

## KEY ISSUES FOR CALIFORNIA EMPLOYERS



By Frank E. Melton, Olivia Goodkin and  
Wendy Freedman

Implementing and maintaining preventive measures to avoid employment law problems remains a constant challenge for employers. In this article, we discuss briefly how carefully drafted offer letters and employee handbooks can help companies reduce exposure to employment law disputes. The risks created by the widespread use of blogs and other electronic communications are also addressed. Finally, we summarize recent developments in the law of retaliation, an active area in employment litigation.

### OFFER LETTERS

One of the most useful and important employment-related documents for all California employers, regardless of size, is an effective offer letter signed by new employees. The key objectives of the letter include:

- Establishing "at-will" employment, which protects the right of both the employer and employee to terminate the employment at any time, with or without cause. Properly worded at-will language in an offer letter is the best means of protection against wrongful termination lawsuits based on contractual claims that the employer lacked good cause to terminate employment.

- Clearly defining compensation, commissions, bonuses (discretionary or otherwise) and benefits, with appropriate flexibility for future changes. Reference

should be included, where appropriate, to detailed documents such as commission and bonus plans, benefit packets, or the employee handbook as they may be modified in the future.

- Providing other protections important to many businesses such as employee commitments: (1) not to disclose without authorization the company's confidential, proprietary and trade secret information; (2) not to solicit the company's customers and employees for a reasonable period; (3) relating to inventions and other intellectual property; and/or (4) to arbitrate employment-related disputes with certain procedural safeguards required by California courts over the past five years. In some cases, it is better to address these issues in separate agreements for new employees to sign as part of the hiring process.

- Communicating clearly about other points to ensure that there is no misunderstanding, such as 90-day introductory periods, a delay in eligibility for certain benefits, or the terms of a relocation package.

### EMPLOYEE HANDBOOKS

A well-drafted employee handbook is a valuable tool for promoting good employee relations and morale, and avoiding costly litigation or settlements in employment cases. Generally, California employers with 15 or more employees should consider having a handbook and employers with between 5 and 15 employees may find it worthwhile. As the number of employees approaches or exceeds 50, having a quality employee handbook should be considered essential.

A few examples of critical areas to be addressed in the handbook are:

- Paid family leave, for which all California employees may be eligible, and many other types of leave of absence, whether or not they are required by California and federal laws.

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## R H D A T T O R N E Y U P D A T E



We are pleased to welcome **David Y. Joe** to the firm. David specializes in real estate transactions, with particular emphasis on purchase and sale, leasing and financing of industrial, office and retail properties. David's legal expertise is complemented by business acumen gained as the co-founder of a full-service residential and commercial real estate brokerage and property management firm and as a broker with Colliers International. David earned his Juris Doctorate from UCLA and his B.A. from UC Davis.

❖ Congratulations to **Wendy Freedman** who will be installed as President of the Barristers of the Beverly Hills Bar Association on September 28, 2006 at The Four Seasons Hotel.

❖ Kudos to **Terry Nunan** for being appointed to the **National College of Probate Judges**.

❖ *Los Angeles Magazine* and *Law & Politics* named **Wendy Freedman** (Business Litigation) and **Eric Peterson** (Bankruptcy) as Rising Stars.

❖ **Fred Fenster** has become a columnist for the *Westside Chronicle*, penning "Legal Briefs."

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- Substance abuse policies, including in appropriate cases reasonable suspicion drug and alcohol testing or other requirements, in accordance with applicable law.

- Workplace violence.

- Make-up time policies (one aspect of flexibility for non-exempt employees permitted in certain specific circumstances under Section 513 of the California Labor Code).

- Conflicts of interest and ethics.

- At-will employment, privacy issues, protection of trade secrets, and anti-retaliation policies, discussed below.

Every organization has its own unique culture and business needs that should be reflected in the handbook. Handbooks should be updated at least every few years to take into account developments in employment law.

### BLOGS, EMAIL AND THE INTERNET

The widespread use of blogs (short for "weblog," an online diary or personal journal published on a webpage), email and the Internet by employees are presenting new challenges for employers. The ease, informality and speed of communicating electronically compound the problems of preventing harassment and protecting employer trade secret information and the reputation of the company. We recommend that companies consider their positions on blogs and other electronic communications and create or revise their policies as necessary. The following are examples of areas to be addressed:

- Employers should reserve the right to monitor employee blogs, Internet usage, emails, and other electronic communications using company equipment. Employers may wish to periodically monitor electronic communications for violations of company policy including improper disclosure of the company's confidential information; excessive use for personal purposes during work hours; downloading or posting of pornographic material; and misuse in connection with sexual or other harassment.

- Before engaging in monitoring or inspection of electronic communications, employers should publish a written policy stating that their information technology systems and equipment are company property and that emails, keystrokes and use of the Internet involving company property (or on company time) are not private and are subject to monitoring at any time by the company. Since California employees have a right of privacy under Article I of the California Constitution, such a policy is important to establish that employees do not have a reasonable expectation of privacy in electronic communications connected to the workplace.

- Compliance with software licensing requirements, as well as system security and non-disclosure requirements (relating to confidential information), should also be addressed.

### RETALIATION

Retaliation continues to be a hot area of employment litigation. It is against both federal and state law to retaliate against an employee who exercises a right under anti-discrimination laws. Moreover, individuals, as well as companies, can be held liable for retaliation.

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Very recently, the U.S. Supreme Court, in *Burlington Northern & Santa Fe Railway Co. v. White*, defined the scope of "retaliation" under Title VII, the primary federal anti-discrimination law. The Court held that retaliation is not limited to termination of an employee's job -- the ultimate employment decision -- but rather includes any materially adverse action that would dissuade a reasonable employee from making or supporting a charge of discrimination.

As an example, if an employee makes a claim of sexual harassment, it would be considered retaliation to reassign the employee to less favorable job duties absent a compelling business justification. It would not matter whether the harassment claim was meritorious, since retaliation provides an independent basis for filing a lawsuit. In addition, it is unlawful to retaliate against an employee who reports conduct that is illegal under a statute or regulation, or seeks to assert a legal right under a statute or regulation.

California law already included a broad definition of "retaliation," namely, an employment action that is "reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career." Thus, with *Burlington*, both federal and state laws now provide increased protection for employees against retaliation.

Managers and Human Resources personnel involved in employment decisions must be aware of and understand the anti-retaliation laws given their expanded scope and emphasis in the past several years. Companies should also have clear written policies against retaliation.

*Frank Melton, Olivia Goodkin and Wendy Freedman litigate and provide preventive day-to-day advice in connection with a wide range of issues that confront employers, as illustrated in this article and the representative engagements summarized below. If you have any questions about labor and employment issues, please call Frank, Olivia or Wendy at (310) 286-1700.*

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*Recent Labor & Employment-related engagements completed by Rutter Hbbs & Davidoff*

## COUNSELING & NEGOTIATIONS

- Counseled a manufacturer on whether its employees could be terminated based on eyewitness accounts of illegal drug use during business hours.
- Advised a religious non-profit on termination of pre-school director and related documentation.
- Negotiated buy-out of employment agreement for long-term studio executive.
- Negotiated employment agreements for executives of financial services firms.
- Negotiated collective bargaining agreement for unionized employees of non-profit employer.
- Represented physician in dispute over compensation with medical group.

## LITIGATION

- Successfully defended claims for sexual harassment against a high-level executive employee brought by his former subordinate.
- Successfully defended wage and hour claims for overtime pay and failure to provide meal and rest periods for large construction company.
- Successfully prosecuted a claim for misappropriation of trade secrets by a manufacturing company against its former employee and a prominent competitor who solicited the employer's customers.

- Successfully defended claims for religious discrimination, defamation, and wrongful termination in violation of public policy by the Executive Director of a non-profit.

## DRAFTING DOCUMENTS

- Drafted a drug and alcohol testing policy for aerospace company and its affiliates throughout the U.S. in compliance with state and federal laws, including regulations promulgated by the Federal Aviation Administration and the Department of Defense.
- Drafted updates to employee handbooks used by manufacturing and other facilities of a company supplying boxes and equipment to the agriculture industry.
- Drafted employment agreement for Executive Director of a non-profit, and offer letters for other employees.
- Drafted consulting agreement for independent contractor of a food service company.

## INVESTIGATIONS

- Investigated a claim of sex-based harassment against a senior executive of a manufacturing company, including interviews with the alleged victim and perpetrator and witnesses; made recommendations for counseling and worked with other professionals in bringing the matter to a proper conclusion.

