

Rediger, McHugh & Hubbert, LLP

Representing Management in Labor, Employment and Unfair Competition Litigation

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What Every Employer Must Know If A Union Tries To Organize Its Employees

By Robert L. Rediger

While many employers believe that organized labor is “on the ropes” and that a union would not attempt to organize their employees, recent activities by unions in various parts of the United States, and in California in particular, should cause employers to reconsider their complacency. The AFL-CIO has earmarked 20 to 30 million dollars for organization drives. The Teamsters is targeting white-collar employees. The Service Employees International Union has refined its organizing tech-

niques to include effective “corporate campaigns” that besiege targeted employers. Sophisticated strategies and tactics employed by unions to organize render virtually every employer a potential target for a union organizing campaign.

WHY EMPLOYEES UNIONIZE

Employees are often drawn to unions because they believe they are being underpaid and/or that management treats them unfairly or with a lack of respect. In most cases, a disgruntled employee will initiate contact with a business agent of a labor organization. Some unions have adopted a more aggressive approach to organizing employees and will initiate efforts at a company. Encouraged by recent decisions of the federal courts and the National Labor Relations Board (NLRB), some unions “salt” an employer’s workforce by having one of their paid employees seek employment with a targeted employer. If hired, the salt spends all of his or her nonworking time soliciting employees to designate the union as their exclusive representative.

HOW UNIONS ORGANIZE

A union begins its organizing drive by seek signatures from employees on authorization cards that usually state that the employee designates the union as his or her exclusive bargaining agent. A union must secure signatures from at least 30% of the employees in an appropriate bargaining unit to enable it to file a petition for a certification election with the NLRB. The union organizer usually induces employees to sign authorization cards indicating that the signer desires to be represented by the union with promises of increased wages, job security and better working conditions.

During this initial organizing period, management is usually not aware of the union organizer’s goal of securing signatures on the union’s authorization cards from a

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We would be happy to email our law firm's newsletter to you or to add an interested colleague to our email list upon request. Simply call Sara B. Wood at (916) 568-2855 or email your request to info@rmlaw.net and we will put you and/or your colleague on our electronic mailing list to receive our newsletter four times a year.

majority of its employees. Typically, after the union has secured signatures from more than 50% of non-supervisory employees who share a community of interest, a union organizer or business agent will make a verbal or written demand for recognition on the employer.

AN EMPLOYER'S RIGHT TO AN ELECTION

Once presented with a union's demand for recognition, representatives of management should decline any offer by the union for the employer to verify that a majority of its employees in an appropriate bargaining unit have designated the union as their exclusive bargaining representative. Verifying the union's evidence of majority status, by inspecting signatures on the authorization cards or agreeing to a card check by a "neutral" party, may result in the employer waiving its right to a government supervised election. Rather than voluntarily recognizing a union, an employer should run its own campaign to educate its employees on the nature and consequences of their selecting the organizing union as their *exclusive* bargaining representative at an NLRB supervised secret ballot election.

TAKING PREVENTATIVE MEASURES NOW

One of the best defenses an employer has to prevent the unionization of its workforce is to implement preventative measures before a union begins organizing. First, management should review its current procedures, practices and policies to ensure that only the best applicants are hired, employees' wages and benefits are competitive, job performance evaluations are done honestly, and discipline is administered fairly. Second, the company's employee handbook should include a valid no solicitation/distribution rule that will assist it in the event it becomes the target of unionization. Third, front-line supervisors must be trained in how to deal with common per-

sonnel matters and the "dos" and "don'ts" of a union organizing drive. Supervisors are considered "agents" of the employer and certain comments and conduct on their part could result in substantial adverse consequences (and monetary liability) to the employer.

THE TIPS RULE

All supervisory and managerial employees of an employer involved in a union organizing campaign *must* be aware of the TIPS rule. If they Threaten, Interrogate, Promise a benefit, or Spy on employee organizing efforts during nonworking time, they may find themselves and their employer immersed in litigation before the NLRB. A standard union tactic, especially if it starts losing employee support, is to file unfair labor practice charges against an employer alleging that supervisors or managers engaged in conduct that violates the TIPS rule.

The NLRB has the power to order an employer who has engaged in outrageous or egregious conduct to recognize and bargain with a union that has secured authorization cards signed by at least 50% of the employees *without* the benefit of an election. The NLRB will also impose remedies designed to restore the status quo and erase the effects of the employer's unfair labor practices. For example, the NLRB may order an employer to reinstate employees who were terminated for their union or concerted activities with back pay and interest and to return work, equipment, or the employing entity itself, if such were moved by the employer to thwart unionization. In light of the substantial dangers presented to an employer whose "agents" say or do the wrong things during a union organizational drive, it behooves an employer to avoid any knee-jerk reaction to a union's efforts to organize its employees.

Rediger, McHugh & Hubbert, LLP Presents Employment Law “Essentials” For 2003

Wednesday, January 15, 2003 – 9:00 a.m. to 12:00 p.m.
The Sutter Club – 1220 9th Street, Sacramento

Registration begins at 8:30 a.m. with Continental Breakfast

Client cost: \$50.00 for the first person, \$25.00 for each additional person
(Cost includes seminar, breakfast, written materials and parking)

Is your company prepared to deal with the new employment laws that will become effective in 2003? As part of our continuing commitment to our clients, the attorneys of Rediger, McHugh & Hubbert, LLP will present a seminar that will provide business owners, human resource professionals, supervisors and managers with the knowledge and tools they will need to deal with the new employment-related laws and the typical person-related matters that arise on a daily basis.

Topics To Be Addressed

■ **New California Employment Laws for 2003**

Paid family leave, family sick leave, plant closure and layoffs, discrimination and retaliation, workplace investigations, an employee’s right to inspect payroll records, health benefits, Cal-COBRA, undocumented employees, living wage ordinances, employment references, protection for employees who disclose working conditions and more.

■ **New Federal Employment Laws for 2003**

The Post-Enron Sarbanes-Oxley Act of 2002 including its protections for employees, fines and criminal penalties for individuals who engage in “obstructive conduct,” and regulation of employment benefits, important decisions of the federal courts and administrative agencies.

■ **Model Forms, Posters, Notices, Etc.**

Employee reprimands, termination checklist, leave of absence request form and employer response, certification of health care provider, confidential information agreement, waiver of meal period, *critical* language for timecards, “flex” time and arbitration policies and more.

Please print information and mail with a check for \$50.00 for the first attendee and \$25.00 for each additional attendee to Rediger, McHugh & Hubbert, LLP, 655 University Avenue, Suite 200, Sacramento, CA 95825.

(This seminar has been offered to the public and may fill up quickly).

Company: _____ Phone: _____

Address: _____

Attendees: _____

Park in The Sutter Club Garage located at 824 L Street.

Background Checks – New Laws: Are You In Compliance?

By Laura C. McHugh

On September 28, 2002, Governor Gray Davis signed two bills (AB 1068 and AB 2816) regarding background investigations, which went into effect immediately to amend California's Investigative Consumer Reporting Act ("ICRA") (Civil Code section 1786 *et seq.*). The new legislation clarifies the responsibilities of employers in requesting investigative consumer reports through third-party consumer-reporting agencies and in conducting in-house background checks. The new laws were enacted to combat the "exploding" crime of "identity theft in this new computer era."

OUTSIDE INVESTIGATIONS: NOTICE AND CONSENT REQUIRED EVERY TIME, UNLESS THE INVESTIGATION PERTAINS TO ALLEGED MISCONDUCT OR WRONGDOING

Under California's new laws, an employer must provide notice and obtain consent *each time* it hires a third-party consumer-reporting agency to prepare an investigative consumer report (a report that provides information regarding an employee's or applicant's character, general reputation, personal characteristics and mode of living). This is different from federal law, which permits a single consent form to be used for all reports.

The consent form must be separate from other documents, and cannot be contained in the application or handbook. It must provide written disclosure to the consumer of the following:

- That an investigative consumer report will be obtained;
- The permissible purpose for the report, *e.g.*, for hiring or promotion;
- That the report may contain information on the consumer's character, general reputation, personal characteristics and mode of living;
- The name, address and phone number of the investigating consumer reporting agency;
- Notice of the specific nature and scope of the investigation requested, informing the consumer of his or her right to view the information compiled

by the consumer reporting agency; and

- That the consumer must authorize in writing *on the disclosure form* his or her consent to having the report made.



Under the new laws, the employer must provide a "check box" on the consent or other form, which permits the consumer to check whether he or she wants a copy of the investigative report. Also, if an employer denies employment "either wholly or partly because of information contained in an investigative consumer report," it must notify the consumer of that fact, along with the name and address of the consumer reporting agency.

These notice and consent requirements for investigations by outside entities do *not* apply to investigations into misconduct or wrongdoing, such as theft or sexual harassment. Also, employers are not required to provide employees suspected of wrongdoing or misconduct with a copy of the investigative report(s).

IN-HOUSE BACKGROUND INVESTIGATIONS: NO DISCLOSURE UNLESS "PUBLIC RECORD" OBTAINED

Under the new laws, an employer does not have to disclose information that it obtains directly through in-house investigations unless the information obtained is "a matter of public record." Public records are defined as "records documenting an arrest, indictment, conviction, civil judicial action, tax lien or outstanding judgment." Where an employer receives such information, it must provide the consumer with a copy within seven days.



A consumer may waive his or her right to receive a copy of the public record information by marking a "check box" on the job application or other written form. However, if an employer takes adverse action based upon the public record information, a copy of the information must be provided regardless of whether the consumer waived his or her rights to receive such.

Recent Legal Developments

EEOC UPDATES GUIDANCE ON NATIONAL ORIGIN BIAS

On December 2, 2002, Cari M. Dominguez, Chairperson of the United States Equal Employment Opportunity Commission (EEOC) announced the issuance by the EEOC of an updated guidance prohibiting national origin discrimination under Title VII of the Civil Rights Act of 1964. Title VII prohibits employers with at least 15 employees from discriminating in employment based on individual's national origin, including treating an individual less favorably because of his or her ethnicity, accent, place of birth, etc. In its press release, the EEOC described its "pro-active" efforts to prevent workplace discrimination in light of recent world events, including those of September 11, 2001.

EMPLOYEE CAN NOT BE FIRED FOR COMPLAINING ABOUT BONUS

A California Court of Appeal has held that an employee could not be fired for discussing concerns related to her bonus with fellow employees. The court in *Grant-Burton v. Covenant Care, Inc.* stated that discussions regarding wage related matters is considered "protected concerted activity" under that National Labor Relations Act and protected by the California Labor Code. The court held that an employer may not discharge an employee for engaging in such protected conduct, even where the decision to discharge was also based on other nondiscriminatory, business-related reasons.

EMPLOYER NOT LIABLE FOR SEXUAL HARASSMENT BY CUSTOMER TOWARDS ITS EMPLOYEE

In *Salazar v. Diversified Paratransit, Inc.*, a California Court of Appeal held that an employer was not liable under the Fair Employment and Housing Act when one of its customers engaged in inappropriate conduct of a sexual nature toward one of its employees. California law states that employers will be held liable for unlawful harassment engaged in by its non-supervisory employees when it knew or should have known about such conduct and failed to take immediate and appropriate corrective

action. In *Salazar*, the court noted that an employer did not have managerial or disciplinary authority over its clients or customers.

NOTE — The outcome in *Salazar* may have been different had the plaintiff filed a charge with the EEOC or brought an action in federal court asserting a claim under Title VII of the Civil Rights Act of 1964. In *Folkerson v. Circus Circus Enterprises*, the Ninth Circuit Court of Appeal held that liability may be imposed on an employer for the sexual conduct engaged in by a non-employee towards an employee. The *Folkerson* court relied on a federal regulation that stated that an employer may be held liable for the acts of *non-employees* if it knew or should have known about the unlawful acts and failed to take immediate and corrective action to remedy such.

AN EMPLOYEE'S SEXUAL ORIENTATION IS NOT RELEVANT TO HIS CLAIM FOR SEXUAL HARASSMENT

The Ninth Circuit Court of Appeal in *Rene v. MGM Grand Hotel* held a butler who was subjected to severe and pervasive unwelcome physical and verbal conduct of a sexual nature by other men could state a claim under Title VII of the Civil Rights Act of 1964 alleging unlawful sexual harassment. Although Title VII does not expressly prohibit sexual harassment, such is a form of unlawful sexual discrimination. The court held that the targeting of the plaintiff's body parts linked to the plaintiff's sexuality were sufficient to bring the offensive conduct within the scope of Title VII's protections.

EMPLOYEES MAY BE LIABLE FOR FEES IN APPEAL OF LABOR COMMISSIONER AWARD

In *Smith v. Rae-Venter Law Group*, the California Supreme Court held that an employee who appeals an award of the Labor Commissioner must obtain a monetary judgment in excess of the amount of money awarded by the Labor Commissioner to avoid liability for the employer's attorney's fees incurred in defending the matter in court. Abandoning the "prevailing party" test for an award of attorneys' fees, the *Smith* court adopted the "more favorable result" test to determine whether the

Recent Legal Developments, *continued.*

appealing party (employee or employer) should be awarded its attorneys' fees.

INDIVIDUAL SUPERVISOR CAN BE SUED FOR RETALIATION

In *Walrath v. Sprinkle*, a California Court of Appeal held that an employee may state a cause of action against

his supervisor alleging that he had been "retaliated" against by his supervisor for complaining about being passed over for a job by younger workers. The *Walrath* Court rejected the supervisor's contention that the California Supreme Court's holding in *Reno v. Baird* insulating individual supervisors from liability for claims of *discrimination* under the Fair Employment and Housing Act extended to claims of *retaliation*.

Announcements

E. Aubrey Hubbert and his client, a major car dealership, were recently successful in resisting the efforts of the Machinists Union to organize its employees into the Union. Once the employees were properly advised of the advantages and disadvantages of Union participation, they voted overwhelmingly in an NLRB election to reject the Union's organizing attempts.

E. Aubrey Hubbert also successfully represented a number of both private and public sector employers in labor negotiations during the last quarter including employers with employees in the following areas: transportation, lumber and building materials, special districts for golf courses, and construction.

Laura C. McHugh prevailed in an arbitration proceeding involving two sisters, one who claimed she was wrongfully terminated and the other who claimed she was forced to resign a few months later after receiving a poor performance evaluation. The arbitrator granted summary judgment in favor of the employer as to one sister, finding that her termination for discrepancies in her time records was not unlawful. Following a hearing on the merits, the arbitrator also ruled in the employer's favor as to the other sister, finding that her resignation was not coerced and that the employer did not act unlawfully.

Laura C. McHugh prevailed in a Labor Code section 132a hearing involving an employee's claim that his employer terminated him in retaliation for his filing a claim for workers' compensation benefits. The judge ruled that the employer's actions were necessitated by the realities of doing business and that the employer did not have any permanent modified jobs for the employee that fit within his medical restrictions.

Robert L. Rediger succeeded in a campaign to defeat the Teamster's Local 150 who attempted to organize parking lot attendants at 400 Capitol Mall and the Sheraton Hotel in downtown Sacramento.

Robert L. Rediger successfully concluded collective bargaining negotiations with the Graphic Communications International Union Local 583 for a publishing company in Sacramento.

Robert L. Rediger successfully concluded collective bargaining negotiations with the Service Employees International Union Local 1877 for the parking garage employees at the San Jose International Airport.

Upcoming Events

January 15, 2003 - Employment Law “Essentials” 2003 Seminar

The attorneys of Rediger, McHugh & Hubbert, LLP, will host a half-day seminar on new federal and California employment laws that become effective in 2003. Attendees will receive model forms, policies, brochures, etc. to help them comply with common personnel-related matters. Breakfast and registration begins at 8:30 a.m. at the Sutter Club in downtown Sacramento. See page 3 of this newsletter or call Sara Wood at (916) 568-2855.

January 22, 2003 - Stockton Builders Exchange Employment Law Update

The attorneys of Rediger, McHugh & Hubbert, LLP, will present a half-day seminar for members of the Stockton Builders Exchange on new federal and California employment laws for 2003 with an emphasis on model policies for construction industry employers. Breakfast and registration begins at 8:30 a.m. at the Stockton Builder’s Exchange. For more information, please call Sharon Hill at (209) 478-1000.

February 25, 2003 - Nonprofit Resource Center - Managers Forum

Robert L. Rediger will provide an overview of new labor and employment laws in California at this breakfast meeting to be held in Sacramento. If your organization is not a member of the Nonprofit Resource Center, you may attend this event by identifying yourself as a client of our firm. Call NRC Administrative Assistant Chris Howland at (916) 264-2788.

March 4, 2003 - Lorman Education Services - Leaves of Absence in California

The attorneys of Rediger, McHugh & Hubbert, LLP will present a full-day seminar addressing all aspects of federal and state leaves of absence laws. This seminar is geared toward human resource professionals, business owners, managers, payroll supervisors and bookkeepers and will be held in Sacramento. Call Lorman Seminar Coordinator Michelle Planert at (715) 833-3940.

March 17, 2003 - National Business Institute - Fundamental Issues in California Human Resource Law

Robert L. Rediger will present the morning segment of this seminar addressing employment laws, legal aspects of the hiring process and rights and responsibilities regarding sexual harassment. NBI will present this seminar at the Vizcaya Conference Center in Sacramento from 8:30 a.m. to 4:30 p.m. Call NBI Seminar Planner Jennifer Geiss at (715) 835-8525.

March 19, 2003 - Lorman Education Services - ADA, FMLA and Workers’ Compensation

Lorman Education Services will present a full-day seminar regarding protections under federal and state laws for disabled employees. The seminar will focus on employer responsibilities under the Americans with Disabilities Act, the Family and Medical Leave Act, and the California Workers’ Compensation Act. Robert L. Rediger will address Granting a Disabled Employee’s Request for a Leaves of Absence and participate in a role playing exercise that highlights ADA and FMLA issues. Call Lorman Seminar Planner Amy Miller at (715) 833-3940.

March 28 and 29, 2003 - California Employer Advisory Council Conference

On March 28, 2003, attorneys and staff of Rediger, McHugh & Hubbert, LLP will participate in a “mock trial” during an afternoon session of this two-day conference. Clients of Rediger, McHugh & Hubbert, LLP may attend a luncheon at 11:45 a.m. and the mock trial thereafter for \$25.00, or attend the mock trial at no cost. You must identify yourself as a client of our firm and make reservations in advance with Jan Thompkin of the California EDD at (916) 227-0291.

For additional information regarding upcoming events, please call Sara Wood at (916) 568-2855 or email her at swood@rmlaw.net.

Answers To Your Commonly Asked Employment Law Questions

With permission, we will print your commonly asked labor and employment law questions in this column.

Question: When is it okay for an employer to deny benefits coverage under COBRA based on “gross misconduct?”
– Chris Brown, Paratransit, Inc., Sacramento, CA

Answer: COBRA makes it clear that employers must allow employees to continue their insurance coverage (at their own expense) whenever they are terminated, except when the termination is for “gross misconduct.” Unfortunately, the regulations governing COBRA do not define “gross misconduct” and there are few court opinions on the issue. The courts that have ruled on it agree that the conduct must be extreme or outrageous; mere negligence or incompetence will not suffice. Some courts have commented that “gross misconduct” would include criminal conduct, such as theft or embezzlement. Other courts have looked to the state unemployment compensation and other laws defining “misconduct” or “willful misconduct” to guide their determinations. Thus, a Delaware court found that an employee’s actions did not rise to the level of “gross misconduct” in a case where she was terminated for leaving onion powder out of a ravioli product. The employer was convinced the employee intentionally sabotaged the ravioli because she was allegedly upset that she was forced to work with an employee she did not like. The court found that the employer was not justified in denying benefits coverage under COBRA, since the employer could not prove that the employee’s actions were intentional.

In sum, cases must be individually analyzed. If there is any doubt as to how an employee’s conduct should be characterized, it is usually more prudent to offer COBRA than to risk liability and statutory penalties for failure to give the required COBRA notice. Also, it may be a wise to define “gross misconduct” in your written policies.

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**Best Wishes
For A Great New Year!**