

WHAT'S NEW! TIP POOLING DECISIONS

In the first of two Tip Pooling decisions, the California Court of Appeal has held that a restaurant's distributions from a "tip pool" to employees who did not provide direct table service did not violate the state's Labor Code. *Budrow v. Dave & Busters of Calif., Inc.*

An employee claimed that the employer's tipping policy, requiring servers to contribute one percent of their gross sales to bartenders and other non-management employees, violated Section 351 of the Labor Code, which relates to tip sharing. The Court rejected the employee's claim, ruling that Section 351 did not limit tip pools to staff providing direct table service, and affirmed the trial court's judgment.

"... SECTION 351 DID NOT LIMIT TIP POOLS. . ."

The employer operates six restaurants in California and employs servers, cocktail servers, bussers, and bartenders. Aaron Budrow worked as a cocktail server during 2002. He filed a class action against the employer, claiming that its tip pooling policy violated Section 351 of the Labor Code because bartenders, who shared in the tips, did not provide direct table service. The trial court granted the employer's motion for summary judgment, and the plaintiff appealed. The appellate court first reviewed the language of Section 351, which provides: "No employer or agent shall collect, take, or receive any gratuity or a part thereof that is paid, given to, or left for an employee by a patron." Section 351 also states that "[e]very gratuity is hereby declared to be the sole property of the employee or employees to whom it was paid, given, or left for."

The court noted that the statute does not include any direct table service requirement. Accordingly, under the "plain meaning" rule of statutory construction, the court gave effect to the statute's clear and unambiguous terms.

The court further noted that, because Section 351 did not impose a "direct table service" requirement on tip pools, the court would not "delve into legislative intent and history," or "further parse the language of the statute to determine its meaning."

This case indicates that employers have flexibility in developing tip pooling policies suitable for their business. As long as the tip pools do not involve managerial employees or other agents of the employer, the courts will not aid plaintiffs who seek a bigger share of a tip pool, to the detriment of other wait staff. [PE]

PRIVATE RIGHT OF ACTION ON TIPS

A California Court of Appeal has ruled that there is a private right of action under Labor Code Section 351 which allows employees to recover civil damages for tip pooling violations.

In the case, *Grodensky v. Artichoke Joe's Casino*, the defendant casino implemented a mandatory tip pooling policy that required dealers to pay a set hourly amount into a tip pool, to be divided among shift managers, floor managers, board persons, and chip sellers. Plaintiff Grodensky, a dealer, filed a class action alleging claims for conversion, unfair competition, and violation of Labor Code sections 351 (tip pooling) and 1194 (minimum hourly wage laws). The trial court held in part that the mandatory tip pool was legal, but that the casino violated Labor Code section 351 by distributing a portion of the tip money to shift managers. [PE]

Hiring Checklist Enclosed!

President's Report ~Dave Miller~ No Lunch Waivers!



On duty meals? The state law regarding "On-duty Meal Breaks" as listed in the Industrial Welfare Commission Wage Orders states that employees may take on-duty meal breaks in certain circumstances. The circumstances for an on-duty meal break:

Permitted only when the nature of the work prevents an employee from being relieved of all duty;

- Must be agreed to in writing by the employee and employer;
- Must be paid; and
- May be revoked at any time in writing by the employee.

However, the Office of the State Labor Commissioner is not in agreement with the law. Like a number of other laws that are meant to clarify employment situations, no employer can make sense of a law that is interpreted at the whim of the bureaucrat. The Labor Commissioner has decided that there exists virtually

no situation in which "the nature of the work prevents an employee from being relieved."

For this reason, we must recommend that you be very circumspect when using the on-duty meal waiver form.

Hiring Checklist

We have enclosed a Hiring Checklist for your use in preparing the personnel files and list of necessary documents needed for the orderly processing of employees during the hiring process. The form is best used in conjunction with our Website which has numerous forms and documents for your use.

The Hiring Checklist notes the various forms to use and a checkmark designates those forms that are required by law, such as the I-9 Form and the IRS W-4 Form. Each of these forms is available just beneath the Hiring Checklist form on the Forms Page at - www.pacificemployers.com

Many other forms are also available, and we hope your trip to the Website will provide you with all you need in your hiring process. Any questions, just give us a call. [PE]

I like nonsense; it wakes up the
brain cells. — Dr. Seuss

Recent Developments

COBRA UNDER ARRA

The American Recovery and Reinvestment Act of 2009 (ARRA), which was recently made part of employment law, includes major changes to Health Insurance Continuation under COBRA.

"... FEDERAL GOVERNMENT WILL SUBSIDIZE 65% OF THE PREMIUM ..."

Under ARRA, workers terminated since September 1, 2008 may pay reduced COBRA premiums for a period of up to nine months. The federal government will subsidize 65% of the premium, and individuals are responsible for the remaining 35%. The changes were effective March 1, 2009 for most plans.

Key Provisions

- Covered Employers - Most employers providing group health plans must comply including employers subject to the federal COBRA rules and small employers subject to state mini-COBRA laws currently in effect, such as in California.
- Eligibility - Those eligible for COBRA continuation coverage beginning September 1, 2008.
- Payments - Reduced COBRA premiums from the March 1 date of enactment. The employer must either reimburse or provide a credit towards future premium payments for those who have paid in advance.
- Duration - Subsidy payments are for a maximum period of nine months.
- Extended Election Period - Those not enrolled in COBRA before the ARRA enactment may enroll during an extended election period which opens the date of enactment and ends 60 days after the plan administrator provides the individual notice of the extended election period.
- Expanded Notice Requirements - Required COBRA notification must also include notice of the availability of premium reductions and, if the employer permits such option, the option to enroll in different plan coverage.
- Employer Reimbursement - After receiving reduced COBRA premiums, employers may take a credit on their periodic payroll tax deposits.
- Employer Reporting Requirements - Employers seeking subsidy reimbursements must submit reports to the IRS on their Form 941.

To review these points in greater depth, go to the VCC website at www.visaliachamber.org/dmiller or to Pacific Employers' website at www.pacificemployers.com and click on the "What's New!" link. [PE]

Fresno Farm to Pay \$111,000

Terra Linda Farms of Fresno has been assessed \$111,000 by the California Department of Fair Employment and Housing, which says the company retaliated against farm labor contract workers Maria Santillan and Maribel Rivas by refusing to rehire the women after Ms. Rivas obtained a restraining order and filed a sexual harassment complaint with the DFEH.

"... AN EGREGIOUS VIOLATION OF CIVIL RIGHTS..."

Ms. Rivas, a Salvadorian immigrant who speaks only Spanish, had obtained a temporary restraining order in July 2005 after being

assaulted on the job by a co-worker who had followed her home and pulled a gun on her five years earlier.

She asked her supervisor, Ms. Santillan, also Spanish-speaking, to serve the order on the co-worker and in July 2005 filed a sexual harassment complaint against him.

But for the rest of the 2005 onion season, the women were subjected to repeated taunts and threats that they would be fired, the state says.

In 2006, Terra Linda Farms refused to recall the women who had graded, sorted, and bagged onions for the company during each consecutive onion season since 1995, says the department.

"California will not tolerate such an egregious violation of civil rights," says DFEH Director Phyllis Cheng.

Finding the Fresno grower liable for retaliation in violation of the Fair Employment and Housing Act, the commission ordered Terra Linda Farms to pay \$6,500 to compensate Ms. Rivas for her lost wages and \$90,000 to compensate Ms. Rivas and Ms. Santillan for their emotional suffering.

The commission further found Terra Linda Farms liable for failure to prevent discrimination and harassment in the workplace and ordered the company to pay a \$15,000 administrative fine, conduct retaliation prevention training, and post a notice stating that the commission found the company violated the FEHA and ordered it to pay damages. [PE]

The Lilly Ledbetter Fair Pay Act

On January 29, 2009, President Obama had signed the Lilly Ledbetter Fair Pay Act of 2009 (superseding a Supreme Court decision in the 2007 case of Ledbetter v Goodyear Tire & Rubber Co.) which is expected to greatly affect small businesses in terms of likely increases in legal and compliance costs.

"... EACH TIME THE INDIVIDUAL RECEIVES COMPENSATION ..."

According to the U.S. Equal Employment Opportunity Commission:

Under the Act, an individual subjected to compensation discrimination under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, or the Americans with Disabilities Act of 1990 may file a charge within 180 [or 300 days in jurisdictions that have a local or state law prohibiting the same form of compensation discrimination] days of any of the following:

- When a discriminatory compensation decision or other discriminatory practice affecting compensation is adopted;
- When the individual becomes subject to a discriminatory compensation decision or other discriminatory practice affecting compensation; or
- When the individual's compensation is affected by the application of a discriminatory compensation decision or other discriminatory practice, including each time the individual receives compensation that is based in whole or part on such compensation decision or other practice.

The Act has a retroactive effective date of May 28, 2007, and applies to all claims of discriminatory compensation pending on or after that date. [PE]

Hiring Checklist Enclosed!



Human Resources Question with Candice Weaver

THE MONTH'S BEST QUESTION

Tip Pooling

Q: "We have heard conflicting opinions on tip pooling. Are cooks and busboys allowed to participate in a tip pooling arrangement? What about supervisors?"

A: It is coincidental that two recent decisions of the California Court of Appeal appear within quick succession and appear to hold opposite views. However, these cases clarify the law.

In the first case the courts have exonerated the employer and allowed a tip pooling program to proceed in which employees other than the ones who actually have contact with the customer, share in the tips left by the customer.

The court ruled in this case that "[t]ip pools exist to minimize friction between employees and to enable the employer to manage the potential confusion about gratuities in a way that is fair to the employees." The court stated that "igniting an artificial controversy" over direct and indirect table service would serve "no useful purpose." Furthermore, there must be "flexibility" in determining the employees that the tip was "paid, given to or left for" and that the decision about which employees are to participate in the tip pool "must be based on a reasonable assessment of the patrons' intentions." Accordingly, the court concluded that non-servers may participate in tip pools.

The second case deals with sharing tips in a tip pooling plan that rewarded members of management including "shift managers, floor managers, board persons, and chip sellers."

The Court of Appeals upheld the trial court's finding that the casino's shift managers were agents of the casino, and therefore could not lawfully participate in the tip pool. [PE]

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 22nd, registration at 7:30am — seminar 8:00 to 10:00am, at the Lamp Litr, Visalia.

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



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.

2009 Topic Schedule

◆ **Safety Programs** - Understanding Cal/OSHA's Written Safety Program. Reviewing the IIPP or SB 198 requirements for your business.

Thursday, April 16th, 2009, 10am - 11:30am

◆ **Family Leave** - Federal & California Family Medical Leave, California's Pregnancy Leave, Disability Leave, Sick Leave, Workers' Compensation, etc.; Making sense of them.

Thursday, May 21st, 2009, 10am - 11:30am

◆ **Wage & Hour and Exempt Status** - Overtime, wage considerations and exemptions.

Thursday, June 18th, 2009, 10am - 11:30am

◆ **Hiring & Maintaining "At-Will"** - Planning to hire? Putting to work? We discuss maintaining "At-Will" to protect you from the "For-Cause" Trap!

Thursday, July 16th, 2009, 10am - 11:30am

There is No Seminar in August or December

◆ **Forms & Posters** - as well as Contracts, Signs, Handouts, Fliers - Just what paperwork does an Employer need?

Thursday, Sept. 17th, 2009, 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, Oct 15th, 2009, 10am - 11:30am

◆ **Discipline & Termination** - The steps to take before termination. Managing a progressive correction, punishment and termination program.

Thursday, Nov. 19th, 2009, 10am - 1:30am

Lemoore Chamber of Commerce

Employer Workshop presented by Pacific Employers

"Employer Policies - Hiring "At-Will"
Thursday, May 14th 10-11:30 a.m.

Lemoore Depot, 300 E Street, Lemoore
Information & Reservations:

Lynda Lahodny - (559) 924-6401 or
ceo@lemoorechamberofcommerce.com

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Hiring Checklist Enclosed!

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Small Business
of the Year



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Court Upholds WC Reforms

A California court of appeal has confirmed the expanded protections for employers intended by the Legislature when it passed the California Chamber of Commerce-supported workers' compensation reforms of 2004.

In the case *Benson v. Workers' Comp Appeals Board* 170 Cal. App. 4th 1535 (2009), the court held that if an employee suffers from a specific injury and a cumulative injury, regardless of when the injury occurred, they are entitled to two separate awards — one for each injury. The worker is not entitled to a combined award with a longer payout period as this is contrary to the legislative intent, the court ruled. [PE]

Arbitration Agreement "Unconscionable"

In *Franco v. Athens Disposal Co., Inc.*, the court held that an employment arbitration agreement was unconscionable and unenforceable, based on the agreement's inclusion of a provision prohibiting the employee from pursuing class relief or representative relief under Private Attorney Generals Act (PAGA) in arbitration.

The Employee claimed his former employer violated the Labor Code by denying him meal and rest breaks. The employer filed a petition to compel arbitration based on a written arbitration agreement the plaintiff had signed during his employment. The trial court found the arbitration agreement enforceable and granted the petition to compel arbitration. Plaintiff appealed, arguing that the arbitration agreement was unenforceable because the class action and PAGA waiver rendered the agreement unconscionable. [PE]

UNLIMITED CONSULTATION?

A benefit of Pacific Employers' Membership is unlimited, direct, phone consultation on labor, safety or personnel questions on the Pacific Employers' Helpline at (559) 733-4256 or Toll Free (800) 331-2592

More Than 100 arrested in Statewide Undercover Sting

Simultaneous undercover sting operations in five counties throughout California including two in the Central Valley in March netted more than 100 unlicensed contractors, the Contractors State License Board says. Among the 107 arrested, several were people with outstanding arrest warrants.

In the stings, CSLB investigators posed as homeowners and invited suspected unlicensed operators to houses to bid on various construction jobs, ranging from landscaping, fencing and concrete to cabinets, roofing and painting.

The operations were conducted in Contra Costa, Kern, Los Angeles, Riverside and Tulare Counties.

The CSLB also conducted a sting on what it terms a phony contractor who is believed to have scammed at least two consumers in different parts of the state out of more than \$250,000. Gerald Thissen, 51, drove 275 miles from his home in Encinitas to Exeter, in Tulare County, to give CSLB undercover investigators a rough estimate of between \$300,000 and \$400,000 for a 20,000-square-foot building that would be used to restore classic cars. He was arrested and will face at least one felony charge, the CSLB says.

Other notable arrests include a man with an arrest warrant for spousal abuse, and one who said he bought a fake driver's license, Social Security card and resident alien card at a flea market.

By law, all contractors who perform work that totals \$500 or more (labor and materials) must be licensed by CSLB.

Other unlicensed people who showed up and bid more than \$500 on contracting jobs were arrested and given "Notices to Appear" before a Superior Court judge where they will answer to misdemeanor charges of contracting without a license and, in many cases, for illegal advertising. The charges carry a maximum of six months in jail or a \$1,000 fine for the first offense. A second violation carries a mandatory 90-day jail sentence. [PE]