



# REDIGER, MCHUGH & OWENSBY, LLP

LABOR AND EMPLOYMENT LAW

## LABOR AND EMPLOYMENT LAW REPORTER

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### RM&O, LLP Welcomes New Associate Susana Solano

Rediger, McHugh & Owensby, LLP is excited to announce that Susana P. Solano has joined the firm as an associate. Ms. Solano received her Juris Doctor from the University of California Davis School of Law and her B.A. cum laude in Psychology from the University of California Los Angeles. Prior to law school, Ms. Solano conducted intervention programs for adolescents, coordinated citywide Educational



Susana P. Solano

campaigns on mental health, and researched mental health issues. During law school, she worked as a law clerk for RM&O and participated in the Immigration Law Clinical Program. Ms. Solano continues to volunteer for the UCD Immigration Law Clinic during community events that provide pro bono legal services. She is a member of the Sacramento County Bar Association and the Women Lawyers of Sacramento.

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### The Continuing Legal Assault Against Businesses

by Robert L. Rediger

During the campaign that preceded the November 2008 elections, Barack Obama made promises of transforming the American workplace into a more employee-friendly environment. On January 29, 2009, shortly after being sworn in as President of the United States, Mr. Obama signed the Lilly Ledbetter Fair Pay Restoration Act permitting a plaintiff to bring a claim alleging "discrimination in compensation" within 180 days of receiving any paycheck. On October 28, 2009, President Obama signed the National Defense Authorization Act into law, expanding the protections of the Family and Medical Leave Act. During the last two years, the President has signed several pro-union executive orders and took steps to increase the enforcement activities of various employment-related federal agencies, including the U. S. Department of Labor ("DOL"), the Occupational Safety and Health

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Administration, and Equal Employment Opportunity Commission. He also appointed two pro-union attorneys to the National Labor Relations Board.

While the “shellacking” the Democratic Party took in the November 2010 election may cause some in the business community to believe that the worst of the anti-business laws and regulations are behind them, such a mindset would be unwarranted and perilous. On November 19, 2010, Vice President Biden, as chair of the administration’s Middle Class Task Force, announced the establishment of an attorney-referral system between the DOL and the American Bar Association whereby the DOL will refer workers to ABA-approved lawyers experienced in the Family Medical Leave Act and the Fair Labor Standards Act.

Given the prospect of even more employment-related lawsuits being filed by disgruntled employees, it behooves employers to audit their policies and procedures. A well-drafted employee handbook should be an essential component of an employer’s personnel operations and it should complement the employment application, pre-employment interview and hiring process. Employers should ensure that all legal notices are posted, employees are classified properly, adequate time records are kept, rest breaks and meal periods are properly scheduled, etc.

***A SELF-AUDIT CHECKLIST appears on page 4 for your use in identifying, evaluating and hopefully correcting any deficiencies in your company’s policies and procedures.***

## Announcements

**Robert L. Rediger** convinced a labor arbitrator that the employer had “good cause” to discharge an employee under the Collective Bargaining Agreement where the employee had used profanity towards her supervisor in the employer’s lobby. Although the employee had been warned several times regarding her use of abusive and profane language towards other employees, and she had received a “last chance notice” along with a two-week suspension, she persisted in engaging in such conduct. The arbitrator rejected the Union’s argument that the employer had “picked on” the employee because she was the Union Shop Steward and that the penalty of discharge was too severe for the offense. *Pacific Standard Press and Teamsters Union DC 2, \_\_ LA \_\_* (2010).

**Laura C. McHugh** prevailed in a labor arbitration involving an employee’s discharge for violation of the employer’s zero-tolerance policy against workplace racial harassment. After the employer received a complaint that the employee had used the “n” word and other racially derogatory slurs in the break room, the employer conducted an immediate investigation. The employee denied using the “n” word, but admitted to “talking smack” following a game of dominoes. Other witnesses, however, testified that the employee used the “n” word and instigated a fight, refuting his contention that he was “just acting in jest.” The Union argued that the employee should have received lesser discipline than discharge, but the arbitrator upheld the discharge under the “just cause” provision of the Collective Bargaining Agreement. *Paratransit and ATU Local 256*. Ms. McHugh was also successful in reversing the employee’s award of unemployment benefits on appeal. The California Unemployment Insurance Appeals Board found that the employee’s conduct constituted misconduct connected with his most recent work, and reversed the Administrative Law Judge’s ruling in his favor.

**Laura C. McHugh** and **Sarah R. Lustig** prevailed on a motion for summary judgment dismissing a lawsuit brought by an employee in San Francisco County Superior Court alleging numerous causes of action, including harassment and discrimination based on gender and sexual orientation, retaliation, intentional infliction of emotional distress and wrongful termination. The employee, a security officer, had been accused of sexual harassment and had been suspended pending investigation. During the investigation, the employee violated the employer’s directive that he not return to the work site or contact certain persons. Accordingly, he was fired. He brought a lawsuit, alleging that the person who brought the harassment allegations against him actually had harassed him. After nearly two years of litigation, the trial judge granted summary judgment in favor of the employer, finding that the employee failed to establish essential elements as to each of his claims and/or that the employer had established viable affirmative defenses. The judgment in favor of the employer included an award to the employer for reimbursement of its defense costs from the employee. *Mento v. Universal Protection Service*.

**Laura C. McHugh** and **Sarah R. Lustig** prevailed in a lawsuit brought by an employee in San Francisco County Superior Court alleging retaliation for filing a prior lawsuit. In his prior lawsuit, the employee, a security officer, alleged that he had been denied promotions due to his age. He settled that lawsuit with his employer for nuisance value. The employee was subsequently promoted to a supervisory position. After the employer received several complaints about the employee, it gave him formal warnings to improve his performance. When his performance did not improve, the employee was demoted. He sued again, alleging that the employer demoted him in retaliation for filing his original lawsuit. The trial judge granted summary judgment in the employer's favor, finding that the employer had articulated legitimate business reasons for its actions, and that the employee did not establish that its actions were a pretext for a retaliatory motive. The employer has filed a cost bill with the Court, seeking reimbursement from the employee of its defense costs. *Caraballo-Padilla v. Universal Protection Service*.

## Recent Developments

### **Employee May Sue Present Employer for Enforcing Prior Invalid Non-Competition Agreement**

On July 30, 2010, the Second Appellate District Court of Appeal in *Silguero v. Crete Guard, Inc.* held that an employee may sue his current employer for wrongful termination in violation of public policy after he was discharged because his employer sought to enforce an illegal non-competition agreement that the employee had signed with his former employer. The court held that Crete Guard, Inc. could be held liable for discharging the employee "out of respect and understanding with colleagues in the same industry" where he had "signed an agreement which prohibited him from all sales activities for 18 months following his departure" from the former employer. The *Silguero* court held that that Business and Professions Code section 16600 embodies California's "settled legislative policy in favor of open competition and employee mobility."

### **Organ and Bone Marrow Donor Leave of Absence**

On September 30, 2010, the Governor signed Senate Bill No. 1304 into law, requiring any business that employs 15 or more employees to grant a leave of absence up to 30 days in any one-year period to an employee who is an organ donor for the purpose of donating his or her organ to another person, and a leave not exceeding five days in any one-year period to an employee who is a bone marrow donor for the purpose of donating. To receive a leave under new Labor Code section 1508 *et seq.*, an employee must provide written verification that he or she is a donor and that there is a medical necessity for the donation. The employer may require the employee to take up to five days of earned but unused sick or vacation leave for bone marrow donation, and up to two weeks of earned but unused sick or vacation leave for organ donation, but it may not require that the leave be taken concurrently with FMLA or CRFA leave. The leave may be taken intermittently and the employee is entitled to reinstatement following the leave, unless the employer declines to do so due to conditions unrelated to the leave.

### **Exemption from Meal Period Rules for Certain Unionized Employees**

On September 30, 2010, the Governor signed Assembly Bill No. 569 into law, amending Section 512 of the Labor Code to provide that employees in a construction occupation, commercial drivers, security officers, and employees of electrical and gas corporations or local publicly owned electric utilities, are exempt from California rules pertaining to "meal periods" if those employees are covered by a collective bargaining agreement that contains provisions regarding meal periods, final and binding arbitration of disputes concerning application of its meal period provisions, premium wage rates for all overtime hours worked, and a regular hourly rate of pay of not less than 30 percent more than the state minimum wage rate.

### **Three-Year Statute of Limitations for Employees Seeking Waiting Time Penalties**

On November 18, 2010, the California Supreme Court in *Pineda v. Bank of America* held that an employee who seeks "waiting time penalties" pursuant to Labor Code section 203 may sue for such penalties within the three-year statute of limitations, but that such penalties could not be recovered under the unfair competition law.

## SELF-AUDIT YOUR COMPANY'S POLICIES AND PROCEDURES

	YES	NO
<b>A. Hiring Procedures:</b>		
1. Do you use an employment application that solicits relevant information and contains language that will protect your business in litigation?	<input type="checkbox"/>	<input type="checkbox"/>
2. Does your interviewer ask only permissible pre-employment inquiries?	<input type="checkbox"/>	<input type="checkbox"/>
3. Do you conduct adequate reference and background checks of applicants?	<input type="checkbox"/>	<input type="checkbox"/>
4. Are any pre-employment tests used job-related and "validated"?	<input type="checkbox"/>	<input type="checkbox"/>
5. Are your hiring decisions based on objective or subjective criteria, or both?	<input type="checkbox"/>	<input type="checkbox"/>
6. Do you send successful applicants appropriate offer-of-employment letters?	<input type="checkbox"/>	<input type="checkbox"/>
<b>B. Employee Classifications:</b>		
1. Do all job descriptions reference the "essential functions" of the position?	<input type="checkbox"/>	<input type="checkbox"/>
2. Do your "exempt" employees satisfy all the criteria for an exemption?	<input type="checkbox"/>	<input type="checkbox"/>
<b>C. Wage and Hour Record Keeping:</b>		
1. Are properly completed and signed employee time cards processed?	<input type="checkbox"/>	<input type="checkbox"/>
2. Are appropriate rest breaks and meal periods scheduled for non-exempt employees?	<input type="checkbox"/>	<input type="checkbox"/>
3. Does all information required by law appear on the employee's pay stub?	<input type="checkbox"/>	<input type="checkbox"/>
<b>D. Employee Handbook:</b>		
1. Is your "at-will" policy rendered ineffective by other policies or procedures?	<input type="checkbox"/>	<input type="checkbox"/>
2. Will your policy and procedure regarding unlawful discrimination/ harassment and retaliation provide you with the "avoidable consequences" defense?	<input type="checkbox"/>	<input type="checkbox"/>
3. Does your leave of absence policy address each of the numerous reasons your business must permit an employee to be "excused" from work?	<input type="checkbox"/>	<input type="checkbox"/>
4. Are certain forms you want employees to use, such as a Request for a Leave of Absence, Certification of Health Care Provider, On-Duty Meal Period Agreement, Request to Make-up Time, etc., included in an appendix to your handbook?	<input type="checkbox"/>	<input type="checkbox"/>
5. Do you use a Response to Leave Request form to address all pertinent issues before the leave begins and to inform employees of your expectations during the leave?	<input type="checkbox"/>	<input type="checkbox"/>
6. Does your Employee Handbook effectively integrate the necessary information contained in various legal notices, brochures, forms, posters, regulations, etc.?	<input type="checkbox"/>	<input type="checkbox"/>
<b>E. Notices, Posters and Brochures:</b>		
1. Do you have all of the most current Notices that apply to your business posted?	<input type="checkbox"/>	<input type="checkbox"/>
2. Do you make available all non-discrimination brochures to your employees?	<input type="checkbox"/>	<input type="checkbox"/>

## Managing Risk in the Employment Relationship: Closing out a Workers Compensation Claim

by Jeff Owensby

*This article was written by Jeff Owensby, Esq., a partner with Rediger, McHugh & Owensby, LLP, in an effort to acquaint readers with risks in the employment relationship. Jeff has observed a number of trends in the types and frequency of employment law claims that confront employers. This is the first in a series of articles he has written from a risk management perspective and with the goal of rendering the audience less prone to claims.*

After many months of litigating a contested workers' compensation claim, a Hospital was finally nearing the closure of the claim. The worker was employed as a general maintenance worker and, prior to the injury, frequently lifted and carried objects up to 25 pounds. Residual injury to the worker's arm compelled a physician engaged by the workers' compensation carrier to opine that the injured worker could not lift more than 10 pounds with his injured arm. The Hospital's workers' compensation insurer sent a form to the facility and asked if the Hospital could provide the injured worker with modified duty consistent with the residual injury to the worker's arm (lifting restriction of 10 pounds) that resulted from the workplace injury.

The workers' compensation specialist employed by the Hospital's Human Resources Department asked the manager of the maintenance department if he could return the worker to full time work in light of the lifting restriction. Terrified that this restriction could lead to more workers' compensation claims by the same worker, jeopardize the recuperation of the worker's arm, and adversely impact the department's budget (because the department would need more workers or more hours from staff to make up for the work foreclosed by the lifting restriction), the department manager said that it was not feasible, stating, "We cannot accommodate the lifting restriction."

The workers' compensation specialist relayed the rejection of the return to work proposal to the workers' compensation carrier who in turn told the worker and his counsel that the requested modification of duties was not feasible and emphasized the potential risk to the injured worker and his health. The worker concluded

that the employment was over and so stated in an email to his boss in the maintenance department. The employee thereafter applied for unemployment insurance benefits and the Hospital did not contest his claim.

The foregoing exchange is more common than you might think. Such seemingly benign communications often occur at the tail end of a workers' compensation claim when the parties assess the ability of the worker to resume his or her position. The problem is that the applicant's counsel may argue that this simple question from the workers' compensation carrier or its counsel is the starting point for an "interactive dialogue" under state and federal disability discrimination laws, i.e., Americans with Disabilities Act (ADA) and the California Fair Employment and Housing Act (FEHA). It is not clear that this interpretation is ironclad. However, forewarned is forearmed. An employer should answer inquiries regarding an employee's possible return to his or her former position with an eye towards workers' compensation, disability and potential accommodation issues.

A trained H.R. professional who understands the significance of workers compensation and the disability discrimination laws, as well as an employer's duty to "reasonably accommodate" a worker under federal and/or state disability statutes might be the best suited to respond to any such inquiry. The H.R. professional can evaluate whether any accommodation is warranted, what the accommodation might be, determine whether accommodation other than reinstatement to the same job better suits the situation and appreciate the potential intricacy of and arguable obligation to engage in "the interactive process." ■

## Alerts

### **Supervisory Anti-Harassment Training Must be Provided Every Two Years**

As of January 1, 2006, employers in California that regularly employ 50 or more employees anywhere in the U.S. were required to provide two hours of anti-harassment training to their supervisors and managers. **An employer covered by the law must provide such training to each supervisory employee once every two years.** (AB 1825). To schedule a two hour training at your Sacramento facility, or at our law firm at a total cost of \$600.00 (including materials for all attendees), call Sara at (916) 442-0033 or email us at [info@rmlaw.net](mailto:info@rmlaw.net).

### **Updated Worker Compensation Posters and Pamphlets**

Effective September 23, 2010, all employers in California are required to post an updated “Notice to Employees—Injuries Caused by Work” poster regarding workers’ compensation rights and benefits and make “Your Rights to Workers’ Compensation Benefits” pamphlets available to their employees. Employers that have Medical Provider Networks (MPN), and those changing their MPN status, must post an additional MPN notice.

### **IRS Issues Standard Mileage Rates for 2011**

On December 3, 2010, the Internal Revenue Service issued optional standard mileage rates that may be used to calculate the deductible costs of operating an automobile for business, charitable, medical or moving purposes. Beginning January 1, 2011, the standard mileage rates will be: 51 cents per mile for business miles driven, 19 cents per mile driven for medical or moving purposes, and 14 cents per mile driven in service of charitable organizations. (For more information visit the IRS website at [www.irs.gov](http://www.irs.gov)).

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