

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 II)*

By Robert L. Rediger

* *In Part I of this article, Mr. Rediger discussed how employers should evaluate a request for a leave of absence and provided a checklist of reasons for leaves of absence required by law. In Part II of this article, Mr. Rediger suggests various safeguards employers should consider when developing meaningful policies and procedures to process employee requests for leaves of absence.*

The best strategy for handling an employee's request for a leave of absence is to promulgate, disseminate and fairly administer policies and procedures that comply with the law. A knowledgeable individual or a human resources department should be assigned the responsibility of insuring that the employer complies with

all applicable federal and state laws regarding an employee's request for a leave of absence. A prudent employer will also take steps to insure that all of its supervisors and managers have an understanding of the employer's established procedures for processing leave requests. Basic training provided to managers and front line supervisors may safeguard against an inadvertent or intentional denial of a leave request that should have been granted.

To ensure that an employer grants leaves of absence to all eligible employees in accordance with the law, it should conduct an audit of its policies and procedures that includes the following:

1. Post All Notices Required by Law - Numerous federal and state laws require employers to post various notices in conspicuous places informing employees of their employment related rights. Whether an employer in California is required to post a specific notice will depend upon whether the underlining law applies to it. For example, all employers in California are covered by the Workers' Compensation Act and must therefore post a notice identifying its compensation insurance carrier. Only employers employing 50 or more employees, however, are covered by the Family and Medical Leave Act and are therefore required to post the notice entitled, "Your Rights Under the Family Medical Leave Act of 1993," promulgated by the United States Department of Labor.

2. Insure that Your Employee Handbook Contains Legal Policies and Procedures Regarding Leaves of Absence Required by Law - Where an employer is required by law to grant a particular leave of absence to an eligible employee, it may not, by contract, employee handbook or otherwise, infringe upon that employee's right to the leave of absence. An employee handbook that contains a policy or procedure that denies an eligible

employee a leave of absence, or imposes impermissible restrictions on the employee's ability to request, use, or return from a leave of absence allowed by law is unlawful. Leaves of absence policies and procedures should be simple, straightforward, and in compliance with the law. As with other provisions contained in an employee handbook, such policies and procedures should not provide a disgruntled employee with a *sword* to attack an employer in litigation. Rather, well written policies and procedures should provide the employer with a *shield* to defend itself in the event it is accused of wrongfully denying an employee a leave of absence.

3. Use a Leave of Absence Request Form - To avoid misunderstandings, employees should be encouraged to submit all requests for a leave of absence in writing on a form prepared by the employer. The employee handbook should include a "Request for Leave of Absence Form," or inform employees where it may be obtained. The fully completed form, along with copies of any documentation pertaining to the reason for the leave, should be submitted as soon as possible after the employee learns of his or her need for a leave of absence. The form should clearly indicate its purpose as well as the dates and reason for the requested leave. The employee should also sign and date the form verifying that the information he or she has written thereon is true and correct to the best of his or her knowledge and belief.

4. Use an Appropriate Form to Acknowledge an Employee's Leave Request and to Inform Him or Her of the Employer's Expectations During the Leave - Rather than simply informing the employee that his or her request for a leave of absence has been "granted" or "denied," the employer should respond to the employee in writing and state why the leave request was denied or what information it will need, and when, if the request is granted. For example, in when a leave has been granted for medically related reasons, an employer may require an employee to furnish medical certification at least 15 days after being informed of the request and/or require the employee's health care provider to provide specifics in regards to the employee's "serious health condition." In addition, the employer should attempt to settle foreseeable issues *before* the employee begins a leave of absence. Once again, to avoid misunderstandings, the

employer's response should inform the employee whether some or all fringe benefits will be continued during part or all of the leave, whether all or part of the leave is paid or unpaid, whether the requested leave will run concurrently with or piggy back on another leave, and the consequences of the employee's failure to comply with the terms under which his or her leave was granted or to return on the anticipated reinstatement date.

5. Be Prepared to Reinstatement An Employee Returning From A Leave of Absence - The reinstatement rights of an employee returning from a leave of absence will vary depending upon the federal and/or state law that establishes the right to the leave. For example, an employee returning from a pregnancy related leave of absence will be "guaranteed" reinstatement to her same, or a substantially similar position, absent legitimate business reasons. An employee returning from a leave due to an industrial injury will be entitled to reinstatement unless the economic realities of doing business caused the employer to replace the injured worker. An employer who contemplates denying reinstatement to an employee who is ready, willing and able to return to work at the scheduled conclusion of a leave allowed by law must exercise extreme caution.

6. Consider Revising Employer-Created Leave of Absence Policies That Are More Generous Than What the Law Requires - Rather than their leave of absence policies simply satisfying the requirements of the law, some employers promulgate more generous policies or provide for benefits that the law does not require. Similarly, some employers allow employees to take varying amounts of time off from work for "personal reasons." One may question the wisdom or need for employees to be excused from their jobs for reasons that the law does not sanction, and in excess of the holidays, vacations, sick leave and other typical employer-designated days off. If an employer bestows more generous benefits than a law requires, or grants a leave of absence for certain personal-related reasons, but not for other reasons, it could find itself accused of discrimination and/or retaliation. An employer's well-intentioned generosity in one situation may require it to provide similar benefits to another employee in different circumstances and/or to further extend an employee's time away from the job.

FOLLOW THE “PAPER” TRAIL

*The following is a reprint of an article that appeared in the May 24, 2002 edition of **The Los Angeles Daily Journal**. Written by Eron Ben-Yehuda as a feature in his **Keys to Victory** column, the article discusses the strategies used by Robert L. Rediger in a recent case he litigated on behalf of an employer to convince a Solano County Superior Court to dismiss the plaintiff’s lawsuit before the case would have been submitted to the jury.*

FACTS

On Oct. 28, 1999, Maria I. Torres, 36, was fired from her job as a social worker at Dixon Family Services, where she had worked for 10 years. Torres claimed that her employer had terminated her in retaliation for blowing the whistle on the company’s alleged misuse of funds. She also had filed a complaint, two months before losing her job, with the state’s Department of Fair Employment and Housing. In the department complaint, Torres had accused the Dixon-based company of discriminating against Hispanics. In her subsequent lawsuit, the plaintiff claimed that she had been an excellent employee who had received several promotions. But by 1999, her supervisors had accused her of insubordination and substandard job performance.

CONTENTIONS

Plaintiff- Her former employer fired her in retaliation for complaining about the misuse of funds and race discrimination. Her supervisors also defamed her by calling her insubordinate and by giving her critical performance evaluations.

Defendant- The plaintiff lost her job because her work was unsatisfactory and she had refused to follow her supervisors’ directions.

NOTHING FOR THE JURY

The trial judge granted a motion for nonsuit before jury deliberations, Rediger of Sacramento’s Rediger, McHugh & Hubbert says. To prevail on the motion, Rediger convinced the judge that the plaintiff hadn’t presented enough evidence to satisfy the essential elements of her claims of retaliatory termination and defamation. “There is nothing for the jury to consider,” Rediger says. The defense presented a “paper trail” that showed legiti-

mate business reasons for firing Torres, he says. “The plaintiff was unable to show that these reasons given by the defendant to justify her termination were false,” he says. Rediger submitted memos from supervisors of Torres that detailed her acts of insubordination. For example, she allegedly had called her company’s executive director a “dictator” and refused to take direction from her, Rediger says.

Opposing counsel Richard J. Davis of Sacramento denies that the documentary evidence hurt his client’s case. “The paper trail showed her an excellent employee,” Davis says. “She received numerous promotions.” Davis suspects that he lost the motion because the judge allegedly didn’t consider as evidence of potential retaliation the fact that the plaintiff lost her job only two months after complaining about her employer’s purported misconduct. “I guess he believed it wasn’t short enough,” Davis says.

CASE CLOSED

Torres alleged that her former supervisors had defamed her by calling her insubordinate and an unfit employee. But Rediger claims that case law proves her wrong. “As a matter of law, work-related statements in a performance evaluation do not establish defamation,” he says. Such legal protections for employers weakened the plaintiff’s chances of overcoming the defense motion, Davis concedes. Nevertheless, her supervisors’ name-calling did harm the plaintiff’s reputation, he says. “It was still a lie,” he says. - **Eron Ben-Yehuda**

*For a complete summary of this case, published March 8, 2002, visit **Verdicts & Settlements’** searchable database at www.dailyjournal.com. Reprinted with permission.*

PROACTIVE LEGAL SERVICES AVAILABLE TO CLIENTS OF REDIGER, MCHUGH & HUBBERT, LLP

In furtherance of our commitment to keep clients of our firm apprised of developments in labor and employment related matters, Rediger, McHugh & Hubbert, LLP is pleased to offer the following legal services to our clients for a nominal fee of \$500.00 per service through the Summer 2002.

Employee Handbook Critique

An attorney of Rediger, McHugh & Hubbert, LLP will review your company's employee handbook, discuss available legal options with you to improve your existing policies and procedures, and provide you with a follow-up letter highlighting the requirements of specific federal and state labor, wage and hour, health and safety and employment related laws that apply to your business.

Recent changes in the law enable employers to implement written policies and procedures that will assist them in litigation. A well-drafted employee handbook will assist an employer in administrative (Labor Commissioner, DFEH, EDD, WCAB, NLRB, etc.) and judicial proceedings and will help to prevent a disgruntled employee from using your company's employee handbook against you.

The time to ensure that your employee handbook complies with wage and hour, anti-discrimination (including pregnancy and sexual harassment), leaves of absence, wrongful termination and other employment-related laws is *before* a governmental agency or employee lawsuit forces you to review it.

Three-Hour Personnel Law Training Seminar

An attorney of Rediger, McHugh & Hubbert, LLP will conduct a three-hour "nuts and bolts" training seminar for Human Resources personnel, managers and supervisors at your Sacramento facility or at our law firm, depending on your preference. To permit sufficient time for questions and answers, please select no more than FOUR (4) of following *critical* and *essential* personnel related topics:

- 1. The Hiring Process-** Applications, tests, record retention, reference checks, permissible inquires, etc.
- 2. Wage and Hour Update-** The new Wage Orders, exempt v. nonexempt, independent contractors, etc.
- 3. How to Discipline-** Proper documentation, job evaluations, last-chance letters, types of discipline, etc.
- 4. Leaves of Absence-** Leaves required by law, documentation, forms, reinstatement, piggy-backing, etc.
- 5. Sexual Harassment-** Unlawful harassment, investigations, corrective action, rights of the accused, etc.
- 6. How To Discharge-** At-will or cause, safety concerns, final check, *post*-termination developments, etc.
- 7. Union Organizing-** No solicitation rules, authorization cards, picketing, NLRB elections, TIPS rule, etc.
- 8. Employment-Related Lawsuits-** Arbitration, affirmative defenses, discovery, motions, voir dire, trial, etc.
- 9. Employee Handbooks-** Essential policies and procedures, signoff sheet, formal employment contract, etc.

Since many laws hold the employer responsible for the actions of its managerial employees, it behooves an employer to equip its supervisors and managers with the knowledge and tools necessary to handle typical personnel-related matters. Handouts, including forms and brochures, will be disseminated to all attendees.

Call Sara Wood at (916) 568-2855 before September 23, 2002 to obtain either or both of these programs.

Favorable Decision Regarding Labor Code Section 132a – Employers No Longer Obligated To Con- tinue Health Benefits

By E.A. Hubbert, Jr.

A recent decision by the Workers' Compensation Appeals Board (WCAB) has reversed a trend, which was expanding the benefits required to be provided to employees who were off work because of an industrial injury. For several years, attorneys representing workers' compensation claimants had success in arguing to the Board that employees who are off work because of an industrial injury should be provided with continuing health insurance under the provisions of Labor Code Section 132a which prohibits discrimination against employees who are injured on the job. These same attorneys attempted to expand this claim to include claims for accruing vacation and sick leave while off work because of an injury.

A recent decision of the WCAB has reversed this trend and has held specifically that Labor Code Section 132a is preempted by ERISA and therefore it is not a violation of that Section for an employer to discontinue health insurance benefits for an employee who is off work for an industrial injury.

Employers should be aware, of course, that they may have an obligation to continue health insurance benefits under either the Family Medical Leave Act or the California Family Rights Act for a period of time. Employers may also have an obligation under their practices and procedures either expressed in an employee handbook or established by the Employer's practice regarding providing health benefits to other employees who are on leave of absence for matters not related to industrial injury. Employers should likewise be aware of their obligations when terminating health benefits regarding adequate notice and complying with the provisions of COBRA or CalCOBRA which maybe applicable.

Labor Code Section 132a Claims: What Are They?

Section 132a of the California Labor Code proclaims that it is the "policy of this state that there should not be discrimination against workers who are injured in the course and scope of their employment." The California Supreme Court has interpreted the broad policy language of Section 132a to provide the increased compensation remedies of Section 132a for *any discrimination* against an employee based on an industrial work-related injury. (*Judson Steel Corp. v. Workers' Compensation Appeals Board* (1978) 22 Cal.3d 658, 667.)

Section 132a applies to *any* employer who discharges, or threatens to discharge, or *in any manner* discriminates against an employee because the employee: (1) has filed or made known his intention to file an application with the Workers' Compensation Appeals Board (WCAB); (2) has received a rating, award or settlement; or (3) has testified or made known his intention to testify in any manner relating to the WCAB.

Civil penalties that may be asserted against an employer for violating Section 132a are significant. The employer may be ordered to reinstate the employee, reimburse him for lost wages and benefits, and pay him a penalty of one-half of the compensation he receives up to \$10,000, together with costs and expenses up to \$250.

Although a liberal law favoring injured employees, Section 132a does not compel an employer to ignore the realities of doing business. An employer *may* take adverse employment action against an employee who utilizes the workers' compensation system, but only if such action is *not* prompted by such or otherwise related thereto. Also, an employer need not "reemploy" unqualified employees or employees for whom positions are no longer available following leaves for industrial injuries. Bottom line - employers must proceed with caution in disciplining workers compensation claimants or witnesses.

Pending Legislation in California Concerning Employment

SB 1236 would consolidate several existing labor-related departments into The Labor and Workforce Development Agency. The new “super” labor agency would combine the Employment Development Department (EDD), the Department of Industrial Relations (DIR), the Workforce Investment Board (WIB) and the Agricultural Labor Relations Board (ALRB). The objectives of Senate Bill 1236 are to save money by streamlining operations and to increase coordination in enforcement, training and research among agencies dealing with various aspect of California labor law. Governor Davis had vetoed SB 25 that would have also included the Public Employment Relations Board (PERB) and the Fair Employment and Housing Commission (FEHC) in the consolidation.

AB 2752 would expand employee rights under Labor Code Section 132a, which already prohibits discrimination against employees who exercise their rights under the Workers’ Compensation Act. The proposed law would increase penalties, expand protection to an employee who makes a complaint about health and safety matters, and create a rebuttable presumption of retaliation when an employer takes any adverse employment action against an employee within 180 days after he or she engages in protected activity.

SB 1538 would prohibit pre-dispute employment arbitration agreements where an employee alleges discrimination under the Fair Employment and Housing Act. The proposed law would make it an unlawful employment practice for an employer to require an employee to waive rights established by the FEHA or to retaliate against an employee who refuses to waive such rights.

AB 1309 would require employers of 100 or more employees to file annual reports with the Department of Fair Employment and Housing delineating the gender and ethnicity of its employees by job classification.

AB 2989 would require employers who employ 100 or more employees to provide “severance pay,” equal to one week for each twelve months of service, to employees with at least three years service, when the employer relocates or terminates an establishment.

AB 2990 would create a rebuttable presumption of unlawful retaliation when an employer takes certain adverse action against an employee within 90 days after he or she exercised any rights under the California Labor Code.

Case Notes: Recent U.S. Supreme Court Decisions

In *Chevron U.S.A. Inc. v. Echazabal*, 2002 WL 1270586, 536 U.S. ___ (June 10, 2002), the U.S. Supreme Court held that employers may consider the danger posed by disabled individuals to themselves in making employment decisions. In so holding, the Court reversed the Ninth Circuit Court of Appeals, which had found that Chevron’s refusal to hire an applicant because of the alleged threat to his health caused by his disability violated the Americans With Disabilities Act (ADA). **Lesson: In addition to considering whether disabled persons pose a direct threat to co-workers or third parties, employers may consider whether they pose a direct threat to themselves as a result of their presence in the workplace. Note: As the Court cautioned, an employer’s decision based upon a safety risk posed by a disabled individual must be based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence and upon an expressly “individualized assessment of the individual’s present ability to safely perform the essential functions of the job reached after considering, among other things, the imminence of the risk and the severity of the harm portended.”**

In *Ragsdale v. Wolverine Worldwide, Inc.*, 122 S. Ct. 1155 (March 2002), the U.S. Supreme Court invalidated part of a federal regulation that prohibited employers from deducting FMLA leave from an employee's annual 12-week FMLA leave allotment when the employer failed to timely designate the FMLA leave as such. (29 C.F.R. § 825.700(a).) The Court found that this part of the regulation improperly "altered the FMLA's cause of action in a fundamental way" by relieving employees of the burden of proving actual harm as a result of the employer's failure to make a proper designation. **Lesson: An employer's failure to designate FMLA leave as such no longer prevents the employer from deducting FMLA leave from an employee's 12-week allotment; however, employers should err on the side of being cautious and continue to promptly designate FMLA leave as such as early as possible. Note: The Supreme Court did not invalidate the part of the regulation requiring employers to notify employees that their leave will be deducted from their annual FMLA allotment, and the decision does not preclude claims by employees who can prove that they suffered actual harm as a result of the employer's failure to provide the requisite notice.**

Announcements

E. Aubrey Hubbert successfully defended a sexual harassment claim wherein it was determined that one isolated incident of touching did not amount to sexual harassment or a hostile work environment.

Laura C. McHugh prevailed in an arbitration against a union that had alleged that the employer's use of subcontractors as well as company managers and supervisors to perform bargaining unit work violated the terms of the collective bargaining agreement. The arbitrator found no such violation and denied the grievance.

Laura C. McHugh defeated a union's claim that an employee should have received a weekly minimum pay guarantee under the parties' collective bargaining agreement. The arbitrator denied the union's grievance, finding that the employee, whose work hours were restricted due to his FMLA leave, was not ready, willing and able to work and thus was not qualified for the minimum pay guarantee.

Komal Chaddha will be joining the firm this summer as a law clerk through the Sacramento County Bar Association Minority Fellowship Program. Ms. Chaddha attends law school at University of California at Davis.

Future Topics For Our Newsletter?

Are there any personnel-related subjects that you would like see discussed in the *Labor and Employment Law Reporter*? If you receive this newsletter, you are a current or past client of our firm, or a current member of the Sacramento Employers Advisory Council (SEAC). Should you or a management representative of your company desire to see a particular employment-related subject addressed in a future edition of our quarterly newsletter, please call Sara Wood at (916) 568-2855 or email her at swood@rmlaw.net.

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

Upcoming Events

July 23, 2002 - Sterling Education Services, LLC will present a one-day seminar in Sacramento. Robert L. Rediger will address the topics of “Leaves of Absences Required By Law in California” and “Wage and Hour Update.” Call Tammie Johnson at (715) 855-0495 to register.

August 1 and 2, 2002 - Lorman Education Services will sponsor a two-day conference in Sacramento. On the second day of this conference, Laura C. McHugh will address “Leaves of Absence Under Federal and California Law” and Robert L. Rediger will address “Complying With Wage and Hour Laws.” Call Mary Lane at (715) 833-3940 to register.

September 24, 2002 - National Business Institute will host a one-day seminar in Sacramento. Robert L. Rediger will discuss “What Every Employer Needs to Know About Employee Handbooks” and “Sexual Harassment-An Employer’s Responsibilities.” Call Julie Lintz at (715) 835-8525 to register.

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