Rediger, McHugh & Hubbert, LLP

Representing Management in Labor, Employment and Unfair Competition Litigation

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New California Supreme Court Decision On The Arbitration Of Employee Claims

By E.A. Hubbert, Jr.

In a recent case entitled *Little vs. Auto Stiegler, Inc.*, the California Supreme Court expanded one of its previous decisions regarding the requirements necessary to uphold mandatory arbitration of employee claims against employers. In the year 2000, the California Supreme Court in *Armendariz vs. Foundation Health Psychcare Services, Inc.,* set forth the "minimum standards" required for an arbitration agreement between an employer and an employee to require the parties to arbitrate *statutory claims* of discrimination. The *Armendariz* decision required, among other things, that the employer pay most, if not all, of the fees and costs of such arbitrations.

On February 27, 2003, in *Little vs. Auto Stiegler, Inc.*, the California Supreme Court extended the *Armendariz* requirements to cases where an employee sues for *nonstatutory* employment-related claims. The plaintiff in *Little* alleged that he had been terminated from his employment for reporting warranty fraud and sued for "tortious termination in violation of public policy." The *Little* Court found that the provision in the parties' agreement to arbitrate permitting either party to appeal an award of more than $50,000.00 to a second arbitrator was "unconscionable" and severed it from an otherwise enforceable agreement.

In its decision, the *Little* Court held that an employee seeking to litigate a claim of wrongful termination in violation of public policy should have the same minimal protections under *Armendariz* to ensure that he or she can prosecute the claim effectively in arbitration. In view of this extension of procedural safeguards, it would not be surprising if there is a gradual extension of the *Armendariz* standards to all employment-related claims brought under an arbitration agreement.

For some time now, this office has been advising its clients that their arbitration agreements, whether contained in an employee handbook, policy manual, separate written agreement or otherwise, *must* meet all of the requirements of the *Armendariz* decision to ensure it will be upheld by the courts. A poorly worded, defective or incomplete agreement to arbitrate employment-related disputes may result in an employee's claim being litigated to a jury, rather than to an arbitrator, contrary to an employer's expectations.

Establishing Lawful And Protective Hiring Procedures

By Robert L. Rediger

Some employers hire an individual based upon an acquaintance's recommendation or after a two-minute conversation with the applicant. Other employers require the applicant to submit a detailed employment application and resume, attend several interviews with management personnel, and then perform their own background and reference checks before deciding whether to extend an offer of employment to the applicant.

An employer *must* gather sufficient relevant information regarding the applicant to enable it to make an informed decision as to whether the person is qualified and whether he or she will be a benefit or a detriment to the company. The extensiveness of the employer's information gathering efforts will depend upon its size, budget, and the position it seeks to fill. At a minimum, employers should:

1. *Accept Only A Completed Employment Application From Each Applicant*

When accepting applications for employment, an employer should accept only a completed employment application from every applicant for employment. Resumes should be accepted as a supplement to the completed employment application, but not in lieu of it. An employer may not require a photograph of the applicant and the application may not be coded or separated in a manner that identifies the "protected status" of the applicant. Under California law, an employer must maintain all completed applications for employment for at least two years.

The employer should use an employment application form that elicits all relevant information from the applicant to enable it to weed out those individuals who do not meet the requirements of the open position and who have not been ideal employees in the past. The employment application should contain explicit language putting the applicant on notice that certain policies are in effect at the company, such as the "at-will" nature of the employment relationship, that all disputes will be resolved exclusively through arbitration, etc. To provide the employer with a modicum of protection, an employment application should also state that the applicant acknowledges, consents to, and releases the employer and all those individuals and entities who exchange information about the applicant when the employer conducts reference and background checks of the applicant. The employee should also be required to sign and date the application form, verifying that all information provided is true and correct.

2. *A Knowledgeable Person Should Interview The Applicant In Person*

A face-to-face interview with an applicant provides an employer with the best opportunity to assess whether an applicant will "fit in" at the company. The interview is also the stage of the hiring process, however, where the interviewer is most likely to expose the employer to liability by "saying the wrong thing." Unskilled and unprepared interviewers may ask impermissible questions, make unauthorized promises or inappropriate comments, note immutable characteristics of the applicant, or make misrepresentations of fact about the employment.

All questions posed to an applicant by the interviewer during an interview should be job related. Using the completed employment application as a guide, the interviewer should encourage the applicant to elaborate and expand upon his or her prior experiences and how the applicant believes such could benefit the employer. The interviewer should inquire into the applicant's prior employment history, including promotions, demotions, disciplinary action, reasons for leaving, and names of prior supervisors. It is critical that the interview not inquire into matters prohibited by law. (*See* DFEH Pre-Employment Inquiry Guidelines). A skillful interviewer should also be able to answer relevant questions concerning (continued on page 4)

WE'VE MOVED!

Effective April 28, 2003, our new address is:

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Sick Leave: Is Your Policy In Compliance With The Law?

It has been the law for a few years under California Labor Code section 233, that employers who provide sick leave to their employees, must allow their employees to use their sick leave to attend to the illness of their children, parents, spouses or domestic partners. Employees may use six months' worth of their accrued and available sick leave entitlement for such purposes. Further, section 233 prohibits employers from discriminating or retaliating against employees who use sick leave for family members. An employee aggrieved by a violation of this law may recover legal and equitable relief from his or her employer.

Recently enacted Labor Code section 234 now makes it a *per se* violation of section 233 for employers to maintain *absence control policies* that count sick leave used for a family member as an absence that may lead to or result in discipline, discharge, demotion, or suspension. Employees working under such policies are entitled to appropriate legal and equitable relief.

Section 234 affects "no-fault" attendance policies. "No-fault" policies are those which provide for discipline after a certain number of absences, without any consideration given to the reason for the absence. For example, if you have a policy stating that ten absences in one year will result in discipline, you will have to re-write that policy. Employers now have to look at what the sick leave is being used for and, if it is being used to attend to the illness of a child, parent, spouse, or domestic partner, such leave cannot be counted against the employee as far as discharging, disciplining, demoting, or suspending him or her.

Recent Legal Developments

California Law Provides Greater Protection To Disabled Employees Than The ADA

The California Supreme Court in *Colmenares v. Braemar Country Club,* held that a claim for disability employment discrimination under the FEHA, unlike the ADA, does not require proof of a "substantial" limitation of major life activity.

No Claim For Employee Who Missed Work For Reasons Not Related To Medical Treatment

The Ninth Circuit Court of Appeal in *Gradilla v. Ruskin Manufacturing* held that an employee who left work to travel with his seriously ill wife was not entitled to leave under the CFRA where he elected to travel away from home for reasons not related to medical treatment.

Preferential Treatment Given Paramours Does Not Discriminate Against Other Employees

In *Mackey v. Dept. of Corrections*, a California Court of Appeal rejected the discrimination and harassment claims of two employees who alleged that their supervisor had granted favors and preferential treatment to three other employees with whom he had romantic relations. (Petition for review filed.)

Employer May Not Fire Employee Who Refused To Fire Unattractive Subordinate

In *Yanowitz v. L'Oreal*, a California Court of Appeal held that a manager unlawfully "retaliated" against an employee who refused to fire a female subordinate the manager deemed "unattractive."

(continued from page 2) the employer's wages, hours and working conditions. The interviewer must know enough about the essential functions of the job for which the applicant is applying to begin "the interactive process" if the applicant discloses that he or she has a disability. In short, the interviewer must have a complete understanding of the legal principles applicable to the hiring process and be prepared to discuss a potential employment relationship with the applicant. All notes made by the interviewer should be on a separate sheet of paper and not made on the applicant's application for employment.

3. *Conduct Adequate Background Checks*

The importance of the position to be filled and the financial resources of the employer will determine how thoroughly it will look into the background of an applicant. At a minimum, the interviewer should make telephone inquiries regarding the applicant to his or her supervisors at prior employers. While the interviewer may only receive a "neutral" reference from the applicant's former supervisors, he or she should attempt to verify the truth or falsity of any critical statements made by the applicant.

Care must be exercised by the interviewer in making inquiries regarding the applicant since nothing said is truly "off the record." If the person contacted is amenable to answering the interviewer's questions, all inquires should be job-related and all discussions conducted in a professional manner. Ratings, reports and records obtained before an employee was hired need not be produced for an employee's inspection after he or she is employed, but information obtained by an interviewer pertaining to an applicant's protected status may be alleged to have played some part in the employer's decision not to hire the applicant.

4. *Job Related Pre-Employment Testing*

An employer may require an applicant for employment to take a pre-employment test that measures the applicant's skill, experience, education, and/or ability to perform a particular job. An employer who is desirous of having all applicants submit to a pre-employment test, however, should be prepared to "validate" its test by demonstrating that it is "job-related" and that it does not have an adverse impact on individuals in protected classifications. An employer may have to consult with an industrial psychologist or other expert in validation techniques to insure that any pre-employment test is satisfies legal standards.

5. *Send An Offer Letter To The Applicant*

If it is determined that an offer of employment should be extended to an applicant, it is a good idea for the interviewer to send the applicant a short letter memorializing the offer of employment and repeating other critical information, such as the "at-will" nature of the employment relationship. A carefully drafted offer letter may provide protection to an employer where a disgruntled employee later attributes statements to the interviewer that were not made. The letter should also indicate that acceptance of the offer of employment is contingent upon the applicant signing a formal employment agreement, such as an agreement to arbitrate all disputes, if such is in use at the company.

6. *Use a Formal Employment Agreement*

Given the judicial reluctance in California to find an at-will employment relationship as a matter of law where the employer's only evidence of such is a statement in its employee handbook, an employer should consider whether to have formal employment agreements with its employees. All important issues should be addressed *at the outset* of an individual's employment. Employers are presented with the opportunity to include provisions in an employment agreement that will protect it in the event an employee brings litigation in the future. Provisions regarding "at-will" employment, confidential information and trade secrets, employee inventions, arbitration of all disputes, opportunity to consult counsel, choice of law, and zipper clauses, are all provisions an employer should consider including in a complete, fully integrated written employment agreement.

Answers To Your Commonly Asked Employment Law Questions.

Question: Where a private employer is unionized, an employee who is summoned by his or her supervisor to answer questions that may result in discipline being imposed may request that the questioning take place only after the employee's union representative or shop steward is present. Does the same rule apply to *nonunion* employers in the private sector?

Answer: Yes. In *Epilepsy Foundation of North East Ohio*, the National Labor Relations Board held that a *nonunion* employer must grant an employee's request to have a co-worker notified and present during an investigatory interview that the employee reasonably believes could result in the imposition of disciplinary action. The United States Circuit Court of Appeal for the District of Columbia Circuit enforced the Board's Order stating that "the presence of a co-worker gives an employee a potential witness, advisor, and advocate in an adversarial situation, and, ideally, militates against the imposition of unjust discipline by the employer."

Announcements

Laura C. McHugh successfully represented an employer in a recent Employment Development Department hearing. The administrative law judge found that the employee was disqualified from receiving unemployment benefits because the employer demonstrated that the employee was terminated for "misconduct connected with work," where she had used a company bus to go to her personal hair appointment.

Laura C. McHugh successfully represented an employer in a Labor Code section 132a hearing that involved an employee's claim that he was retaliated against for filing a claim for workers' compensation benefits. The workers' compensation judge ruled, and the Appeals Board agreed, that the employee was not discriminated against in his termination, which occurred because he failed to submit to a drug test following his industrial injury.

Robert L. Rediger limited the back wages and penalties an employee claimed in a proceeding before the California Labor Commissioner from $4,234.00 to $288.00. A disgruntled employee testified that she had not received "meal periods" and "rest breaks" for two years during her employment. The employee received a nominal award from the Labor Commissioner only because the employer was unable to produce "complete and accurate" time records as required by California Wage Orders for the *entire period* of the employee's claim.

Geoffrey Lee recently joined the firm as a part-time legal research clerk. He is a second-year student at the University of California, Davis, School of Law. He clerked for civil litigation firms for over two years prior to law school and externed for a federal district judge last summer. Geoff will be gaining a union-side perspective of labor-management relations this summer by interning with the Screen Actors Guild (SAG) in Los Angeles.

Information in our newsletter is for informational purposes only and should not be relied on in reaching a conclusion to a specific legal question.

Upcoming Events

April 10, 2003 – Nonprofit Resource Center will present a half-day seminar from 9:00 a.m. to 12:00 p.m. in downtown Sacramento on "Critical Human Resources Issues." Robert L. Rediger will address Layoffs, Discharges, Employee Handbook and Wage and Hour. Special rate of $50.00 per person for clients. Call the Nonprofit Resource Center at (916) 264-2788 for more information.

May 16, 2003 – National Business Institute will present a full-day seminar on "Counseling The Small Business Client in California." Robert L. Rediger will address Employment Law Issues. Call NBI at (800) 930-6182 for more information.

June 11, 2003 – The Sacramento Employers Advisory Council will present a half-day mock trial involving a behind the scenes look at a trial of an employment discrimination lawsuit. Attendees will act as jurors and deliberate. Call our firm or the SEAC at (916) 484-4647 for more information.

July 24, 2003 – Sterling Education Services will present a full-day seminar on "Hiring and Firing." Attorneys of our firm will address the Termination Process and Information Disclosure Issues. Clients receive a 25% discount. Please call SES at (715) 855-0495 for more information.

August 14, 2003 – Nonprofit Resource Center will present a half-day seminar from 9:00 a.m. to 12:00 p.m. in downtown Sacramento. Attorneys of our firm will address the Hiring Process, How To Discipline, Leaves of Absence, Sexual Harassment and Employment-related Lawsuits. More information will be provided to you in our Summer 2003 newsletter. Please call (916) 264-2788 for more information.

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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