

April 2008

## TOP OF THE NEWS SUITS FOR 401K LOSSES

In a decision that could open the floodgates for lawsuits against retirement-plan administrators, the U.S. Supreme Court has ruled that individuals have a right to attempt to recover losses they believe were caused by fiduciary misconduct.

“... \$2.7 TRILLION IN 401(K) RETIREMENT PLANS.”

The unanimous decision covers some 50 million U.S. workers who have invested upwards of \$2.7 trillion in 401(k) retirement plans.

In overturning a ruling last year by the 4th U.S. Circuit Court of Appeals in Richmond, Va., the Supreme Court said that James LaRue should be allowed to try to recoup \$150,000 he believes was lost from his retirement account when the plan manager failed to follow his directions on how to invest the money. The ruling marks a turning point in the interpretation of the Employee Retirement Income Security Act and underscores how workers are now making the biggest decisions about their retirement nest eggs, as more companies turn away

from traditional pension plans in favor of retirement-investment accounts.

“Defined contribution plans dominate the retirement-plan scene today,” Justice John Paul Stevens wrote in his opinion for the court.

While the decision allows individual suits as well as employee-group litigation to be brought against plan administrators under the fiduciary-breach claim, it does not stipulate that relief will be available.

“I do not mean to suggest that these are settled questions,” Chief Justice John Roberts Jr. wrote in his opinion. “They are not. Nor are we in a position to answer them.”

Traditional plans typically guarantee a fixed monthly benefit, while the value of a 401(k) plan is dependent on how much money is contributed and how the money is invested over a period of time. LaRue claimed that his plan administrators ignored his instructions on at least two occasions to move portions of his stock-market holdings, resulting in the \$150,000 loss.

Stevens said that federal law covers more than just a plan’s loss because it does “authorize recovery for fiduciary breaches that impair the value of plan assets in a participant’s individual account,” according to the opinion. [PE]

## Cell Phone “Hands Free” Guidelines Enclosed!

### President's Report ~Dave Miller~

#### “Hands-Free!”



**It is claimed that 30% of all accidents are caused by distracted drivers. Because of such a belief, the State of California has enacted cell phone laws for drivers that become effective very soon.**

These two new laws dealing with the use of wireless telephones while driving go into effect July 1, 2008.

The first new cell phone law prohibits all drivers from using a handheld wireless telephone while operating a motor vehicle. (Vehicle Code (VC) §23123). The law allows motorists 18 and over to use a cell phone if they use it with a hands-free device. The law allows a driver to use a wireless telephone to make emergency calls to a law enforcement agency, a medical provider, the fire department, or other emergency services agency. Also, the law does provide an exception for those operating a commercial motor truck or truck tractor (excluding pickups), implements of husbandry, farm vehicle or tow truck, to use a two-way radio operated by a “push-to-talk” feature.

However, the other new law (VC §23124) makes it illegal for drivers under the age of 18 to use a wireless telephone or hands-free device while operating a motor vehicle. [PE]

### “Open House”

**T**O CELEBRATE 44 YEARS IN BUSINESS - PACIFIC EMPLOYERS will be holding an Open House on April 18<sup>th</sup> from 2:00 to 6:00 PM. Join us in celebrating 44 Years of serving California employers with a unique combination of safety, human resources and labor relations services.

Come see the extensive redecorating on our Downtown Visalia offices as we will set the counters with a wide array of comestibles and libations (*eats & drinks*) and gather round for an afternoon of camaraderie based on many years of good relationships. [PE]

PS - A little birdy just told me that we will also be celebrating my 40 years with Pacific Employers. Twice as many reasons to show up! — Double Fun!! [PE]

We have met the enemy, and he is us. — Walt Kelly

# Pacific Employers

## Supervisors' Sexual Harassment Prevention Training

**Visalia Chamber of Commerce and Pacific Employers, will jointly host a state mandated Supervisors' Sexual Harassment Prevention Training Seminar & Workshop** with a continental breakfast on **April 23<sup>rd</sup>, 7:30am—10:00am, at the Lamp Liter Inn.**

RSVP Visalia Chamber - 734-5876 – \$25  
Certificate – Forms – Guides – Full Breakfast

## Court Cases

### ONLY "REASONABLE" FEES

**C**alifornia employers are very familiar with the negotiating leverage afforded to employees by the state's wage and hour laws. A California Court of Appeal took a step towards leveling the playing field in *Harrington v. Payroll Entertainment Services, Inc.*

An employee who had been underpaid \$44.63 in overtime filed a lawsuit on behalf of himself and all similarly situated employees. The court denied class certification and the case ultimately settled for \$10,500. The parties agreed that employee was the "prevailing party" for purposes of an attorney fee award, and agreed that the trial court would determine the reasonableness of the fee claimed by employee's lawyers.

The fee request submitted by the employee's lawyers totaled \$46,277. Defendant opposed the application, and the trial court denied it in its entirety. On appeal, the court agreed with employee that "reasonable" attorneys fees were mandated by statute. However, the court characterized the \$10,500 settlement of a \$44.63 claim as a "windfall" and refused to work a still greater injustice by awarding tens of thousands of dollars in attorney's fees. The court reasoned that such an award would not meet the "reasonableness" standard of the statute. Instead, the court awarded a total of \$500 in fees, and encouraged the employee to share his windfall with his attorneys.

This ruling recognizes that California's strict wage and hour laws can result in injustice if applied blindly, and may be helpful in injecting an element of reasonableness into future employee-employer negotiations. Please contact us directly to discuss any questions you may have regarding the impact of this decision as it relates to your business. [PE]

### EMPLOYEES NOT PERSONALLY LIABLE

**E**mployers and managers received some welcome news from the California Supreme Court when it ruled in *Jones v. The Lodge at Torrey Pines Partnership* that supervising employees could not be held personally liable in cases alleging claims of retaliation.

In *Jones*, a jury returned a verdict against the employer and an individual defendant supervisor, finding both liable for retaliating against an employee who had made a sexual orientation discrimination complaint. In reversing the appellate court's decision affirming that verdict, the California Supreme Court found that the statutory language prohibiting retaliation did not plainly provide for personal liability on retaliation claims. Drawing an analogy to discrimination claims, which also do not provide for personal liability of individual employees, the Court stated that:

*"All of these reasons for not imposing individual liability for discrimination – supervisors can avoid harassment but cannot avoid personnel decisions, it is incongruous to exempt small employers but to hold individual non-employers liable, sound policy favors avoiding conflicts of interest and the chilling of effective management, corporate decisions are often collective, and it is bad policy to subject supervisors to the threat of a lawsuit every time they make a personnel decision – apply equally to retaliation."*

Based upon these policy considerations, the ambiguous statutory language, and a review of legislative history, the Court held that there was no personal liability for retaliation claims. In analyzing this decision, employers should be mindful that, although individual employees are not personally liable, employers are still liable for any unlawful retaliation. Please contact us directly if you have any questions regarding the *Jones* decision. [PE]

### ILLEGAL IMMIGRANTS' FINES INCREASE

**M**ost employers are already aware that they must verify that their employees are eligible to work in the United States, and that they may be fined if they knowingly hire illegal immigrants. Currently, those fines vary from \$250 to \$11,000, depending on the offense.

The United States Attorney General and Homeland Security Secretary recently announced that these fines will be increased by twenty-five percent, the first such increase in nearly ten years. The government also announced that it is working on a plan to increase criminal penalties for the most egregious of employer-offenders.

You may contact us directly to discuss any questions relating to your obligations regarding verification of employee-eligibility to work in the U.S. [PE]

Want Breaking News by E-Mail?  
Just send a note to  
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Tell us you want the News by E-Mail!

**Cell Phone "Hands Free" Guidelines Enclosed!**



## Human Resources Question with Candice Weaver

### THE MONTH'S BEST QUESTION

#### More on Job Testing

**Q:** "I would like more information about using testing during the hiring process. What tests or inventories can we ask applicants to complete for screening purposes to identify work habit tendencies, computer skills, typing speed, etc.?"

**A:** In a previous column we discussed not running afoul of discrimination rules by performing background checks or other types of tests that could be considered discriminatory. This month we look at another aspect, testing that could result in wage and hour violations.

You can create a wage and hour violation by requesting an applicant to perform work for your firm, as a demonstration of their abilities, that is profitable to your firm. The moment they begin a task that benefits your firm, they are your employee, due wages, covered under Workers' Comp Insurance, etc. So it is clear first off, that you cannot have them do any tasks that profit the company.

The next step is to make sure that the tasks they undertake are ones that would be performed by them as an employee in the position for which you are hiring. There is no hard and fast rule regarding how much time or how many tasks, but it should be comprehensive in covering the important aspects of the job the applicant will be expected to do.

Much can be learned of an applicant as you allow them to determine the order of the tasks, which tasks should be accomplished first, how they are to be accomplished, accuracy, etc.

A standardized test is generally the easiest to score and compare. If you give the same test to all applicants it also provides the least chance of being considered discriminatory to any applicants. Remember to consider accommodation for those who have disabilities. [PE]

#### Dinner for 2 at the *Vintage Press*?



**That's right!** When a business that you recommend joins Pacific Employers, we treat you to an unlimited dinner for two at the *Vintage Press*. Phone us at 733-4256 or Toll Free 800 331-2592.

#### NO-COST EMPLOYMENT SEMINARS

The Small Business Development Center and Pacific Employers host this Free Seminar Series at the Tulare-Kings Builders Exchange on the corner of Lover's Lane and Tulare Avenue in Visalia, CA. RSVP to Pacific Employers at 733-4256 or the SBDC, at 625-3051 or fax your confirmation to 625-3053.

The mid-morning seminars include refreshments and handouts.

#### 2008 Topic Schedule

- ◆ **Safety Programs** - Understanding Cal/OSHA's Written Safety Program. Reviewing the IIPP or SB 198 requirements for your business.  
**Thursday, April 17th, 2008, 10am - 11:30am**
- ◆ **Family Leave** - Federal & California Family Medical Leave, California's Pregnancy Leave, Disability Leave, Sick Leave, Workers' Compensation, etc.; What are the Pitfalls & How do you handle them?  
**Thursday, May 15th, 2008, 10am - 11:30am**
- ◆ **Wage & Hour and Exempt Status** - Overtime, wage considerations and exemptions.  
**Thursday, June 19th, 2008, 10am - 11:30am**
- ◆ **Hiring & Maintaining "At-Will"** - From the thought to hire to putting to work, we discuss maintaining procedures that protect you from the "For-Cause" Trap!  
**Thursday, July 17th, 2008, 10am - 11:30am**
- ◆ **Record Keeping** - Forms, Posters, Signs, Handouts, Fliers - Just what paperwork, posters, flyers and handouts does an Employer need?  
**Thursday, September 18th, 2008, 10am - 11:30am**
- ◆ **Guest Speaker Seminar** - Annually we bring you a speaker for a timely discussion of labor relations, HR and safety issues of interest to the employer.  
**Thursday, October 16th, 2008, 10am - 11:30am**
- ◆ **Discipline & Termination** - The steps to take before termination. Managing a progressive correction, punishment and termination program.  
**Thursday, November 20th, 2008, 10am - 1:30am**

There are No Seminars in August & December

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Celebrating 43 Years!

## *"Open House" Invitation Below*

Articles in this Newsletter have been extracted from a variety of technical sources and are presented solely as matters of general interest to employers. They are not intended to serve as legal opinions, and should not be deemed a substitute for the advice of proper counsel in appropriate situations.

