VALLEY LAWYER

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A Publication of the San Fernando Valley Bar Association

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Labor and Employment Law

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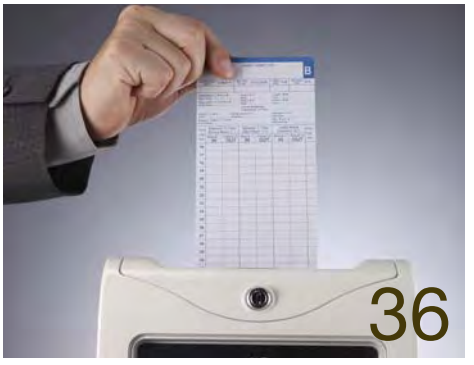

President's Message

What's Hot in the New Millennium?

ALAN J. SEDLEY
SFVBA President

I AM PLEASED TO REPORT that our new Mentorship Program is off and running. You can read about it on page 14 of this issue. As I have shared with you, a major goal of this program is to expose lawyers, both new attorneys as well as experienced, veteran lawyers to areas of practice otherwise unfamiliar to them.

The purpose is to provide insight (delivered in meetings with a mentor) and resources to the lawyer about an area of practice, enabling him or her to decide whether this practice area would be a useful or gratifying area of law to add to an existing law practice, or perhaps provide to the lawyer who is dissatisfied, discouraged or disillusioned with his or her present practice a fresh, new start and an opportunity to discover a passion for the practice of law, a concept unfamiliar to too many practitioners.

The theme for this month's *Valley Lawyer* turns the focus to labor and employment law. To say that this area of law is *hot* is a gross understatement.

What then makes labor and employment law practice so enticing, so desirable, so hot in the new millennium? Well, for one thing, our persistent ailing economy, business downsizing, a declining or (at best) flat job market, and increased government enforcement has resulted in a dramatic increase in employment lawsuits. In a strong economy (a now-unfamiliar concept), employees find new jobs quickly and are less inclined to file employment-related claims. However, discharged and unemployed workers facing financial ruin are more motivated to pursue litigation.

Moreover, litigation rises in an economic downturn as government regulators step up enforcement, and organizations are more apt to file lawsuits to collect on money owed. Not surprisingly, a recent litigation trends survey found that labor and employment disputes are predicted to account for a significant number of those lawsuits.

Whether choosing to represent labor (employee) or management (employer), the labor and employment lawyer has the benefit of an ever-changing landscape of laws and regulations, providing plaintiff counsel a wide spectrum of potential causes of action to pursue for a disgruntled employee, while affording management counsel a never-ending supply of issues and policies to navigate on the employers' behalf, not to mention drafting frequent and often comprehensive updates to the clients' employment policies and procedures manual.

Given the growing regulatory component associated with labor and employment law, it is not at all surprising that both the disgruntled employee and the overwhelmed employer seek counsels' advice, consultation and in the case of disputes, litigation services. Indeed, this area of law is wide in scope and breadth. Issues involve the interpretation and evaluation of a wide variety of laws and regulations, an exhaustive list which include: Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Equal Pay Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act of 1990, the Family and Medical Leave Act of 1993, the Fair Labor Standards Act, the WARN Act, Labor-Management Reporting and Disclosure Act of 1959, the Migrant and Seasonal Agricultural Worker Protection Act, the Uniformed Services Employment and Reemployment Rights Act of 1994, and many other federal and state laws.

In the context of discharged employees, an event which gives rise to most employment law litigation matters, and prior to 1988, it was commonplace (and somewhat lucrative for plaintiff and counsel), particularly for an employee without a written contract (most), to bring a tort action under the doctrine of "breach of the implied covenant of good faith and fair dealing," which represented an extension of insurance law to the employment arena. Thereafter, and following the California Supreme Court's landmark holding in *Foley v. Interactive Data*, that tort remedy was no longer available in the employment context.

Hence, we saw a rapid and significant reliance by plaintiffs and counsel of the various claims under the umbrella of discrimination as the wrongful cause for termination, i.e., age, race, religion, sex and physical

disability to name a few. Added to the multitude of discrimination claims are alleged public policy violations, including retaliation (including whistleblower and *qui tam* claims).

Such litigation, while often leading to large settlements and verdicts (those deemed having merit) are expensive both to prosecute and defend, time-intensive and can exact a significant toll on the discharged employee, the employer's staff and in particular, plaintiff's former colleagues who are often called to testify. Such testifying colleagues are frequently emotionally torn between rendering testimony that would be favorable to their friend, versus the desire to keep their job.

Finally, the attorney often finds him or herself counseling the client, be it the discharged employee or employer. As I had the opportunity to represent both sides throughout the years of practice, I can attest to the need to counsel, sooth—and above all—provide objectivity to the fired, humiliated employee who most often believes that he or she gave their work duties "their all," and were wrongfully terminated. Sometimes the attorney views the claim as having merit, but oftentimes must tell the prospective client that though now unemployed, they have no sustainable claim.

On the other hand, and as a prelude to the necessity of providing a defense in a lawsuit, the management lawyer often assumes a role of counseling the client in a preventative sense; avoid claims brought by employees by understanding the law, observe wage and hour guidelines and train upper level management to understand and appreciate the pitfalls of conduct that could be construed as harassment, abuse and hostile to the work environment.

Not covered in this discussion are other aspects to this vast body of practice, including labor relations law (union disputes) and worker's compensation law. All in all, the practice of labor and employment law offers the practitioner a broad and challenging practice.

Alan J. Sedley *can be reached at Alan.Sedley@HPMedCenter.com.*

VALLEY LAWYER

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From the Executive Director

Access to Fastcase

ELIZABETH POST
Executive Director

THERE IS ONE BENEFIT THAT SEPARATES THE SAN FERNANDO Valley Bar Association from all other bar associations in Los Angeles County and across Southern California—members' free access to Fastcase, the comprehensive online law library.

Fastcase's libraries include primary law from all 50 states, as well as deep federal coverage going back to 1 U.S. 1, 1 F.2d 1, 1 F.Supp. 1 and 1 B.R. 1. The Fastcase collection includes cases, statutes, regulations, court rules and constitutions. Fastcase also provides access to a newspaper archives, legal forms and a one-stop PACER search of federal filings through its content partners.

Fastcase's libraries are searchable, just like you search the web or traditional legal research services—by keyword (or "Boolean" search), natural language search or citation lookup. According to its website, what makes Fastcase's solution so much smarter is its tools that find the best answers fast. Because Fastcase is the only legal research system that sorts the best results to the top of the list (like Google), you can find the most important cases right away (at the top), no matter how many search results you get.

Free MCLE Webinars

Fastcase provides free live training webinars so that SFVBA members can learn how to use Fastcase. The following MCLE webinars have been scheduled this spring for SFVBA members:

- *Introduction to Fastcase* (March 5 at 12:30 p.m., April 9 at 7:00 a.m. and May 7 at 10:00 a.m.)
- *Boolean (Keyword) Search for Lawyers* (March 26 at 12:30 p.m., April 30 at 7:00 a.m. and May 28 at 10:00 a.m.)
- *Advanced Tips for Enhanced Legal Research on Fastcase* (March 7 at 12:30 p.m., April 4 at 7:00 a.m. and May 9 at 10:00 a.m.)

Fastcase has added a new webinar in 2012 aimed specifically at paralegals. While this webinar does not offer MCLE credit, it is a great way to bolster Fastcase research skills. The webinar is available on March 6 at 12:30 p.m., April 3 at 7:00 a.m. and May 1 at 10:00 a.m.

Members can sign up for one of the webinars above at www.fastcase.com/webinars. Just select the webinars for the San Fernando Valley Bar Association on that page.

iPhone App

Fastcase for the iPhone is the largest free law library on the iPhone and it uses smart search technology from Fastcase's fully-featured web-based legal research application. The application is free, but you will need to register for an account so that you can save favorites and your own customized search history.

To activate Fastcase, SFVBA members can simply click the Fastcase logo on the Bar's website at www.sfvba.org.

***Liz Post** can be contacted at epost@sfvba.org or (818) 227-0490, ext. 101.*

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Dear Counsel

By Client Communications Committee

Ethics and Professional Conduct

The SFVBA established the Client Communications Committee to address the number one reason for client discontent—need for better communication—and reduce negative contacts with the State Bar. The Committee, a volunteer group of a dozen veteran practitioners in wide-ranging fields of law, answers written questions from attorney members regarding problems they observed or dealt with that may have been avoided by better attorney-client communication. Responses are published anonymously in Valley Lawyer.

Q: SFVBA Communications Committee is supposed to help us avoid problems with clients. When will we learn about the ethics of communication?

A: For attorneys, "ethics" has at least two connotations. Its negative aspect suggests lawyers who are disciplined by the State Bar for their conduct, whether professional, criminal or personal-social. Its more positive application is the professional responsibility all lawyers owe to the public, their clients and the profession itself, that is, the "high road".

The Committee's previous responses to inquiries attempted to show the close connection between client communications (or deficiencies therein) and reasonable attitudes and expectations of clients in relation to those communications. Present inquiry impliedly seeks to look more closely at the negative or disciplinary and liability downsides for communication shortfalls.

Start with the Rules

A good place to start is with rules. California's Rule of Professional Conduct 3-510 requires lawyers to promptly communicate to the client all terms and conditions of any offer made in a criminal matter and only if there is a written offer in all other matters. The discussion has no mandate but notes that oral offers in a civil matter should also be communicated if they are significant for the purposes of Rule 3-500.

By way of contrast, the American Bar Association Rules, which prevail in all states in the United States except California, comments that "a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance."

Five years ago, the California Supreme Court and legislature both commissioned a five year program to revise California rules to conform them more in line with either the ABA Rules or the American Law Institute's Restatement of the Law Governing Lawyers. The Restatement continues its long standing tradition of citing the majority view in the United States. The Restatement, however, is geared to common law and not administrative law, which is the rule-based law of attorney discipline. However, unlike the wide chasm California enjoys between professional negligence (legal malpractice) and professional responsibility/lawyer discipline, the Restatement tends to parallel ABA conduct rules.

The California Conduct Rule Revision Commission completed their assignment and generally proposed to make our rules the longest, most convoluted in the country, but did make some attempts to narrow the gap. The Supreme Court presently has their proposal under consideration but it seems unlikely California will join the rest of the country. In spite of this dichotomy, graduating law students are required to take and pass the Multistate Professional Responsibility Examination along with passing the Bar Exam so they never quite get the opportunity to have the question raised by present inquiry answered in law school.

As far as ethical rules are concerned, California is, in some respects, the most liberal state in the United States. By liberal, we mean, it's the most lawyer protective and least likely to support clients laying such claims against their attorneys before the State Bar. Rule of Professional Conduct 3-500 is our basic communication rule. It only requires that a lawyer "shall keep a client reasonably informed about significant developments relating to the employment or representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed."

In its discussion, the rule states that a lawyer "will not be disciplined for failing to communicate insignificant or irrelevant information" since the rule "is not intended to

change a (lawyer's) duties to his or her clients." Duties of Attorneys are set out in Business & Professions Code §6068, which is part of the State Bar Act. Only subsection (m) deals with communication. Since the rule was copied from the statute, its requirements and language are about the same.

Note that the qualifier "significant," like its anonym "insignificant," leaves a huge question mark for anyone seriously concerned with compliance. What is significant to the client may look nothing like what a case-hardened, jaded lawyer might consider significant. The rule provides no clue as to significant to whom?

California Rules, Statutes and Mandates

By way of contrast, ABA Rule 1.4 which the rest of the country follows, requires promptly informing a client of any decision or circumstance requiring the client's informed consent, consultation with the client as to the means of achieving the client's objectives or any relevant limitation on what the lawyer can do based on ethical constraints on the lawyer as well as the few things California requires. The critical difference is that in California, an attorney can be discipline free (no professional responsibility violation) and still need to put his or her errors and omissions carrier on notice of committing malpractice for insufficient communication (professional liability violation).

ABA Rule 1.4 mandates that "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding representation." The ABA rule expressly mandates informed consent for any "client decision or circumstance" and defines informed consent as "the agreement to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."

Although California ethical rules and statutes have no informed consent requirement comparable to the rest of the country, our common law has substantially similar requirements. "Adequacy of communication depends in part on the kind of assistance involved. For example, in negotiations where there is time to explain a proposal, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation the lawyer should explain the general strategy and prospects of success—the information to be provided is that appropriate for a client who is a comprehending and responsible adult." 5 Witkin, Cal. Procedure, 5th ed., p 519. See *Lysick v Walcom* (1968) 258 Cal App 2d 136); *Sharp v Nex Entertainment* (2008) 163 Cal App 4th 410; *Neel v Magana* (1971) 6 Cal 3d 176.

Cobbs v Grant (1978) 8 Cal 3d 229, following national unanimity implementing Justice Cardozo's 1914 articulation of requisite informed consent for a professional's patients, essentially establishes the same risk-benefit analysis set forth in ABA's definition of informed consent, supra.

The above covers the principal basics of the ethics of communication. Future responses will deal with other aspects of communication, which likewise have both disciplinary and liability aspects. They will cover soliciting clients, lawyer advertising, misleading and patently fraudulent representations and other areas of attorney-client communications.

Written questions may be submitted to epost@sfvba.org or SFVBA Client Communications Committee, 21250 Califa Street, Ste. 113, Woodland Hills, CA 91367. The opinions of the Client Communications Committee are those of its members and not those of the Association.

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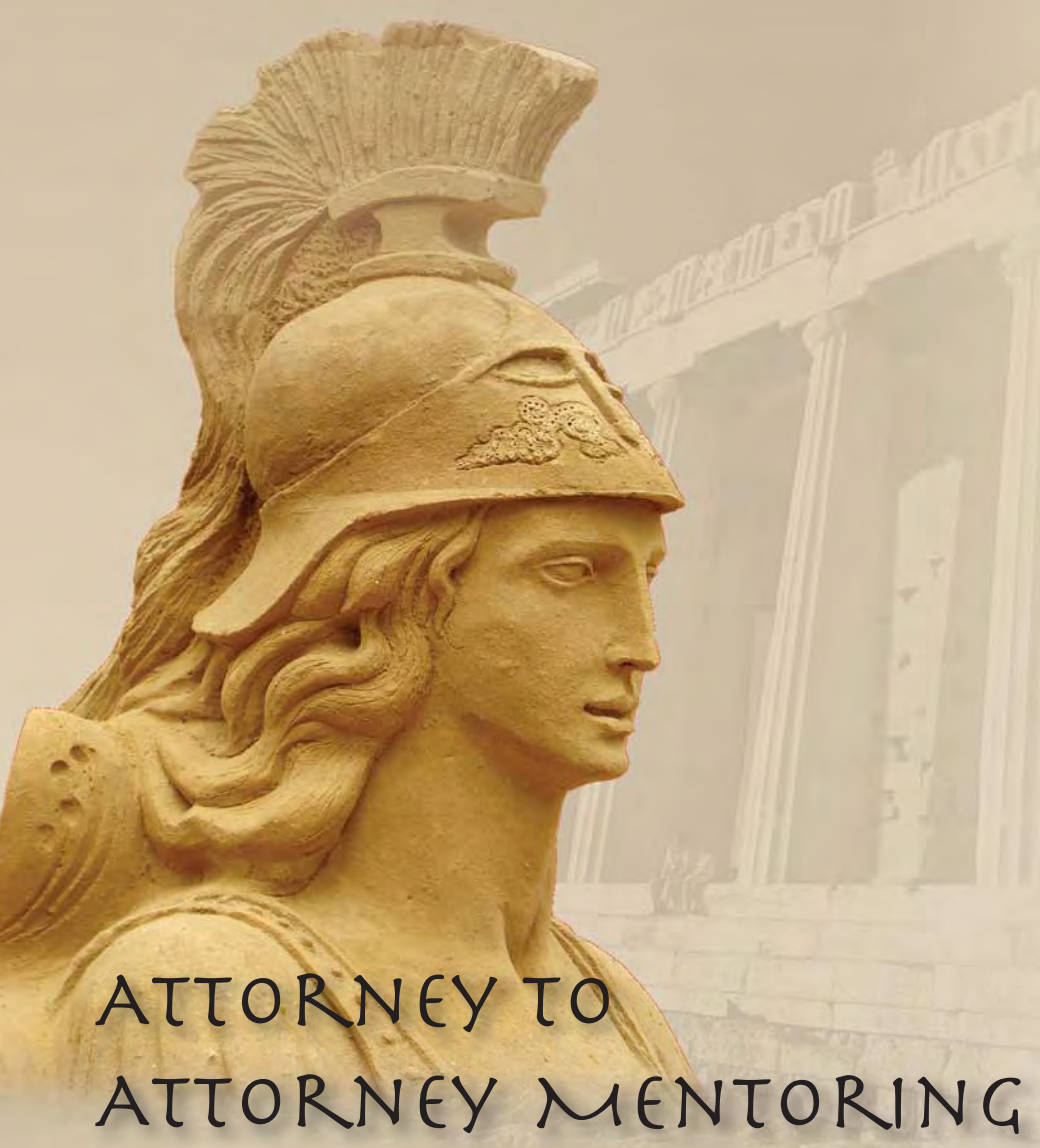

Attorney to Attorney Mentoring

By Angela M. Hutchinson

IN GREEK MYTHOLOGY, MENTOR was a friend of Odysseus. When Odysseus left for the Trojan War, he placed Mentor in charge of his palace and his son, Telemachus. The goddess Athena visited Telemachus, disguised as Mentor. In this disguise, she encouraged Telemachus to stand up against evil suitors of his mother Penelope, and to go abroad to find out what happened to his father. When Odysseus returned, Athena appeared briefly in the form of Mentor again at Odysseus' palace.

Because of Mentor's relationship with Telemachus, and the disguised Athena's encouragement and practical plans for dealing with personal dilemmas, the name Mentor has been adopted in English as a term meaning someone who imparts wisdom to and shares knowledge with a less experienced colleague.

It's no secret that a mentor relationship can help guide a law student or budding attorney throughout their legal career, as well as have impactful and long-lasting effects in the lives of the mentor and mentee. At his installation at the start of this Bar year, SFVBA President Alan Sedley described his journey as a lawyer. After many years of practice, he felt something less than complete fulfillment. Then he was introduced to a new area of law, which he explored and developed a deep enthusiasm for. This revitalized his affection for the practice of law.

The San Fernando Valley Bar Association has launched the SFVBA Mentoring Program so that new lawyers can benefit from the opportunity to have a professional relationship with an experienced lawyer in their field, and that some experienced, less-than-satisfied lawyers can benefit from the opportunity to explore other areas of law. The SFVBA envisions its program as an opportunity to advance professional associations among lawyers in the Valley. The Mentoring Program seeks to:

1. Connect new and veteran lawyers in particular fields of law, allowing new lawyers to benefit from the wisdom of experienced colleagues, and serve as resources to each other.
2. Expose lawyers who may not feel complete fulfillment in an area of practice to other law practice areas, and enthusiastic lawyers in those fields.
3. Continuously improve the quality and enthusiasm for the practice of law in the Valley through the sharing of knowledge.
4. Introduce Valley lawyers to other members of the Bar and Bench.

Sedley and President Elect David Gurnick, chair of the Mentoring Program Taskforce, were instrumental in the creation and implementation of the Mentoring Program. Other Taskforce members are Barry Kurtz, Charles Shultz, Jerome Fogel and Tiffany Feder.

The Mentee and Mentor Pair

"While there are no 'rules' or 'measuring sticks' to guide us to the perfect mentee, two particular types of mentees jump out right away. The first is the established attorney who is dissatisfied with his or her practice area in law to the point that daily work becomes a joyless or unchallenging burden each and every day, and would be willing to learn from an established attorney the challenges, nuances and rewards found in a new area(s) of law," explains Sedley.

"At the other end of the spectrum, I envision a good mentee candidate to be a newly-licensed lawyer, who perhaps enjoyed studying law in school, but graduated without a clue as to what specialty he or she might have a passion to practice."

Sedley believes the mentor can help the mentee discover his specialty, "perhaps by discussing the mentee's interests and passions outside of law, and relating and applying it to a specific area of law." Sedley gives the example of a mentee who likes to

perform in high school plays may find an entertainment lawyer as the perfect mentor.

New Attorney to Seasoned Attorney

A professional may start off working in the recruiting field as a recruiter, and then later obtain a juris doctorate, but unsure how to best utilize their work experience, education and talents. The SFVBA Mentoring Program would connect such a legal professional with an employment law attorney who may be able to provide career path guidance

Gurnick believes it's important for established attorneys to mentor new ones. He says, "So much law resides in the minds of lawyers and judges and how we practice our profession. The law and precepts and practices are passed from a generation of lawyers to the next."

Gurnick describes mentoring as an important way for seasoned, experienced, capable lawyers to instill the highest and best qualities in newer members of the legal profession.

Gurnick had several mentors that were instrumental to his career as a lawyer. "From my first day, a great business and franchising lawyer, Marty Fern, invested a lot of time, care, energy and affection mentoring me how to draft, and provide first class service to clients. A few years later a great business litigator, David Laufer, mentored me as well," shares Gurnick.

"Even as an experienced lawyer I am still mentored, for the past eight years, by terrific lawyers I look up to at the Lewitt Hackman firm. My focus on franchising law and how I try to provide great client service and zealous practical advocacy can be traced largely to learning from what mentors have shared."

One Practice to Another

"The idea of changing one's established practice to another area of law is a daunting and troubling proposition," says Sedley. "After all, the very thought of it conjures up images of hours spent learning new laws and procedures, not to mention the impact such a transition will undoubtedly have on one's income in the short term. Even adding a new focus or areas of law to one's existing practice cannot be successfully accomplished without serious focus and dedication."

Sedley continues, "The mentor, an attorney specifically chosen because he or she demonstrates a passion for area(s) of law practice, will be instrumental in calming and settling the mentee's initial trepidation at the 'unknown' by reinforcing the mentee's passions, skills and interests for this new practice by sharing the excitement and enthusiasm the mentor has for this particular legal expertise."

Sedley's health law mentor did precisely that as she calmed his initial reluctance to make such an extreme shift in practice. Sharing her infectious passion for the practice of health law resonated with Sedley.

> "The SFVBA is confident in its new mentoring program and places a high value on mentoring for all involved parties."

Does Mentoring Really Work?

Flexibility will enable the SFVBA Mentoring Program to satisfy needs of mentors and mentees. The mentoring relationship should facilitate frequent discussions about practicing law and careers in the legal profession. SFVBA mentors may need to provide encouragement, support and affirmation. They may also be called on to give suggestions on available resources and allow their mentee to explore new ideas and to inquire about interacting with judges, adversaries and colleagues, ethical matters, dealing with difficult clients and work-life balance.

Mentors will gain insight and receive the satisfaction of giving back to the law profession. Suggested mentorship activities include meetings over breakfast, lunch or coffee; periodic phone conversations and emails; and invitations from mentors to SFVBA events to introduce mentees to other members of the Bar.

The SFVBA is confident in its new mentoring program and places a high value on mentoring for all involved parties. Sedley says, "Though it sounds like a cliché, it is nevertheless accurate to say that if we learn that one (new or established) attorney discovers his or her passion for a newly discovered practice area of law through the help of a mentor and makes a successful transition (or a new focus to an ongoing practice), we will have created a successful program."

Attorneys who would like to become involved in the SFVBA Mentoring Program are encouraged to contact Executive Director Liz Post at epost@sfvba.org or (818) 227-0490, ext. 101. An application to become a mentee or mentor can be downloaded from the SFVBA's website.

Angela M. Hutchinson *celebrates four years as the Editor of SFVBA's Valley Lawyer magazine. She works as a communications consultant, helping businesses and non-profit organizations develop and execute media and marketing initiatives. She can be reached at editor@sfvba.org.*

NEW CALIFORNIA EMPLOYMENT LAWS PRESENT MORE CHALLENGES

By Ken Rose

A NUMBER OF NEW EMPLOYMENT-RELATED bills that Governor Brown approved became law on January 1, 2012. The new employment regulations consist of significant changes for California employers. As with any new legislation, businesses must bring their employment policies and practices into compliance.

Wage Theft Prevention Act of 2011 (AB 469)

California's Wage Theft Prevention Act of 2011 ("Act") took effect on January 1, 2012. The Act gives greater protection to employees, and makes changes in the way most workers are notified of basic employment information.

The Act amends existing employment laws (California Labor Code sections 98, 226, 240, 243, 1174, and 1197.1) and adds new requirements (Labor Code sections 200.5, 1194.3, 1197.2, 1206, and 2810.5) which criminalizes willful violations for non-payment of wages after a court judgment or final administrative order; requires restitution to the employee in addition to a civil penalty for failure to pay minimum wages; extends the time period for obtaining judgments on final orders for collection of penalties by the California Division of Labor Standards Enforcement (DLSE); enhances bond requirements for employers with convictions or court judgments for non-payment of wages including requiring an accounting of assets upon request by DLSE or court order; establishes that penalties under the Labor Code for failure to comply with wage-related statutes are minimum penalties; and allows employees to recover attorney's fees and costs incurred to enforce a judgment for unpaid wages.

Labor Code Section 2810.5

The provision in the Act that will be of most immediate concern for California employers is the new Labor Code section 2810.5. This statute requires that private sector employers provide a written form notice to newly hired non-exempt employees, and to current non-exempt employees when changes occur, about their wages and other employment-related information. This "Notice to Employee" requirement is codified as California Labor Code Section 2810.5.

Labor Code section 2810.5 specifically requires that all employees hired on or after January 1, 2012 must receive the Notice to Employee at the time of hiring, with the following exceptions: (1) governmental/public sector employees; (2) employees who are exempt from the payment of overtime wages under the California Labor Code and the Wage Orders of the Industrial Welfare Commission (e.g., employees properly classified as professional, executive, or administrative, outside salespersons, and some employees who receive more than half their compensation in commissions); and (3) employees who are covered by a Union collective bargaining agreement if the agreement states working conditions of the employee, and if the agreement provides premium wage rates for all overtime hours worked and a regular hourly rate of pay for those employees of not less than 30 percent more than the state minimum wage.

Labor Code section 2810.5 also requires that the employer notify covered employees, in writing of any changes to the information set forth in the Notice To Employee within seven calendar days after the time of the changes, unless all changes are reflected on a timely itemized wage statement (i.e., paystub) furnished in accordance with Labor Code section 226, or notification of all changes is provided in another writing required by law within seven days of the changes.

If the wage rate is the only change, a Notice to Employee is not required where there is an increase in a rate and the new rate is shown on the itemized wage statement with the next payment of wages.

Per Labor Code section 2810.5, the Notice to Employee must contain at least the following information:

- rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission or otherwise, including any rates for overtime, as applicable
- allowances, if any, claimed as part of the minimum wage, including meal or lodging allowances
- regular payday designated by the employer in accordance with the requirements of the Labor Code
- name of the employer, including any "doing business as" ("dba") names used by the employer
- physical address of the employer's main office or principal place of business and a mailing address, if different

- telephone number of the employer
- name, address and telephone number of the employer's workers' compensation insurance carrier

Moreover, the statute authorizes the Notices to Employee to include any other information that the California Labor Commissioner "deems material and necessary."

Employers may use any form of written notice provided it contains all the required information specified in Labor Code section 2810.5. The Act instructed the California Labor Commissioner to issue a template format for employers' optional use to comply with Labor Code Section 2810.5. In accordance with that directive, the Labor Commissioner prepared a template Notice to Employee, and published it on the California Department of Industrial Relations' website.

The template is available in six languages in both Word and PDF formats. Concurrently, the Labor Commissioner's Division of Labor Standards Enforcement ("DLSE") issued Frequently Asked Questions on the new Notice to Employee requirement.

The Labor Commissioner's template Notice to Employee includes additional items of information not particularized in Labor Code section 2810.5. Among the added categories of information in the Labor Commissioner template that are not specified in Labor Code section 2810.5 are the following:

- hire date and position
- business form of employer—corporation, partnership, etc.
- identity of any other entities used to hire employees or administer wages or benefits, excluding recruiting services or payroll services
- whether the employment agreement is oral or written
- workers' compensation policy number or certificate number for permissible self-insurance
- name and signature of the employee and the date the notice was received and signed
- name and signature of the employer representative providing the notice and the date notice is provided

Whether the template is intended as an indirect statement from the Labor Commissioner that these add-ons are now required under its "[a]ny other information the Labor Commissioner deems material and necessary" authority, is not clear. Obviously, the prudent course of action for employers is to assume for now that all of the information on the Labor Commissioner's template form should be included in whatever Notice to Employee format the employer elects to use.

The penalty for non-compliance is not specified in the Act, and, presumably, the penalties contained in the Labor Code Private Attorneys General Act of 2004 ("PAGA"), Labor Code sections 2699 (f)(1) (2), apply. The PAGA penalties are $100 per employee per pay period for the initial violation and $200 per pay period per employee for subsequent violations.

New Restrictions on Employers' Use of Credit Reports (AB 22)

Many employers want to obtain employees' and applicants' credit information as part of their hiring processes and for other employment-related reasons. Assembly Bill 22, which took effect on January 1, 2012, significantly restricts employers' ability to procure credit reports. The new law specifically applies to credit checks and does not address criminal record and other background checks.

This bill generally prohibits employers from using an applicant's or employee's credit history in making employment decisions. Prior to this legislation, employers could request a credit report for employment purposes if they provided prior written notice of the request to the person for whom the report was sought.

This bill significantly changes prior law by prohibiting employers, other than some financial institutions, from using credit reports for employment purposes unless the report is used for one of the following limited purposes: (1) a managerial position; (2) position in the State Department of Justice; (3) a sworn peace officer or other law enforcement; (4) a position for which the information contained in the report is required by law to be disclosed or obtained; (5) a position that involves regular access to confidential information such as credit card account information, social security number or date of birth; (6) a position in which the person can enter into financial transactions on behalf of the company; (7) a position that involves access to confidential or proprietary information; or (8) a position that involves regular access to cash totaling $10,000 or more of the employer, a customer, or client during the workday.

State and Local Governments Cannot Require Employers to Use E-Verify to Confirm Employees' Legal Worker Status (AB 1236)

The E-Verify Program of the United States Department of Homeland Security, in partnership with the United States Social Security Administration, enables participating employers to use the program, on a voluntary basis, to verify that the employees they hire are authorized to work in the United States.

This bill prohibits the state, or a city, county, or special district, from requiring an employer other than one of those government entities to use an electronic employment verification system except when required by federal law or as a condition of receiving federal funds. This new law does not prohibit employers to use E-Verify to confirm employees' work eligibility, but merely bars cities or counties from requiring private employers to do so.

Prohibition of Employers' Interference with Employee Leaves of Absence Under the California Family Rights Act and the Pregnancy Disability Leave Law (AB 592)

The California Family Rights Act and the Pregnancy Disability Leave Law prohibits an employer from denying an eligible employee's request for leave to care for a family member with a serious health condition, to bond with a child, to attend to the employee's own serious health condition, or for disability due to pregnancy or childbirth.

This bill additionally makes it explicit that it is unlawful for an employer to interfere with, or restrain the exercise or attempted exercise of, any right provided to an employee under the California Family Rights Act and Pregnancy Disability Leave Law. This new law amends sections 12945 and 12945.2 of the California Government Code.

Expansion of Fair Employment and Housing Act to Include Discrimination on Basis of Genetic Information (SB 559)

This bill adds discrimination "on the basis of genetic information" as another protected class under the California Fair Employment and Housing Act (FEHA). Genetic information is broadly defined, and includes information relating to an individual employee's genetic tests, the genetic tests of the employee's family members and the manifestation of a disease or disorder in the employee's family members. Under the new law, discrimination in hiring or employment based on any of these characteristics would be considered a violation of law. This bill amends Section 12921 of the California Government Code.

New Consequences for Willful Misclassification of Employees as Independent Contractors (SB 459)

Intentional and willful misclassification of employees as independent contractors has become an increasing problem in the United States, and certainly in California. Existing law provides extensive protections relating to the employee-employer relationship. When companies misclassify workers as independent contractors instead of employees, these workers do not receive standard worker protections mandated by existing law. These existing legal protections relate to wage standards, workers' compensation, employment contracts, working conditions and many other issues.

This new law ups the ante for employers with respect to independent contractor misclassification issues. The bill prohibits willful misclassification of individuals as independent contractors. The law defines willful misclassification as "avoiding employee status for an individual by voluntarily and knowingly misclassifying that individual as an independent contractor."

Employers also will no longer be permitted to make deductions from contractors' pay that could not be made if the contractors were employees. The bill authorizes the California Labor Commissioner to issue determinations that a person or employer has violated these prohibitions with regard to an individual filing a complaint, and to assess civil and liquidated damages against a person or employer based on a determination that the person or employer has violated these provisions. The bill imposes a fine of between $5,000 and $25,000 for willfully misclassifying workers as independent contractors.

Moreover, the bill provides that any person who, for money or other valuable consideration, knowingly advises an employer to treat an individual as an independent contractor to avoid employee status shall be jointly and severally liable with the employer if the individual is not found to be an independent contractor. Exempt from these provisions regarding joint and several liability is any person who provides advice to his or her own employer or an attorney who provides legal advice in the course of practicing law. This bill adds sections 226.8 and 2753 to the California Labor Code.

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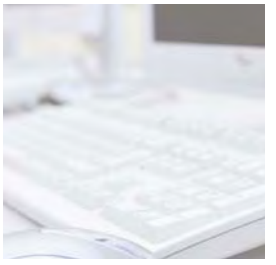


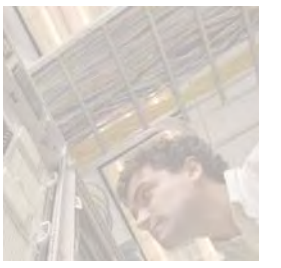

California Imposes Steep Penalties *for* Misclassification *of* Independent Contractors











By Robyn M. McKibbin

GOVERNOR JERRY BROWN SIGNED MANY new employment bills that became law on January 1, 2012, including changes regarding hiring practices, leaves of absence and providing medical coverage. The most significant new law, labeled by its opponents as the "Job Killer Act," prohibits the "willful misclassification" of workers as independent contractors instead of employees.[1] Improper deductions or fees charged to a willfully misclassified worker for any purpose such as space rental, services, repairs or equipment maintenance, also constitute a statutory violation.

If the Labor Workforce Development Agency ("LWDA")[2] or a court makes a determination that an individual was willfully misclassified, the "person or employer" will be subject to a civil penalty of not less than $5,000, and up to $15,000 for each violation.[3] These penalties are in addition to any other penalties permitted by law. If a pattern or practice is found, the penalties increase to $10,000 to $25,000 per violation.[4] It is important to examine the new law and to explain the potential pitfalls of misclassification and the directions from which an independent contractor challenge can emerge, sets forth the different tests applied by the different triers of fact, and gives attorneys practical guidance on how to assist clients.

What the New Law Says and Doesn't Say

Unfortunately, the new law does not clearly define what "willful misclassification" means, which creates substantial risk for employers who don't know the complexities of the multi-factor independent contractor analysis, or simply make a mistake in good faith. As written, a "willful violation" means "avoiding employee status for an individual by voluntarily and knowingly misclassifying that individual as an independent contractor."[5] The terms "pattern" and "practice" are also not defined.

The new law also has a non-monetary, public embarrassment penalty. For one year following a willful violation finding, the person or employer must post on its website, or if it does not have a website, in an area visible to employees, customers and the general public, a notice signed by an officer, stating:

- the person or employer "committed a serious violation of the law" by willfully misclassifying employees
- the person or employer changed its business practices to avoid further violations
- an employee who believes he or she is misclassified as an independent contractor may contact the LWDA (identifying the LWDA's mailing and email addresses, and telephone number)
- the notice is displayed pursuant to state order[6]

A related new law imposes joint and several liability on consultants who knowingly advise an employer to classify an employee incorrectly.[7] Attorneys and employees within the company, however, are expressly excluded.

Why Employers Use Independent Contractors

Financially, there are several advantages for using independent contractors, especially for smaller employers. The employer:

- does not pay customary payroll contributions, including unemployment and disability insurance taxes and personal income taxes[8]
- does not pay for optional employee benefits such as medical or life insurance, paid vacation and sick leave, or retirement plans
- is not obligated to pay for workers' compensation coverage[9]

Independent contractors also reduce exposure for potential liability.

- Labor Law protections such as minimum wage, overtime pay, meal and rest breaks, pay stub itemization and indemnification for work-related expenses only apply to employees.[10]
- California's Fair Employment and Housing Act ("FEHA") prohibits discrimination and harassment in employment based on a laundry list of criteria including race, sex, national origin, marital status, genetic information and age.[11] Independent contractors are expressly excluded by administrative regulations.[12]
- The doctrine of *respondeat superior* imposes liability on employers for injuries suffered by third parties as a result of an employee acting within the course and scope of employment.[13] Employers are not vicariously liable for the intentional or negligent actions of independent contractors.

Potential Pitfalls If the Employer Gets It Wrong

The risks of misclassification are significant and arise from a myriad of sources. An employer could unwittingly violate its statutory obligations to pay overtime wages, properly itemize pay stubs, pay employees at least twice a month (subject to several exceptions) and to maintain accurate records of hours worked.[14] If the worker files a lawsuit or a claim with the Labor Commissioner and Labor Code violations are found, the employer is liable for all unpaid wages, interest, costs, attorney's fees and statutory penalties — which are independent of the penalties available under the new law.[15]

The Employment Development Department ("EDD") administers California's payroll tax programs. If the EDD audits an employer and determines there was a misclassification, the employer will be assessed amounts due for state income tax withholding, unemployment insurance contributions, disability insurance taxes and personal income tax. The employer is also subject to a 10% penalty of the amount of the unpaid contributions plus interest on any unpaid taxes (variable and compounded daily). In addition, the failure to withhold state income tax from an employee's paycheck could constitute a misdemeanor or even a felony.[16]

Employers who fail to obtain workers' compensation coverage for their employees are subject to workers' compensation claims or civil tort liability, not only to the worker but to any third party who is injured as a result of negligent acts by the misclassified worker that occurred in the course and scope of employment. Criminal penalties are also possible.[17] The injured employee may hold the employer liable for an additional penalty of 10% of the workers' compensation benefits recovered. Attorney's fees will also be assessed.[18]

The Tests

Common misconceptions about independent contractor status result from the worker requesting to be a contractor and not an employee, or the parties had a written agreement that expressly denies the existence of an employment relationship. Generally, the Labor Code protections cannot be waived by private contract.[19] Also, how a worker is paid, i.e., on a straight commission basis, or by lump sum payment, does not impact the analysis.

The determination of employee or contractor status is one of fact and, of course, each trier of fact applies a different test. The EDD utilizes a common law test, under which the most important factor is the principal's right to control the manner and means of accomplishing a desired result.[20] The IRS has its own 20-factor test, broken down into three categories: (1) behavioral control, (2) financial control and (3) nature of the parties' relationship.[21]

Federal employment issues such as the Fair Labor Standards Act Title VII of the Civil Rights Act of 1964, and the Age Discrimination in Employment Act, are analyzed under an economic reality test.[22] This test considers: (1) the worker's opportunity for profit or loss depending on his/her managerial skill; (2) the worker's investment in equipment or materials required for the tasks, or the employment of helpers; (3) whether the service rendered requires a special skill; (4) the degree of permanence of the working relationship; and (5) whether the service rendered is an integral part of the principal's business.

For California wage and hour, FEHA and workers' compensation issues, the trier of fact evaluates the degree of control the principal exercises over the worker under the standard enunciated in *S.G. Borello & Sons v. Dept. of Industrial Relations* (1989) 48 Cal.3d 341. Given the prevalence of these claims, the test and examples of its application are discussed below.

Under *Borello*, the factors utilized to determine whether an employment relationship exists include: (a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.

The *Borello* court also adopted five additional factors used in other jurisdictions: (1) the worker's opportunity for profit or loss depending on his/her managerial skill; (2) the worker's investment in equipment or materials required for the task, or the employment of helpers; (3) whether the service rendered requires a special skill; (4) the degree of permanence of the working relationship; and (5) whether the service rendered is an integral part of the principal's business. Generally, these individual factors cannot be applied mechanically because they "are intertwined and their weight depends often on particular combinations."[23]

Cases that Found Employee Status

Antelope Valley Press v. Poizner (2008) 162 Cal.App.4th 839

Although the Independent Contractor Distribution Agreement between a newspaper publisher and its delivery persons described the carriers as "self-employed, independent distributor[s]," referred to throughout the contract as "contractor[s]," and permitted them to work for other companies, the remaining portions of the 11-page agreement were filled with "manner and means" provisions dictating when and how the publications were to be delivered. The agreement also detailed the potential negative consequences if the carriers did not comply with the written directives.

The court held while the carriers could "choose the sequence of their delivery, the vehicle they use to make deliveries, whether and when to take breaks, and the clothes they wear during their deliveries, those choices are, in reality, a function of the weather, the size and density of their routes, and whether they can afford to have a vehicle for deliveries separate and apart from a vehicle for their own personal use."

Lujan v. Minagar (2005) 124 Cal.App.4th 1040

During the one year a hair stylist worked at a beauty salon, the owner made up her work schedule; she was paid weekly, based on a percentage of the money received for her services and product sales; she was given a workstation and paid no rent for it; she did not pay for any of the beauty supplies she used; all appointments were booked through the salon's front desk; the customers paid the salon, not her; and she was required to use and pay the salon's "shampoo girl." While the hair stylist received a 1099 form instead of a W-2 form, it was not sufficient evidence to undermine the other factors.

Cases that Found Independent Contractor Status

Varisco v. Gateway Science and Engineering, Inc. (2008) 166 Cal.App.4th 1099

A construction company contracted with an inspector to ensure that its clients' construction projects met applicable code requirements. The company did not provide any uniform, apparel, equipment, material or tools to plaintiff. Plaintiff wore his own hardhat and work boots that were mandatory apparel when on the job site. He used his own car for transportation and was not reimbursed for mileage or gas. The company did not train him. His work hours were established by the client's architect of record, not the company. Plaintiff went to the company's offices twice a month to pick up his paycheck, and never at any other time. If plaintiff had a question, or discovered a problem, he contacted the client, not the company.

Although there was an at-will clause in his written agreement with the company, the court held the right to terminate the agreement does not, in and of itself, change the independent contractor relationship into an employee-employer relationship. "If it did, independent contractor arrangements could only be established through agreements which limited the right of a party, or perhaps both parties, to terminate the agreement. This would be absurd, and it is not the law."

Arnold v. Mutual of Omaha 2011 WL 6849652 (Cal.App. 1st Dist.)

Licensed insurance agent was retained to procure and submit applications for an insurance company's products, collect moneys and service clients. Training was offered but only with respect to compliance with state law directives. The company provided software as a "best practice" to enable the agents to sell its products more successfully. Business expenses for client entertainment and mailings were not reimbursed.

The agent used her own judgment in determining whom to solicit, and the time and manner in which she solicited sales for the company's products. She was permitted to work for other insurance companies. At the time of her retention, both the company and the agent believed they were creating an independent contractor relationship and not an employment relationship.

Martinez v. Combs (2010) 49 Cal.4th 35

Seasonal agricultural workers who worked for a strawberry farmer brought action against the farmer's produce merchants seeking to recover unpaid minimum wages, which they could not collect from the bankrupt farmer. Evidence established the produce merchants did not (1) hire or fire the workers, (2) set their wages or hours, (3) supervise their work, (4) pay them, (5) provide tools and equipment or (6) pay for workers' compensation insurance.

The court also rejected plaintiffs' contention that because the produce merchants benefited from their labor, they should be liable for the unpaid wages. If true, the court noted, then grocery stores and consumers could also be liable, which would be an "unreasonably broad" interpretation of the IWC's wage order.

What to Do

Proponents posit the new law will properly bring more workers under the protections of the Labor Code, California will benefit from the increase in payroll taxes employers will pay to classify workers as employees instead of independent contractors and the State may see revenue from the significant penalties that will become collectible. More workers classified as employees instead of independent contractors means workers' compensation carriers will benefit from the increased premiums. The stiff penalties will be yet another weapon for the plaintiff's bar to use to compel a settlement in wage claims, whether meritorious or not. Counsel is urged to initiate conversations with their employer-clients so that potential exposure is minimized.

If the employer utilizes independent contractors, understand what the job duties are and the degree of control the employer asserts. Was the worker trained on how to complete the tasks assigned? Where does the worker complete the assigned tasks? Is the worker supervised? Who provides the materials, supplies and equipment to accomplish the assigned tasks? How long has the worker been performing services for the employer? Does the worker have a separate company or enlist its own helpers? If the answers raise a control issue, ask why the worker is classified as an independent contractor. If the reason is either the employer wants to save money on payroll taxes, insurance, etc., or the worker asked to be classified as such, the attorney should express such concerns and strongly encourage the client to consult with employment counsel.

If the employer is confident that its independent contractors would never expose the company to potential liability by filing a lawsuit or a claim for wages or benefits, remind them of the numerous other potential state and federal agencies that have considerable financial interests in employee misclassifications. Even if the client does not heed his/her attorney's advice, the value of the attorney's services to protect a client's interests will be reinforced.

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[1] *Lab. Code* §226.8(a)(1).

[2] The LWDA is an executive branch agency that oversees several workforce programs including the Department of Industrial Relations, The Employment Development Department, and the Unemployment Insurance Appeals Board.

[3] *Lab. Code* §226.8(b). Note the phrase "person or employer" is not defined.

[4] *Lab. Code* §226.8(c).

[5] *Lab. Code* §226.8(i)(4).

[6] *Lab. Code*§226.8(e). See §226.8(i)(3) for definitions of "officer."

[7] *Lab. Code* §2753(a).

[8] *Un. Ins Code* §§976, 976.6, 2901, 13020.

[9] *Lab. Code* §3353.

[10] *Lab. Code* §§90.5, 226, 510, 512, 1182.12, 2802.

[11] *Govt. Code* §12940. The anti-discrimination law clarified the protected categories of sex and gender include "gender identity" and "gender expression," i.e., whether a person's gender-related appearance and behavior stereotypically correspond with his or her sex at birth.

[12] *2 Cal. Code Regs.* §7286.5(b)(1).

[13] *Lisa M. v. Henry Mayo Newhall Memorial Hosp.* (1995) 12 Cal.4th 291, 296.

[14] *Lab. Code* §§204(a), 226, 510, 1174(d).

[15] *Lab. Code* §§203, 210, 218.5, 226.3, 226.7, 1194, 1197.1.

[16] *Un. Ins. Code* §§1112.5, 1113, 2118, 2118.5.

[17] *Lab. Code* §§3602(d), 3706.

[18] *Lab. Code* §§4554, 4555.

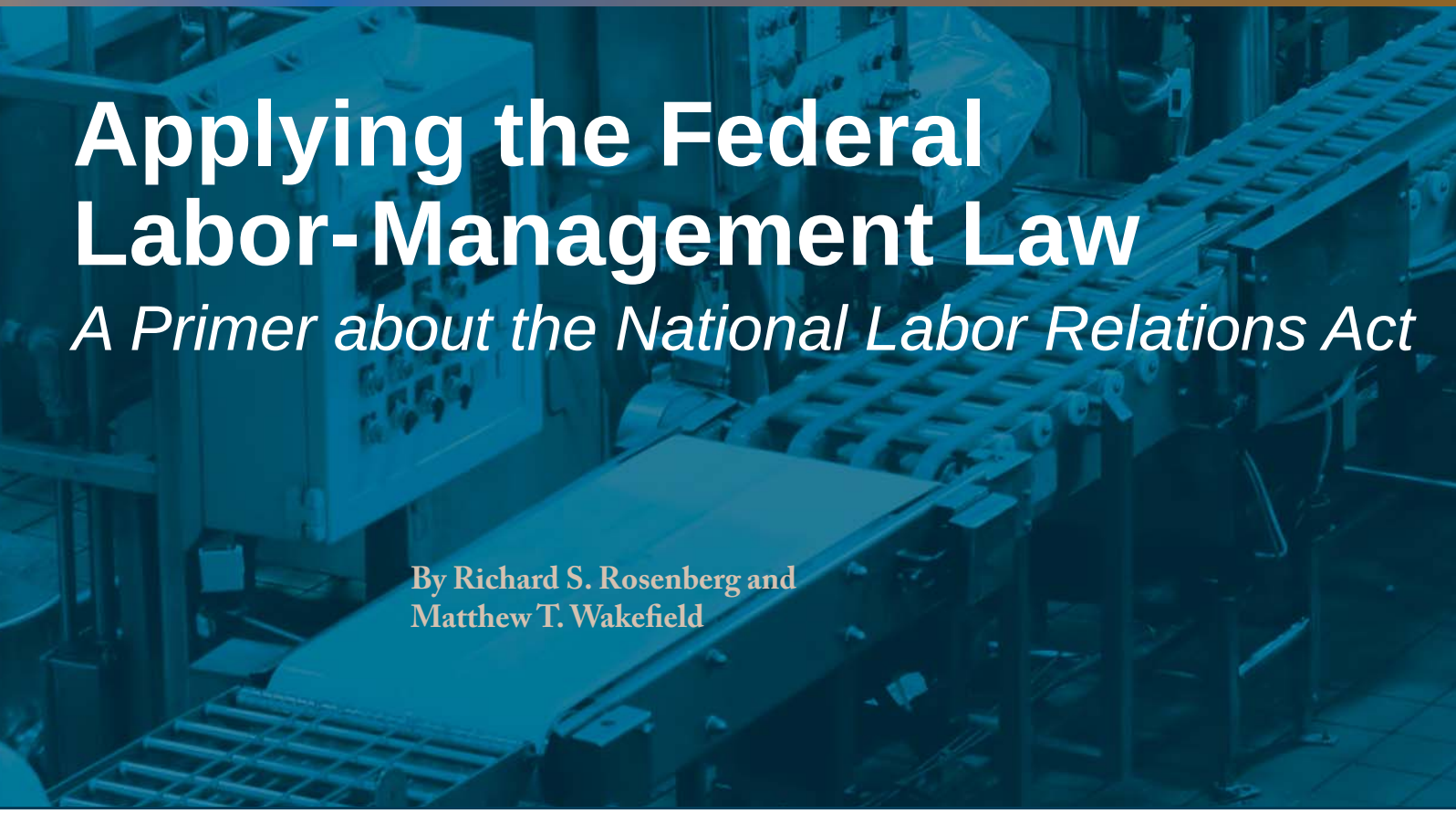
[19] *Lab. Code* §§1194, 1198, 2802; *see also Civ. Code* §3513. Meal breaks may be waived in limited circumstances. *Lab. Code* §512(a).

[20] *Un. Ins. Code* §621; 22 Cal. Code Regs. §4304-1.

[21] I.R.S. Rev. Rul. 87-41. See I.R.S. Form SS-8.

[22] *Goldberg v. Whitaker House Coop.* (1961) 366 U.S. 28, 33, 81 S.Ct. 933, L.Ed.2d 100; *Lutcher v. Musicians Union Local 47* (9th Cir. 1980) 633 F.2d 880, 883.

[23] *S.G. Borello & Sons v. Dept. of Industrial Relations, supra,* 48 Cal.3d at 351 (citation omitted).



Applying the Federal Labor-Management Law

A Primer about the National Labor Relations Act

By Richard S. Rosenberg and Matthew T. Wakefield

ATTORNEYS WHO BELIEVE THAT THE FEDERAL labor-management law, known as the National Labor Relations Act ("NLRA"), applies only to unionized businesses, or to the less than 7% of the private sector workforce which actually belongs to a union,[1] are actually overlooking significant legal issues facing their business clients. Despite the fact that union membership in the United States has been steadily declining for decades, the National Labor Relations Board ("NLRB") under President Obama has been busy reinventing itself as a 21st century labor law watchdog agency.

Recent NLRB decisions and administrative actions demonstrate the agency's willingness to branch out far beyond the union organizing process and traditional unionized labor-management relations. Indeed, although the last major amendment to the NLRA was in 1959, recent interpretations of the Act by the NLRB prohibit non-union employers from disciplining employees for certain postings on Facebook,[2] outlaw seemingly innocuous employee handbook policies and bar arbitration agreements which restrict class action claims.[3]

NLRA Coverage

The NLRA applies to almost all private sector employees and employers in the United States, with the most notable exceptions being the air, rail and agricultural industries. Some small businesses, such as those with less than $500,000 in annual sales, also may be excluded. It's always a good idea to confirm the Act's applicability to your client's business.

The NLRA was intended primarily to protect the rights of employees. As a result, the Act's protections do not apply to most employer representatives, such as managers and supervisors (whose actions are nevertheless attributable to the employer under a strict liability theory). Congress excluded them by defining a "supervisor" as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

Thus, anyone who has authority to perform at least one of these enumerated functions is exempt from the Act's protections as a supervisor, provided the individual in question either can take such action without approval of another employer representative or can recommend such action to another employer representative and the recommendation is typically accepted without any additional investigation, and provided further that the action to be taken is not merely routine or insignificant. Notably, the title of the person means nothing.[4]

In deciding whether an individual is a supervisor or an employee, the NLRB is concerned only with the individual's

demonstrated authority. For example, if an individual has the final authority to decide whether to take disciplinary action against an employee, that person would be a supervisor, provided he/she is not simply issuing an automatic warning for tardiness or other routine disciplinary actions which may be dictated by an employer policy and procedure manual.[5] Alternatively, if that same individual made a recommendation to more senior management or human resources that an employee should be disciplined (concerning a non-routine issue), and that recommendation is approved without any additional investigation by another employer representative, the individual making the recommendation would be deemed a supervisor because he/she has the authority to effectively recommend discipline.

Purpose of the NLRA

The expressly stated purpose of the NLRA is that of "encouraging the practice and procedure of collective bargaining" and protecting employee rights "to full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."[6] In other words, Congress has explicitly endorsed the idea of unionization.

The cornerstone of the Act is Section 7, which implements the Act's purpose by expressly declaring the rights of employees "to form, join or assist a labor organization"[7] So-called Section 7 activity includes the "concerted" actions of two or more employees for their "mutual aid or protection," or "where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management."[8] This is referenced in the cases as "protected concerted activity".

Aside from traditional union organizing or collective bargaining activities, examples of protected concerted activities range from one employee confronting a supervisor on behalf of other employees about workplace concerns, even matters as simple as the room temperature being too cold or the calculation of a commission, to two or more employees refusing to work in protest of anything that falls within the broad terms "wages, hours, or other terms and conditions of employment," even if no other employees agree with them.[9] Notably, it does not matter at all whether the employees are represented by a union. The Act applies to all businesses that meet the applicable jurisdictional standards.

It usually comes as a surprise to employers that employees have a federally protected section 7 right to speak out collectively to customers or others in the public about their wages, hours and other terms and conditions of employment, even using harsh and unflattering terminology.[10] Indeed, an employer policy or rule declaring such matters to be confidential runs afoul of the Act, as is any discipline for violating such a rule.

Section 7 also explicitly protects the right of employees to refuse to join in these activities, except that employees may be required by a collective bargaining agreement to pay union dues in order to remain employed, which is the case with most union contracts in states such as California.[11]

Section 7 is not without limitation. For example, it generally does not protect partial strikes (such as performing only part of a normal work assignment), sit-in strikes (such as refusing to leave the workplace at the end of a shift), picket-line violence or public disparagement of the employer's products or services.[12]

Lawyers advising clients about personnel matters must be sensitive to the broad reach of the Act when advising about planned employer actions such as discipline or discharge. If the NLRB concludes that the action was in response to protected section 7 activity, then the action is unlawful. In a so-called "mixed motive" case (i.e., the employer allegedly has multiple reasons for the adverse action), the employer's action will be deemed a violation of the Act if it can be shown that the employee's protected section 7 activity played a role.[13]

Primary Functions of the NLRB

The NLRB is headquartered in Washington, D.C. In the absence of political maneuvering inside the beltway, the NLRB is run by five members, one of whom is Chairman. Board members are appointed by the President of the United States, by and with the advice of the Senate, to staggered five-year terms. The NLRB has 32 regional offices throughout the United States. Southern California is split into two regions, with Region 21 based in downtown Los Angeles and Region 31 based on the westside. The San Fernando Valley is in Region 31.

The NLRA established two primary purposes for the NLRB. One is to supervise the process by which employees may designate a collective bargaining representative. This is typically accomplished by an NLRB supervised secret-ballot representation election.[14] The agency is responsible for determining such things as who is eligible to vote and for ensuring that elections are conducted fairly and properly.

President Obama's appointees to the NLRB recently amended agency regulations to shortcut the timeline between a union filing a petition for an election and the election being conducted, which currently occurs in a median time of 38 days.[15] The U.S. Chamber of Commerce has a lawsuit pending in the U.S. District Court for the District of Columbia, challenging these amendments. If the speedier election process is upheld, employers can expect to see an increase in union organizing activity.

The NLRB is also responsible for investigating objections to an election whenever they are filed by whichever party loses the election. If the NLRB concludes that that a party who won the election engaged in objectionable conduct that likely interfered with the election process, it will set aside the outcome and conduct a new election.

The other primary purpose of the agency is to investigate and, when merited, prosecute allegations that an employer or union committed what are known as "unfair labor practices."[16] An unfair labor practice is any violation of section 8 of the NLRA, as determined by the NLRB.

The important function of investigating and prosecuting unfair labor practices falls under the direction of the NLRB's General Counsel, who is appointed by the President of the United States, by and with the advice of the Senate, for a term of four years. The NLRB General Counsel is vested with virtually unreviewable prosecutorial discretion. The recent action by the NLRB to issue a formal complaint against Boeing Corporation over its establishment of a new plant in the Southeast (over the objection of its labor union) demonstrated just how powerful the NLRB's General Counsel can be.

NLRB Actions Involving Employer Rules and Policies

Corporate counsel should review all employer policies for compliance with the Act. The NLRB has found union and non-union employers alike to have committed unfair labor practices simply by maintaining rules or policies, that tend to "interfere with, restrain, or coerce" employees in the exercise of section 7 activities. For example, the NLRB has held that employers may not maintain rules or policies which prohibit employees from:

- discussing their wages, benefits, schedules, discipline or other terms and conditions of employment amongst themselves or sharing those views with customers or members of the public
- wearing union buttons, pins or stickers, even if the employer provides a uniform
- leaving their assigned work area or ceasing work without permission
- making negative remarks about a manager or the employer
- bringing a complaint to anyone other than the employer
- making false, profane or malicious statements
- returning to "the premises" of the workplace outside of his/her normal shift
- talking to or providing information about the company to the media

- soliciting other employees during their non-work time
- distributing flyers during non-work time or in non-work areas
- being negative[17]

Likewise, the NLRB will find an employer commits an unfair labor practice when it takes disciplinary action or terminates an employee for engaging in section 7 activities. Thus, an employer would commit an unfair labor practice if it took adverse action against an employee who, on behalf of other employees, complained on Facebook or to the media or a customer, about low wages, a challenging workload or an insensitive supervisor, even if using unflattering terms such as "son of a b_." Section 7 does not, however, protect such activity where the employee is merely expressing an individual gripe.[18]

NLRB Investigation of Unfair Labor Charges

Any person, organization or entity may file an unfair labor practice charge against an employer or a union, even someone who has no connection to the charged party or the purported victim. In order to be timely filed, a charge must be filed and served within six months of the unfair labor practice occurring.[19] While there is no standing requirement, the charging party must promptly provide evidence in support of the charge to the NLRB agent assigned to investigate, including making witnesses available to be interviewed by the agent and to give testimony in the form of a sworn affidavit.

If the charging party is able to present sufficient evidence to indicate an unfair labor practice occurred within the last six months, the NLRB agent offers the charged party an opportunity to provide evidence in defense of the allegations, including making witnesses available to be interviewed by the agent and to give testimony in the form of sworn affidavits. The NLRB agent may also contact third parties to obtain evidence and testimony. Neither the charging party nor the charged party is obligated to share with the other any information or evidence provided to the agency during the investigation.

Regional Director Determination

Once the NLRB agent completes the investigation, the Regional Director will make a determination on the merits of the charge allegations. In certain unique cases, the Region may submit the investigation to the NLRB General Counsel's Division of Advice (Advice), which is located at the NLRB headquarters in Washington, D.C.

Advice formulates and executes policy decisions on certain types of unfair labor practices to prosecute, which is done in the form of a confidential Advice memorandum. Depending upon the severity and number of allegations, an investigation may take anywhere from a few weeks to a few months. The agency traditionally finds some merit in 32% to 40% of all charges filed.[20]

If a charging party declines to withdraw the allegations found to be without merit, the allegations are formally dismissed, giving the charging party the opportunity to appeal the Regional Director's decision to the NLRB General Counsel's Office of Appeals (Appeals). Historically, Appeals upholds the Regional Directors' decisions in over 98% of all cases.[21] Absent Appeals reversing the Regional Director, a charging party has no further legal recourse on allegations that have been dismissed.[22]

Settlements are Encouraged and Promoted

If a Regional Director believes an allegation to have merit, the NLRB agent will so advise the charged party and offer an opportunity to settle the matter. The NLRB customarily orders a "make-whole" remedy for an employer or union that violates the Act. In settling, the NLRB seeks to achieve the same or similar result.

Thus, for example, if an employer were to fire an employee for engaging in protected concerted activities, the employer would be required to reinstate the employee, reimburse the employee for all lost wages and benefits (plus interest) and post an NLRB issued notice. The Notice, which typically must be posted for 60 days, advises employees of their rights, contains an affirmative commitment that the employer will not interfere with such rights and specifies the steps which the employer is taking to make the employee whole.

Depending upon the case, such steps may include: (1) requiring an official of the employer to read the notice to all employees; (2) removal of a disciplinary action from an employee's file; (3) reinstating an employee and reimbursing the employee for lost pay and benefits; (4) offering employment to an employee who was not hired because of his/her union or other protected concerted activities; (5) rescinding a rule or policy that is contrary to the NLRA; and (6) advising an employee that the employer will not attempt to use the rescinded adverse actions against the employee in the future.

With settlements, the Notice does not state that the charged party has been found to have violated the Act. This is not the case after a case goes to trial and an employer or union has been found to have violated the Act. Over the last 10 years, the NLRB has settled between 91.5% and 99.5% of all cases in which a Regional Director has found merit.[23]

Hearings Before an Administrative Law Judge

Absent settlement, the Regional Director will issue a formal complaint and set the matter for a trial before one of the NLRB's administrative law judges. (At this point, the charged party is now referred to as the respondent.) The respondent must file an answer to the complaint within 14 days. In certain cases, the Regional Director may seek an injunction in the federal district court, such as to stop certain unlawful conduct by a union or to require an employer to restore the status quo pending the outcome of the agency litigation.

While the charging party may participate in the trial before the administrative law judge, an NLRB attorney in the region (referred to as "counsel for the General Counsel") will have sole responsibility for prosecuting the allegations in the complaint. Although it is ideal for charging parties and respondents to be represented by experienced labor counsel, the NLRB permits a party to represent themselves or even to be represented by a non-attorney.

The NLRA does not permit any pre-trial discovery. However, trial subpoenas (documents and witnesses) are available to all parties. At the hearing, parties will have the opportunity to examine and cross-examine witnesses, and to introduce relevant evidence. In most cases, the parties are given the opportunity to file post-hearing briefs before the

administrative law judge issues a decision and recommended order.

NLRB Orders

If neither party files exceptions, the NLRB adopts the administrative law judge's recommended order in an unpublished decision. If any party files exceptions to the ALJ's decision, the matter is assigned to a panel of three members of the NLRB that will then rule on the exceptions, typically in a published decision. When the NLRB is fully constituted with five members, either or both of the two members who were not assigned to the case may join in the decision. This typically occurs when the NLRB wants to make a shift in policy, such as to reverse prior interpretations of the NLRA. Over the last ten years, the General Counsel has succeeded in winning before administrative law judges and the Board all or a portion of the allegations in 78% to 91% of all complaints that are issued.

Notably, NLRB orders are not self-enforcing. Thus, if a respondent refuses to comply, the NLRB General Counsel's Division of Enforcement Litigation will file a petition for enforcement, which may be done in any circuit of the United States Court of Appeals where the respondent transacts business or where the unfair labor practice occurred.[24]

Similarly, the respondent or the charging party may file a petition for review of the NLRB's order in any circuit where such party transacts business, where the unfair labor practice allegedly occurred or in the United States Court of Appeals for the District of Columbia.[25] This occasionally results in a race to file in what may be perceived as a favorable circuit, given that petitions for review and enforcement must be heard together (normally in the circuit in which the first petition was filed).

In 2009, courts of appeals decided 61 NLRB enforcement and review cases. Of those cases, 88.5% were enforced in whole or in part, 78.7% were enforced in full, 6.6% were remanded entirely and 4.9% were not enforced entirely.

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[1] See http://www.bls.gov/news.release/pdf/union

[2] pdf 2 See http://www.nlrb.gov/news/acting-general-counsel-releases-report-social-media-cases

[3] *D.R. Horton, Inc.,* 357 NLRB No. 187 (2012).

[4] 29 U.S.C. §152(11).The burden of proving supervisory status is on the party who alleges that it exists. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 711 (2001). *See Magnolia Manor Nursing Home*, 260 NLRB 377, 385 n.29 (1982).

[5] *See, e.g., Riverboat Servs. of Ind.*, 345 NLRB 116 (2005) (employees are not supervisors where their involvement in discipline was merely to refer problems to their superiors); *Pacific Beach Corp.*, 344 NLRB 177 (2005) (employee not a supervisor by simply distributing routine tasks among the employees and monitoring the way each task was performed); *Jordan Marsh Stores Corp.*, 317 NLRB 460 (1995) (preparing work schedules, selecting employees for overtime, changing assignments, and writing up records of personnel interviews did not rise to the level of independent judgment or supervisory status under the Act). *Fleming Cos.*, 330 NLRB 277 (1999) (recording instances of tardiness and absences and issuing standard disciplinary forms based on an accumulation of occurrences did not establish supervisory status).

[6] 29 U.S.C. §151.

[7] 29 U.S.C. §157.

[8] *Meyers Industries*, 281 NLRB 882, 887 (1986), aff'd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

[9] *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14-15 (1962); *Citizens Investment Service Corp. v. NLRB*, 430 F.3d 1195, 1199 (D.C. Cir. 2005);*NLRB v. Jasper Seating Co.*, 857 F.2d 419 (7th Cir. 1988).

[10] *Reef Industries v. NLRB*, 952 F.2d 830 (5th Cir. 1991).

[11] 29 U.S.C. §§157, 158(a)(3), and 164(b). Currently, 23 states (Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming) and one territory (Guam) have in place a right-to-work law, meaning that employees cannot be required to pay union dues under threat of loss of employment.

[12] See *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 494 (1960);*NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939); *NLRB v. W.C. McQuaide, Inc.*, 552 F.2d 519 (3d Cir. 1977). *NLRB v. Local Union No. 1229*, IBEW, 346 U.S. 464 (1953).

[13] See Wright Line, 251 NLRB 1083 (1980), enf'd, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982). The Wright Line test was subsequently approved by the U.S. Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[14] 29 U.S.C. §159.

[15] See Memorandum GC 11-03 (Jan. 10, 2011), which may be found at: http://www.nlrb.gov/summary-operations

[16] 29 U.S.C. §160.

[17] *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *Beth Israel Hospital v. NLRB*, 437 U.S 483 (1978); *Double Eagle Hotel & Casino v. NLRB*, 414 F.3d 1249 (10th Cir. 2005); *Handicabs, Inc. v. NLRB*, 95 F.3d 681 (8th Cir. 1996); *NLRB v. Ohio Masonic Home*, 892 F.2d 449 (6th Cir. 1989); *Salon/Spa at Boro, Inc.*, 356 NLRB No. 69 (2010); *Mission Foods*, 350 NLRB 336 (2007); W San Diego, 348 NLRB 372 (2006); Claremont Resort & Spa, 344 NLRB 832 (2005); *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), *enf'd* 203 F.3d 52 (D.C. Cir. 1999); *Leather Center, Inc.*, 312 NLRB 521, 528 (1993); *Kinder-Care Learning Ctrs.*, 299 NLRB 1171, 1172 (1990); *GHR Energy Corp.*, 294 NLRB 1011, 1012 (1989), *enf'd* 924 F.2d 1055 (5th Cir. 1991).

[18] *Severance Tool Indus.*, 301 NLRB 1166, 1170 (1991), *enf'd*, 953 F.2d 1384 (6th Cir. 1992); *Communication Workers of America*, 303 NLRB 264, 272 (1991); *Hospital of St. Raphael*, 273 NLRB 46 (1984).

[19] 29 U.S.C. §160(b).

[20] See Memorandum GC 11-03 (Jan. 10, 2011), which may be found at: http://www.nlrb.gov/summary-operations

[21] *Id.*

[22] 29 U.S.C. §153(d).

[23] See Memorandum GC 11-03 (Jan. 10, 2011), which may be found at: http://www.nlrb.gov/summary-operations

[24] 29 U.S.C. §160(e).

[25] 29 U.S.C. §160(f).

Test No. 43

This self-study activity has been approved for Minimum Continuing Legal Education (MCLE) credit by the San Fernando Valley Bar Association (SFVBA) in the amount of 1 hour. SFVBA certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

1. The National Labor Relations Act applies only to unionized businesses.
   ❑ True ❑ False

2. The Speaker of the House of Representatives appoints the General Counsel of the National Labor Relations Board.
   ❑ True ❑ False

3. Aside from the air, rail and agricultural industries, the National Labor Relations Act applies to most California employers and employees.
   ❑ True ❑ False

4. An employer may not prohibit employees from making group complaints about wages, hours or other terms and conditions of employment.
   ❑ True ❑ False

5. The National Labor Relations Board is responsible only for conducting elections for employees to decide if they want to be represented by a union.
   ❑ True ❑ False

6. Anyone with the title of supervisor or manager is excluded from the protection of the National Labor Relations Act, regardless of their authority.
   ❑ True ❑ False

7. The National Labor Relations Board is run by seven persons appointed by the President of the United States.
   ❑ True ❑ False

8. An employer may avoid union problems by implementing a carefully worded policy that prohibits employees from being members of a union.
   ❑ True ❑ False

9. An employer may not ban pro-union employees from applying for employment.
   ❑ True ❑ False

10. Unions have rapidly expanded their membership since President Obama was sworn into office in January 2009.
    ❑ True ❑ False

11. The NLRB does not have contempt power to enforce its own orders.
    ❑ True ❑ False

12. An employer may discipline or terminate a group of employees who make false or disparaging comments about a supervisor.
    ❑ True ❑ False

13. If a group of employees walk off the job because they are upset with a new, lawful policy that their employer implements, the employees are protected from being fired by the employer only if they are represented by a union.
    ❑ True ❑ False

14. An employer may include a confidentiality requirement in any employment agreement, employee handbook or employee policy.
    ❑ True ❑ False

15. An employer may not have a policy that prohibits employees from talking to the media.
    ❑ True ❑ False

16. Once the Nation al Labor Relations Board's General Counsel determines there is merit to an unfair labor practice charge, the agency provides the charged party an opportunity to settle prior to issuing a complaint.
    ❑ True ❑ False

17. If an employee is fired for participating in protected concerted activities, the National Labor Relations Board prohibits any competitor of the employer from filing an unfair labor practice charge.
    ❑ True ❑ False

18. A San Fernando Valley employee wanting to file an unfair labor practice charge against his/her employer must contact the National Labor Relations Board office in Sacramento.
    ❑ True ❑ False

19. An employer must be represented by an attorney in NLRB proceedings.
    ❑ True ❑ False

20. Approximately 90% of all unfair labor practice charges filed against employers by employees, unions and/or their attorneys are ultimately found to be without merit.
    ❑ True ❑ False

MCLE Answer Sheet No. 43

INSTRUCTIONS:
1. Accurately complete this form.
2. Study the MCLE article in this issue.
3. Answer the test questions by marking the appropriate boxes below.
4. Mail this form and the $15 testing fee for SFVBA members (or $25 for non-SFVBA members) to:

   San Fernando Valley Bar Association
   21250 Califa Street, Suite 113
   Woodland Hills, CA 91367

METHOD OF PAYMENT:
❒ Check or money order payable to "SFVBA"
❒ Please charge my credit card for $_____.

_____
Credit Card Number Exp. Date

_____
Authorized Signature

5. Make a copy of this completed form for your records.
6. Correct answers and a CLE certificate will be mailed to you within 2 weeks. If you have any questions, please contact our office at (818) 227-0490, ext. 105.

Name_____
Law Firm/Organization_____
_____
Address_____
City_____
State/Zip_____
Email_____
Phone_____
State Bar No._____

ANSWERS:
Mark your answers by checking the appropriate box.
Each question only has one answer.

1.	❑ True	❑ False
2.	❑ True	❑ False
3.	❑ True	❑ False
4.	❑ True	❑ False
5.	❑ True	❑ False
6.	❑ True	❑ False
7.	❑ True	❑ False
8.	❑ True	❑ False
9.	❑ True	❑ False
10.	❑ True	❑ False
11.	❑ True	❑ False
12.	❑ True	❑ False
13.	❑ True	❑ False
14.	❑ True	❑ False
15.	❑ True	❑ False
16.	❑ True	❑ False
17.	❑ True	❑ False
18.	❑ True	❑ False
19.	❑ True	❑ False
20.	❑ True	❑ False

Disability Claims, the Interactive Process and Reasonable Accommodations

By Cindy Elkins

EMPLOYERS MUST UNDERSTAND THEIR LEGAL obligations when an applicant or employee asserts that they are disabled, or when an employer regards the person as disabled, or if the person has a record of a disability. Failing to understand the strict legal requirements can lead to costly litigation.

Federal Law

The Americans with Disabilities Act[1] ("ADA") governs employers with 15 or more employees and prohibits the discrimination against a qualified individual with a disability. In the ADA Amendments Act of 2008[2] ("ADAAA"), the ADA was amended and the definition of disability was revised so that it is less difficult for an individual to establish the existence of a disability for legal protection.

Under the ADA, as amended by the ADAAA, there are three ways in which a person can come within the definition of being disabled: (1) the person has an actual disability, in that the individual has a physical or mental impairment that substantially limits a major life activity; (2) the person has a record of an actual disability; or (3) the person is regarded as disabled by virtue of the employer taking a prohibited action because of an actual or perceived impairment that is not minor or transitory[3].

Following the ADAAA, the U.S. Equal Employment Opportunity Commission ("EEOC") issued its final regulations[4], which notes that the focus of the ADA is whether discrimination has occurred as opposed to the prior focus of whether an individual comes within the definition of "disabled." EEOC's regulations set forth the following nine rules of construction to apply in making the determination of whether or not an impairment substantially limits a major life activity:

1. The term "substantially limits" shall be construed broadly in favor of expansive coverage and to the maximum extent permitted by the terms of the ADA.
2. One should look to whether a person is substantially limited as compared to most people, and the impairment need not prevent or significantly restrict the individual from performing a major life activity.
3. The analysis should not be an extensive one.
4. The degree of functional limitation required to satisfy the standard of substantially limited is lower than that applied prior to the enactment of the ADAAA.
5. There is no need for medical, scientific or statistical analysis in making the determination of whether an impairment is substantially limiting.
6. The determination of whether an impairment substantially limits a major life activity is made without considering the ameliorative effects of mitigating measures (except ordinary eyeglasses or contact lenses).
7. Episodic impairments or diseases in remission are disabilities if they would substantially limit a major life activity when active.
8. A substantially limiting impairment need limit only one major life activity.
9. An impairment lasting or expected to last less than six months can still be substantially limiting.[5]

California Law

The Fair Employment and Housing Act[6] ("FEHA") governs employers with five or more employees and provides greater protection to disabled individuals than under federal law. Generally, FEHA prohibits California employers from discriminating against an individual with a known disability (physical and/or mental), a medical condition[7] or on genetic characteristics (among other protected classifications).[8]

Both the ADA and FEHA also provide that AIDS and HIV positive status are protected conditions. Under California law a person is considered disabled if they:

- have a physical or mental impairment that limits one or more of the major life activities[9]. (Federal law requires the person to be "substantially limited".) A mental or psychological disorder or condition limits a major life activity if it makes the achievement of that activity difficult to obtain.
- has a record of an impairment[10]
- is regarded as having an impairment.[11] An example is an employee who has fully recovered from a disabling event, but continues to be treated by the employer as still having some present disabling condition. The recovered individual may not be treated less favorably because

of a perception that they are or continue to be disabled where there is no actual disability. To avoid "regarded as" claims, employers should not treat any employee or applicant differently once there is an awareness of any prior disabling condition. It is the burden of the employee/applicant to disclose any condition that would classify them as disabled.

- is regarded as having a condition that is not presently disabling but could become a physical disability at a later time[12]

The ADA[13] and FEHA[14] do not provide protection to a person, even if disabled, if such disability condition posed a direct threat to the employee's own health or safety or others.

Another important aspect of the ADAAA, the EEOC Regulations and FEHA is that the effects of mitigating measures are not to be considered when assessing the disability condition, manner or duration of the person's ability to perform a major life activity. The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effect of mitigating measures.

Legal Obligations When an Applicant or Employee Discloses a Disability Condition: Qualified Individual

The initial inquiry is whether the applicant or employee is a "qualified individual who can perform the essential functions of the position, either with or without a reasonable accommodation?" That question must then be broken down into segments. Is the employee or applicant qualified to perform the essential functions of the job? Do they meet the minimum qualifications of the position? What are the essential functions of the position?

A detailed job description should set forth the physical and mental requirements of the position so that it can be determined what is an essential function and what is a non-essential function. Attendance can be established as an essential function and should be included in job descriptions[15]. If there are any specific expectations, goals, or quotas, they should be included. If any technical skill or expertise is required, identify it.

Reasonable Accommodations[16]

The next step in the analysis once the applicant or employee

is determined to be qualified to perform the essential functions of the position is to determine, if the applicant or employee requests or requires a reasonable accommodation, whether such request can be accomplished. The employee has the initial burden of requesting or identifying the need for an accommodation.[17]

It is beneficial to ask the employee what they believe will help accommodate the disability, and then the employer must evaluate what type of accommodation would be considered reasonable.

- job restructuring (This accommodation only needs to be considered with respect to a position's non-essential duties or marginal functions. Restructuring essential job functions is not required, even if an employee claims it is reasonable for an employer to do so.)
- modified work schedules (Reduced schedules, flexible starting times and other options can be considered.)
- re-assignment to a vacant position
- obtaining equipment or devices that would enable performance (i.e., hearing impaired phones, larger computer monitors, etc.)
- leave of absence (though it does not need to be indefinite)
- telecommuting from home

Employers do not have to create positions nor reduce expectations or lower standards for the performance of the position or obtain personal use items (i.e., glasses, hearing aids, etc.).

Interactive Process[18]

The next step is to engage in a good faith ongoing interactive process with the employee/applicant. California law requires that employers engage in an ongoing manner an interactive process with the disabled individual to discuss and determine if a reasonable accommodation can be made[19]. Recent court decisions have held that this is an ongoing process.

In *AM v. Albertsons, LLC* [20], the court held that after an accommodation has been agreed upon, any refusal to accommodate or to continue the interactive process is a violation of the Fair Employment and Housing Act and that even one denial of the accommodation can result in a finding of liability.

While there is no definitive legal guidance on what the interactive process must consist of, at a minimum employers should discuss with the applicant or employee (and document):[21] (1) what aspects of the job cannot be performed and why; (2) the employee's job restrictions/limitations; (3) the employee's job description and the essential functions of the job; (4) the employee's ability/inability to perform the essential functions of the job; (5) any reasonable accommodations, if appropriate; and (6) alternative vacant positions, if the employee cannot perform the essential functions of his or her current position, and any reasonable accommodations applicable to the alternative vacation position.

Any accommodation proposed by an employee must be objectively reasonable. Not every request for an accommodation must be met if such accommodation would interfere with business operations and/or is not reasonable.

Undue Hardship or Burden

An employer may be excused from providing a reasonable accommodation if it can be established that to do so would result in an undue hardship which includes any accommodation that is unduly costly, extensive or that would fundamentally alter the nature of the business operations.[22] This analysis must occur on a case-by-case basis and the larger the employer, the less likely the rationale of expense is likely to prevail.

The following factors should be considered when an undue burden analysis is undertaken: (1) the nature and cost of the accommodation[23]; the financial resources of the employer, the number of persons employed by the employer, the overall impact the accommodation might have on the business operations[24]; the availability of tax incentives; and any assistance available from agencies or organizations specializing in assisting employers to provide accommodations such as the California Department of Rehabilitation, the U.S. Department of Health and Human Services and many other public and private organizations.

Terminations

Can the disabled employee be terminated? Can the disabled applicant be denied employment? It is never a wise decision to terminate any employee who has disclosed a disability condition or to refuse to hire an applicant who has disclosed a disability condition, as such could easily result in a claim of disability discrimination.

It is imperative that prior to any termination decision, the entire situation be evaluated to determine whether the employee is protected as a disabled individual; the employer has met its legal obligations to engage in the interactive process; whether an accommodation can be made; and how have other similar situations been handled by the employer so that there is consistency of application for policies and procedures. Once these factors are considered, the termination decision can be evaluated and the risks of litigation determined.

Return to Work Issues

If an employee has taken a leave of absence to attend to a disabling condition, the employee must be returned to work to the same or substantially equivalent position following a release from a physician

that they are able to safely perform the essential functions of the position, unless doing so results in an undue burden or hardship on the employer.

Lastly, in order to defend against claims of disability discrimination, an employer should have a clearly established policy in its employee handbook setting forth the legal obligations and requirements of both the employees and the employer, the policies should be strictly and consistently applied and all discussions with the applicant/employee and actions taken by the employer should be thoroughly documented.

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[1] 42 U.S.C. §12101 et seq.

[2] 2 122 Stat. 3553

[3] 42 USC §12112(1)(A-C)(3)

[4] Equal Employment Opportunity Commission, Final Rule, Regulations to Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended, 76 Fed. Reg. 16978 (2011).

[5] 29 C.F.R. §1630.2(j)(4)(iii).

[6] Gov't Code Section 12900 et seq.

[7] A "medical condition" is one which is related to or associated with a diagnosis of cancer, a record or history of cancer and an individual's genetic characteristics.

[8] *Pensinger V. Bowsmith, Inc.*, (Cal. App 5th Dist, 1998) an employer cannot be liable for disability discrimination if the employer has no knowledge of the disability; *Avila v. Continental Airlines, Inc.* 165 Cal. App. 4th 1237 (2008) (modified at 166 Cal. App. 4th 132) an employee has the burden to establish that the employer knew of a protected disability condition before the employer made an adverse employment decision.

[9] 42 USC 12102(1)(A) and Gov't Code §12926 (k)(1)(b)

[10] 42 USC 12102(1)(B) and Gov't Code §12926 (k) (1) (b)(3)

[11] 42 USC 12102(1)(C) and Gov't Code §12926 (k) (1) (b)(4)

[12] 42 USC 12102(3) and Gov't Code §12926 (k) (1) (b)(5)

[13] 42 USC 12113 (e)(2)

[14] Gov't Code §12940 (a)(1)

[15] *Corder v. Lucent Techs* (7th Cir. 1998) 162 F.3d 924

[16] Cal. Gov't Code §12940(m).

[17] *DFEH v. Lucent Technologies, Inc.*, (9th Cir. 2011) 642 F.3d 728

[18] Cal. Gov't Code §12940(n).

[19] Gov't Code §12926.1(e)

[20] *A.M. v. Albertsons, LLC* 178 Cal. App 4th 455 (2009)

[21] *Cuiellette v. City of Los Angeles*, 194 Cal. App. 4th 757 (Apr. 22, 2011)

[22] 42 USC 12111(10)

[23] 42 USC 12111(10); Govt' Code §12926

[24] 42 USC 12111(10); Govt' Code §12926

California Court of Appeal Clarifies Reporting Time Pay and Split Shift Premium Requirements

By Nicole Kamm

OVER THE HOLIDAYS, A family arrived at the Denver airport the day after Christmas eager to catch their flight home to California and be back to work the following morning. After checking their bags and clearing security, they were greeted at the gate with the dreaded announcement that the flight had been overbooked and offers were being provided of free vouchers in exchange for being bumped to a later flight. Luckily, other more flexible passengers gave up their seats and the family was able to make it home to Burbank before sunset that evening.

Overbooking Workers

In the employment context, this similar practice of "overbooking" workers is addressed by the requirement that employers provide their employees "reporting time pay" under certain circumstances. In the past, reporting time pay was one of the most overlooked requirements in California wage and hour law. But with the continually increasing number of wage and hour class actions, California employers are taking greater notice of this regulatory creation.[1]

Reporting time pay is a form of premium pay that, like overtime or missed meal period compensation, is intended to reduce work scheduling practices that create an undue burden on employees. Set forth in Section 5 of the Industrial Welfare Commission ("IWC") wage orders, the rationale behind reporting time pay is to discourage employers from intentionally overstaffing their operations and then sending home "extra" workers without pay.

> "So long as the time is scheduled and the employee works at least half the scheduled time, no reporting time pay is owed."

Subject to a few limited exceptions, the IWC wage orders provide that for each day an employee is required to and does report to work, but is finished less than half the "usual or scheduled" day's work, the employer must pay the employee for half the scheduled day's work, but not less than two hours or more than four hours pay. If the employee is required to report to work a second time, but is given less than two hours work on the second reporting, the employer must pay the employee an additional two hours of pay.

Scheduled Meetings

What if an employee is required to attend a meeting that lasts less than two hours on a day he or she is not normally scheduled to work? The Division of Labor Standards Enforcement ("DLSE") generally has taken the position that employers are required to pay employees two to four hours of reporting time pay when they report to work for a previously scheduled meeting of shorter duration. Recently,

however, the California Court of Appeal issued a contrary decision in *Aleman v. AirTouch Cellular*, 202 Cal.App.4th 117(December 21, 2011).

In *Aleman*, a putative class of employees sought a minimum of two hours reporting time pay for attending scheduled staff meetings on days they were not otherwise scheduled to work. The meetings were noted clearly on the weekly schedule, which was posted at least four days in advance, and generally lasted from one hour to one-and-a-half hours. Rejecting the plaintiffs' claim, the Court of Appeal held that, where any work time is scheduled, reporting time pay is only owed when the employee works less than half of the expected scheduled time. In this case, the plaintiffs were scheduled and expected to work only one to one-and-a-half hours, and they worked at least half that scheduled time. Thus, the court held, no reporting time pay was owed.

In its ruling, the Court of Appeal closely analyzed Section 5 of the IWC wage orders. Section 5 states that employees are owed reporting time pay if they report for their "usual or scheduled" shift and work less than half that time. The plaintiffs in *Aleman* attempted to argue that because their usual shifts were generally longer than two hours, any time they showed up and worked less than two hours, they were entitled to at least two hours of reporting time pay. The court disagreed, holding that since the work periods at issue were pre-scheduled meetings of an established duration, they qualified within the term "usual or scheduled" day's work. The length of an employee's "usual" shift was irrelevant. Provided the employee worked at least half of the scheduled work time–whatever that length of time happened to be–reporting time pay was not owed.

The court disregarded the plaintiffs' reliance on the DLSE Enforcement Policies and Interpretations Manual, stating it was unclear as applied to the facts in this case and, regardless, the court was not bound by a DLSE interpretation.

The Facts are Critical

In another recent case, *Price v. Starbucks*, 192 Cal. App. 4th 1136 (2011), an employee was called in on a day that he was not scheduled to work for "a talk" (i.e., to get fired). The meeting lasted approximately 45 seconds. Recognizing the employee was entitled to at least some reporting time pay, the employer paid the employee two hours of reporting time pay. The employee sued, claiming he should have been paid 3.3 hours of reporting time pay, based on the average length of his scheduled shifts, instead of two hours. On appeal, the court in *Price* held that employees are only entitled to the minimum payment of two hours of reporting time pay when they are called in to work to "attend a meeting for an unspecified number of hours," which is what the employee had received. The *Aleman* court distinguished *Price*, recognizing that in *Aleman*, the meetings were pre-scheduled and had definite start times, expected topics and durations. Unlike the unscheduled, 45-second "talk" in *Price*, the *Aleman* meetings "could only be considered scheduled work." Thus, so long as the time is scheduled and the employee works at least half the scheduled time, no reporting time pay is owed.

A further clarification was provided in *Aleman* regarding split-shift premiums. The wage orders define a "split shift" as "a work schedule, which is interrupted by non-paid non-working periods established by the employer, other than bona fide rest or meal periods." Under the wage orders, an employee who works two such separate shifts in a day is entitled to one hour of pay at the minimum wage in addition to the minimum wage for that workday. In *Aleman*, the plaintiffs occasionally worked a split shift, when they attended a meeting in the morning and then returned for a longer shift later the same day.

The company argued that it had properly paid the plaintiffs on these days because their total daily pay exceeded the minimum wage for all hours worked, plus an additional hour at minimum wage. The court agreed, noting that the wage orders only required one hour at the minimum wage to be paid "in addition to the minimum wage for that day," rather than the "regular wage" for the day. In this case, because the plaintiffs were paid an hourly rate over the state minimum wage, the surplus amount could be used to satisfy the split-shift premium requirement.

In sum, the *Aleman* court clarified that an employee who works eight hours on a split-shift must receive minimum compensation of nine hours times the minimum wage, as opposed to eight hours their regular rate plus one hour of minimum wage. For example, assuming an $8 minimum wage, an employee who earns more than $72 for an 8 hour day is not entitled to receive a split-shift premium, even if he or she works a split shift. This is because they were paid a total amount equal to or greater than the minimum wage for all hours worked, plus one additional hour.

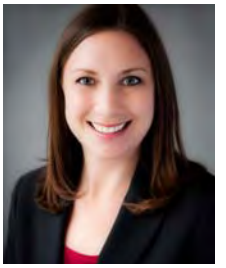
Split-Shift Premiums

As is often the case, the court left open the remaining question of what happens when an employee works less than eight hours in a workday. Nevertheless, the *Aleman* case confirms that employers need be most mindful about split-shift pay for employees whose hourly wage is at or close to the minimum wage (though, when in doubt, do the math or consult employment counsel).

In view of *Aleman* and *Price*, employers are advised to:

- clearly designate all meetings and events of short duration on employee work schedules
- indicate the precise length of the meeting
- ensure the meeting lasts at least half as long as the scheduled time
- make sure employees record the time spent attending the meeting

With regard to split-shifts, employers should make sure they are using the proper calculation to determine whether split-shift premium payments are in fact owed.



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[1] The reporting time pay requirement is not currently codified in a California Labor Code section

An Inside Look at Human Resources Technology

By Martin Levy, CLU/RHU

TODAY'S SMALL AND MEDIUM-sized businesses have many human resources functions and responsibilities. Departments are overwhelmed with having to focus on everything from payroll and benefits administration, performance reviews, hiring, firing, all the way through to retirement planning.

Core HR competencies consist of more than just payroll and benefits; they also include compensation, talent management, recruiting and compliance. It is virtually impossible for HR generalists to effectively manage all of these areas. Yet, that is exactly how most businesses manage this exposure.

HR Administration

As technology has evolved, most vendors have moved away from paper and automated their process through web technology. The problem with this is while it gets the HR department away from paper pushing, it moves them into keying information into anywhere between 4-6 different systems on a day-to-day basis, which can ultimately be just as time consuming and tedious of a process. It embraces technology, and is green; however, it does little to alleviate a lot of the burdens of HR administration.

Leveraging a comprehensive toolset through a web-based Human Resource Management System ("HRMS") can enable small and medium-sized businesses to proactively manage the needs of their business, close the gaps in employment litigation and become a more compliant and strategic employer. The consolidation of tools under one roof also alleviates pressure on staffing, and when properly designed and implemented, becomes a vital part of the company culture.

Return on Investment

The issue always comes down to the return on investment of having enough resources to effectively run an HR department. For most small and mid-sized businesses, dependency upon vendors for payroll and benefits is essential. Yet when properly deployed, can integrate seamlessly with a HRMS, which integrates time and attendance tracking, job tracking, training and recruiting. This type of tool can turn a meager HR budget into a powerful workhorse.

From a human factors standpoint, providing employees with 24/7 access to view their paycheck, W-2, PTO and health benefits, frees up time for managers and the HR department while offering real-time data and promoting employee accountability. This can be achieved through an integrated HR platform which includes an employee lifecycle approach.

No HRMS platform could be deployed without 100% assurance of security and confidentiality. More and more businesses are adapting cloud-based platforms to safely store data. This is possible through the use of SSL and 128bit-256bit encryption, the highest standard of security available. Redundant backup assures absolute data security. This is an important feature when evaluating vendors.

Recruiting and talent management have begun to remerge as business climate improves. Social networking sites such as Facebook, LinkedIn and Twitter are emerging as complements to Monster and Craigslist. For an overwhelmed HR department to scour email submitted posts, or review multiple resume posts, it can be an arduous, time-consuming process. A HRMS tool automates this process, allowing companies to screen and review based upon their criteria. After recruitment, conducting a background check and transition into payroll can be seamless. Part of their orientation will most likely include training. Typically, HR professionals would have to venture out to trade conferences for the latest in training materials.

Recruit, Train, Hire

HRMS comes into play as a critical tool for training. Manuals, training presentations and other relevant courseware can be delivered virtually, through the portal. Employees read and electronically sign all policies and procedures. This allows organizations to offer all types of training programs while reducing costs.

The more advanced systems are "recruit to retire," including every aspect of the employees lifecycle. Applicant tracking, time off tracking

(PTO and vacation), time and attendance, scheduling center, payroll, benefit administration, employee files, training performance reviews, onboarding documents (W-4, I-9, employee handbook, etc.), tracking and use of flexible spending accounts, health savings accounts and COBRA administration can be seamlessly integrated into one system.

Time clocking, now more commonly referred to as time and attendance, is a great component that is enhanced when such a HRMS is implemented. Employees clock in, and the location is recorded via IP address, which can be restricted. Time tracking of projects and job costing can all be electronically imported into payroll and accounting, and also now accomplished through smart phones and iPad devices. This integration can be seamless and saves countless hours, while ensuring billable hours.

Take the case of employee reviews. These are one of the critical components of retaining talent, and yet so few firms have a process to quickly and easily perform them. Using such a system, employers can conduct, and employees can complete them through a myriad of ways, such as surveys, continuing education, certifications, trainings, etc., while the system ensures that certain performance, attendance or other criteria are to the job standard. Performance reviews turn from a labor to an opportunity and can be matched to job descriptions electronically.

Too Good to be True?

Sounds ideal? While many HRMS programs exist, enterprise-level organizations are way ahead of the curve when it comes to deploying these programs. Part of the appeal of employers migrating to employee leasing arrangements and professional employer organizations ("PEO's"), have been the ability to deploy this type of software previously thought to be available to Fortune 500 companies. Fortunately, the market has evolved and advanced, and while not every HRMS plan offers the comprehensive array of integration described herein, there are several that may be adaptable to suit the needs of small and mid-sized employers.

"But, we are special! We do things different. We have special needs." These comments are common concerns facing employers who resist transitioning to HRMS software, who truly do have unique process or workplace needs. Higher-end HRMS systems are not necessarily "what you see is what you get." They are highly customizable software that can be adapted and tailored to each company's specific needs.

To determine if one's business is a candidate for such a platform, the company needs to take a look at their processes. If the HR person was absent for a week, would the business capably be able to have a replacement step in and administrate the workplace? Are there all sorts of secret processes that reply on a desktop or are tracked manually? Is payroll processing a constant nightmare for the team? Are time-off requests a burdensome process done manually?

Leveraging an HRMS, the HR department can be more productive and responsive to the strategic needs of employees and the business as a whole. Integrating payroll and employee benefits into a compliant HRMS platform can simplify and alleviate wasted time, and when properly deployed, provide a customized comprehensive platform for record keeping and tracking of all employment-related issues from hiring through termination.

Regardless of the size of a company's workforce, the daily management of payroll, benefits administration, training and other continuously changing HR needs can be overwhelming. Optimizing a secure HR platform (via the web), is now available with a majority of these functions administered by employees themselves, freeing time for the management team and HR department to focus on more strategic issues. It's 2012; business should no longer be performing HR functions like they did 10 years ago!

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Workplace Investigations from a Defense Perspective

Investigating Sexual Harassment, Discrimination and Whistleblowing Cases

By Cameron A. Stewart

LATE ONE FRIDAY AFTERNOON, JUST BEFORE a long anticipated weekend, the telephone rings and it's a client who has just been informed that his young, vivacious (and sometimes flirtatious) receptionist has just reported that she was improperly touched by the office manager. The alleged misconduct occurred during a late afternoon lunch, which included several fruity cocktails. Responding to allegations of employee misconduct, if not handled properly, can create legal implications including civil and criminal liabilities.

Prompt and Thorough Investigation

By and far, one of the biggest mistakes made by employers in harassment and discrimination cases is the failure to conduct a prompt and thorough investigation. Most often, by the time the file lands on the lawyer's desk, months have passed since the alleged misconduct. Sometimes the victim or alleged perpetrator are no longer with the company or witnesses have moved away and lines have been drawn in the sand. Any investigation at this point is simply for damage control and to prepare for trial.

While most employers are aware of their obligation under the law to investigate complaints of harassment, discrimination, whistleblowing, retaliation or other wrongdoing, they fail to appreciate the importance of timing and thoroughness. A sloppy investigation or no investigation at all is a defense lawyer's nightmare. All employers must strive to meet the minimum requirements of an adequate workplace investigation.

Coltran v. Rollins Hudig Hall International, Inc., 17 Cal.4th 93 (1998), is the most significant case to address workplace investigations. The *Coltran* court thought it imprudent to specify in detail the elements of an adequate investigation, but it determined that the governing standard of a reasonable investigation is whether the employer acted in good faith.

There are many ways to conduct an objective, impartial and unbiased investigation, but the first step is promptness. All investigations must be conducted promptly. Promptness means commencing an investigation within 24 hours of being notified of a complaint.

An employer has a statutory duty to take appropriate corrective action once a complaint of harassment or discrimination is brought to its attention. Even one incident of harassment warrants immediate and corrective action, if necessary. *Flait v. North American Watch Corp.*, 3 Cal.App. 4th 467 (1992). Failure to immediately address allegations of harassment may encourage other incidents and may expose the employer to punitive damages.

California Civil Code section 3294 provides that an employer is only liable for punitive damages if the employer had "advance knowledge of the unfitness of the alleged perpetrator and continued to employ the employee with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct...or was guilty of oppression, fraud or malice." Even if the employer doubts the alleged victim's allegations of harassment, the duty to conduct a prompt investigation cannot be delayed.

Independent and Experienced Investigator

In determining who should conduct the investigation, whether it be a member of the human resources department, in-house legal counsel or an outside consultant, the investigator should: (1) be a neutral party with credibility; (2) possess good interviewing skills; (3) have knowledge concerning the company's sexual harassment/discrimination policy; (4) have a general understanding of the law; and (5) the ability to conduct the investigation impartially and with confidentiality.

Even before the official investigation begins, the investigator, with the assistance of the employer, must establish the scope and protocol of the investigation. The pre-investigation should include a review of workplace policies, personnel files, witness statements, if any, and anything else bearing on the investigation. The investigator should attempt to uncover as much information as possible before meeting with any witnesses.

An experienced investigator is extremely important because the manner in which the investigation is handled will be closely scrutinized by plaintiff's counsel. The investigator must be skilled at asking open-ended and probing questions.

Simply allowing the complainant or the alleged harasser to tell his or her version of events is not enough. It's also important to keep in mind that under California law, the only independent contractors allowed to perform investigations are licensed private investigators and attorneys performing their duties as attorneys. Cal. Bus. & Prof. Code sec. 7522(e).

Regardless of who conducts the investigation, the employer must ensure that the investigator is impartial and objective. The purpose of an investigation is to uncover enough relevant facts to enable the investigator to make credibility assessments and ultimately to determine whether the harassment or other wrongdoing occurred and, if so, to recommend appropriate corrective action.

Confidentiality

Oftentimes, workplace investigations concerning allegations of sexual harassment or discrimination involve sensitive information. To protect the integrity of the investigation and those involved, protective measures should be taken to maintain confidentiality to the extent possible.

Depending on the scope of the investigation and the number of witnesses, it may be difficult to keep all aspects of an investigation confidential; however, the employer should take reasonable steps to ensure that information disclosed during the investigation is only shared on a need to know basis.

Sometimes it's necessary for the investigator to share certain information with witnesses to find out what he or she knows but, this should be done on a limited and confidential basis. An investigator's notes, written statements or tape recorded interviews should also be kept confidential.

FEHA

The Fair Employment and Housing Agency ("FEHA") guidelines identify several key components of a workplace investigation. First, a complaint of sexual harassment must be "fully and effectively" investigated. This means the investigation must be "immediate, thorough, objective and complete." Anyone with information concerning the complaint should be interviewed. A determination must be made and the results communicated to the complainant, to the alleged harasser and anyone else directly concerned. If the harassment is proven, there must be prompt and effective remedial action. Appropriate action must be taken against the harasser and communicated to the victim. Second, steps must be taken to prevent further harassment and third, appropriate action must be taken to remedy the complainant's loss, if any.

In *Silva v. Lucky Stores, Inc.*, 65 Cal. App. 4th 256 (1998), the court scrutinized the investigation of Lucky Stores following several complaints of sexual harassment by a store manager. The court discussed the basic requirements of a reasonable, good faith investigation. Some of the key points identified by the *Silva* court include: commencing a prompt investigation, use of an independent investigator trained in how to conduct an investigation, memorialized findings, use of "relevant, open-ended, nonleading questions" and confidentiality. Id. at 272.

Final Determination

Finally, after concluding the investigation, the investigator must make a final determination—either the harassment happened, it didn't happen, the investigation was inconclusive or, there was other inappropriate conduct. The investigator should prepare a written report which includes a summary of the complainant's allegations, witness statements, timeline of material events and the investigators findings and credibility determinations.

Many investigations fail to meet the legal requirements under *Coltran* and the FEHA because the investigator doesn't make a determination about whether the harassment actually occurred. According to the Equal Employment Opportunity Commission's ("EEOC") Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors, a trained investigator will have to weigh all of the facts and make crucial credibility assessments. Factors to include in the assessments are:

1. is the testimony believable
2. what is the person's demeanor during the interview
3. does the witness have a bias or reason to lie
4. is there other evidence to corroborate the victim or alleged harasser's testimony
5. does the alleged harasser have a history of similar misconduct

Addressing and determining the credibility of main participants and eyewitnesses will assist the investigator in making a final determination about whether the alleged harassment occurred.

If the harassment happened, appropriate remedial measures must be taken. In *Fuller v. City of Oakland*, 47 F.3d 1522 (9th Cir. 1995), the Ninth Circuit underscored the importance of the employer's duty to investigate and take appropriate remedial measures. "Remedies should be reasonably calculated to end the harassment." Remedial measures include but, are not limited to, sexual harassment training, written reprimand or warning, demotion, transfer, suspension or termination.

Even if the investigator determines that no harassment occurred, it may still be prudent to separate the complainant and alleged harasser and monitor the situation to avoid further allegations of misconduct. Equally important is a follow up with the victim to make sure the alleged harassment or other misconduct has stopped and no retaliation is occurring. In the end, the final written decision should be a reasoned conclusion supported by substantial evidence in accordance with *Coltran*.

Workplace investigations, of any type, can be very disruptive and time consuming. The best approach is to be proactive. At the very least, all employees should be provided with the company's workforce conduct policy and asked to sign an acknowledgement of receipt. Periodic sexual harassment training classes, for all employees, both educate and reinforce the employer's commitment to a workplace free of harassment, intimidation and retaliation.

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Financial Planning for Employers

BY SERRIA BISHOP

FRESH STARTS ARE VERY exciting and the New Year traditionally marks the beginning of hope for many professionals and businesses. But once February rolls around, how many of those promises are still in effect? Below is a list of activities and actions that employers may want to examine preferably in December or January, but March can work as well.

1. Examine the Firm

Think of the firm as a family household. Has anything changed? Are there more partners, or less? What about new employees and associates? Whatever the change, make sure that the advisors for the firm are aware. For example, some small firms have retirement accounts that cannot be transferred without the permission of an ex-partner; if this partner is disgruntled, accomplishing this task may be about as easy as asking a divorcing spouse to pass the other spouse a glass of water. When at all possible, make sure retirement accounts, or anything that is important to the firm, are addressed in the exit interview.

In regards to a business owner's family, if anything has changed, contact an estate attorney to decide if the event merits altering the current estate plan. For new families, consult with a professional to decide the appropriate time to create an estate plan. Please note that one does not need to wait until more money is earned to approach an estate attorney for information.

2. Evaluate the Business

Guess what? Retirement, voluntarily or not, is one year closer as of the New Year. How did the business perform compared to expectations? If under-performance is an issue, how long has it been happening? Some firms are still in a recession, when the fact is that the recession began in 2008, it's now 2012 and this could be the new normal.

The names for the economy change, "recession, depression, boom," like the stages of a story, "exposition, climax, denouement." If the firm has not recovered, consult with a business strategist to see what can be done to help the business or partners.

If the firm performed better than expected last year, consult with an accountant to discuss tax strategies. More money, more taxes! Also, figure out what contributed to the firm's amazing year so that it can be repeated.

There might also be an opportunity for a partner of a growing law firm to have personal benefits owned by the business. This is especially popular for medical insurance because of the group coverage, but it can also fit with other risk strategies. Review the type of corporation, retirement plan, insurance, bank, CPA, etc., every few years or when there are significant changes. There is no "one size fits all" in business, which means the accountant used for a two partner firm might not work as well for ten partners.

Begin each year with the end in mind. For example, if the goal is to bring on a partner by the end of the year, consult with the firm's business

advisors to help make sure the firm is desirable so that the best candidate wants to be there. Or let's say the founding partner would like to sell the firm to retire; if this is the case, it's a good time to examine who represents the "face" of the firm. What can happen as a result of bad planning is a drop in revenue once the founder leaves because clients refuse to work with anyone else.

If client acquisition seems to be the issue that needs addressing, set a calendar to audit groups, associations, website designers, public relations, etc, that are used to help attorneys develop a larger market. Create a checklist of monthly, semi-annually and annual benchmarks.

3. Plan for the Worst Case Scenario

Take the time to sit down and think about the most desirable position during a downturn. This might be one year of reserves in the bank because of a case that monopolized time and energy for months, or it could be to reduce the firm's overhead so that the cash flow is not so strained.

The biggest worst case scenarios are disability and death, one of which is inevitable. Responsible professionals should update insurance policies as their personal situations change, both personal and business related.

With personal policies, the two considerations that influence most decisions are cost versus benefit. The more debt, the bigger the policy. In regards to disability insurance, be sure that the monthly benefit covers the office overhead and personal mortgage, then if needed, add more as income allows. If there is already a policy in force but the monthly benefit is not enough, have an insurance advisor check to make sure it's still appropriate for your situation.

Lawsuits! Affordability of insurance can be a problem for some attorneys when it comes to liability insurance. Discounts may be available, so do your research.

4. Always Save

An employee's personal financial issues are a big concern for employers because employees tend to use work hours to find solutions and make arrangements for their personal financial problems. As an employer, the way to minimize this is through education. Check into programs that help the employees as well as the partners learn about money or budgeting. Some financial firms have programs that emphasize the importance of debt management and improving the employee's cash flow, as well as establishing financial goals and putting a plan in place to achieve those goals.

Whether the salary is $75,000 or $750,000, saving money each month or pay period is a wise decision. It's a habit that is hard to break and great to have. For those paid on a contingency basis instead of a fixed savings amount, you may want to focus on saving a percentage of your income.

The most common threat to a good savings habit is procrastination. Try to avoid it and start saving something small today, not after the marriage, divorce, kids, private school, student loan, mortgage, parents pass, etc. Life will always continue to happen regardless of plans set.

If a firm starts now with these four steps, once 2013 rolls around, there could be a noticeable difference in the firm's financial situation. Altering the way one thinks is the key to changing behavior. Remember, baby steps. Start the year with small objectives. Examine the results three months later; there may be room for improvement, so make adjustments as needed. Once a goal has been checked off the list, start the next.

This article should not be construed as investment or financial advice related to your personal situation. Waddell & Reed does not provide legal or tax advice. Please consult your financial, legal and tax advisors prior to making financial decisions.

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Calendar

Probate & Estate Planning Section
Update from the Bench

MARCH 13
12:00 NOON
MONTEREY AT ENCINO RESTAURANT
ENCINO

Judges Mitchell Beckloff and Reva Goetz will discuss the latest developments at the Probate Court.

MEMBERS
$35 prepaid
$45 at the door
1MCLE HOUR

NON-MEMBERS
$45 prepaid
$55 at the door

Intellectual Property, Entertainment and Internet Law Section
America Invents Act: Patent Reform 101 for Attorneys and Clients

MARCH 15
12:00 NOON
SFVBA CONFERENCE ROOM
WOODLAND HILLS

Attorney Mark Nielsen will discuss the Leahy-Smith America Invents Act, signed into law by President Barak Obama on September 16, 2011. The Act represents the first significant overhaul of the U.S. patent system in 60 years and will have an immediate impact on patent litigation.

MEMBERS
$30 prepaid
$40 at the door
1MCLE HOUR

NON-MEMBERS
$40 prepaid
$50 at the door

Business Law, Real Property & Bankruptcy Section
Chapter 11 Cases

MARCH 22
12:00 NOON
SFVBA CONFERENCE ROOM
WOODLAND HILLS

Judge Geraldine Mund's law clerk and former law professor Mary Elisabeth Kors will discuss how to get a Chapter 11 case off the ground.

MEMBERS
$30 prepaid
$40 at the door
1MCLE HOUR

NON-MEMBERS
$40 prepaid
$50 at the door

Santa Clarita Valley Bar Association

MARCH 15
12:00 NOON
TOURNAMENT PLAYERS CLUB
VALENCIA

MEMBERS
$35 prepaid
$40 at the door
1MCLE HOUR

NON-MEMBERS
$40 prepaid

Workers' Compensation Section
Ogilvie III: Mediations and Arbitrations

MARCH 21
12:00 NOON
MONTEREY AT ENCINO RESTAURANT
ENCINO

Attorneys Mark Polan and Saul Alweiss will discuss the effect of Ogilvie III.

MEMBERS
$35 prepaid
$45 at the door
1MCLE HOUR

NON-MEMBERS
$45 prepaid
$55 at the door

Litigation Section
California Supreme Court Practice in Civil Cases

MARCH 22
6:00 PM
SFVBA CONFERENCE ROOM
WOODLAND HILLS

Attorneys David Axelrad and David Ettinger of Horvitz & Levy will review how to write a compelling petition to get review granted after you've lost in the Court of the Appeal as well as strategies for defending against your opponent's petition for review when you've won.

MEMBERS
$35 prepaid
$45 at the door
1MCLE HOUR

NON-MEMBERS
$45 prepaid
$55 at the door

Family Law Section
Prevention of Substance Abuse

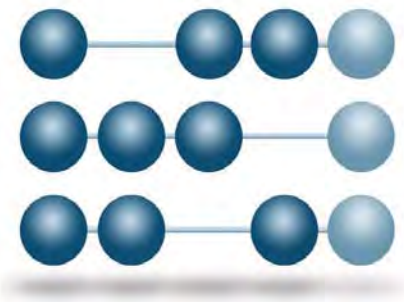
MARCH 26
5:30 PM
MONTEREY AT ENCINO RESTAURANT
ENCINO

Criminal Law Attorney Robert Hoffman, an expert in this area, will discuss substance abuse in regard to you and your family law practice.

MEMBERS
$45 prepaid
$55 at the door
1 MCLE HOUR
(Prevention of Substance Abuse)

NON-MEMBERS
$55 prepaid
$65 at the door

The San Fernando Valley Bar Association is a State Bar of California MCLE approved provider. To register for an event listed on this page, please contact Linda at (818) 227-0490, ext. 105 or events@sfvba.org.



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