

Rediger, McHugh & Hubbert, LLP

Representing Management in Labor, Employment and Unfair Competition Litigation

LABOR AND EMPLOYMENT LAW REPORTER

Summer 2004

RM&H ATTORNEYS PRESENT MOCK EMPLOYMENT TRIAL

On March 29, 2004, Laura C. McHugh and Robert L. Rediger presented a mock trial at the Hilton Hotel in San Francisco, California. In attendance were Human Resource directors, managers and associated staff employed throughout the country by American Building Maintenance Industries, Inc.



Laura C. McHugh (far left) and Robert L. Rediger (far right) present a mock trial, complete with bailiff, witnesses and judge, for the Human Resource professionals of ABM Industries, Inc.

Based on an actual wrongful termination case, the attorneys presented opening statements, produced witnesses, introduced exhibits, made objections that were ruled on by the judge, and presented closing arguments. The HR professionals were then divided into groups and deliberated as jurors.

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DOL ISSUES FINAL REGULATIONS REGARDING OVERTIME EXEMPTIONS AND COBRA

On April 23, 2004, the U.S. Department of Labor (DOL) published its final regulations under the Fair Labor Standards Act (FLSA) implementing the exemptions from minimum wage and overtime pay for executive, administrative, professional, outside sales and computer employees, often referred to as the “white collar” exemptions. To obtain more information on the regulations, see page 2.

On May 26, 2004, the DOL issued final regulations regarding the content and procedure employers must follow when issuing notices under the Consolidated Omnibus Budget Reconciliation Act (COBRA). The regulations will apply to all COBRA notice obligations that arise in plan years beginning after November 26, 2004. (Continued on page 5)

**SEMINAR MATERIAL ON THE NEW FEDERAL “WHITE-COLLAR” EXEMPTIONS
AVAILABLE TO CLIENTS OF REDIGER, MCHUGH & HUBBERT, LLP**

On June 1, 2004, Robert L. Rediger presented a seminar over the Internet for West Legal Education Center to a nationwide audience of attorneys, employers and HR professionals entitled, “The New U.S. Department of Labor Wage and Hour Regulations.” Mr. Rediger’s hour long lecture was supplemented with an electronic version of written materials that were downloaded by attendees of the program.

As a professional courtesy to clients of our firm, upon request, we will email you a complete set of the materials Mr. Rediger prepared and made available to attendees of the seminar without cost. The written materials contain explanations of each of the “white-collar” exemptions from the minimum wage and overtime provisions of the FLSA, strategies for avoiding wage and hour related claims, and pertinent excerpts from the Code of Federal Regulations. The new federal regulations are scheduled to become effective on August 23, 2004. Please call (916) 442-0033, fax (916) 498-1246, or email info@rmlaw.net, your request.

**THE LATEST ON THE BOUNTY HUNTER LAW:
A PARTIAL FIX MAY BE NO FIX AT ALL**

The Law: Labor Code Section 2698 was enacted in 2003, allowing employees to seek penalties from their employer *for any violation of the Labor Code on behalf of themselves and current and former employees.* Previously, only the Division of Labor and Standards Enforcement could seek penalties for violations.

The Challenges: Termed the “Bounty Hunter Law,” Labor Code Section 2698 was challenged by pro-business members of the California State Legislature who, in early 2004, sought to completely repeal the law. Although their attempts have failed so far, the groundswell of support to repeal this law is growing, including support from Governor Schwarzenegger who maintains the highest approval rating in the past 45 years at 65 percent. He wants to see legislation on his desk *completely repealing* the “Bounty Hunter Law.”

A Partial Fix – Senate Bill 1809: To undermine the support for a full repeal, a partial fix has been introduced with Senate Bill 1809. As currently written, this bill purportedly would take away the financial incentive for employees to sue their bosses for not complying with posting or notice requirements, give judges more discretion to lower judgments, and allow

the state 15 days to take action before a private lawsuit could progress. Proponents of Senate Bill 1809 claim the bill would limit private legal actions to the most serious Labor Code violations. However, opponents claim that consumer attorneys and organized labor groups could still be enriched by suing over posting and notice violations, that judges will not exercise their discretion to lower monetary awards, and that 15 days is not enough time to allow the state to take action.

While a partial fix may be better than none at all, this could be an issue that the Governor flexes his muscles on by demanding a full repeal so California businesses can continue to rebound from tough economic times. Stay tuned as Senate Bill 1809 makes its way through the ever-evolving legislative process.

**Employee Handbook Review
Flat Fee Offer Extended
Through Summer
Please see insert for details.**

APPELLATE COURT TELLS ‘FRIENDS’ TV SHOW PRODUCERS: “CREATIVE NECESSITY” MAY NOT JUSTIFY DIRTY JOKES

Although the television show “Friends” is finished after its decade-long run, the show will not be forgotten. Not only because of syndication; the show will be memorialized in law books. On April 21, 2004, the Second District California Court of Appeal ruled against several producers and writers of the comedy show who sought to use “creative necessity” as an affirmative defense against sexual harassment allegations by the writers’ assistant.

In *Lyle v. Warner Brothers Television Productions*, plaintiff Amaani Lyle was fired four months into her job at Warner Brothers as a writers’ assistant on ‘Friends’ because she could not type fast enough to record the writers’ dictation accurately. Her job required her to take copious notes for the writers while they were discussing story lines, jokes, and dialogue. Lyle had to sort through what was being discussed, select the dialogue and jokes that were most likely to be used in the script, and type quickly.

Lyle alleged that during these meetings, the comedy writers would regularly make jokes about women and sex in the process of writing the sitcom. She sued, alleging sexual harassment. The writers admitted to the use of sexually coarse, vulgar, and demeaning language in the workplace, but maintained that since such language was “essential to the creative process of developing scripts for the show,” they had a “creative necessity” defense.

The Court recognized that the defendants’ “creative necessity” argument is analogous to the “business necessity” defense in racial discrimination cases, which provides that the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices that would better accomplish the business purpose, or accomplish it equally well with a lesser

differential racial impact. The defendants argued the sexually explicit conversations among the writers had a compelling business purpose: to generate ideas for jokes, dialogue and story ideas for the show, which routinely contains sexual innuendos and adult humor and situations. According to the defendants, no alternative to these brainstorming sessions existed. The sexually explicit conversations in the writers’ room were part of the nature of the writers’ work and the terms and conditions of Lyle’s job required her to be present during these conversations.

The Court, however, rejected the defendants’ “creative necessity” argument as a defense to Lyle’s lawsuit and held that a jury should resolve whether the jokes made by the comedy writers were appropriate for the social context in which the alleged misconduct occurred (writing a sitcom) or whether they created an actionable “hostile working environment for women.” The Court further held that “creative necessity” was only a *factor* that the jury could consider in determining whether Lyle was a victim of sexual harassment. In so holding, the Court recognized that the “creative necessity” defense has its limits. For example, a writers’ assistant cannot be kissed, fondled or caressed in the interests of developing a “love scene” between characters. Nor would “creative necessity” justify lewd, offensive or demeaning remarks directed at the assistant personally.

In sum, the Court reaffirmed the rule that the severity of sexual harassment requires consideration of the social context in which particular conduct occurs and is experienced by a plaintiff.

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RECENT DEVELOPMENTS

CALIFORNIA MAY NOT PROHIBIT AN EMPLOYER FROM EXPRESSING ITS OPINION REGARDING A UNION'S EFFORTS TO ORGANIZE ITS EMPLOYEES

On April 20, 2004, the Ninth Circuit Court of Appeals in *Chamber of Commerce of the United States v. Lockyer*, upheld a federal district court's issuance of an injunction prohibiting the State of California from enforcing a law that forbid employers who received State grants or funds over \$10,000.00 from using such funds to advocate for or against union organizing. The Ninth Circuit held that the National Labor Relations Act preempted the California statute because the state law attempted to regulate a process controlled by federal law. Federal law guarantees the right of an employer to express its views, arguments or opinion regarding the desirability or undesirability of a labor organization representing its employees provided such expressions do not contain a threat of reprisal or force or promise of benefit.

EMPLOYER MAY NOT USE WORK PLACE RULE TO PROHIBIT EMPLOYEES FROM DISCUSSING WAGES, HOURS AND WORKING CONDITIONS

On January 30, 2004, the National Labor Relations Board in *Double Eagle Hotel and Casino* held that an employer's "confidentiality" rule contained in its Employee Handbook was unlawful. The "confidentiality" rule prohibited employees from discussing personnel-type issues, including disciplinary information, grievance information, performance evaluations, salary information, pay increases and termination dates of employees. The Board found that the employer's rule was "overly broad" and infringed on its employees' right to discuss matters pertaining to "wages, hours and working conditions" so long as such discussions did not disrupt the employer's legitimate business interests.

Announcements

Robert L. Rediger negotiated a three-year collective bargaining agreement on behalf of an employer that provides transportation services to the disabled with the Amalgamated Transit Union Local No. 256.

Laura C. McHugh successfully represented an employer in a hearing before the Employment Development Department, defeating the employee's claim for unemployment benefits. The employee had given the Board of Directors an ultimatum to follow her vision for the organization or she could no longer serve in her position. The Board did not agree and her employment was severed. The judge found that the employee was terminated for misconduct connected with work for her insubordination.

Shagha Balali is a summer fellow with the firm through the Sacramento County Bar Association's Minority Fellowship Program. She is a current student at the University of California at Davis School of Law and will begin her second year in August. Ms. Balali graduated from the University of California at Berkeley with a double B.A. degree in Political Science and Religious Studies. Whenever she has the chance, she enjoys taking trips to foreign countries and visiting her hometown of Los Angeles.



NEW COBRA REGULATIONS

(Continued from Page 1)

The final COBRA regulations make several changes to the proposed regulations issued last May. Consequently, all group health plan documents, summary plan descriptions (“SPDs”), and COBRA notices and procedures must be reviewed for compliance, even if changes have already been made to comply with the proposed regulations. Highlights of the finalized regulations follow.

1. General COBRA Notices. The regulations specify the COBRA notice information that must be provided to employees and dependents. The notice must be furnished within 90 days after an employee’s coverage under the group health plan begins. A plan can satisfy this requirement by including the notice in the SPD. However, a notice separate from the SPD may also need to be provided to spouses or other adult dependents. A revised model general notice is included in the final regulations for use by plan administrators. To obtain a copy, visit the DOL’s website at <http://www.dol.gov/ebsa/regs/fedreg/final/2004011796.htm>.

2. Employer Notice of Qualifying Event. The regulations provide guidance on the required timing and content of notices that employers must give to plan administrators for certain qualifying events, such as termination of employment, reduction in working hours, death of an employee, or enrollment of an employee in Medicare.

3. Notices by Plan Administrators. Where the employer is also the plan administrator, the employer has 44 days from the date of a qualifying event (or, if applicable, the date regular coverage is lost) to provide the COBRA election notice to the employee.

4. Notices Required by Employees and Beneficiaries. The final regulations require plans to establish “reasonable procedures” for employees and qualified beneficiaries to give notice of certain qualifying events, including divorce or legal separation, of the employee, the dependent’s loss of coverage under the plan, and

Social Security disability determinations. Procedures are generally deemed reasonable if they are described in the SPD and specify the content of the notice, the method of sending it, and the person designated to receive it. Such notices must be given to the party that normally handles benefit matters for the employer. Plans are required to accept notices that meet the minimum content requirements of the regulations.

5. COBRA Election Notices. The election notice must contain all relevant information necessary for an individual to decide whether to elect COBRA coverage, including available health plan options, premium payment requirements, the consequences of failing to elect COBRA, and how COBRA coverage could be extended due to disability or a second qualifying event. Again, a model election notice is provided. It no longer will be necessary to provide information on alternative coverage and conversion rights in the election notice.

6. Two New Required Notices. Once a plan receives notice of a qualifying event (or request for disability extension) from an employee or dependent, the plan must notify affected individuals if it determines that the individual is not eligible for COBRA, for instance, in cases of gross misconduct. In addition, plans must notify individuals if their COBRA coverage will be terminated earlier than the normal COBRA coverage ending date, for example, if the employer terminates COBRA coverage for late payment or nonpayment of premiums.

Substantial penalties and fiduciary and plan liabilities can result from noncompliance with these new regulations. Should you have any questions or require any additional information, please feel free to contact one of the attorneys of the firm.

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, California. Robert L. Rediger will address its attendees during the morning session of the seminar and provide an overview of the State and federal wage and hour laws, discuss “exempt” employees under California law, discuss the new federal overtime regulations and “special” issues that arise under wage and hour laws. Clients of Rediger, McHugh & Hubbert, LLP are eligible for a \$50.00 discount of the registration fee by identifying themselves as a client of the firm. For more information, contact 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. The seminar is a 2-day event and there will be other speakers addressing various labor and employment law topics. Call CEM at (704) 561-0215 to register.

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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