

Hill, Farrer & Burrill LLP

Attorneys at Law

Management News

RECENT DEVELOPMENTS IN LABOR AND EMPLOYMENT LAW

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Route To: _____

FIRM TO HOLD CLIENT BREAKFAST MEETING ON DECEMBER 12

The Firm's Labor and Employment Department will hold a breakfast meeting on Thursday, December 12, 2002 from 8:00 a.m. to 9:30 a.m. at the DoubleTree Hotel located at 100 The City Drive in Orange. The meeting will provide clients and friends of the Firm with an update of recent developments in employment law and new laws going into effect on January 1, 2003. We will be providing sample language to be included in employment handbooks for the legislation enacted in this and prior years, and will also be reviewing several recent opinion letters from the state Labor Commissioner on such matters as off-duty conduct, meal and break periods, and other important wage and hour issues.

We look forward to having you as our guest. If you are interested in attending the meeting, please contact Sherry Hill, assistant to Ronald W. Novotny, at (213) 620-0460.

SUMMARY OF NEW LAWS AFFECTING CALIFORNIA EMPLOYERS

Paid family leave will soon be a reality for California employers, as this state just enacted the first "paid family leave" law in the United States. The new law actually adds a Family Temporary Disability Insurance ("FTDI") component to the State's Disability Insurance ("SDI") Program. The current SDI program pays disability benefits to employees who miss work due to non-occupational illnesses and injuries. Now, in addition to traditional SDI benefits, FTDI will provide up to six weeks of benefits for workers who take time off to care for a seriously ill child, spouse, parent or domestic partner, or for the birth, adoption or foster care placement of a new

child. Employees' payroll taxes will increase on January 1, 2004 to fund FTDI.

FTDI benefits:

- Begin until July 1, 2004;
- Will pay 55 percent of the employee's salary, up to \$728/week;
- Last for up to six weeks.

The FTDI will not provide for job protection for employees on FTDI leave, although other laws, such as the FMLA or its California equivalent, CFRA, may apply to provide job protection.

California Fair Employment and Housing Act Amended to Add Age Discrimination

The California State Legislature has recently approved a bill that would amend California's Fair Employment and Housing Act to include age discrimination in the granting of employment benefits. The age bias bill is aimed at overturning a 2001 appellate court ruling which rejected an older workers' claim of age discrimination based on the denial of educational tuition reimbursement. The bill would add age discrimination to the list of prohibited acts in the FEHA, along with discrimination based on race, religion, color, national origin, ancestry, physical or mental disability, medical condition, marital status, sex or sexual orientation.

Sexual Assault Bill

A bill which would amend California Labor Code Section 230 to prohibit an employer from discharging, discriminating or retaliating against an employee who is a victim of sexual assault and takes time off from work to obtain restraining orders or other injunctive relief has recently been approved by

the State Legislature and signed into law by the Governor.

Plaint Closures and Layoffs

AB 2957 establishes requirements under California law similar to those already existing under the federal Worker Adjustment and Retraining Notification Act (commonly referred to as WARN). Covered employers will be required to provide 60 days' written notice of a mass layoff, relocation, or plant closure to the affected employees and a variety of state and local agencies. One difference between the two laws is that the state statute applies to companies with 75 or more employees; the federal law doesn't apply until the company has at least 100 workers. The law applies to layoffs of 50 or more employees, and to relocations of all or substantially all of an employer's commercial or industrial operations 100 miles away.

Sick Leave

SB 1471 prohibits an employer from using an absence-control policy that counts sick leave used to care for an ill child, parent, spouse, or domestic partner as a basis for discipline, demotion or discharge. An employee may recover legal and equitable relief from her employer for any violation.

Payroll Records

AB 2412 requires an employer to provide a former or current employee with copies (at cost) of its payroll records or to permit the individual to inspect those records within 21 days of receiving a written or oral request. Employers may be fined \$750 for failure to comply with the law.

RECOVERED DRUG ADDICT ALLOWED TO PROCEED WITH ADA CLAIM

In *Hernandez v. Hughes Missile Systems Co.*, the U.S. Ninth Circuit Court of Appeals recently held that a recovered cocaine addict could proceed with his failure to hire claim under the Americans With Disabilities Act (ADA), when the company rejected his application based on his prior termination for cocaine use. Reversing summary judgment for the employer, the court held that a job applicant's former employer impermissibly rejected him based on his "record of a disability," without making any inquiry as to his present fitness for the job. The court held that the applicant could proceed with his claim under the

ADA because that law protects qualified individuals with a drug addiction who have been successfully rehabilitated, as opposed to those who are currently engaging in illegal drug use.

The employee in that case quit in lieu of discharge in 1991 after testing positive for cocaine. In reviewing his application to become re-employed with the company in 1994, the human resources director concluded that he was ineligible for rehire based on the company's unwritten policy of not rehiring former employees whose employment ended due to termination or resignation in lieu of discharge. Although the H.R. director testified that she did not know of the applicant's drug addiction or of his reason for leaving the company in 1991 when she rejected his application, she also admitted that she had pulled his entire personnel file, which presented a question of fact as to whether she should have been aware of the fact that he was a recovered drug addict. This raised sufficient issues of fact to warrant a trial on whether the applicant was denied re-employment because of his past record of drug addiction in violation of the ADA.

The court also ruled that the employer's unwritten policy against rehiring former employees who were terminated for any violation of its misconduct rules, although not unlawful on its face, violated the ADA as applied to former drug addicts whose only work-related offense was testing positive because of their addiction. The court reasoned that a policy that serves to bar employment of a drug addict despite successful rehabilitation violates the law.

COURT DISMISSES HOSTILE WORK ENVIRONMENT CLAIM BASED ON SEXUAL DRAWING

The courts are increasingly finding that not all inappropriate or offensive conduct or material in the workplace is sufficient to establish a "hostile work environment" under California law. In the recent case of *Herberg v. California Institute of the Arts*, a California appellate court ruled that a vulgar drawing depicting an 82-year-old female administrative employee in a sexual pose, displayed in an art school's exhibition of drawings, did not constitute unlawful sexual harassment by her employer under state law. More specifically, the court held that the drawing did not constitute sufficiently severe or pervasive conduct which altered the conditions of the employee's employment and created an abusive work environment.

The court stated that for a single incident to meet the "severe or pervasive conduct" standard, it must be extreme and include either physical violence or the threat thereof. In the *Herberg* case, this standard was not met because the drawing was left up for only 24 hours before being removed, was seen by only about 100 people, and the plaintiff employee never saw it. The drawing was also posted as an example of "representational art" which was intended to refute claims that that kind of art was "incapable of provoking a strong response." In this respect, the court stated that in its view it was "reasonable to expect that exhibitions of student art work would, from time to time, include sexually explicit material," and that this also "militated against a finding of severe or pervasive harassment."

GAY BUTLER ALLOWED TO PROCEED WITH TITLE VII DISCRIMINATION CLAIM

In the recent case of *René v. MGM Grand Hotel*, the U.S. Ninth Circuit Court of Appeals permitted a homosexual butler to proceed with a harassment claim based on his sexual orientation. The butler specifically claimed that he was grabbed in the crotch by co-employees, poked in the anus, and forced to look at pictures of naked men having sex, and that his complaints to management about this conduct did not result in any action being taken. Although a three-judge panel of the same court had ruled last year that claims for sexual orientation discrimination did not fall within the prohibitions of the federal law, an eleven-judge panel of the court reconsidered this decision and concluded that the offensive touchings could violate the law if they were clearly linked to the employee's sexuality. Under this ruling, employees subjected to this kind of behavior in California could proceed with claims under both federal law and state law, which already explicitly prohibits discrimination or harassment based on one's sexual preference.

In a somewhat different context, a federal court in Louisiana recently ruled that a transgender male truck driver who was fired after telling his supervisor that he sometimes publicly cross-dressed as a woman could not sue for sex discrimination under Title VII. The court stated that the federal law does not prohibit employment discrimination based on an individual's "gender identity issues," and rejected the employee's claims that he was a victim of prohibited "sexual stereotyping." The decision of the Louisiana court is in accord with most of the federal courts outside of California, which have refused to

recognize sexual orientation as a basis for prohibited conduct under Title VII.

STATE TROOPER CADET'S CONSTRUCTIVE DISCHARGE CLAIM DISMISSED

In *Lawson v. State of Washington*, Washington State Trooper Cadet Greg Lawson alleged that he was unlawfully constructively discharged from his employment as cadet because he would not salute the flag. His training manual required that he "assemble for flag formations twice daily unless otherwise assigned." Additionally, the manual also stated that if a Cadet deviates from the rules contained in the manual that he would be subject to discipline up to and including termination. For his first two days at the Academy, Lawson fully participated in the flag formations and performed the required hand salutes. However, he asserted that it was troubling for him to perform this part of his duty as a patrol cadet because it conflicted with his religious beliefs as a Jehovah's Witness. Lawson contended that his religious beliefs forbade him from saluting the flag.

Subsequently, Lawson quit and filed a lawsuit alleging religious discrimination and constructive discharge. The Court analyzed Lawson's claim of discrimination under a three part test. The Court stated that Lawson must show that (1) he had a bona fide religious belief, the practice of which conflicted with his employment duties as a Trooper Cadet; (2) he informed the Washington State Patrol of his beliefs and the conflict; and (3) the Washington State Patrol "threatened him or subjected him to discriminatory treatment, including discharge, because of his inability to fulfill the job requirements. The Court ruled that Lawson did not meet the third prong of the religious discrimination test.

While Lawson asserted that he satisfied the third prong because he was "constructively discharged," the Court found that Lawson voluntarily resigned. A constructive discharge occurs when a person "quits his job under circumstances in which a reasonable person would feel that the conditions of employment have become intolerable." The mere fact that the Patrol Academy staff "did not make extraordinary efforts" to talk Lawson out of leaving did not change the fact that it was Lawson who first mentioned resignation. The Court therefore concluded that Lawson resigned voluntarily and was not subjected to any intolerable circumstances sufficient to give rise to a claim of either constructive discharge or discrimination.

**AN EMPLOYER MAY ENFORCE ITS
POLICY AGAINST SEXUAL HARASSMENT
AGAINST A KNOWN UNION SUPPORTER**

In *PPG Industries, Inc.*, the National Labor Relations Board (NLRB) upheld discipline issued to a known union supporter for alleged sexual harassment which occurred in the context of union activity. There, a female employee (Julie Meeks) repeatedly declined invitations by an open union supporter, John Sharber, to sign a union authorization card, and had asked him to leave her alone. Sharber, however, was persistent in his attempts, and in June of 1997 he noticed that Meeks was being temporarily transferred from her normal job duties to a different job classification. Sharber then shouted across the shop floor to Meeks that "They're f-ing you. They're screwing you. You need to sign one of my [union authorization] cards."

Sharber was ultimately disciplined for those comments and filed a charge with the NLRB, alleging that he was unlawfully disciplined as a result of his activities on behalf of the union. The Board found that, although Sharber had previously engaged in union activities protected by the National Labor Relations Act, his statement to Meeks, when taken in context with his previous unsuccessful solicitations of Meeks and her requests to be left alone, violated "common standards of decency" and concluded that the conduct which precipitated his discipline "was not concerted activity that should be protected" under the Act, and dismissed the Complaint.

**LAWSUIT COULD PROCEED BASED
ON EMPLOYER'S AUTHORIZED ACCESS
OF THE EMPLOYEE'S WEBSITE**

In *Konop v. Hawaiian Airlines*, the Ninth Circuit ruled that an employee's invasion of privacy lawsuit could proceed against his employer based on his employer's viewing of his secure website.

The employee controlled access to his website by requiring visitors to log in with a user name and password. He also created a list of fellow employees who were eligible to access the site. The website itself was accessed when a person from the eligible list entered their name, created a password and clicked the site's "submit" button, indicating user acceptance of the employee's "terms and conditions" of use for his site. His terms and conditions prohibited any member of Hawaiian Airline's management from viewing the site, and prohibited the

site's users from disclosing the website's contents to anyone else. After a company vice-president obtained permission from two co-workers to use their names for the purpose of accessing the employee's site, he created a password and logged in to the site, allegedly concerned about "untruthful allegations" that the employee was making on the site, and continued to view the website as many as 30 additional times.

Konop filed suit in federal court, alleging that Hawaiian violated the Federal Wiretap Act and the Stored Communications Act by viewing his secure website. The Ninth Circuit dismissed **only** Konop's claims based on the Federal Wiretap Act. The Court reasoned that since the Wiretap Act prohibits only the "intentional interception" of electronic communications, and that in order for a website to be "intercepted" in violation of the Wiretap Act, the information "must be during transmission" and not merely while it is in "electronic storage." However, the Court held that Konop could proceed on his claim under the Stored Communications Act, which prohibits intentionally accessing stored electronic communication "without authorization." The Court ruled that, although the company obtained permission from at least two employees to use their names in order to gain access to the website, there was no evidence presented as to whether those employees had ever previously accessed the employee's site. Therefore, it was factually unclear as to whether those two employees were "users" of the site within the meaning of the SCA with the requisite authority to grant the Company permission to use the site.

**VEGAN'S "RELIGIOUS CREED"
CLAIM DENIED**

In *Friedman v. Southern California Permanente*, a California Court of Appeals recently threw out a vegan's religious discrimination lawsuit filed under the California Fair Employment and Housing Act. Plaintiff Jerold Friedman applied for a job at Kaiser Permanente was advised that, in order to finish the process of becoming a Kaiser employee, he would have to get a mumps vaccine. He refused to take the mumps vaccine because it made from chicken embryos, and to be vaccinated would have violated his "system of beliefs" as a strict vegan. Kaiser then withdrew its offer of employment, and Friedman filed a complaint for religious creed discrimination and retaliation under any state anti-discrimination law.

Friedman alleged that, as a strict vegan, he fervently believed that it is "immoral and unethical for humans to kill and exploit animals," even for food or vaccinations. As a result, he claimed that his vegan beliefs forbade him from eating animal products, wearing products derived from animals, such as silk, leather or wool and even from using products which had been tested for human safety on animals, such as household cleaners, soap or toothpaste. Friedman claimed that he held these beliefs "with the strength of traditional religious views," and that Kaiser's withdrawal of his employment offer based upon his exercise of his religious beliefs violated FEHA.

The Appeals court disagreed. The Court held that while veganism may compel the plaintiff to "live in accord with strict dictates of behavior," it does not contain any "spiritual or otherworldly" components which would be indicative of a religious philosophy. The Court concluded that Friedman's veganism was more a "personal philosophy" or way of life, rather than a legally-recognizable religion within the meaning of the FEHA, and dismissed his religious discrimination claims.

**COURT REJECTS MANDATORY
ARBITRATION CLAUSE AS
UNENFORCEABLE**

The U.S. Court of Appeals for the Tenth Circuit recently ruled that a mandatory arbitration agreement used by a New Mexico golf course was unenforceable. The Court held that because the employee handbook could be interpreted as permitting the employer to modify the arbitration agreement without notice, the entire agreement was "illusory" and therefore unenforceable.

The Court refused to enforce the agreement to arbitrate because of apparent conflicts in the employee handbook. One section of the handbook declared that the employer "reserves the right at any time to change, delete, modify, or add to any of the provisions contained in this handbook at its sole discretion," with the exception of an employee's at-will status and the arbitration provision. However, on the signature page of the handbook which is signed by the individual employee, the Country Club reserved the right to amend, supplement or revise everything in the handbook, with the sole exception of the employees' at-will status. The Court required that this apparent conflict between two separate handbook provisions rendered the plaintiff's agreement to

arbitrate her employment dispute illusory, and denied the Country Club's motion to compel arbitration.

Although this case is not binding on California courts, it nevertheless stands for the proposition that handbook ambiguities are likely to be resolved against the employer as the drafter of the document. Therefore, employers should carefully craft not only an employee's agreement to arbitrate, but also the entire handbook should be coordinated so as to eliminate any potential inconsistent provisions.

**INSURANCE CLAIMS ADJUSTER HELD
ELIGIBLE FOR OVERTIME UNDER
CALIFORNIA STATE LAW**

In *Palacio v. Progressive Insurance Company*, an insurance adjuster asserted claims against his employer, Progressive, including failure to pay overtime wages under the California Labor Code and under the Fair Labor Standards Act (or "FLSA"). The district court granted Progressive's motion for summary judgment regarding the plaintiff's claims under the FLSA which exempts workers from overtime who are employed in a bona fide executive, administrative, or professional capacity. The claims agent was held to have been exempt from the FLSA as an administrative employee, whose primary duties consisted of the performance of office or non-manual work directly related to management policies or general business operations of the company or its customers and included work requiring the exercise of discretion and independent judgment. The employee's duties required her to assess liability, weigh evidence, determine credibility, review insurance policies, negotiate with attorneys and claimants and make recommendations to management based on skills, knowledge and training acquired "over the course of several years." Because she was actively involved in advising the management, planning, negotiating and representing of the company throughout her employment, the court held that her employer met its burden under the Fair Labor Standards Act of establishing the administrative exemption for Palacio.

However, the Court ruled that the employee's overtime claim might have a different result under the California Labor Code. The applicable Wage Order provision stated that "no person shall be considered to be employed in an administrative capacity unless the employee is engaged in work which is primarily intellectual, managerial or creative and which requires the exercise of discretion and independent judgment." The Court held that while the plaintiff's duties as a

claims adjuster were in fact primarily intellectual and required the exercise of discretion and independent judgment, the employer was also required to show that the claims agent performed a duty of "substantial importance" to its business in order to establish that she was exempt. The court held that it was precluded from granting summary judgment on this issue to Progressive because Palacio's settlement authority never exceeded \$7,500, and that a triable issue of fact existed as to whether Palacio performed duties of substantial importance to Progressive, given her limited settlement authority.

Employers should note that California overtime exemptions are often harder to qualify for than exemptions under the federal law, and that such exemptions are usually construed narrowly by the courts. Therefore, employers should designate an employee or a class of employees as exempt from overtime only after a careful review of applicable law in this area.

ADA UPDATE

- In *Williams v. Motorola, Inc.*, the U.S. Eleventh Circuit Court of Appeals in Florida rejected the ADA claim of an employee who refused to submit to a medical examination. The record in that case was clear that the employee was discharged because of her inability to work with others, insubordination, and threats of violence, and that a medical exam was suggested only as an alternative to discharge. The court also held that the employer could have required the examination in order to determine the employee's continued fitness for the job, given her history of recent behavior and threats.
- In *Mays v. Principi*, the U.S. Seventh Court of Appeals in Chicago held that a hospital did not violate its duty to reasonably accommodate a nurse when it reassigned her to a clerical job after her doctor imposed lifting restrictions on her due to a back injury. Even though the clerical job had fewer fringe benefits and career advancement opportunities, it resulted in the same net income that she had previously earned as a nurse. The court stated that an accommodation need only be reasonable and not ideal, and rejected the nurse's proposed accommodation of returning to a full nursing

job because it would have required her to perform lifting duties in violation of her restrictions.

- In *Watson v. Lithonia Lighting and National Service Industries, Inc.*, the Seventh Circuit held that an employer was not required to accommodate a former assembly line worker with permanent repetitive motion restrictions due to shoulder injury by allowing her to remain in a light duty position indefinitely. The Court reasoned that permanently assigning the employee to a light duty position would simultaneously increase the incidents of workplace injury and diminish the employer's ability to accommodate employees who have transient conditions by allowing them to work light duty jobs.

If you have any questions about these issues or any other labor matters, please contact any member of the Labor Department at Hill, Farrer & Burrill LLP -- we're here to help.

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This occasional newsletter is published as a service to clients, friends and colleagues.

Each publication summarizes recent developments in state and federal law affecting employers, but should not be relied upon as an opinion or advice of the Firm regarding any specific matter.