



BRIEFLY SPEAKING

March 2001

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New Employment Issues for 2001

By: Julie Rose

The new year 2001 has brought new legislation and case law affecting employers. Below I have summarized some of the new changes impacting employers.

Disabled Applicants and Employees

The State legislature passed Assembly Bill 2222, which clarifies the definitions of "mental disability", "physical disability" and "medical condition" for the purposes of California's civil rights laws. The bill also limits an employer's ability to require medical or psychological examinations, or to make certain medical or disability-related inquiries. It also requires an employer to engage in a good faith, interactive process to determine reasonable accommodations for a disabled employee or applicant. These changes broaden the protections provided to

employees and applicants under the Americans with Disabilities Act ("ADA") and increases an employer's obligations to accommodate individuals with a disability or perceived disability. The new definitions expand the number of employees who will be able to claim protection under the ADA.

The law specifically requires that employers engage in a dialogue or "interactive process" to determine whether the disabled applicant or employee requires a reasonable accommodation and what options are available. This interactive process is required even if there is no reasonable accommodation available.

This is probably going to be one of the most difficult areas for employers in the coming year. Employers are going to see even more of an overlap among Worker's Compensation, the ADA and the above California law.

Every case is likely to require analysis under all of the laws.

Covenants Not to Compete

Employees are far more mobile than they were ten or twenty years ago. Employers now have a harder time trying to keep confidential information, trade secrets and general nonpublic business information out of the hands of competitors. Even though California bans covenants not to compete, many employers have included such covenants in their employment contracts as a way to make an employee think twice about going to a competitor. *D'SA v. Playhut, Inc.* a December 21, 2000, appellate court decision, found that an employer violates public policy by terminating an employee for refusing to sign a confidentiality clause which includes a covenant not to compete. Upon a finding of a violation of a public policy, a court can award an employee

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New Developments in the Law

By: Phillip G. Vermont

Two new cases, decided in December of 2000, shed some light on two areas of law regularly confronted by McNichols Randick O'Dea & Tooliatos, LLP's clients.

In the first case, *Neu-Visions Sports, Inc. v. Soren/McAdam/Bartells*, decided by the Court of Appeal Fourth District on December 22, 2000, addresses whether representations of property value were actionable under either fraud

or negligent misrepresentation claims. In the action, the court said no.

The plaintiffs, *Neu-Visions Sports, Inc.*, among others sued *Soren & Sykes*. Specifically, the plaintiffs alleged that Mr. Sykes made two misrepresentations in connection with a proposed project to build an ice and roller hockey arena in the former commissary building of Norton Air Force Base. The alleged misrepresentations were that the former

commissary building was worth five million dollars, and that the title to the property would not be a problem in securing financing for the project because the defendant would have obtained clear title to the property before the funding of any financing for the project.

The defendants argued that that alleged misrepresentations were not actionable because they were only the opinions of Mr. Sykes, upon which plaintiffs were not entitled to rely.

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Capital Gain Treatment for Employer Securities Upon Distribution/Rollover from 401(k)

“you may be able to take a distribution from your 401(k) plan and not recognize the gain on the appreciation in the year of distribution”

By: Kimberly Farrington

Does your 401(k) plan hold stock of your employer that has substantially appreciated? If so, you may be able to take a distribution from your 401(k) plan and not recognize the gain on the appreciation (i.e. be taxed) in the year of distribution. If you have held the securities long enough, you can receive capital gain treatment upon sale.

Internal Revenue Code (IRC) § 402(e)(4)(A) provides that securities of an employer corporation may be distributed from the employer’s 401(k) plan, or any other type of qualified retirement plan, to an employee without tax on net unrealized appreciation (NUA) of the stock, if the distribution is taken as a lump

sum. Securities that qualify for deferment are shares of stock and bonds or debentures, issued by a corporation with interest coupons or in registered form.

An employee who receives a distribution of appreciated employer securities and rolls over to an IRA the balance of his or her qualified retirement plan account can defer income tax on the net unrealized appreciation on the employer securities. The receipt of the employer securities and the rollover of the balance of his or her account constitute a lump-sum distribution for this special rule.

A “total lump distribution” occurs when the balance of the employer securities in the 401(k) plan is distributed

within one taxable year, thus allowing the deferral of both employee and employer contributions to the 401(k) plan. Shares distributed in this way will not be taxed until such shares are sold. At that time, the gain is eligible for capital gain treatment. The basis of the securities (the value when contributed to the plan) is includable in income upon distribution. If the value of the securities at the time of distribution is less than basis, the total value of the securities is taxable in accordance with the general rules applicable to lump-sum distributions.

Feel free to consult us or your tax preparer if you think you might be eligible for this special benefit.

EPICUREAN DELIGHT

Wild Duck with Sweet Potatoes

By Don Odell

Now that you’ve pulled in your decoys, hung your waders in the back closet and oiled down your shotgun, it is time to think about all those ducks sitting in the freezer. Here is a recipe which should prove to your significant other that all those long hours in the duck blind were really for his or her benefit.

- Salt
- 4 Tbsp butter
- Ground red pepper (cayenne)
- 2 sweet potatoes
- Ground black pepper
- 2 apples
- 6 wild ducks, cleaned & dressed
- 1 cup dry red wine
- 2 onions, cut into chunks
- 1 large can mushrooms

Season ducks inside & out with salt, red pepper & black pepper. Sauté the onions and celery in 2 Tbsp of the butter for 5 minutes. Parboil the potatoes until partially cooked, but still firm. Peel and dice the potatoes and apples, and mix with the onions and celery. Stuff the ducks loosely. Place ducks in a heavy baking pan with a tight lid. Bake in a preheated oven at 325° for 2 hours. Melt the rest of the butter & add the wine. Baste the ducks with this mixture until all is used, then continue basting with the pan juices. About 15 minutes before the ducks are done, raise the oven temperature to 450°, add the mushrooms, uncover the pan & brown the ducks. Be sure to baste often during the browning period.

Announcements

LESLIE A. BAXTER

A senior litigation associate with McNichols Randick O’Dea & Tooliatos, LLP has become a partner in the firm. Ms. Baxter practices in the areas of Civil Litigation with an emphasis on Business and Real Estate disputes and Land Use.

JEFFREY TURNER

Formerly a partner of Turner & Beeler has become “Of Counsel” to McNichols Randick O’Dea & Tooliatos, LLP. Mr. Turner will continue to practice in the areas of Real Estate, Civil Litigation, Estate Planning and Business Law.

New Employment Issues for 2001...cont.

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punitive damages in addition to his economic damages for a wrongful termination. This substantially raises the stakes for the employer.

Including a covenant not to compete in an employee handbook, when the employer knows it is not enforceable, can trigger a violation of Business and Professions Code section 17200. This code section defines unfair competition to include unlawful, unfair or fraudulent business practices. Employers should review their employee manuals, employee applications and any confidentiality agreements to make sure that there is not buried somewhere in the language a covenant not to compete.

Sexual Harassment

In January 2000, the legislature codified case law which held employers strictly liable for

harassment by a supervisor. Assembly Bill 1670. The legislature then took the matter one step further and effective January 1, 2001, any co-worker, whether supervisory or not, may be personally sued for sexual harassment. The employer is not strictly liable for this harassment if the employer had no knowledge of the harassment as it is in the case of the supervisor.

Depending upon the factual situation of the particular harassment claim, under Labor Code section 2802, an employer may be ordered to reimburse employee for legal expenses and the amount of a judgment entered against the employee sued for sexual harassment. It is therefore important for employers to make it clear to all employees that it will not tolerate any form of harassment in the work place and to advise all employees that they can now face personal liability in the event of a sexual harassment claim.

Reporting Requirements

To increase child support collection, California has instituted a new reporting requirement for businesses to report independent contractors. Any business that is required to file a federal Form 1099-MISC for services performed by an independent contractor must now also file a DE542 form with the EDD on all individual independent contractors, within 20 days of either making payments totaling \$600 or more or entering into a contract for \$600 or more in any calendar year. Businesses are not required to report the services provided by businesses such as corporations, general partnerships or limited liability companies. For more information, contact the EDD at 1-888-745-3886 or visit the EDD website at www.edd.ca.gov.

“Employers should review their employee manuals, employee applications and any confidentiality agreements to make sure that there is not buried somewhere in the language a covenant not to compete.”

New Developments in the Law...cont.

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In short, the court finds that expressions of an opinion as to a future fact are not actionable. Only misrepresentations as to past facts (not opinions) can be actionable under a fraud or misrepresentation claim.

In a case decided April 18, 2000 by the Fourth District Court of Appeal, Choate v. County of Orange, the plaintiffs had brought an action against the County, alleging that sheriffs deputies committed civil rights violations. The plaintiffs filed an action seeking hundreds of thousands of dollars, but, after trial, were awarded only \$3,380.00 in compensatory damages and

\$1,000.00 in punitive damages. The plaintiffs' attorney sought almost \$250,000.00 in attorneys' fees for achieving this victory under the federal statute that permits the "prevailing party" to recover attorneys' fees. Instead, the court denied the attorneys' fees for the plaintiffs. Instead, the court awarded the defendants fees of approximately \$241,000.00, finding that plaintiffs' civil right causes of action were frivolous and without merit.

The Court of Appeal reversed the decision of the trial court as to the attorneys' fees for the defendants but sustained the denial of attorneys' fees for the plaintiffs. The Court of Appeals found that this case accomplished essentially nothing other than

consuming substantial time, energy and resources of the court and the judicial system. As such, the trial court properly exercised its discretion in issuing a "no fee" decision for a recovery which resulted in so little benefit to the plaintiffs or the public.

Both of these cases reveal a trend in the California trial courts. When faced with cases of little or extremely weak merit, courts may deny these plaintiffs a remedy, and even if the plaintiffs prevail, may decline to award attorneys' fees or court costs. In short, be sure your case has strong factual merit and can be proven at trial, before the action is filed.



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Rotary Gives Thanks – By Erin Kvistad

Living and working in Pleasanton, I enjoy giving back to the community in which I was raised. As a member of the Pleasanton Downtown Rotary Club, there are plenty of opportunities to do so.

Each year on the Saturday before Thanksgiving, the Rotary Club sponsors a day called Rotary Gives Thanks. This is an annual event coordinated by our club and the Valley Community Health Center – Senior Support Division, to assist local senior citizens. Members of our club, students from Amador Valley High School's Interact Club (a Rotary-sponsored service club) and local Boy Scouts from Troop 911 perform tasks for seniors around their homes, such as cleaning windows, cleaning gutters and flipping mattresses, that many seniors are unable to do on their own.

This past fall, I organized the event on behalf of the Rotary Club. Marlene Peterson and Lorie Rohloff coordinated the event for Valley Community Health Center and made all of the arrangements with the local seniors. The seniors completed forms outlining and their wish list of projects they wanted performed. I coordinated the Rotarians, the Interact students and the Boy Scouts. I set up volunteer teams

comprised of members from each group and assigned each group several projects to be completed. In all, we had more than 80 volunteers.

The day began at 8 am at the Kottinger Senior Apartment complex where we had breakfast, including bagels donated by the local Noah's Bagels. The groups then dispersed to begin their projects. Our volunteers performed tasks at over 60 seniors' homes that day. Many of the volunteers also had a chance to visit with the seniors who were very grateful for the hard work performed on their behalf. In addition to the projects on the wish lists, this year we also brought new batteries to make sure all of the seniors' smoke detectors were properly functioning. At lunchtime, all of the groups returned, still enthusiastic, but tired, to the Kottinger complex for pizzas, donated by Round Table Pizza on Main Street.

All of the participants were excited for the opportunity to get out and work in the community and assist the seniors. They also enjoyed the camaraderie of the work teams comprised of members of all ages. It was a rewarding day for all involved.