



April 2004

Our Practice Areas

- Business & Corporate Transactions
- Representation of Emerging Businesses
- Patent & Intellectual Property Law
- Construction and Real Estate Litigation
- Employment Law
- Estate Planning & Probate
- Land Use & Development
- Franchise Law
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New Employment Laws for 2004

By Julie Rose

Here are some of the new employment laws that the legislature passed in 2003.

Harassment

The courts held in 2003 in *Salazar v. Diversified Paratransit, Inc.* that an employer is not liable to an employee for harassment by a customer. In response to *Salazar*, Assembly Bill 76 amends the California Fair Employment and Housing Act so that employers may now be liable to their employees for sexual harassment by non-employees if the employer "knew or should have known" of the conduct in question. This includes customers, clients or visitors. An employer must take "all reasonable steps" to prevent the occurrence of such harassment.

Discussing Employment Conditions

Many employers are unaware that they cannot prohibit an employee from disclosing the amount of his wages, or discharge or discipline an employee for doing so (Labor Code Section 232). Along the same lines, Labor Code Section 232.5, passed in 2003, states that no employer may prohibit an employee from disclosing information about the employer's working conditions, or discharge or discipline an employee for doing so.

This new law raises an interesting question. What does an employer do about the proverbial disgruntled employee who constantly complains about work conditions, eroding the morale of other employees? Is the constant complainer

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HIPPA: Impacting Your Loved Ones

By Brendan Lund

A child away at college. An elderly parent. A non-English speaking family member. An aging sibling relying on other siblings for help. Each of these individuals could likely need medical attention, or assistance with medical decisions, in the near future. Yet, unless specifically addressed, family and friends can now be severely hampered in their efforts to help individuals who are clearly in the most need of assistance.

In July 2003, a new federal statute took effect: The Health Insurance Portability Accountability Act (HIPAA). This legislation was intended to protect the privacy of patient's medical records and medical information. However, one of the unintended results of HIPAA was to prevent family members and health care agents designated

under advanced directives from receiving valuable medical information that will help them make informed decisions regarding the medical care of their loved ones.

The HIPAA statute only permits individuals with specific authorization from the patient to receive medical records and medical information. Unfortunately, some legal documents and many forms provided to incoming patients at hospitals and extended care facilities do not have the necessary language to deal with HIPAA.

We urge you to review your Durable Power of Attorney for Health Care or Advance Health Care Directive to ensure that your loved ones have the proper access to your medical information. Our Estate Planning Group can assist you in this endeavor.

In the Law

By Phillip Vermont

The January 2004 codes have created new obligations for landlords of residential real property.

California Civil Code Section 1942.4, which addresses the penalties against a landlord for collection of rent for untenantable dwellings, has been modified. Previously, the statute made it illegal for the landlord to demand rent for an untenantable dwelling. The protection for tenants is now even stronger. Civil Code Section 1942.4 now prohibits a landlord from demanding rent, collecting rent, issuing a rent increase, or issuing a Three Day Notice to Pay Rent or Quit if, prior to the landlord's demand or notice, the dwelling lacked any affirmative characteristics set forth in Civil Code Section 1941.1 (such as hot water, adequate waterproofing, heating, electricity and the like) or the condition of the property is dangerous to life, limb, health, property safety or public welfare. Further, the penalty against the landlord who

violates the section has been increased from \$1,000 to \$5,000.

California Civil Code Section 1942.5, which sets forth the tenant's remedies when the landlord retaliates against the tenant for exercise of a legal right, (such as reporting the property to the health department) has also been modified. The penalty against the landlord for retaliatory eviction has been increased from \$1,000 to \$2,000.

California Civil Code Section 1950.5, which addresses the landlord's use of a security deposit for residential property, has been significantly modified. Now, no later than 21 calendar days after the tenant has vacated the premises, but not earlier than the time that either the landlord or the tenant provides a notice to terminate the tenancy or not earlier than 60 calendar days prior to the expiration of a fixed term lease, the landlord must furnish the tenant, by personal

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Firm Announcements

McNichols Randick O'Dea & Tooliatos is growing. We have added two new partners and five new associates.

NEW PARTNERS: Everitt Beers and Don Odell have become Partners in the firm.

Everitt is a patent and intellectual property law litigator who also has experience in patent prosecution, intellectual property transactions and licensing. Everitt is a registered patent attorney. Everitt has twenty years of litigation experience.

Don's practice focuses on the areas of land use and development, construction related civil litigation and contract dispute resolution. Don began his career with a major independent civil litigation defense firm in Walnut Creek where he worked in the areas of real estate, land use and development, medical malpractice and asbestos-related personal injury defense.

NEW ASSOCIATES: John Nielsen, Brendan Lund, Randy Sullivan, Ryan Donlon, Patrick Guevara, David Austin, and Ralph Kokka

John's practice will focus on intellectual property matters, including patent and trademark prosecution, litigation and licensing. John is registered to appear before the U.S. Patent and Trademark Office as a patent attorney.



Brendan's practice will focus on corporate and business transactions and related tax implications, including corporate, limited liability company and partnership counseling, organization and structuring, as well as tax and estate planning for individuals and businesses.

Randy will be working in the litigation department. He attended Santa Clara University School of Law and was admitted to practice law in 2003. Randy worked at the San Francisco Firm of Drinker, Biddle & Reath and clerked at the

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Snowboarding & the Law

By John Nielsen

My friend Chris and I recently embarked on a snowboarding adventure at a ski resort in Lake Tahoe. This was, for both of us, our first time on a snowboard. I will point out right away that this excursion was not my idea. Chris chose this as a way to celebrate his 40th birthday. (Although he was the Valedictorian of our high school, he's never been accused of having good judgment). We attended a 2-hour morning lesson, which, by the way, was painful and humiliating. Our instructor then gave us a few tips on the use of the nearby chair lift. Chris then decided that we should try the chair lift immediately, while our skills were still honed to a fine edge.

As it happened, we took separate lifts up the hill, with me in front. We were told by the instructor that everybody falls on their first attempt to unload from the ramp at the top of the lift. This was certainly accurate in my case, as I almost immediately, however with great dignity, collapsed at the bottom of the ramp. After I composed myself, I looked back to see Chris standing in front of the chair lift operator, who was looking at the back of Chris' head with her hand over her mouth.

It turns out that Chris also fell after attempting to exit the lift, but had the misfortune of having a sharp piece of metal on the bottom of the lift strike his head as it went past him. This opened up a fairly good size cut, which was causing the ski lift operator from Perth great amounts of anxiety. She contacted the ski patrol, which

sped us down the hill on a snowmobile, which was, sadly, the highlight of our day. We spent the next 8 hours in the emergency room at Barton Memorial hospital. Interestingly, we spent the first 5 hours or so watching all manner of more seriously injured people come in and get treated. Perhaps coincidentally, most of the injuries we saw were snowboarders who were injured at the same resort as the one from which we had just come. Most of the injuries we saw were arm and shoulder injuries. Chris was eventually seen and treated, and I was lucky enough to be allowed to attend while he was cleaned and stapled.

The next day, contrary to doctor's orders, we decided to tempt fate yet again. After some discourse with the management at the resort, they were kind enough to refund our lessons from the previous day, as well as give us two additional days of lessons and tickets. I guess the combination of a lawyer and a guy with staples in the back of his head got their attention! We took another lesson and kept primarily to the towrope area and had no further problems, other than fear, panic, and additional humiliation.

After our return to civilization, I researched the area of law dealing with liability of ski resorts for this type of occurrence. While the scope of a discussion on this topic exceeds the available space in this newsletter, suffice it to say that there is a vast area of law, which deals with this, and similar issues. If you are interested in discussing it, please let me know!

In the Law...cont.

(Continued from page 2)

delivery or by first class mail, a copy of an itemized statement indicating the basis for, and the amount of, any security received and the disposition of the security deposit.

Along with the itemized statement, the landlord must also include copies of the documents showing the charges incurred and deducted by the landlord. If the landlord or landlord's employee did the work, the itemized statements shall reasonably describe the work performed, the time spent and the reasonable hourly rate charged. If the landlord or the landlord's employee did not do the work, the landlord must provide the tenant with a copy of the bill or invoice supplied by the person performing the work. Further, if a repair to be done by the landlord or the landlord's employee cannot reasonably be completed within 21 calendar days after the tenant has vacated the premises, or if the documents showing the work are not in the landlord's possession within 21 calendar days, the landlord is now entitled to deduct the amount of a good faith estimate of the charges that will be incurred and provide that estimate with the itemized statement. Then, within 14 calendar days of completing the repair or receiving the documentation, the landlord has to provide that information to the tenant.

Further, the landlord does not need to provide an itemized statement if the reduction for repair and cleaning does not exceed \$125.00. The

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Going Places - Humboldt County

By Phillip Vermont

My wife, Kathi, and I found ourselves spending three days in early December in Eureka, Humboldt County, California. We had planned a vacation to northern California and southern Oregon in May of 2003, which, as it turned out, needed to be cancelled because of ongoing snowstorms in southern Oregon. Instead, we spent Thanksgiving weekend traveling to Eureka, spent two days in the Eureka areas, and on the North Coast.

The drive to Eureka through the Napa Valley and the red-colored grape vines was absolutely beautiful. The entire seven-hour drive to Eureka was foggy and rainy, which only added to the lushness of the countryside. Approximately 25 miles south of Eureka is the AVENUE OF THE GIANTS, the old Highway 101. Approximately 1 mile off the main highway, the AVENUE OF THE GIANTS is a beautiful country road that takes you through the giant redwoods, eventually returning you to Highway 1, just south of Scotia, California. Scotia is a quaint, logging company owned town, which at one time housed the nation's largest lumber mill.

We drove north through beautiful Arcata and ultimately arrived in Trinidad, a quaint small town on the coast, with a stunning view of the ocean. We enjoyed a two-hour walk on Trinidad's beautiful beach, after taking over 250 stairs to reach the beach. On such a rainy and foggy day in December, we had the pleasure of

walking the entirety of Trinidad beach without running into a single person. We were happy to have brought our ponchos.

We also had the opportunity to visit Humboldt State University; a beautiful, small California State University nestled in the foothills behind Eureka. The dormitories of this quaint campus are located so close to the redwoods, that upon exiting the dormitory, a student can walk some 100 feet to the right and find him or herself surrounded by gigantic, historic redwoods.

On the return trip to Eureka from Trinidad along Highway 101, we walked approximately five miles on Little River State Beach, just north of Arcata and south of Trinidad. This amazing strip of coastline, which contains approximately 10 miles of beautiful sand beach, was virtually deserted.

Eureka's historic downtown area has been redeveloped to include many unique restaurants, shops, saloons and art galleries. The coastline from Eureka to Trinidad is reminiscent of the coastline between Mendocino and Fort Bragg. While Eureka has all of the amenities one would expect in the Bay Area, it also feels quite secluded.

Both Kathi and I enjoyed visiting the area and intend to return when we can experience the region during the warmth of summer.

In the Law...cont.

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statute now specifically allows the landlord to send the notices to the unit that has been vacated, if the tenant does not provide a more recent address.

Finally, **Civil Code Section 1954**, which deals with how a landlord can enter a dwelling to make inspections, or in case of emergency, has also been modified. Now, the statute makes it very clear that such inspections can only occur during normal business hours, unless the tenant consents otherwise. Further, the landlord must give reasonable notice in writing of the intent to enter, and this notice must include the date, approximate time and purpose of the entry.

The statute also clarifies that the tenant and the landlord may agree orally to make agreed repairs. In this case, the landlord is not required to provide the tenant with a written notice.

In short, the California Legislature continues to modify the landlord-tenant statutes in a way more favorable to the tenant, in recognition of a housing crunch, which often results in unfairness in the tenant. Before acting to recapture possession of residential premises, the landlord or his or her realtor should carefully review the applicable statutes.

New Employment Laws for 2004...cont.

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protected by this new law? Time will tell, as discharged employees raise Labor Code 232.5 in unlawful termination actions.

Penalties

Assembly Bill 276 doubles the penalty for 158 different labor code misdemeanor violations. Under prior law, if an employer failed to pay wages or unlawfully withheld wages, the penalty for the first violation was \$50. This bill increases the penalty to \$100.

Attorneys' Fees

Labor Code Section 98.2(c) was amended to overturn the California Supreme Court's decision in *Smith v. Rae-Venter Law Group*. In *Smith* the court had held that under Labor Code Section 98.2(c), if an employee appealed a Division of Labor Standards Enforcement ("DLSE") decision and did not obtain a more favorable ruling, he would be required to pay the costs and attorneys' fees incurred by the employer. Under the new law, if an employee appeals and receives anything, even if less than the original DLSE award, the employer is not entitled to recover its costs and fees. A likely result will be an increase in appeals.

Paid Leave

In 2002, California passed a law creating a wage replacement program for employees who take time off from their jobs to care for a child or family member. Originally called "Family Temporary Disability Insurance," the program has been renamed "Paid Family Leave." Withholding from employee

paychecks for Paid Family Leave went into effect January 1, 2004. Paid Family Leave benefits are based on past quarterly earnings and range from a minimum of \$50 to a maximum of \$728 per week, for up to six weeks for claims beginning July 1, 2004.

Paid Family Leave applies to all employers, regardless of size. Paid leave is available to any employee who has paid into the designated fund, regardless of the length of employment with the current employer.

Paid Family Leave does not provide job protection or return rights. Those rights are available only to employees who are entitled to leave under the Family Medical Leave Act and the California Family Rights Act.

Employers can visit the EDD website (www.edd.ca.gov) and print the Paid Family Leave brochure that employers must give to their new employees who join after January 1, 2004, and to persons requesting leave.

Whistleblower Protections

Existing law prohibits employers from enforcing a policy that prevents an employee from disclosing violations of the law. 2003 legislation extends this protection to employees who report a violation of a law and those who refuse to participate in an activity that would violate the law. The new law will establish a whistleblower hotline within the State Attorney General's office and requires an employer to display a list of employee's rights under the whistleblower laws, along with the telephone number of the hotline.

Epicurean Delight: Mothers Day Apple Almond Pancakes

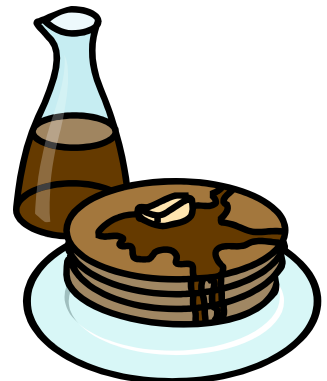
By Shelley Jarvis

Surprise your Mom with this scrumptious recipe.

½ cup - Whole-wheat flour
½ cup - Unbleached flour
1 tb - Brown sugar
1 ½ ts - Baking powder
¼ ts - Salt
2 - Eggs, separated
4 tbs - Oil
½ cup - Buttermilk
½ cup - Apple Juice
¼ cup - Chopped almonds

1. Combine flours, sugar, baking powder, and salt in a mixing bowl.
2. Beat egg yolks with oil, buttermilk, and apple juice.
3. Stir into flour mixture with nuts until all ingredients are moistened (do not over stir).
4. Beat egg whites until stiff and fold into batter.
5. Spoon onto a hot, greased griddle and turn once when bubbles appear.

Makes 8 to 10 pancakes.





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Firm Announcements...cont.

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U.S. Attorneys Office in San Francisco. **Ryan** will also be working in the firm's litigation department. He attended Santa Clara University School of Law and was admitted to practice law in 2003. Ryan clerked with the Berkeley firm of Paul, Hanley & Harvey, LLP, was an Extern for Associate Justice Patricia Bamattre-Manoukian and for Chief Magistrate Judge Patricia V. Trumbull.

Patrick's practice areas are Trademark and Copyright Counseling and Prosecution, Litigation and Dispute Resolution, Cyberspace Law, Business Immigration. Patrick attended Santa Clara University School of Law where he received his Juris Doctorate in May 1999.

David joins our litigation section of the firm. He attended University of California Davis School of Law where he received his Juris Doctor in 2001. He received his B.A. at the University of California Santa Barbara. He speaks, reads, and writes conversant Japanese.

Ralph will be working in the transactional department. He attended Boalt Hall School of Law where he received his Juris Doctor in 1989. He attended Golden Gate University & received his LLM in taxation in 1999.

A NEW ARRIVAL

CONGRATULATIONS Brendan and Amie Lund on their new arrival Conor K. Lund. Conor was born at 1:25 a.m. on Monday, February 23, 2004, weighing in at 9 lbs. 7 oz.. and 21 inches long. Mom and Dad are both doing fine and enjoying their new bundle of joy!

