Pacific Employers
MANAGEMENT ADVISOR
Over 50 Years of Excellence!
April 2015

WHAT'S NEWS!

Heat Illness Prevention Revised!

California's Occupational Safety & Health Standards Board (the "Board") has now voted to approve major revisions to the state's heat illness prevention standard (8 CCR 3395).

The Board has requested a May 1 effective date (in time for the growing season), instead of July 1. Affected employers will have just a few weeks to revise their heat illness prevention plans, institute new procedures and update training.

The threshold for automatically providing shade has been lowered from 85 degrees to 80 degrees. Shade must now be provided by means "that does not deter or discourage access or use." This phrase does not appear to truly be an occupational safety or health standard but one catering to preference. And it seems ripe for "gotcha" disputes over what exactly discourages access or use. Additionally, the shade provided must accommodate all employees who are on a rest or recovery period (previously the shade needed to accommodate only 25% of the employees on shift). During meal periods, the shade must accommodate all employees on their meal period who remain on-site.

When an employee chooses to take a preventative cool-down rest, the employer must monitor the employee, ask if he or she is experiencing symptoms of heat illness, and encourage the employee to remain in the shade. If the employee exhibits signs or reports symptoms of heat illness, the employer must provide appropriate first aid or emergency response. The employer cannot order the employee back to work until any signs or symptoms of heat illness have abated.

The high-heat procedures (applicable when the temperature meets or exceeds 95 degrees) were expanded in several ways including the requirement that employers observe employees for alertness and signs or symptoms of heat illness was expanded to list specific means of observation: (1) a mandatory buddy system, (2) observation by a supervisor or designee (for 20 or fewer employees), or (3) regular communication with a solo employee (e.g., by radio or cell phone).

The employer must designate one or more employees at each worksite as authorized to call for emergency medical services. Other employees may call when no designated employee is available.

Employers must conduct pre-shift meetings covering high-heat procedures, encouraging employees to drink plenty of water and reminding employees of their right to take cool-down breaks.

The new changes will require employers to:

- Closely observe new employees during their first two weeks working in a high heat area, as well as all employees during heat waves;
- Provide shade for all workers on a rest or meal break at 80°F (lowered from 85°F), with at least enough shade to accommodate all workers who remain onsite during meal periods;
- Provide water that is "fresh, pure, suitably cool, and provided to employees free of charge" – to stop employers from reportedly providing free water that is warm and undrinkable while selling bottled water kept in coolers;
- Provide water and shade "as close as practicable" to the workers (likely to be interpreted in new Cal/OSHA guidance documents), and encourage people to take preventative cool-down rest breaks in the shade and drink water;
- Implement stronger provisions for five industries when "high heat" conditions kick in a 95°F, including a system to stay in contact with all workers, close observation of those with early signs of heat-related illness, and a mandatory cool-down rest period every two hours for agricultural workers; and
- Develop emergency response procedures, incorporate them into a beefed-up written heat illness prevention plan, and train workers about how to activate them.
- Make the plan available at the worksite.

Employers with outdoor worksites should now prioritize a review and update of their heat illness prevention plans. Employers will not only face Cal/OSHA penalties if they are not in compliance, but also additional Labor Code penalties for failure to provide heat recovery periods. *See Labor Code § 226.7.* [PE]

Pre-Employment Inquiry GuidelinesEnclosed!

President's Report
~Dave Miller~

July 1, 2015 - Sick Leave & CFRA Regulations

Mandatory paid sick leave will not be the only new rule affecting California employers this summer. Also effective on July 1 are amendments to the California Family Rights Act (CFRA) regulations, just approved by the Office of Administrative Law.

These regulations will more closely align the CFRA with the federal Family and Medical Leave Act (FMLA) regulations, welcome news to CA employers who have grappled with the overlay of the FMLA regulations (amended in 2008) and the pre-2008 CFRA regulations (which did not incorporate the FMLA's 2008 amended regulations.) Nonetheless, some differences still exist between state and federal family and medical leave laws, including how the CFRA coordinates with state pregnancy disability leave laws.

The amended CFRA regulations include guidance on certain definitions (such as how to determine when businesses will be considered joint employers under CFRA), include changes to the mandatory poster requirement, and change what information employers must include on the certification form they make available to health care providers who are asked to certify leave for serious health conditions.

ALSO: Following an amendment (AB 2053) to the Fair Employment and Housing Act (FEHA) that takes effect this year, California employers that are subject to the mandatory sexual harassment training requirement for supervisors must now include an additional training topic: prevention of "abusive conduct." [PE]

The only difference between death and taxes is that death doesn't get worse every time Congress meets. – Will Rogers

Recent Developments

Paid Leave In DOL Budget Proposal

A $2 billion paid leave initiative as well as millions for enforcement of laws on equal opportunity, wage and hour issues, safety, whistleblowing, and retirement security are among the priorities outlined in President Barack Obama's fiscal year 2016 budget for the U.S. Department of Labor (DOL).

"... following the example of California, ..."

The DOL announced that the budget includes $2 billion for a Paid Leave Partnership Initiative to help as many as five states launch paid leave programs following the example of California, New Jersey, and Rhode Island. The DOL announcement said participating states would be eligible to receive funds for the initial setup and half of benefits for three years. The budget also includes a $35 million State Paid Leave Fund to provide technical assistance and support to states as they build the infrastructure needed to launch paid leave programs in the future, according to the DOL announcement.

Enforcement Funds

The budget also includes nearly $1.9 billion for the DOL's worker protection agencies:

- $207 million for the Employee Benefits Security Administration, which deals with retirement, health, and other benefits employers offer. The budget also includes proposals to make saving easier for workers without employer-based retirement plans, according to the DOL.
- $114 million for the Office of Federal Contract Compliance Programs to enforce equal employment opportunity laws affecting federal contractors.
- $277 million for the DOL's Wage and Hour Division. The DOL said the funds would "ensure workers receive appropriate wages and overtime pay, as well as the right to take job-protected leave for family and medical leave purposes."
- $592 million for the Occupational Safety and Health Administration for enforcement of safety and health regulations, inspections of hazardous workplaces, and strengthening protections for whistleblowers against retaliation.
- $395 million for the Mine Safety and Health Administration for enforcement of mine safety regulations.

The overall DOL budget calls for $13.2 billion in discretionary funding. It's part of the president's $3.99 trillion federal budget. The spending plan faces stiff opposition in Congress. [PE]

What is a "Spouse" - FMLA Final Rule

Effective March 27, 2015, workers in legal, same-sex marriages, regardless of where they live, will now have the same rights as those in opposite-sex marriages to federal job-protected leave under the Family and Medical Leave Act (FMLA) to care for a spouse with a serious health condition.

"... updates the FMLA regulatory definition of "spouse"

The U.S. Labor Department has just announced a rule change to the FMLA in keeping with the U.S. Supreme Court ruling in United States v. Windsor. That ruling struck down the federal Defense of Marriage Act provision that interpreted "marriage" and "spouse" to be limited to opposite-sex marriage for the purposes of federal law.

The rule change updates the FMLA regulatory definition of "spouse" so that an eligible employee in a legal same-sex marriage will be able to take FMLA leave for his or her spouse regardless of the state in which the employee resides. Previously, the regulatory definition of "spouse" did not include same-sex spouses if an employee resided in a state that did not recognize the employee's same-sex marriage. Under the new rule, eligibility for federal FMLA protections is based on the law of the place where the marriage was entered into. This "place of celebration" provision allows all legally married couples, whether opposite-sex or same-sex, to have consistent federal family leave rights regardless of whether the state in which they currently reside recognizes such marriages. [PE]

Appeals Court Tosses EEOC Complaint

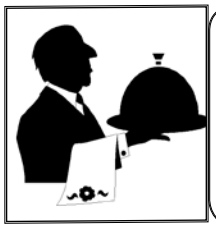
The EEOC has pushed hard in recent years to curb employer use of background checks in hiring decisions. In 2009, the EEOC filed suit against **Freeman**, a national provider of integrated services, alleging that Freeman relied on credit and criminal background checks that caused a disparate impact on black and male job applicants.

EEOC Accused of "Cherry-Picking" Data."

A federal judge in Maryland granted summary judgment to Freeman, slamming the EEOC's questionable use of shoddy expert reports (referring to the reports, with particular focus on expert Kevin Murphy's work, as "unreliable," "rife with analytical errors," "mind-boggling," and "laughable,"). Within the thirty-page Memorandum Opinion, Judge Titus dedicated nearly the entire legal analysis section to criticizing the EEOC's expert reports and data.

Last month the Fourth Circuit affirmed Judge Titus' order of summary judgment. The court called out Murphy's expert report for its "alarming number of errors," "analytical fallacies," and "utterly unreliable analysis." Judge Agee wrote a separate concurring opinion with the apparent purpose of telling the EEOC he wasn't mad, just disappointed (in the EEOC's "litigation conduct"). As with the district court, the Fourth Circuit focused almost exclusively on the shortcomings of Murphy's expert report, and in doing so avoided the need to address the legal boundaries of permissible background checks. Judge Agee explicitly referenced a recent Sixth Circuit case where the EEOC relied on Murphy and lost, noting that the expert is "no stranger to having courts reject his work for improper sampling." (*EEOC v. Kaplan Higher Educ. Corp.,*)

Although *Freeman* and *Kaplan* provide employers with enough ammunition to discredit any future Murphy report, these cases hardly illustrate courts' positions on whether background checks can cause a disparate impact. Although the EEOC might see these losses as reason to focus on different employment practices, it could just as easily hire a different expert and keep pushing. Employers should therefore continue to exercise caution when using background checks in the application process, avoiding blanket consideration for all positions. [PE]



Human Resources Question with Candice Weaver

The Month's Best Question

Wage Order Questions

Q: "I recently received Pacific Employers' new 2015 All-In-One Poster. It says I need to have a Wage Order posted. Which Wage Order do I need?"

A: Industry orders apply to all classifications of employees in an industry regardless of the work they do. For example: The Manufacturing Industry (Order 1) covers everyone in the manufacturing industry from production employees to clerical staff and janitors.

The occupational orders -- 4, 14, 15, and 16 -- cover workers engaged in occupations not covered by the industrial orders.

Several major kinds of businesses -- including banks, public utilities, insurance companies, accountants and others employing office workers -- do not fall under one of the industry-wide orders. Their workers are covered by Wage Order 4, which includes professional, technical, clerical, mechanical and similar occupations.

The other occupational orders are Wage Order 14 (agricultural occupations), Wage Order 15 (household occupations) and Wage Order 16 (onsite occupations in the construction, drilling, logging and mining industries).

In some circumstances where employees are covered by an occupational order, the employer may need to post more than one order. For example: A construction company (Wage Order 16) employing office help also needs Wage Order 4. An agricultural business (Wage Order 14) with an after-harvest operation will also need either order 8 or order 13.

Go to Pacific Employers' Links page *(see link below)* where there is a link to an Alphabetical Index of Businesses and Occupations including which IWC wage orders govern them. If you still aren't sure which order you need, review the pamphlet on this subject listed below the Alphabetical Index. ***http://pacificemployers.com/links.htm*****.** [PE]

Seminar Topic Talk with Dawn

Heat Illnes is Big Topic at Safety Program (IIPP) Seminar

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

The Heat Illness Prevention Plan has been substantially changed with new requirments in all provisions. Make sure that your Safety Program is up to date with all the required changes in Heat Illness, Violence and Hazard Communications. Attend our free Seminar on Thursday April 16th from 10-11:30am at the Tulare-Kings Builders Exchange (1223 S. Lover's Lane in Visalia).

Dave Miller and Candice Weaver will be our presenters. RSVP to Pacific Employers at 733-4256 to make sure you have a spot. [PE]

No-Cost Employment Seminars

Pacific Employers hosts this Seminar Series at the Builders Exchange at 1223 S. Lover's Lane at Tulare Avenue, Visalia, CA. RSVP to Pacific Employers at 733-4256.

These mid-morning seminars include refreshments and handouts.

2015 Topic Schedule

♦ **Safety Programs -** Understanding Cal/OSHA's Written Safety Program. Reviewing the IIPP or SB 198 requirements for your business.
Thursday, April 16th, 2015, 10 - 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, 2015, 10 - 11:30am

♦ **Wage & Hour and Exempt Status -** Overtime, wage considerations and exemptions.
Thursday, June 18th, 2015, 10 - 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, 2015, 10 - 11:30am

There is No Seminar in August

♦ **Forms & Posters -** as well as Contracts, Signs, Handouts, Fliers - Just what paperwork does an Employer need?
Thursday, September 17th, 2015, 10 - 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 15th, 2015, 10 - 11:30am

♦ **Discipline & Termination -** The steps to take before termination. Managing a progressive correction, punishment and termination program.
Thursday, November 19th, 2015, 10 - 11:30am

There is No Seminar in December

Sexual Harassment & Abusive Conduct Training

Visalia Chamber of Commerce & Pacific Employers, will host a Supervisors' Sexual Harassment & Abusive Conduct Prevention Training Seminar & Workshop with a continental breakfast on April 22nd, registration at 7:30am Seminar 8:00 to 10:00am, at the Lamp Liter, Visalia.

RSVP Visalia Chamber - 734-5876
PE & Chamber Members $35 - Non-members $50
Certificate – Forms – Guides – Full Breakfast
Future 2015 Training dates: 7-22-15, 10-21-15

Pacific Employers
306 North Willis Street
Visalia , CA 93291
559 733-4256
(800) 331-2592
Fax 559 733-8953
www.pacificemployers.com
email - peinfo@pacificemployers.com

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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.

2014 Union Membership Down Slightly

The U.S. Bureau of Labor Statistics (BLS) reported in January that the 2014 union membership rate, the percent of wage and salary workers who were members of union was 11.1%, down two-tenths of a percentage point from 2013.

The number of wage and salary workers belonging to unions, at 14.6 million, was little different from 2013. In 1983, the first year for which comparable union data are available, the union membership rate was 20.1%, and there were 17.7 million union workers.

Public-sector workers had a union membership rate (35.7%) more than five times higher than that of private-sector workers (6.6%).

Workers in education, training, and library occupations and in protective service occupations had the highest unionization rate, at 35.3% for each occupation group. Men had a higher union membership rate (11.7%) than women (10.5%) in 2014.

Black workers were more likely to be union members than were white, Asian, or Hispanic workers. [PE]

New Pension Formulas Do Not Impair Existing MOUs

The California Court of Appeal, Fourth District, recently held, in *Deputy Sheriffs' Association of San Diego County v. County of San Diego*, that the implementation of new defined benefit formula provisions for "new members" does not impermissibly impair agreements with employee groups where the pre-existing agreements contain conflicting terms.

The Memorandum of Understanding "MOU" between San Diego County and the Deputy Sheriff's Association of San Diego County (DSA) contained provisions requiring the County to provide covered employees with a defined pension benefit based on a 3% at age 55 formula. When the Public Employees' Pension Reform Act of 2012 (PEPRA) became effective in January of 2013, pension formulas for new members after that date were altered by operation of the statute.

The Court found that the pension formula in question could be modified without violating the Contracts Clause until (and unless) the right to it becomes vested – based on an individual performing services under the agreement (also requiring them to be employees covered by the agreement), occurring prior to the effective date of the Statute.

PEPRA contained an express provision stating that the requirement regarding employee contributions would not apply until an existing MOU expired; the plain language of the statute resolves the issue without a need to address the Constitutional questions. [PE]

Immigration Status is Irrelevant!

A California appeals court issued a decision granting a new trial for an undocumented immigrant whose immigration status was revealed to jurors despite its irrelevance to the issues in the case. *Velasquez v. Centrome, Inc. dba Advanced Biotech.*

In this case, a former factory worker named Wilfredo Velasquez sued Advanced Biotech, Inc. for its alleged failure to tell his employer about the harms of a chemical he was exposed to while on the job — exposure which he says led to a devastating lung disease.

But during the jury selection, the trial judge revealed to jurors that Velasquez was undocumented, an action that, in the words of our amicus brief, "unnecessarily injected prejudice into the selection process, making it impossible to know whether Mr. Velasquez received his constitutionally guaranteed fair trial by impartial jurors." The jury concluded that Advanced Biotech had indeed been negligent — yet still awarded no damages to Velasquez, meaning that he, in effect, lost his case.

The appeals court granted him a new trial. The state appeals court noted that "cases both in California and in multiple other jurisdictions have recognized the strong danger of prejudice attendant with the disclosure of a party's status as an undocumented immigrant." [PE]

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