

# Rediger, McHugh & Hubbert, LLP

Representing Management in Labor, Employment and Unfair Competition Litigation

## LABOR AND EMPLOYMENT LAW REPORTER

Summer 2008

### Firm Adds Two New Associates



**Jennifer J. Schultz** has litigated in federal and state courts and has represented clients in arbitration, mediation, trial and appellate forums. She graduated with distinction from McGeorge School of Law, where she was “Top Oral Advocate.” She was awarded a Certificate in Governmental Affairs

after attending Vanderbilt University Law School and completing a thesis on health care law. She is a member of the Employment Law and Litigation Sections of the American, California State and Sacramento County Bar Associations. Ms. Schultz previously worked in the political arena as a policy analyst and received her B.A. cum laude from University of Redlands.



**Sarah R. Lustig** received her law degree from the University of California Davis School of Law in 2007. Prior to working at the firm, she interned at the California Department of Fair Employment and Housing. Prior to working at the DFEH, Ms. Lustig clerked at Disability Rights Advocates and Protection and Advocacy, Inc.

Before attending law school, Ms. Lustig received a master’s degree in Regulatory Affairs from San Diego State University and a bachelor’s degree in Genetics from University of California, Davis. Ms. Lustig also serves on the boards of directors of Legal Services of Northern California and Voluntary Legal Services Program of Northern California.

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### California Supreme Court’s Same-Sex Marriage Ruling: Implications For California Employers

By Sarah R. Lustig

California has become the second state to allow full marriage rights for same-sex partners. On May 15, 2008, the California Supreme Court held that the initiative measure, limiting marriage to opposite-sex couples, violated the state constitutional rights of same-sex couples, despite an existing state registration and rights regime for domestic partners.

The decision, which became final and effective on June 14, 2008, affects more than 100,000 same-sex couples in California (Continued on page 2)

## Summer Fellow Susana Solano

**Susana P. Solano** has joined Rediger, McHugh, & Hubbert, LLP as a summer law clerk. She is a first-year law student at the University of California at Davis School of Law. Ms. Solano received a B.A. in Psychology from the University of California at Los Angeles. Prior to attending law school, she worked for the U.C.L.A. Psychology Department and conducted research regarding people with mental health problems and coordinated an educational campaign on mental health. She also conducted interventions with at-risk adolescents and with individuals from disadvantaged communities.



*Susana Solano*

## Same-Sex Marriage Ruling

*(Continued on page 2)*

(approximately a quarter of whom have children). However, the ruling should not have a major impact on most employee benefit plans. The decision affects California state law, while federal law, which preempts state law in many instances, governs most employee benefit plans.

The Federal Defense of Marriage Act (DOMA) prevents same-sex spouses from receiving benefits offered under federal statutes, including the Family Medical Leave Act (FMLA), Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code. On the other hand, California employers may have to subtract, for state tax purposes, any income imputed to the employee for federal tax purposes,

thereby creating an additional administrative hurdle.

With respect to employee benefit plans that provide benefits through insurance subject to California law, employers generally are already required to provide an employee's domestic partner with benefits equivalent to those provided to an employee's opposite-sex spouse, so the decision may not significantly expand the coverage of such plans. Employers in California will also have to provide same-sex couples with leave under the California Family Rights Act (CFRA).

Given the current legal flux, some employers question whether they should establish same-sex marriage policies at all. Nonetheless, California employers should begin to review their plans and policies in light of the court's ruling.

## Announcements

**Laura C. McHugh** was successful in decertifying a class action lawsuit brought against a fire protection company. The class members were current and former sprinkler fitters who worked for the company for the four years before the lawsuit was filed. The lawsuit alleged that the employer had engaged in unfair competition, failed to pay employees for all overtime hours worked, failed to provide meal periods and rest breaks, failed to itemize wage statements, failed to comply with prevailing wage laws, and other alleged violations of wage and hour laws. The result of the court's ruling is that the case will proceed to trial in August 2008 in regard to the two named plaintiffs only and the value of the plaintiffs' lawsuit is greatly diminished.

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## Recent Developments

### **Overtime Need Not Be Based On Premium Holiday Pay**

On June 3, 2008, a California Court of Appeal in *Advanced-Tech Security Services v. Superior Court (Roman)* held that an employer was entitled to have an employee's overtime claim adjudicated in its favor because the employer was not required to pay overtime based on a premium rate it paid an employee for working on a holiday. A security company's employee handbook provided that a security officer who worked on a designated holiday would be compensated at a rate of one and a half times his or her regular rate of pay.

### **Pension Plan Did Not Discriminate Against Older Workers Who Became Disabled**

On June 19, 2008, the United States Supreme Court in *Kentucky Retirement Systems et al. v. EEOC* held that Kentucky's system of calculating disability benefits by adding the number of years an employee would have had to continue working to become eligible for normal retirement benefits to an employee's actual years of service, adding no more than the number of years the employee had previously worked, does not discriminate on the basis of age against workers who become disabled after becoming eligible for retirement. The plaintiff, who had become disabled and retired at age 61, filed an age discrimination complaint with the EEOC after his pension was calculated on his actual years of service without imputing any additional years. The Supreme Court rejected the EEOC's argument that the system failed to impute years solely because the plaintiff had become disabled after age 55. The high court found that the differences in the pension system were "not motivated by age."

### **Employer Must Prove it Based its Decision on Reasonable Factors Other Than Age**

On June 19, 2008, the United States Supreme Court in *Meacham et al. v. Knolls Atomic Power Laboratory* held that an employer defending against a disparate-impact claim under the Age Discrimination in Employment Act (ADEA) bears *both* the burden of production and the burden of persuasion when establishing the "reasonable factors other than age" (RFOA) affirmative defense. When an employer reduced its work force, it had its managers score their subordinates on "performance," "flexibility," and "critical skills," and then added points for years of service, to determine who would be laid off. Of the 31 employees let go, 30 were at least 40 years old. The plaintiffs alleged that the employer's selection criteria had a "disparate impact" on older workers in violation of the ADEA.

### **State Law Restricting Employer's Free Speech Regarding Unionization Preempted**

On June 19, 2008, the United States Supreme Court in *Chamber of Commerce v. Brown* held that Sections 16645.2 and 16645.7 of the California Government Code (AB 1889), that prohibited employers that receive state grants of more than \$10,000.00 in state program funds per year from using the funds "to assist, promote, or deter union organizing," were pre-empted by the National Labor Relations Act. The high court held that a state may not regulate an employer's speech regarding union organizing by imposing such restrictions on the use of its own funds.

### **IRS Increases Optional Standard Mileage Rates to 58.5 Cents Per Mile**

On June 23, 2008, the Internal Revenue Service announced an increase in the optional standard mileage rate to 58.5 cents a mile for all business miles driven from July 1 through Dec. 31, 2008, an increase of eight cents from the 50.5 cent rate that had been in effect for the first six months of 2008. The standard mileage rate may be used to compute the deductible costs of operating an automobile for business use in lieu of tracking actual costs, but taxpayers have the option of calculating the actual costs of using their vehicle rather than using the standard mileage rates. The optional standard mileage rate is used as a benchmark by the federal government and by many businesses to reimburse their employees for mileage logged when using their own vehicles for work.

## Upcoming Events

**July 9, 2008**—The Sacramento Employers Advisory Council will host a luncheon meeting entitled “Ask the Legal Experts.” Robert L. Rediger will join others at the Red Lion Sacramento Inn from 11:15 a.m. to 1:00 p.m. as attendees will ask the panel of attorneys employment-related questions. Call the SEAC at (916) 484-4647 or register online at [www.saceac.com](http://www.saceac.com).

**November 13, 2008**—Lorman Education Services will present a seminar in Sacramento entitled “Employment Law in California from A to Z.” Robert L. Rediger will join other speakers at the one day seminar and lecture on “Leaves of Absences Required by Law in California” and “How to Discipline and Discharge Employees.” Contact Tobey J. Guntner with Lorman at (715) 833-3940 ext. 1243 for more information.

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