

BEESON, TAYER & BODINE

LABOR LAW BULLETIN

THE PURPOSE OF THIS NEWSLETTER IS TO REVIEW THE LATEST DEVELOPMENTS IN LABOR LAW WHICH ARE OF PARTICULAR INTEREST TO THE LABOR ORGANIZATIONS REPRESENTED BY BEESON, TAYER & BODINE. THE INFORMATION CONTAINED HEREIN HAS BEEN ABRIDGED FROM NUMEROUS SOURCES AND MUST NOT BE CONSTRUED AS LEGAL ADVICE OR OPINION; SPECIFIC ADVICE QUESTIONS MAY BE DIRECTED TO THE FIRM.

Union Right to Leaflet for Consumer Boycott of Mall Tenants Upheld

A lengthy fight by a shopping mall owner to prevent unions from handbilling at California malls urging a consumer boycott of a mall tenant has finally ended with a victory for unions.

The dispute started when pressroom employees of the *San Diego Union-Tribune*, who had a labor dispute with the newspaper, distributed leaflets at the Fashion Valley Mall calling for a boycott of a department store tenant because it advertised in the *Union-Tribune*. Fashion Valley Mall had a policy prohibiting free-speech

activity that asked customers to refrain from patronizing any mall tenant. The mall owner summoned the police, who forced the handbillers to leave. The union filed an unfair labor practice with the NLRB, which held that the content-based restriction on the union's leafleting was unlawful because the activity was protected under California law and the mall's rules discriminated on the basis of protected union activities.

In concluding that the union's leafleting on the private property of the mall

was protected under California law, the NLRB relied on a 1979 California Supreme Court case called *Robins v. Pruneyard Shopping Center*. In that case, the Court held that the California Constitution's free speech rights, which are more expansive than those in the U.S. Constitution, extend to privately owned shopping malls. But the *Pruneyard* Court did not reach the question of whether a mall could prohibit free-speech activity seeking a boycott of one of the mall's own tenants.

Fashion Valley Mall ap-

pealed the NLRB's decision to the Court of Appeals for the District of Columbia, which in turn referred the matter to the California Supreme Court, asking that court to decide the boycott question left open in *Pruneyard*.

In December 2007, the California Supreme Court held that the right to seek a consumer boycott against a mall tenant of a privately owned mall in California *is* protected under the state Constitution. *Fashion Valley Mall, LLC v. NLRB* (2007) 42 Cal.4th 850. The Court rejected the mall's

(Continued on page 2)

U.S. Supreme Court Strikes Down California Law Banning Use of State Funds to Fight Unions

The U.S. Supreme Court voted 7-2 to strike down a California law that prohibited employers that receive state funds from using the money "to assist, promote or deter union organizing." *Chamber of Commerce v. Brown*, 128 S.Ct. 2408 (2008).

The law required employers who receive more than \$10,000 annually from

state coffers to keep records to show that the money was not being spent to discourage or encourage union organizing. The law, which was passed in 2000, also allowed the Attorney General and private citizens to sue suspected violators for injunctive relief and civil penalties.

In its June decision, the Supreme Court sided with

the U.S. Chamber of Commerce, which called the law an attempt "to place the state's thumb on the scale in unionization debate." The Chamber claimed that the law's "burdensome" and "onerous" recordkeeping requirements and potentially steep penalties would prevent employers from speaking freely on union matters.

Although the Ninth Circuit Court of Appeals had upheld the law, the Supreme Court sided with the employers, ruling the law preempted by the National Labor Relations Act. The California law, the Court held, was intended to regulate employer speech about union organizing under circumstances where the NLRA left such speech free from government regulation.

Temp Agency Scabs Due Pay Daily

SB 940 (Yee-D) goes into place January 1, 2009, and requires temporary services employers to pay their employees weekly, regardless of when the assignment ends. Labor Code §201.3. The law was introduced to address temp agency concerns about the California Supreme Court's *Smith* decision requiring daily pay to daily hires (see Fall 2006 *Labor Law Bulletin*). Expressly exempted from the

weekly pay rule are scabs employed by temporary agencies; they must be paid daily. Also, non-exempt temps assigned to work on a day-to-day basis must be paid daily if they are dispatched to the client's worksite each day and return to the temp agency's office upon completion of the assignment. An employer that fails to pay wages due is subject to a penalty up to an additional 30 days of pay.

NLRB Grants Employers Broad Control on E-mail Use

The Bush NLRB has ruled that employers may validly prohibit employees from using company e-mail systems for union and concerted-activity matters, as long as the prohibition does not discriminate against the exercise of such Section 7 activities. *Register Guard*, 351 NLRB No. 70 (2007).

The Board majority rejected the argument that employee use of company e-mail systems made available to employees for their work should be treated any differently than other company equipment or facilities, such as televisions, telephones, and bulletin boards. The Board has ruled in the past that employers may prohibit employees from using company equipment or facilities to exercise Section 7 rights, as long as the prohibition is general, and not directed at Section 7 activities. The majority disregarded the fact that employee use of an e-mail system for Section 7 communications imposes no cost on the employer and does not use up a limited resource, preventing others from using

the system for work.

The Board majority also revised its standard for determining whether an employer has discriminated against Section 7 rights. In the past, an employer committed an unfair practice whenever it permitted use of company facilities, such as a bulletin board, for personal, non-work activities, but not for Section 7 activity. Reversing course in *Register Guard*, the Board applied a test for unlawful discrimination that requires "disparate treatment of activities or communications of similar character because of their union or other Section 7-protected status." Applying the "similar character" test, the majority noted that a rule could lawfully permit charitable solicitations but not non-charitable solicitations, and could permit solicitations to participate in social gatherings but not solicitations to support a group or organization.

It remains to be seen how this decision will be treated under the new administration.

Court Reverses NLRB to Permit Union Buttons on the Job

The Ninth Circuit sided with a nurses' union when it reversed the NLRB and struck down a hospital's rule barring nurses from wearing buttons at work protesting staffing conditions.

The court dismissed the employer's claim that the buttons (reading: "RNs Demand Safe Staffing") caused distress to patients and their families. The court ruled that the hospital's claim was purely speculative, and not supported by evidence of any harm. Accordingly, the rule was invalid, and amounted to an unfair labor practice.

Washington State Nurses Assoc. v. NLRB, 526 F.3d 577 (2008).

In general, the Board upholds the right to wear union buttons or other union insignia as protected, concerted activity in the workplace. Employers, however, may make rules that restrict the wearing of such buttons if they can show that "special circumstances" exist, like the need to prevent customer alienation or harm to patients in a hospital setting. Whether special circumstances justify a particular employer's rule will depend on the facts of the case.

Consumer Boycott of Mall Tenants Upheld

(Continued from page 1)

argument that by requiring a permit for expressive activities at the mall it was only imposing a "time, place and manner" restriction, noting that the mall's rules expressly required the applicant to agree not to ask consumers to refrain from patronizing a tenant – clearly a content-based restriction.

But the mall owner was not quite done. It returned to the federal Court of Appeals and argued that the ruling by the state Supreme Court violated its rights under the Fifth and Fourteenth Amendments to the U.S. Constitution. In May

2008, the Court of Appeals refused to consider that argument because it had never before been raised by the mall through years of litigation.

Finally, the mall sought review by the United States Supreme Court, which in October declined to hear the case, thus letting stand the ruling of the California Supreme Court.

With the final decision in this case, California shopping malls subject to the *Pruneyard* rule, while they may still insist unions comply with reasonable "time, place and manner" restrictions, may no longer ban union handbillers from mall premises because the union seeks a boycott of a mall tenant.

PERB Jurisdiction Over Public Strike Injunctions to be Decided by California Supreme Court

The California Supreme Court has granted certiorari in several cases to decide whether, under the Meyers-Millias-Brown Act exclusive jurisdiction over employer requests to enjoin strikes by public employees whose services are considered essential to public safety rests with the Public Employees Relations Board (PERB) or with the superior courts. In the lead case, *City of San Jose v. Operating Engineers Local 3*, the Appellate Court ruled that San Jose's request for a tem-

porary restraining order and injunction should have been the subject of an unfair practice charge filed with the PERB, which was found to have initial exclusive jurisdiction over such requests.

This issue has acquired increased importance in recent years as public agencies have sought -- often successfully -- to use the superior courts to enjoin broad classifications of employees from participating in strikes on the grounds that their services are essential to public safety. The

courts often generously accept the public agencies' designation of "essential" employees with little scrutiny or acknowledgment that a broad injunction will determine the outcome of a strike.

Public agencies have spoken uniformly that initial exclusive jurisdiction should rest with the superior courts, which they have found to be more favorable to their requests to enjoin strikes.

Labor organizations, on the other hand, have argued that the PERB's special expertise

make it better suited to monitor and potentially resolve labor disputes.

California appellate courts have split on this issue; the First Appellate District ruled Contra Costa County could request an injunction in court without first going through the PERB, while the Third Appellate District ruled Sacramento County had to file a charge before it could go to court.

Charter County Employees Not Covered by Meal and Rest Period Rules

California's First Appellate District ruled that meal and rest break claims under Labor Code sections 512 and 226.7 cannot be asserted against a charter county. *Curcini v. County of Alameda* (2008) 164 Cal.App. 4th 629.

The California Constitution provides charter counties with the right to determine compensation of their em-

ployees, a right that is not subject to legislative interference. The county employees contended that meal and rest break claims relate to "working conditions" and not "compensation."

But the court deemed the meal and rest break rules to regulate employee compensation. The court reasoned that the Supreme Court's

Kenneth Cole decision - which ruled damages for failing to provide meal breaks are properly classified as wages and not penalties -- and the traditionally broad interpretation of the term "compensation" required a finding that the charter county is not subject to these labor code provisions.

Although the *Curcini* court

did not address charter cities, the court's analysis would appear to apply equally to charter cities.

The *Curcini* court also did not address the application of state meal and rest period statutes to general law counties, but it is not clear whether these statutes apply to general law counties.

Peace Officer Discipline Notice Need Not Identify Specific Discipline Proposed

The California Supreme Court ruled that the notice of proposed disciplinary action required by the Peace Officers' Bill of Rights (POBR) need not identify the specific discipline proposed. *Mays v. City of Los Angeles*, 43 Cal.4th 313 (2008).

POBR provides that no discipline may be imposed on an officer unless the investigating agency completes its investigation and notifies the

officer of the proposed action within one year of the agency's discovery of misconduct. Jon Mays, a police officer suspected of misconduct, received notice of proposed disciplinary action three days before the expiration of the one-year time period.

The notice referred Mays to a "Board of Rights" for adjudication of the proposed discipline, but did not specify the

proposed disciplinary action. Mays argued that the notice's failure to identify specific discipline rendered the notice insufficient and that any further notice was barred by the one-year time limitation.

The Court disagreed. The Court observed that the notice Mays received provided sufficient notice that he was subject to discipline. And the Court concluded that the POBR time limit regarding

notice of discipline was intended by the Legislature to shorten investigation times, and not to require the proposal of a specific punishment within one year.

Thus, the Court ruled, the notice to Mays that his misconduct was being referred to the Board of Rights was sufficient to provide him notice under POBR.

Courts Deal Blow to Meal and Rest Break Rules

California's meal and rest break laws have been the topic of several far-reaching decisions that have appropriately received considerable attention in the past year.

Beginning with the Fourth Appellate District's decision in *Brinker Restaurant Corp. v. Superior Court*, and later with the Second District's decision in *Brinkley v. Public Storage*, these courts held that employers need not "ensure" that their employees take meal periods, approved the practice of making employees work more than five hours without a meal break as long as the employee gets his break at some point during the work day, and ruled claims for denial of breaks cannot be asserted on a class basis. Following *Brinker* and *Brinkley*, a number of federal district courts have followed suit, adopting the reasoning

of these decisions.

The California Supreme Court has granted review of both the *Brinker* and the *Brinkley* decisions, and they cannot be cited as precedent.

Duty to "provide" but not "ensure" meal and rest breaks The *Brinker* court concluded that "meal periods need only be made available, not ensured." This holding was predicated on a definition of "provide" to mean "to supply or make available." The Third District had previously held in *Cicairos v. Summit Logistics* that under the meal break rules "employers have an affirmative obligation to ensure that workers are actually relieved of all duty." While the two opinions appear to be inconsistent, they can be read to require employers to ensure that conditions exist for employees to take off-duty meal periods. If the Supreme Court does not clarify this

issue, we anticipate significant litigation over what it means to "provide" a meal period.

Meal Breaks: Early or Late Breaks are OK, no Rolling Five Hour Rule

Brinker and subsequent decisions found that Labor Code section 512(a) does not require a meal break during the first five hours of a work day that exceeds five hours, so long as the meal break is given at some point during the day. The court concluded section 512(a) supersedes IWC Wage Order No. 5 which bars the employment of an employee for more than five consecutive hours without providing a meal break.

Note that Section 512 does not apply to agricultural employees and, therefore, in our view, the *Brinker* ruling regarding rolling breaks is not applicable to agricultural employees.

Meal and rest break claims are not susceptible to class certification The *Brinker* court concluded that because employers are not required to police and enforce employee compliance with meal and rest break rules, claims for denial of breaks cannot be asserted on a class basis, because in theory each individual employee may have a different reason for not taking a meal or rest break.

The reasoning in *Brinker* departs from several other Appellate District rulings, including the First District's April 2008 ruling in *Bufile v. Dollar Financial Group* and the Third District's ruling in *Cicairos*.

If the Supreme Court upholds *Brinker*, to proceed on a class basis plaintiffs must make a showing that their employer actively prohibited them from taking breaks.

Employees May Pursue Internal Appeals Without Jeopardizing Right to Pursue State Discrimination Complaints

Two recent California court decisions have clarified the rules for employees filing discrimination complaints when their employer has an internal appeal procedure available.

In *Ortega v. Contra Costa Community College* (2007) 156 Cal.App.4th 1073, the Appellate Court considered whether a Union member has to exhaust a union contract's grievance procedure prior to filing a complaint

under California's Fair Employment and Housing Act (FEHA). The plaintiff brought a lawsuit charging illegal discrimination because of his race under FEHA. The trial court held that the lawsuit was barred because the plaintiff did not first take his claim through the grievance procedure under his union contract. The Appellate Court disagreed and reinstated his claim.

The court concluded that the

union contract's grievance procedure does not eliminate the right to a jury determination of the FEHA statutory rights afforded to workers, unless the union contract has a "clear and unmistakable" agreement to resolve the worker's FEHA claims by arbitration and the arbitration procedures "allow for full litigation and fair adjudication of the FEHA claim." In *Ortega* the union contract did not have such a provision and thus the em-

ployee was allowed to bypass the grievance procedure.

More recently, the California Supreme Court held that when an employee *voluntarily* pursues an internal remedy prior to filing a complaint under FEHA, the statute of limitations for filing a FEHA claim is equitably tolled or extended. *McDonald v. Antelope Valley Community College District*, (2008) 45 Cal.4th 88.

(Continued on page 7)

Medical Prescription Provides No Job Protection for Marijuana Use

California workers who are medical marijuana users are subject to termination for their marijuana use the California Supreme Court has decided. *Ross v. RagingWire, Inc.* (2008) 42 Cal.4th 920.

The Court rejected the argument that California's Fair Employment and Housing Act

requires employers to accommodate an employee who uses medical marijuana.

Plaintiff Gary Ross had been offered a job by RagingWire but was terminated after he tested positive for marijuana, despite Ross' confirmation that he was using the marijuana under a physician's direction to alleviate back

pain and in compliance with California's Compassionate Use Act.

FEHA does not require employers to accommodate the use of illegal drugs. Marijuana, the Court noted, is still illegal under federal law, and California voters, in approving the Compassionate Use Act, did not give mari-

juana the same status as a legal prescription drug.

The Court concluded voters only intended to exempt medical marijuana users from criminal penalties, not employment-related consequences.

Court Confirms Broad Scope of California Ban on Non-Competes

The California Supreme Court has issued a decision giving an extremely broad sweep to California's ban on non-compete clauses. *Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937.

Edwards was subject to a noncompetition agreement that prohibited him from performing the same type of services for a client that he had performed at Andersen for a limited period after leaving the firm. When Andersen imploded, Edwards sued to void the non-compete agreement.

The Court reviewed the history of non-competes in California, emphasizing California's deviation from the common law of non-competes. The common law has developed a "rule of reasonableness" in assessing the enforceability of non-competes, but the statute California passed on 1872 rejected the common law rule. That legislation is now codified in Business & Professions Code Section 16600.

"Today in California," the Court flatly stated, "covenants not to compete are void, subject to several

exceptions ...". Those narrow exceptions are limited to agreements in connection with the sale or dissolution of corporations, partnerships, and limited liability corporations.

Otherwise, non-compete agreements are void, even when narrowly tailored. And this means, the Court concluded, the "narrow restraint" exception to Section 16600 originally adopted by the Ninth Circuit in *Campbell v. Stanford University* (1987), is not consistent with California law.

In *Campbell* the federal court noted that some California courts excepted application of 16600 "where one is barred from pursuing only a small or limited part of the business, trade or profession." But the Court rejected *Campbell* as a misreading of California law.

The California Supreme Court has the final word on the meaning of state law, so *Campbell* and other Ninth Circuit decisions that applied the narrow-restraint exception are no longer valid.

Greater Burden on Plaintiffs in Reasonable Accommodation Cases

The California Supreme Court has made it more difficult for plaintiffs to prevail in Disability Discrimination cases under the California Fair Employment and Housing Act ("FEHA"). In *Green v. State of California*, (2007) 42 Cal. 4th 254, the state Supreme Court held that employees have the burden of proving they can perform all of the essential functions of the job.

FEHA and the federal Ameri-

cans with Disabilities Act ("ADA") provide that an employer only has to provide a reasonable accommodation for an employee with a disability if the employee can perform the essential functions of the job. For several years, courts have held that under the ADA the plaintiff bears the burden of proving he or she is able to perform the essential functions of the job, with or without accommodations. But the state

Courts of Appeal split on whether it is the employer or the employee who carries this burden. The state Supreme Court's decision in *Green* brings the plaintiff's burden of proof in FEHA claims in line with the ADA.

The ruling could make it more difficult for employees to prevail in FEHA claims that allege an employer failed to provide a reasonable accommodation. Prior to *Green*,

some state courts required the employer to prove that the employee could not perform the essential functions of the job. It is now clear that plaintiffs have the affirmative burden of pleading and providing evidence that the employee is able to perform the essential functions of the job, with or without an accommodation.

Arbitration Roundup

Here is a sampling of recent arbitration cases handled by Beeson, Tayer & Bodine.

AFSCME Local 146 and Nevada Immigration District (Termination)

Grievant, a plant operator with 26 years seniority was terminated for insubordination, poor judgment, failure to carry out duties, failure to secure hazardous materials, rude and disrespectful treatment of a coworker and "undertaking an unorthodox method of identifying a valve problem without getting approval." Arbitrator Bonnie Bogue sustained the charges excepting those related to insubordination, but found that the most egregious charge was not substantiated. She concluded that, while the District had "assiduously" followed some measure of progressive discipline by imposing prior written warnings, the employee's 26 years of seniority was sufficient mitigation to warrant a lesser penalty of a 30-day suspension. On that basis the grievant was reinstated and awarded backpay.

OPEIU Local 29 and ILWU Local 34 (Termination)

ILWU Local 34 terminated grievant, who had fifteen years seniority as the Local's bookkeeper. OPEIU Local 29 represents the ILWU Local's

office staff. An outside audit revealed that grievant was paid higher than the rate set forth in the OPEIU collective bargaining agreement covering her position, and grievant, whose duties included processing payroll, was terminated for fraud. Arbitrator Jerilou Cossack ordered the grievant reinstated and made whole because hearing testimony substantiated the grievant's claim that her higher pay rate had been approved by the ILWU Local's prior leadership, and because the ILWU failed to prove its claim that out-of-scale pay would have to be approved by the membership.

Teamsters 150 and Campbell's Soup (Drug Testing Termination)

Grievant was selected for a random drug test but was unable to provide a sample. He proceeded to a hospital emergency room and was treated, and later provided a medical note to his employer indicating he suffered from a gastrointestinal illness that prevented him from freely urinating. The employer's Medical Review Officer ("MRO") determined that the note was insufficient to excuse the failure to provide a sample, and the grievant was terminated for refusing to submit to a test. Arbitrator Ronald Ho found the Company lacked just cause and ordered the grievant made whole. He reasoned that the Company did not have a clear policy governing how much information must be provided to the MRO and, when presented with the

MRO's decision, the employer did not inquire further or provide the grievant with an opportunity to correct any defects in the note.

Teamsters Local 853 and City and County of San Francisco (Insubordination Suspension)

Two employees were suspended for refusing a direct order to transport an oversized load away from the San Francisco Airport and through city streets. The employees refused the work when the City failed to provide them with a valid wide load permit. The City claimed it could not provide the permit because the work was to be done during the night shift and the office where the permit is kept was locked. The City argued that even if the employees were justified in refusing a direct order, the "obey now, grieve later" rule applied. Arbitrator David Nevins sustained the grievance, finding that the City's own policies require employees to follow all traffic laws, and that state law requires trucks carrying an oversize load to maintain the permit within the vehicle. He noted that failure to do so could result in criminal penalties for the driver and on that basis found the situation presented an exception to the "obey now, grieve later" doctrine. Further, the arbitrator determined, the City was "meaningfully at fault" because it could have, with only minor inconvenience, obtained a copy of the permit.

AFSCME Local 829 and County of San Mateo (Termination / Last Chance Agreement)

A dispatcher was terminated for alleged violation of a last chance agreement (LCA). Arbitrator D'Orazio ruled the County had the burden to establish that the LCA was intended to cover the conduct the employee was accused of, and that the grievant was guilty of the alleged conduct. The LCA prohibited the grievant from disparaging coworkers. Arbitrator D'Orazio concluded that the statements for which the grievant was terminated were within the expectations of her position as a dispatcher and so were not within the scope of the LCA. He ordered the grievant reinstated with back pay.

Teamsters Local 853 and City and County of San Francisco (Termination)

Grievant, a track maintenance supervisor for the City and County of San Francisco, was terminated for violation of the City's sexual harassment policy and for time card fraud. The City alleged that in exchange for sexual favors the grievant altered the time cards of the alleged victim to cover for absences and lateness, and that the grievant had punched time cards for other employees without docking their pay. Arbitrator Fred D'Orazio ordered the grievant reinstated and made whole. He concluded the alleged victim had lied during the course of the City's in-

(Continued on page 7)

Arbitration Roundup

(Continued from page 6)

investigation of the sexual harassment charges, and that the City's policy regarding pay for time not worked and prohibition on punching others' timecards was not enforced to such an extent that management must have been aware of the practice.

Teamsters Local 890 and Dole Fresh Vegetable (Termination) Grievant was terminated for "attempted fighting" which the grievant denied. The Company argued the supervisor overheard the employees fighting, which was sufficient to warrant termination. Arbitrator C. Allan Pool sustained the grievance on the basis that the Company failed to conduct a full and fair investigation and that the supervisor's version of events was not credible, and ordered the grievant reinstated with full back pay.

Teamsters Local 853 and Total Recall Secure Destruction Services (Drug Testing) Grievant was terminated for testing positive for marijuana metabolites

after a random DOT drug test. The Union grieved on the basis that the employee was on light duty and did not perform safety sensitive functions, and therefore should not have been subjected to DOT testing. Arbitrator C. Allan Pool reinstated the grievant with back pay, holding that the collectively bargained drug and alcohol use policy applied only to the use of controlled substances while on company premises and that the DOT rules should not be applied when the employee, because of a work restriction, is not performing DOT-covered functions.

AFTRA and KFSN-TV (Contract Interpretation)

In a dispute over whether an employee classification was covered by the parties' collective bargaining agreement, Arbitrator Barry Winograd found that although the definition of employees covered under the CBA was non-exclusive, the definition was subject to differing interpretations, and based on the parties' long-standing practice of covering the classification under the CBA, the arbi-

trator sustained the grievance ordering the employees included under the contract and made whole. Arbitrator Winograd noted that to deny the grievance would provide a right to the employer to unilaterally determine the scope of the bargaining unit, which is a right that must be bargained by the parties and not established by an arbitrator.

Teamsters Local 517 and Golden Empire Transit District Arbitrator Gerald McKay ruled that Golden Empire Transit District had to pay two employees \$10,000 each, plus interest, as a death benefit following the death of their spouses. The District agreed in collective bargaining with Teamsters Local 517 in 2006 to provide a \$10,000 death benefit, payable on the death of any employee or the spouse of an employee. The CBA was ratified in June, 2006, and in August, the spouses of two employees passed away.

Teamsters Local 856 and County of Alameda (Social Security Withholdings) Grievant was misclassified as

a miscellaneous employee, but was in fact a safety employee. The effect of the misclassification was that Social Security taxes were erroneously deducted from his paycheck for ten years. The Union grieved to recover social security taxes improperly withheld. The County argued that the grievance was stale under contract language that limits damages to 60 days' of pay, and that the grievant was not harmed by the deductions as he will receive benefits from the social security administration. Arbitrator Jerilou Cossack sustained the grievance, holding that the 60-day limitations language was subject to equitable tolling, that the deductions were improperly withheld and that the grievant should be made whole for the entire period; but based on evidence provided by an actuary as to the value of the social security benefits, the employee had no net damages as a result of the misclassification.

Employees May Pursue Internal Appeals Without Jeopardizing Right to Pursue State Discrimination Complaints

(Continued from page 4)

The Court's decision allows employees to pursue internal and informal remedies without fear of forfeiting their FEHA claim provided certain requirements are met. For equitable tolling to apply there must be: (1) timely notice; (2) lack of prejudice;

and (3) reasonable and good faith conduct on the part of the employee. The first two requirements are met where the employee's informal claim is filed within the statutory period and the informal claim is sufficiently similar to the employee's FEHA claim so that the employer's investigation of the

first enables it to fairly defend against the second claim. The Court did not define reasonable and good faith conduct, but did stress the need for the formal FEHA claim to be filed a "short time" after the end of the tolling period.

While the Court's ruling in *McDonald* provides guidance

on how employees may first pursue an alternative internal remedy before filing a formal FEHA discrimination complaint, it is important to remember that employees are not required to pursue internal remedies first but may instead choose to file a complaint directly with the DFEH.

BEESON TAYER & BODINE

Representing Employees
and Unions Since 1935

Bay Area Office

1404 Franklin Street, Fifth Floor
Oakland CA 94612
Phone: (510) 625-9700
Fax: (510) 625-8275

Sacramento Valley Office

520 Capitol Mall, Suite 300
Sacramento, CA 95814
Phone: (916) 325-2100
Fax: (916) 325-2120

Visit our website at www.beesontayer.com

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Gearing Up For Widespread Teacher Layoffs

In recent years, layoff of school employees has unfortunately been an annual Spring ritual for many school districts, as the state budget battle has waxed and waned, impacting school budgets projections and leading districts to shed staff at the close of each school year in June. Then, once the state budget is adopted in the summer or early fall, many of those same employees are rehired as finances stabilized for the next school year.

Beeson, Tayer & Bodine has been involved in layoffs and related hearings held to confirm that the employment data on which the districts rely are correct as to the

individuals threatened with layoff, and that the rehire rights are in place for the next school year.

This Spring the layoff ritual will be repeated but on a much greater scale. Given the ongoing budget impasse and impending fiscal disaster in California, indications are that public school employees statewide will face massive layoffs soon.

There's talk of getting legislative authority to "pink-slip" teachers and other school employees mid-spring in addition to the end of the school year. The cuts will be wide and deep. For instance, the Sacramento City Unified School District is looking at closing 28 schools

and laying off 500 teachers out of its 3,000-member teaching staff. Those kinds of reductions will be seen in small school and medium-size school districts as well.

As always, we BT&B will do all we can to save employees' jobs.



Tri-Valley Growers Chapter 11 Bankruptcy Success

Tri-Valley Growers filed Chapter 11 on July 10, 2000 and the company ceased doing business in 2001 when substantially all of its assets were sold. We represented the union employees at Teamsters Locals 601, 748, and 857 and filed vacation, sick leave, sabbatical, severance and other claims on their behalf total-

ing \$4,866,811.00. The Bankruptcy Court approved 98.4% of those claims in September 2008. Under the settlement, Union members will receive 100% their allowed priority claims (\$422,731.19) and 23 % of their allowed unsecured claims (\$4,368,561.09), for a total distribution of over \$1.4 million.