimes the manager making the decision to deny the leave) to various forms of liability.

How To Evaluate A Request for A Leave of Absence

When presented with an employee's request for time off from work, an employer should first determine *whether it is an entity covered* by one or more of the laws that address the reason(s) underlying an employee's leave request. Second, the employer should ascertain *whether the employee is eligible* for the leave. Third, if a covered employer is inclined to deny an eligible employee's request for a leave, it must do so *only* if the particular law(s) invoked by the leave request permit such and the employer is able to satisfy the requirements for denying the leave request. Finally, if it cannot meet the standard for denying the leave, the employer *must* grant the leave of absence request.

Checklist of Reasons For Leaves of Absence Required By Law

Following is an alphabetical list of reasons an employee may give for requesting time off from work that may require the employer to grant the request and may prevent the employer from taking any "adverse action" against the employee if he or she fails to report for work as scheduled:

1. Alcohol or Drug Treatment – A private employer who employs 25 or more employees must grant an unpaid leave of absence to an employee who expresses a desire to voluntarily enter or participate in an alcohol or drug rehabilitation program, provided such does not impose undue hardship on the employer. California law does not require an employer to hire or continue the employment of a person who is unable to perform his or her duties or who cannot perform said duties without endangering the

health and safety of the employee or others. An employer is required to take steps to protect the employee's privacy regarding his or her enrollment in an alcohol or drug rehabilitation program. An employee may use sick leave to which he or she is otherwise entitled to enter and participate in the rehabilitation program.

2. Disability Leaves – An employee who is injured on the job is deemed to be on a protected leave of absence for the duration of his or her disability unless the employer can demonstrate that business realities necessitated the replacement of the employee or the unavailability of his or her position. To the extent the employee suffers or is perceived to suffer from a physical or mental disability, an employer who regularly employs five or more employees *may* be obligated to grant the employee an unpaid leave of absence as a “reasonable accommodation” if such would enable the employee to perform the essential functions of his or her job.

3. Domestic Violence – An employer must grant unpaid time off from work to an employee who is the victim of domestic violence and needs time off from work 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. An employee requesting a leave for domestic violence related matters may be required to provide the employer with reasonable notice of his or her anticipated absence, unless the advance notice is not feasible. The employer may request that the employee provide a written “certification” to it substantiating the leave for domestic violence related matters. The employer must maintain the confidentiality of any employee requesting a leave for domestic violence related reasons. An employer who employs 25 or more employees may also be required to grant additional time off (up to the unpaid time permitted by the federal Family And Medical Leave Act) to the employee to seek medical and/or psychological attention and/or to obtain or seek other protective services.

An employee requesting a leave for domestic violence related reasons may also use available vacation, personal leave or compensatory time off during the leave. An employee who has been discharged or discriminated against in violation of the law is entitled to reinstatement and reimbursement of lost wages and benefits. An employer who willfully fails to rehire or restore an employee to his or her former position may be found guilty of a misdemeanor.

4. Family Care – An employer who employs 50 or more employees *must* grant the request of an employee, who has been employed for more than 12 months and who has worked at least 1250 hours during said time, to take off from work up to 12 unpaid workweeks in any 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. A covered employer will generally be required to continue any group health care insurance for the employee on the family care leave for at least 12 weeks. (*Note* – Some employers may be required to integrate Family Care Leave with Pregnancy Leave.) An employee who qualifies for a Family Care Leave may take the leave on an intermittent or part-time basis when medically necessary.

5. Illiteracy – A private employer who employs 25 or more employee must permit an employee who reveals that he or she has a problem of illiteracy to enroll in an adult literacy education program provided such does not impose an undue hardship on the employer. An employee who reveals that he or she has a problem with literacy, but who satisfactorily performs his or her work duties, may not be terminated because of their disclosure. The employer must make reasonable efforts to safeguard the fact that an employee has a problem with literacy and must provide “assistance” to the employee, which includes providing the employee with the locations of local literacy education programs or arranging for a literacy education provider to visit the job site.

6. Jury Duty – An employer must grant unpaid time off from work to an employee who gives it reasonable advance notice to serve as a juror. An employee requesting a leave for jury duty may be required to provide the employer with reasonable notice that he or she is required to serve. The employee may also use available vacation, personal leave or compensatory time off during the leave. An employee who has been discharged or discriminated against in violation of the law is entitled to reinstatement and reimbursement of lost wages and benefits. An employer who willfully fails to rehire or restore an employee to his or her former position may be found guilty of a misdemeanor. Federal law provides similar protections for employees who are subjected to adverse action for their participation in actual or scheduled jury service.

7. Military and National Guard Service – Employers must provide unpaid leave to officers and other members of the military or Naval Forces of California or the United States. Under certain circumstances, employees who perform military service under federal law may not be fired without “good cause” for one year following their reinstatement.

8. Pregnancy, Childbirth or Related Medical Condition – Private employers employing five or more employees must grant a female employee who is disabled because of pregnancy, childbirth or related medical condition, an unpaid leave of absence up to four months which need not be taken at one time. A female employee may be required to provide reasonable notice of the beginning and estimated duration of the pregnancy-related leave. The employer may require written medical confirmation that the disability has ceased prior to reinstating the employee, if such confirmation is required of employees returning from leaves because of other disabilities.

9. School Visits – No employer may deny a leave to a parent who is requested to appear at school because their child has been suspended provided the employee gives reasonable notice to his or her employer. An employer who employs 25 or more employees must allow an employee to take up to 40 unpaid hours of time 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 of the child provided the employee provides reasonable notice that their attendance at school is requested. An employer may request that the employee provide documentation from the school that he or she participated in school activities on a specific date and at a particular time. An employee who is subjected to adverse action as a result of taking time off to participate in school activities is entitled to reinstatement and reimbursement for lost wages and work benefits. If an employer refuses to restore such an employee to the status quo, the employer is subject to a civil penalty equal to three times the amount of the employee’s lost wages and benefits.

10. Sickness of Family Member – An employer who provides sick leave for employees is required to permit an employee to use accrued sick leave in an amount not less than the sick leave that would be accrued during six

months, to attend to an illness of a child, parent or spouse of the employee. While the law does not require an employer to provide paid sick leave to any employee, it does protect the employee’s right to be absent from work for using otherwise available sick leave to attend to an illness of a child, parent or spouse of the employee.

11. Subpoenaed Witness – An employer must grant unpaid time off from work to an employee who gives it reasonable advance notice that he or she must appear in court to comply with a subpoena or other court order as a witness in any judicial proceeding. An employee may use vacation, personal leave, or compensatory time off, while on a leave as a subpoenaed witness. An employee who has been discharged or discriminated against in violation of the law is entitled to reinstatement and reimbursement of lost wages and benefits. An employer who willfully fails to rehire or restore an eligible employee to his or her former position may be found guilty of a misdemeanor.

12. Volunteer Firefighting, Reserve Peace Officer or Emergency Reserve Personnel – No employer may deny an unpaid leave of absence to an employee who needs time off to perform emergency duty as a volunteer firefighter, reserve peace officer or emergency reserve or provider of emergency medical services does not have to grant this leave when the employer determines that the employee’s absence would hinder the availability of public safety or emergency medical services. An employee who has been discriminated against is entitled to reinstatement and reimbursement for lost wages and benefits. In addition, an employer who willfully refuses to reinstate such an employee to the status quo may be found guilty of a misdemeanor. An employer who employs 50 or more employees must also allow an employee who is a volunteer firefighter to take temporary leaves of absence up to 14 days per year to engage in fire or law enforcement training.

13. 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 must provide up to 2 *paid* hours off at the beginning or end of the employee’s regular work shift to enable the employee to vote. An employee serving as an election observer on Election Day must be given *unpaid* time off for election observing.

New Law May Require Disclosure of Information to Applicants and Employees

AB 655 amends the California Consumer Credit Reporting Act to provide that employers who do their own checking of an individual's "character, general reputation, personal characteristics, or mode of living," for the purpose of evaluating that individual "for employment, promotion, reassignment, or retention as an employee," must provide that information to the employee, or to the applicant in the interview, or within 7 days of receiving the information, whichever is earlier.

If an employer does not collect information pertaining to an individual's "character, general reputation, personal characteristics, or mode of living," for the purpose of evaluating that individual "for employment, promotion, reassignment, or retention," it would not be affected by the change in the law. If an employer bases employment related decisions, in whole or in part, on an individual's "character, general reputation, personal characteristics or mode of living" it should review the criteria it relies on to hire and evaluate employees (i.e., the application form and performance evaluation forms) to ascertain whether it is collecting, evaluating, compiling or otherwise using such information because it may find itself in the position of having to explain how such information constitutes a "legitimate, business reason" for its employment related decisions.

The articles contained herein are for informational purposes only and should not be relied upon in reaching a conclusion to a particular question.

Recent Decisions...

Robert L. Rediger obtained a "nonsuit" in the Solano County Superior court against an employee who alleged retaliation, whistle blowing and defamation, resulting in her case being thrown out of court. *Torres v Dixon Family Services*.

Laura C. McHugh received a favorable award from a labor arbitrator where the union alleged that the employer failed to provide contractually guaranteed hours to an employee on medical restriction. *ATU Local 256 and Paratransit, Inc.*

Ninth Circuit Rules That Employers Must Notify Employees How The "12 Month Period" For FMLA Leave Will Be Calculated

By E.A. Hubbert, Jr.

The Department of Labor has adopted regulations allowing employers to designate one of four methods for determining the twelve-month period in which an employee may take Family and Medical Leave. The Ninth Circuit Court of Appeals has recently held that if an employer does not designate and notify employees of which of the four methods it will apply in the workplace, the employee will be allowed to select whichever method is most beneficial to the employee. This could result, for example, in an employee being allowed to take twelve workweeks at the end of one calendar year and then another 12 work weeks at the beginning of the calendar year or 24 consecutive weeks on Family and Medical Leave.

The regulations allow an employer to select and designate a 1) calendar year, 2) fixed twelve-month leave year which is either a fiscal year or a year starting on the employee's anniversary date, 3) twelve-month period measured for the date any employee's first leave began or 4) rolling twelve-month period measured backwards from when the employee first uses any FMLA leave.

All employers should carefully select which method they wish to apply at their workplace and be sure that all employees are notified in advance. Employers should spell out the method they choose in their Employee Handbook and/or other notification methods that have been adopted.

In The Next Issue...

In the next issue of The Labor And Employment Law Reporter, Mr. Rediger will address "Developing Policies and Procedures For Handling Requests For Leaves of Absence." Look for **Part 2** of Mr. Rediger's article regarding Leaves of Absence Required by Law in California.

COMPETITION BY FORMER EMPLOYEES: RULES AND TIPS FOR EMPLOYERS

by Laura C. McHugh

When it comes to competition by former employees, California public policy is clear: *the interests of employees in mobility and betterment are deemed paramount to the competitive business interests of the former employer.* Thus, it is not surprising that in California, “non-compete covenants” contained in employment agreements are generally void and unenforceable. The exception to this rule applies where such covenants are designed to protect confidential proprietary or property rights, such as trade secrets. Set forth below are some guidelines for employers regarding competition by former employees and how to handle firing and separation issues involving non-compete agreements.

General Rules on Competition by Former Employees

Employees May Compete with Former Employers, So Long as They Compete “Fairly:” Former employees *may* take and use at their new place of employment any general skills or knowledge acquired at a former job. Such “fair” competition is legal.

Employees May Not “Unfairly” Compete with Their Former Employers: “Unfair” competition typically occurs when the departed employee: (1) uses or discloses the former employer’s trade secrets; (2) uses confidential customer information from a former job to solicit customers in a new job; or (3) interferes with the former employer’s workplace.

Non-compete Agreements Generally Are Enforceable in Three Situations:

1. To Protect Company Trade Secrets.

Agreements not to use or disclose the employer’s trade secrets during and after employment are fully enforceable. The information sought to be protected, however, must meet the statutory definition of “trade secret” under California’s Uniform Trade Secrets Act.

2. To Protect Against Improper Solicitation of Customers.

Former employees are always free to announce a change of employment to their employer’s former customers and accept invitations from them to discuss business. However, they may not use trade secret

customer information, such as customer lists, pricing information, key contact persons, sales reports, marketing plans, specialized requirements, market rates and other information or irrefutable commercial value to the employer that is not readily ascertainable to other competitors, to solicit the business of their former employer’s customers.

3. To Protect Against Improper Interference With the Workforce.

Employers are generally free to solicit or hire away a competitor’s employees who are not under contract. However, covenants which restrict workforce interference may be enforceable, if limited in duration and geographical locality.

Tips on Hiring and Separation

When Hiring - Ask, Ask, Ask! Ask all applicants whether they have signed a non-compete or confidentiality agreement with their present employer. If so, ask to review the agreement to determine applicable restrictions. Discuss what type of confidential information the applicant has had access to. If necessary, inform the applicant that announcing a job change to the former employer’s customers is okay, but that soliciting their business is not. New hires should not sign non-compete or confidentiality agreements until they leave their former employ.

When Severing the Relationship - Remind, Recover and Memorialize! It is a good idea to conduct an exit interview. Remind the departing employee of his or her duty and/or contractual obligation not to divulge the company’s confidential information or trade secrets. Have the departing employee describe his or her new position and any possible overlap in responsibilities. Also, have the departing employee identify all confidential documents in his or her possession and *recover those items immediately.* Finally, the employee should be asked to sign an acknowledgment memorializing the exit interview and his or her duty of confidentiality.

When in Doubt - Ask, Ask, Ask! Should questions arise concerning non-compete or confidentiality agreements, consult a legal professional. It is also wise to have such agreements reviewed periodically.

Upcoming Events

March 19, 2002 - Leaves of Absence In California Seminar sponsored by Lorman Education Services, 9:00 a.m. to 4:30 p.m., Red Lion's Sacramento Inn. The seminar will cover all aspects of legally required leaves in California.

May 9, 2002 - California Employers Advisory Counsel will host a two-day conference in Folsom, California. Robert L. Rediger will participate in the mock trial of a discrimination lawsuit and provide commentary of what takes place behind the scenes in employment-related litigation.

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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