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REDIGER, MCHUGH & OWENSBY, LLP

LABOR AND EMPLOYMENT LAW

LABOR AND EMPLOYMENT LAW REPORTER

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Firm Changes Name to Rediger, McHugh & Owensby, LLP

Rediger McHugh & Owensby, LLP is excited to announce the new name of our firm. Jeff Owensby, our newest partner, brings 27 years of labor and employment law experience with which to serve our clients. Jeff represents some of the largest and most successful employers in the community and throughout Northern California. He shares our passions for quality, value and innovation in the



Jeff Owensby

representation of employers. Like the rest of us, Jeff is dedicated to high quality service to clients of our firm. He also shares our views in regard to technological innovation, associate development, and promoting economy in litigation. With Jeff's added energy, we are poised to embark on initiatives that will help us provide even better service and results for our clients, while carefully controlling costs. Welcome to RMO Jeff!

IN THIS ISSUE

Firm Changes Name to Rediger, McHugh & Owensby, LLP	1
Intermittent Leaves of Absence Under the FMLA.....	1
Flexibility to Reduce Hours and Salaries of Exempt Employees	2
EEOC Issues New Poster.....	3
DOL Issues COBRA Notice	3
Employment Agreement Bars Former Sales Representative From Collecting Commissions After Termination.....	3
Recent Developments.....	4
Upcoming Events.....	6

Intermittent Leaves of Absence Under the FMLA

By Robert L. Rediger

One of the most perplexing questions that arises under the Family and Medical Leave Act (FMLA) is how to deal with an employee who takes unscheduled, intermittent leave on a regular basis. Revised regulations to the FMLA that took effect on January 16, 2009 made substantial changes in FMLA requirements and procedures. When the U.S. Department of Labor began the process of revising the FMLA regulations, it received more public comments regarding employees' unscheduled use of intermittent leave than any other topic.

Given the complexities of the FMLA and its regulations, it behooves an employer to consult with legal counsel before taking any adverse action against an employee who has requested an intermittent leave under the FMLA. In addition to having well-written policies and procedures in place regarding all leaves of absence, an employer may wish to consider:

Requiring reasonable notice of intermittent leave when feasible. Except in an employee emergency situation, an employer may request that any time off be scheduled with reasonable (continued on page 5)

Firm Prevails at Trial on Discrimination Suit

Robert L. Rediger and **Jimmie E. Johnson** recently prevailed in a jury trial held in the Sacramento County Superior Court. On the first day of trial, the Plaintiff dismissed her second cause of action for the intentional infliction of emotional distress. In response to the Defendant's motion for nonsuit, the Plaintiff dismissed her third cause of action alleging termination in violation of public policy. The jury rejected the Plaintiff's remaining first cause of action alleging discriminatory discharge due to her gender because the Plaintiff was not a credible witness and the undisputed evidence showed that she had been informed on numerous occasions that her employment was in jeopardy. Judgment with costs in the amount of \$3,698.60 was entered for the Defendant on November 9, 2009. (*Grenfell v. Blue Printing Unlimited, Inc.*)

Flexibility to Reduce Hours and Salaries of Exempt Employees

By Susana P. Solano, Law Clerk

On August 19, 2009, the California Labor Commissioner issued an opinion letter that provides employers with the flexibility to *temporarily* reduce the number of hours worked by exempt employees and make *proportionate* reduction in their salaries without “converting” them to “nonexempt” status.

California generally requires employers to pay overtime to a nonexempt employee who works in excess of eight hours per day, 40 hours per workweek, or for the first eight hours worked on the seventh consecutive day of one workweek. However, the Legislature authorized the Industrial Welfare Commission (IWC) to establish exemptions to the overtime requirement for executive, administrative, and professional employees. Although the IWC was defunded in 2004, the Department of Labor Standards Enforcement (DLSE) continues to enforce the IWC's wage orders.

Given the current economy, an issue that has come up is whether an employer can reduce an exempt employee's hours of work and salary when business declines. In 2002, the Labor Commissioner's office published an opinion letter that affirmed its policy to follow the federal regulations in regards to the salary basis test. Under the salary basis test, an employer must show an employee regularly, on a weekly or less frequent pay period, receives a predetermined amount constituting all or part of the compensation. Furthermore, the employer could not reduce the exempt employee's salary amount because of variations in the quality or quantity of the work he or she performed. In its 2002 Opinion Letter, the Labor Commissioner's office concluded that federal

law precluded an employer from reducing the salary of an exempt employee due to a shortened workweek caused by economic conditions. The same was true for absences occasioned by the employer or by the operating requirements of the business.

California's labor standards have historically been more protective of employees than the federal standards. Thus, the 2002 Opinion Letter came with no surprise. In its recent Opinion Letter, however, the Labor Commissioner's office held that its 2002 Opinion Letter was incorrect. As long as an exempt employee continues to satisfy the duties test set forth under Labor Code section 515, the Labor Commissioner reasoned that California law does not prohibit an employer from implementing the proposed reduction in hours and salary. Similarly, the Commissioner stated an exempt employee still had to earn at least two times the state minimum wage for full-time employment. At the current state minimum wage requirement, a salaried employee would need to make at least \$640 per week, regardless of the hours he or she worked.

Opinion Letters of the Labor Commissioner are only persuasive authority to a court of law; they are not controlling. In addition, employers must keep in mind that the courts have repeatedly held that “exemptions” to protections afforded employees under federal and state are to be narrowly construed. An employer must be able to show by clear and convincing evidence that an employee fits within the exemption. An employer who asserts that an employee is “exempt,” must be able to establish *all of the criteria* necessary for the particular exemption.” ■

EEOC Issues New Poster

The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits certain entities from discriminating against applicants and employees based on genetic information. Effective November 21, 2009, employers with 15 or more employees and other entities must post a notice regarding such. The EEOC has published notices revising and supplementing its existing posters, both available from the EEOC's website (www.eeoc.gov) or from our law firm on request (info@rmlaw.net).

DOL Issues COBRA Notice

On December 19, 2009, President Obama signed the 2010 Department of Defense Appropriations Act that provided for an extension of benefits to COBRA participants. The U.S. Department of Labor has issued an updated General Notice that may be given to COBRA eligible beneficiaries. The Model COBRA Continuation Coverage Election Notice is available from the DOL's website (www.dol.gov) or from our law firm on request (info@rmlaw.net).

Written Employment Agreement Bars Former Sales Representative From Collecting Commissions After Termination

By Isauro A. Villarreal

In *Nein v. HostPRO, INC.*, a web hosting business was sued by a former sales representative to recover unpaid commissions on a sales transaction that materialized after his termination. The trial court granted summary judgment, in favor of the defendant HostPRO, Inc. dismissing the Plaintiff's entire action, including his breach of contract, breach of the implied covenant of good faith and fair dealing, violations of the Labor Code, and unfair business practices claims. On appeal, the Second District Court of Appeal agreed with the trial court that the former sales representative should not recover on his claims because "under the plain language of the written employment agreement, plaintiff was not permitted to recover additional commissions after his termination."

HostPRO found itself in a difficult situation after terminating Nein's employment. Before he was terminated, Nein had spoken to an agent of AT&T and discussed the possibility of HostPRO's acquisition of AT&T's web hosting business. A short time after Nein was terminated, HostPRO and AT&T executed an asset purchase agreement wherein it purchased all of AT&T's contractual rights relating to its small and medium-sized web-hosting customer accounts and the necessary equipment to service the contracts. Nein's lawsuit sought commissions for his role in the AT&T transaction.

Nein claimed that he had entered into an oral agreement with HostPRO that superseded the original written agreement he had entered when he

was hired. The written employment agreement provided that the plaintiff would receive a salary of \$24,000 per year, plus commissions of four percent "on all direct initial sales," and that he "will be eligible for commission pay as set forth in this [document], *so long as [plaintiff] remains employed* with the Company as a Sales Representative." The written agreement also provided that it "may be amended only by a written agreement executed by each of the parties hereto." The Court in *Nein v. HostPRO, INC.* held that the written employment agreement set specific parameters that determined *when* Nein would no longer be eligible for commissions and included language that disqualified Nein from earning commissions after he was no longer employed as a sales representative.

The *Nein v. HostPRO, INC.* case highlights the importance of addressing certain subjects in an employment agreement that contains a commission structure. Subjects that warrant consideration include the commission rate, what items or services qualify for commission, when does an employee earn a commission, restrictions on the amount of commission that may be earned, conditions that must be satisfied before a commission is paid (such as shipping of the item, performance of the service, payment for the item is received, etc.), whether the commission is affected by a return of the product, how is a commission apportioned if multiple sales representatives are involved in the sale, and must an employee be employed to earn a commission or receive payment of the commission. ■

Recent Developments

Leave of Absence for Employees of the California Wing of the Civil Air Patrol

Effective January 1, 2010, an employer that employs more than 15 employees must provide at least 10 days of unpaid time off per year to volunteer members of the California Wing of the Civil Air Patrol who have been employed for at least 90 days to respond to an emergency operational mission of the California Wing of the Civil Air Patrol, provided the employee gives the employer as much notice as possible of the intended dates upon which the leave would begin and end. Assembly Bill 485 also provides for the reinstatement of the employee at the end of the leave and permits an employee to bring a civil action to enforce said rights.

City Ordinance Requiring Successor Employer to Hire Current Employees Preempted

On July 31, 2009, the Second Appellate District Court of Appeal in *California Grocers Association v. City of Los Angeles* invalidated an ordinance that required purchasers of large grocery stores to employ the predecessor employer's work force for at least 90 days. Based on the California legislature's express intent to occupy the field of health and sanitation standards, the trial judge had found that the ordinance was preempted by California laws. On appeal, the *California Grocers* court held that the ordinance was preempted not only by state laws, but also by the National Labor Relations Act because it intruded on "a zone protected and reserved for market freedom and alters the bargaining process established under federal law."

Employees Have a Limited Expectation of Privacy in the Workplace

On August 3, 2009, the California Supreme Court in *Hernandez v. Hillsides, Inc.* reversed a ruling of a Court of Appeal and held that a trial judge had properly granted an employer's motion for summary judgment in favor of the defendant-employer. Two employees who worked at residential facility for neglected children alleged that their employer had violated their right of privacy by installing hidden cameras without their knowledge or consent in an attempt to ascertain who was using the employees' computers to access pornographic websites after work hours. While acknowledging that the plaintiff's had a "reasonable expectation" of privacy in their office at work, the *Hernandez* court found that under the circumstances, the surveillance was "drastically limited in nature and scope, exempting the plaintiffs from its reach," and that the employer was "motivated by strong countervailing concerns."

Employee's Complaints that do Not Pertain to Safety or Law Violations are Not Protected

On August 17, 2009, the federal district court for the Northern District of California in *Schulthies v. Amtrak* dismissed claims brought by an alleged whistleblower under California Labor Code sections 1102.5 and 6310. The plaintiff had alleged that he was discharged in retaliation for sending his employer an email expressing concern over what he perceived to be danger to the general public and for unsafe working conditions. The court in *Schulthies* dismissed the plaintiff's Complaint for failure to state a claim for either retaliation or wrongful termination in violation of public policy, reasoning that the plaintiff's email referenced "matters pertaining to efficiency, monetary waste and disruption of employees' families." The *Schulthies* court held that to establish violations of sections 1102.5 and/or 6310, an employee's complaint must be "reasonably understood" (*i.e.*, under an objective standard), to pertain to safety or law violations.

Employees May Solicit Customers if Their Former Employer's Trade Secrets Are Not Misappropriated

On August 20, 2009, a California Court of Appeal in *The Retirement Group v. Galante* vacated a preliminary injunction that a lower court had entered prohibiting former employees from "directly or indirectly soliciting" their former employer's customers. Noting that the trial court had prohibited the employees from using information obtained from their former employer's databases and also from solicitation any current customers of their employer, *The Retirement Group* court held that it is "not the solicitation of the former employer's customers, but the misuse of trade secret information, that may be enjoined."

Employee Failed to Show Employer Treated Him Differently Because of his Industrial Injury

On November 13, 2009, in *Gelson's Markets v. Workers' Compensation Appeal Board*, the Second Appellate District Court of Appeal annulled a decision of the WCAB that found an employer had violated section 132a of the Labor Code by refusing to reinstate an employee because of conflictory notes regarding such that the employee had obtained from his physician. The *Gelson's Markets* court held that an employer does not necessarily engage in discrimination "merely because it requires an employee to shoulder some of the disadvantages of his industrial injury," but rather, section 132a prohibits employers from "treating injured employees differently, making them suffer disadvantages not visited on other employees because the employee was injured or had made a claim."

Employer's Application of Strict Attendance Policy Results in Liability

On November 30, 2009, the California Supreme Court in *Roby v. Mckesson Corp.* reversed a judgment that had been entered in favor of a plaintiff who had sued her employer alleging wrongful discharge in violation of public policy, harassment, failure to accommodate, and discrimination under the California Fair Employment and Housing Act (FEHA). During her employment, the Plaintiff had experienced "panic attacks" that restricted her ability to perform her job and caused her to exceed the number of absences allowed under the employer's absentee policy that failed to "reasonably accommodate employees who had disabilities or medical conditions that might require several unexpected absences in close succession." The *Roby* court first held that the jury's verdict regarding the employee's noneconomic losses was "hopelessly ambiguous," because a plaintiff is not entitled to multiple recoveries on nonexclusive causes of action and it could not determine whether the awards the jury made "overlapped." In regard to "personnel management actions," the *Roby* court held that such may be relied on as evidence in support of the plaintiff's harassment claim. After finding that sufficient evidence existed to support the jury's special verdicts regarding harassment and discrimination, the *Roby* court then held that the due process clause of the Fourteenth Amendment to the U. S. Constitution places constraints on state court awards of punitive damages and the maximum award allowable in this case was \$1,905,000.

Employee's Good Faith, but Mistaken Belief as to Wages Owed, is Protected

On November 30, 2009, the Fourth Appellate District Court of Appeal in *Barbosa v. Impco Technologies, Inc.* reversed an order granting a defendant's motion for non-suit of a Plaintiff's complaint for wrongful termination alleging that he had been discharged for making a good faith, but erroneous claim for overtime wages. The *Barbosa* court reversed the grant of non-suit in favor of the defendant and held that public policy in favor of an employer's duty to pay overtime wages protects an employee from terminating that employee for making a good faith, but erroneous claim for overtime wages.

Intermittent Leave (*from page 1*) notice to avoid disrupting its workflow or operations. An employer may also insist that the employee make a good faith effort to schedule necessary medical treatments during his or her non-working time.

- *Transferring the employee to a different position.* An employer may transfer an employee to a different job at the same pay and benefits to avoid disruptions in production as long as it does not do so to punish or retaliate against the employee for exercising rights under the FMLA.
- *Requiring a second medical opinion to justify intermittent leave.* An employer may request a certification from a health care provider of its choosing that addresses dates and number of treatments, and the projected recovery period after

each treatment. A company-paid health care professional may speak with the employee's health care provider to inquire whether treatments can be scheduled during the employee's non-working time.

- *Requiring re-certification.* An employer may require an employee, at his or her cost, to obtain medical re-certification once every 30 days, and in some cases in less than 30 days, to ensure that the need for intermittent leave still exists.
- *Requiring the employee to use all accrued paid time off.* Once an employee's accrued paid time is exhausted (such as sick time or vacation), an employer must still grant intermittent leave to an eligible employee, but such may be on an unpaid basis in whatever increment of time its payroll system allows, even if the employee is exempt. ■

Upcoming Events

April 21, 2010—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.” Clients of Rediger, McHugh & Owensby, LLP are entitled to receive a \$50.00 discount by identifying themselves as a client of our firm and using code J8212177 when registering. Contact Jami Clish, Lorman Seminar Planner at 800-678-3940 or jclish@lorman.com for more information.

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