

Corfee Stone & Associates

5441 Fair Oaks Blvd. Suite B-1, Carmichael, CA 95608, ♦ Telephone: (916) 487-5441 ♦ Facsimile: (916) 487-5440 ♦ Website: www.corfeestone.com

Employment / ADA Access / Fair Housing Law Alert!

Updates you need to know but in a millisecond..

Vol V.

June 2006

IN THIS ISSUE

Employment Law

Proposed Legislation P1

Employee Polygraph Protection Act P1

Court Ruled No Family Medical Leave Discrimination P3

Employers Could Properly Enforce It's Non-Competition Agreement P3

5 Common Wage Hour Mistakes P3

ADA Access

Recent Victory For Public Accommodations Regarding ADA Suits P4

Fair Housing

Housing Discrimination: Reasonable Accommodations Duty P5

Welcome

Corfee Stone & Associates is proud to introduce you to its New Associate Zachary Best.

Thought of the Month

Thought leads to Action. Repeated Action leads to Habit. Habit forms our Character. Character defines our Personality.

EMPLOYMENT LAW

Proposed Employment Law Legislation 2006 Watch Out!!

By Catherine M. Corfee, Esq



AB 2371 - This Assembly bill is currently before the Assembly Judiciary Committee. If enacted, it would invalidate arbitration agreements between employers and employees required as a condition of employment relating to all employment practices covered by the Fair Employment and Housing Act. This would include cases of sexual harassment and discrimination. The bill would additionally put the burden on the employer to prove that a waiver or arbitration agreement was knowingly and voluntarily entered into and not a condition of employment or continued employment. The flood gates of the court house would open if this passed!

SB 1441 - This Senate bill would expand and redefine the list of groups protected under the Government Code to include sexual orientation as a protected group. Sexual orientation would be defined as "heterosexuality, homosexuality, and bisexuality." Sex would also be redefined to include gender. Lastly, it would redefine the protections on race to include perceptions of characteristics and perceptions that a person is associated with a person who has certain characteristics. This means it would be illegal to harass, discriminate, retaliate or stereotype those individuals in that classification.

AB 2980 - This bill would require the Department of Fair Employment and Housing to implement a mediation program to provide efficient and expeditious resolution of complaints received by the Department. Not a bad idea to get a 3rd party to give their two cents on the value and merit of a case.

"Fair Pay Workplace Flexibility Act of 2006" - If passed, this Act would increase the state minimum wage in 2007 to \$7.25 per hour and in 2008 to \$7.75 per hour, with additional increases based on inflation each year.

AB 2618 - This bill, if enacted, would establish a three-year statute of limitations period on causes of action brought under the Unruh Civil Rights Act and similar statutes. Currently, the statute of limitations on these causes of actions is two years.

Employee Polygraph Protection Act

By Catherine M. Corfee, Esq. and Zachary Best, Esq.

It may come as a surprise to many of you that it could be illegal to require or even suggest that an employee or prospective employee take a lie detector test. In 1988, the Employee Polygraph Protection Act (EPPA) became the law of the land. It makes it unlawful for an employer to "directly or indirectly, require, request, suggest, or cause any employee or prospective employee to take or submit to any lie detector test." Notice that an employer violates the statute for merely *suggesting* that the employee or prospective

employee take a test. Therefore, even asking “would you be willing to take a lie detector test?” is against the law for employers.

The penalties for violating the statute are steep. The Justice Department is empowered to prosecute EPPA cases and levy fines including, but not limited to, reinstatement, lost wages, benefits and civil penalties. The penalties can run into the many thousands of dollars for each occurrence. Also, an employee or prospective employee who has been affected by a violation of the EPPA has the right to file their own private lawsuit in addition to the penalties collected by the Justice Department. A common scenario is where an employee is fired for failing or refusing to take a lie detector test. That employee will often sue for the amount of his or her salary, in addition to other remedies. As you might imagine, this can become quite expensive.

There are a few exemptions from the EPPA, however. Most of the exemptions are law enforcement related (the National Security Agency can require its employees to take lie detector tests, for example). However, the main exemption applicable to private employers is the “ongoing investigation” exemption. An employer is exempted from the EPPA if it meets all of the following requirements:

1. The test is administered in connection with an ongoing investigation involving economic loss or injury to the employer’s business;
2. The employee had access to the property that is the subject of the investigation;
3. The employer had a reasonable suspicion that the employee was involved in the incident under investigation;
4. The employer executes a statement, provided to the examinee before the test that sets forth with particularity the specific incident being investigated, and the reason for suspecting the examinee. The statement must be signed by someone with authority from the employer to legally bind the employer. This statement must be kept for a minimum of three years in case the Justice Department decides to audit the employer’s records.

In order for an employer to meet all these requirements, certain circumstances must occur. First, the economic loss must be to the *employer’s* business. A loss to a guest on the premises or an employee is not sufficient. Second, the employer’s suspicion must be “reasonable.” Under the EPPA, “reasonable” means that you have an “observable and articulable basis in fact” to suspect the particular employee. Facts such as information from a co-worker that the employee was observed with the property, inconsistencies in the employee’s statements, or the employee’s behavior or conduct during the investigation will aide in establishing reasonable suspicion. The more facts you can establish, the more reasonable your suspicion becomes. Finally, you are exempt from executing a statement and providing it to the “examinee,” if the employee in question ultimately does not take the test. The statement must only be provided to “examinees.” An employee does not become an “examinee” until he or she actually takes the examination. A word of warning--do not rest on your laurels if you expect the employee to take the test. The statement must be provided at least 48 hours in advance of the test.

The “ongoing investigation” exempts an employer from the prohibition of suggesting or requiring an employee to take the test. In order for an employer to take further action and actually suspend or terminate an employee, the employer must provide “additional supporting evidence.” This evidence is almost identical to the ongoing investigation requirement and is easily met if you clearly qualify for the exemption. Additional supporting evidence includes, but is not limited to:

1. Evidence indicating that the employee had access to the property that is the subject of the investigation; and evidence leading to the employer’s reasonable suspicion that the employee is involved in the incident; or
2. Admissions or statements made by the employee before, during or after the test.

In most circumstances, a lie detector test is not necessary to investigate a property loss and you are better off avoiding possible violations of the EPPA. If serious circumstances occur, it is best to seek legal counsel before speaking with *any* employee regarding lie detector tests to ensure that you are in compliance with the EPPA.

Court Ruled No Family Medical Leave Discrimination

By Catherine M. Corfee, Esq.



The Ninth Circuit Court of Appeals recently ruled in *Denny's v. Union Pacific Railroad* [2006 US.App.LEXIS 5993 \(9th Cir March 9, 2006\)](#) that the employee was not discriminated against for requesting family leave; rather, he committed insubordination. The plaintiff worked at a railroad and needed a request for leave time off intermittently to seek chiropractic treatment for a chronic neck and back problem. The plaintiff called his supervisor with severe back pain and his request for leave was denied. He drove to work with his wife and got into a disturbing argument with his supervisor where he even threatened to "take it outside, off the property." He was terminated. The court said he was properly terminated for insubordination, not because he needed family and medical leave. The court correctly ruled that an employee's insubordination and fighting words are not protected simply because he has a need for medical leave.

Employer Could Properly Enforce It's Non-Competition Agreement

By Catherine M. Corfee, Esq.



For those employers who have top secret and proprietary information, it is common to have employees sign a non-competition agreement prohibiting them from working for competing businesses within a limited time frame after ending their employment. The non-competition agreements have to be properly structured limiting the employee's livelihood to a very short period of time, and relating solely to not being able to disclose, use or disseminate trade secrets at a competitor. In the case of *Biosense Webster, Inc. v. Superior Court*, [135 Cal.App.4th 827 \(2006\)](#), the manufacturer and distributor of electro physiology catheters and anatomical mapping devices required its employees to sign non-competition agreements prohibiting them from performing identical services to competing organizations for 18 months after leaving. Three employees left and went to work for a competitor. Bioscience threatened to sue the competitor for unlawful raiding of the employees. In response, the competitor filed a lawsuit to determine that the non-competition clause was unfair competition. They initially won. However, the Court of Appeal concluded

the trial court erred and that the employer could properly enforce its non-competition clause.

5 Common Wage Hour Mistakes

By Catherine M. Corfee, Esq. & Zachary Best, Esq.



Complying with the complexities of wage/hour law is no easy task for today's employers. Unfortunately for you human resource specialists, the task of complying with wage/hour laws usually falls on your shoulders.

The following are examples of common wage/hour mistakes.

1. Meal periods: The Labor Code and the Wage Hours generally require that if a person works more than five hours in one day, he or she must be provided a minimum of a 30 minute meal period. During the meal period, the employee must be relieved of all duties. Herein lies a very common problem. Often, when work is busy, an employer will ask an employee to work during their meal period. Typically, the employee is allowed to eat their meal, however, they are required to help out with the task at hand while they eat. This is against the law because the employee is not relieved of all of their duties. The penalty for such violations is that the employee must receive an extra hour's pay for each day that the employer violated the rule. If your company always requires its employees to eat while on the job, then you can see how the penalties would add up to a substantial amount over time.

2. Lectures/Seminars: Frequently, employers require their employees to attend lectures, seminars, or other forms of training. The Wage and Hour Division treats the time spent attending these lectures as "hours worked," which means the employees should be compensated. Often, employers do not compensate their employees for this time. The law only allows an exception to this if *all* of the following criteria are met: 1) attendance must be outside the employee's regular working hours, 2) attendance must be voluntary, 3) the lecture or seminar must not be directly related to the employee's job, and 4) the employee must not be called upon to perform productive work while they attend the lecture or seminar. Only if all of these factors are met, can an employer be relieved of the burden of paying for the employee's time while attending the seminar.

3. Uniforms: For nonexempt employees that are required to wear a uniform as part of their job, the employer generally must provide the uniform and pay for its maintenance. Frequently, employers require their nonexempt employees to purchase their uniforms and require them to pay for its cleaning. Regarding maintenance of the uniform, if the uniform only requires washing and tumble drying, the employee can still be required to bear the cost of uniform maintenance. If, however, the uniform must be dry-cleaned or pressed, the employer must either maintain the uniform itself, or pay an allowance to the employee so that they can have the uniform maintained.

4. Personnel files: The Labor Code requires that employers must permit their employees to inspect their personnel file. This inspection right is not limited to the documents kept in the official personnel file. Frequently, employers have multiple files on an employee. A common scenario is where an official file is kept at the home office, while a different file is kept at the local branch where the employee works. If an employee wishes to inspect their personnel file, the employer should make sure that the employee is allowed to inspect *all* of the various files that pertain to that employee. The company's HR specialist should verify that he or she has gathered the complete personnel file of an employee in response to a request to inspect it.

5. On-Call Time: Many occupations require employees to be on standby. For example, apartment managers must be able to respond to emergencies at all times. However, when he or she is not responding to emergencies, the manager merely sits and waits for a call. Many other types of occupations are similar. The law states that if an employee is subjected to "controlled standby," the time spent on standby is considered "hours worked," and therefore the employee must be compensated for it. "Uncontrolled standby," by contrast, is not considered "hours worked," and therefore the employee does not have to be compensated for it. What's the difference between controlled standby and uncontrolled standby? If an employee must either remain on the employer's premises during standby, or is not allowed to venture too far from the employer's premises, then the standby time is considered "controlled." A basic question to answer in these situations is: during the standby time, is the employee allowed to treat the time as their own,

i.e., can the employee pursue their own interests during the standby time? If not, then the employer must pay for the standby time. Take, for example, a hospital x-ray technician who must be at his or her station so that when a patient needs an x-ray, the technician will be there to immediately begin the x-ray. Hours may go by without a patient. During this time, the technician reads a novel, or listens to the radio. This is controlled standby time because the technician is not allowed to leave the premises during the down time. This is so even though the technician reads a novel or listens to a radio during the down time.



ADA ACCESS

Recent Victory for Public Accommodations Regarding ADA Suits

By Catherine M. Corfee, Esq.



We congratulate the judge in [White v. Divine Investments, Inc.](#), 2005 WL 249153, where the court denied the plaintiff's claims to seek a court order to fix every imperfect accessible element discovered by his expert only. Disabled plaintiff Sherie White sued a food and gas market in September 2005. She alleged in her complaint she encountered approximately forty-two barriers. She claims she visited again and the barriers still existed. Because of this she claims she was deterred from going back and filed a lawsuit for being frustrated and humiliated as well as being placed in a dangerous situation. Under the Americans with Disabilities Act (ADA) she sought a court ordering the defendant to make the changes she complained of. Later she sent her expert to go in and run a fine-toothed comb thru the entire facility finding any needle in a haystack to trump up and explode her case of inaccessible elements. He looked for any and every imperfection possible that did not comply with the federal ADAAG. Sherie White conceded that she did not personally encounter each and every barrier. The court held that a plaintiff in an ADA action does not, by mere filing a lawsuit alleging one violation, obtain the right to perform a wholesale audit of the defendants' premises. The only injunctive relief a plaintiff could have remedied are those she knew or had reason to know existed at the time of her visit. The alleged

barriers later discovered by her expert were not known to her at the time she filed her complaint and therefore she could not sue over them. The court would only address the merits of the inaccessible elements alleged in the complaint.

What we expect to see now are complaints that identify each and every inaccessible element even if they don't exist. This way, a plaintiff could sue over such. Nevertheless, this is a good victory for defendants.

FAIR HOUSING

Housing Discrimination: Reasonable Accommodations Duty

By Catherine M. Corfee, Esq.



In some cases, providing a reasonable accommodation to a disabled individual may be less costly than a housing

discrimination lawsuit. In one case, the court found that a landlord's refusal to accept rent money from a different entity other than the disabled tenant was discrimination. The tenant was diagnosed HIV. The landlord refused to accept rental assistance checks from a social service organization which helped subsidize housing expenses for individuals with AIDS. The tenant lived in the unit since 1997 and then later was diagnosed with HIV in 2003. The landlord did not accept the money from the charitable organization and allow the tenant to live in the rental unit. Instead, the landlord refused to accept these checks, refused to accept rent in cash, and eventually evicted the tenant.

California Law prohibits discrimination in housing, or for that matter, employment, on the basis of disability. It also requires landlords and employers to provide reasonable accommodations to the disabled to allow them equal rights and privileges. The Department of Fair Employment and Housing received the complaint from the tenant in this case and proceeded with litigation against the landlord. After substantial time had passed, and recognizing an apparent defeat at trial, the landlord agreed to a settlement with the tenant in the amount of \$80,000.

Instead of continuing to receive the monthly rents from the disabled tenant, as the landlord could have easily and reasonably done, the landlord decided instead to discriminate against the tenant because of his disability. Now, the landlord is paying for the tenant's rent, and will continue to do so for some time.

CORFEE STONE WELCOMES



Welcome Zachary Best, our new senior associate. He grew up in Oakland and Berkeley, California. Zachary graduated from Berkeley High School in 1986 and subsequently attended UC Davis where he earned a bachelor's degree in History in 1990. Zachary then enrolled in the University of the Pacific's McGeorge School of Law in Sacramento, and graduated in May 1993.

Zachary was sworn in as an attorney in December 1993. He worked for the firm of Ross and Associates in Oakland until 2000. Ross and Associates handled plaintiff's civil rights cases exclusively. While there, he became quite experienced in handling employment related civil rights cases, both state and federal.

In 2000, Zachary began working for the Law Offices of Waukeen McCoy. While there, he was part of the legal team that represented the plaintiffs in the historic case of Carroll v. Interstate Brands Inc., SF Superior Court Case No. 995728 (AKA the "Wonderbread Case"). The Carroll case was a race discrimination case that resulted in what is to this day, the largest jury verdict ever awarded in a discrimination case (\$132 million).

Zachary has successfully appealed many cases, both state and federal. He has reversed several Superior Court rulings including one published decision, Carroll v. Interstate Brands Corp. (2002) 99 C.A.4th 1168.

Zachary joined Corfee Stone in December 2005. His practice is now focused on representing defendants in employment cases, as well as representing businesses who have been sued under the Americans with Disabilities Act (ADA).



January 1, 2006 was the deadline for companies with 50 or more employees to complete the Mandated Sexual Harassment Training. To avoid potential fines, contact us today to schedule your training. Since supervisors can bind a company for failure to stop, prevent, and/or investigate and remediate any harassment, supervisors should generally be trained even if not required. The cost is \$500 for a 2-hour training or 1 hour for \$250. This includes comprehensive and easy to follow handouts and certificates of completion. Please call for further details. 916-487-5441.

This document is not intended to provide express or implied legal advice and should not be relied on for such.



Announcements

- ★ Did you know Corfee Stone & Associates practices employment litigation, wage-and-hour law, employment agreements, administrative hearings, human resource support, state and federal OSHA, policies and manuals, severance agreements, trade secret agreements, defamation, employee & manager training, appeals and civil writs, and Americans with Disability Act.
- ★ Congratulations to Corfee Stone & Associates for successfully bringing a motion to compel further responses to discovery.



Corfee Stone In the Media!

Didn't get enough? Check out these following news articles featuring Corfee Stone's commentary on legal concerns:

- California Real Estate Journal: Must You Accommodate a Resident's Pet Under Fair-Housing Laws? February 21, 2006.
- Sacramento Bee: Litigious Crusaders For Disabled Strike at Mom-And-Pop Shops. January 12, 2006.
- Sacramento Business Journal: Lots of Detail, But Still Much to Debate in ADA Proposal. August 19, 2005.

