

WHAT'S NEW!

NINTH CIRCUIT CHANGES ITS MIND COMMUTE TIME MAY BE COMPENSABLE!

An important issue for many employers is whether an employee's time spent commuting to and from work is compensable. Generally, employee commute time does not need to be compensated. California courts have recognized an exception to this general rule where an employer requires employees to use employer-provided transportation.

In March of this year, the Ninth Circuit Court of Appeals reversed its prior ruling on this issue and expanded this exception—holding that under California law an employer must compensate its employees for time spent commuting when the employee is driving a company-provided vehicle with restricted use. *Rutti v. Lojack Corp.*

“... BECAUSE THE EMPLOYEES WERE SUBJECT TO THE CONTROL OF LOJACK.”

THE NINTH CIRCUIT'S DECISION

The Ninth Circuit reaffirmed most of its prior decision, concluding that, under federal law, time spent commuting in a company-provided car is not compensable under the Employee Commuter Flexibility Act (ECFA), which is part of the Portal-to-Portal Act. Under the ECFA, an employer need not pay an employee for time spent commuting to and from work in a company-provided vehicle so long as the use of the vehicle is subject to an agreement between the employer and the employee. This is true even if the use of the vehicle is restricted (such as prohibiting passengers or requiring that the car be used for work only).

Under California law, however, the Ninth Circuit held that commute time in a company-provided vehicle may be compensable. Citing the California Supreme Court's decision in *Morillion v. Royal Packing Co.*, the Ninth Circuit held that the commuting time was compensable in this case because the employees were subject to the control of the employer, *Lojack Corp.* The court focused on the fact that the employees were required to use the

company car and answer work calls while driving, and were prohibited from making personal calls and giving rides to passengers. The court also noted that Lojack limited the use of the car to work only.

The court also addressed the application of the de minimis rule, which provides that an employer need not pay an employee for small amounts of time worked per day. Courts have interpreted de minimis to mean between 5 to 10 minutes per day. The court concluded that an employee's time spent working before his shift was not compensable under the de minimis rule because his pre-shift tasks only took about one minute. The court further noted that the employee failed to explain why this work had to be done before his shift started.

The court held that time spent performing a post-shift task of uploading data onto Lojack's computer system, however, was not de minimis and should be compensated, explaining that data transmission was a recurring daily task, and primarily for the benefit of Lojack. There was also evidence that the time spent on this task was not de minimis because in some instances the computer system failed to work, requiring employees to spend additional time confirming the task.

EFFECT ON CALIFORNIA EMPLOYERS

Employers in California should pay special attention to their policies regarding employer-provided vehicles. If an employer does not want to compensate its employees for commute time in company-provided vehicles, the employer should: (1) make the use of company-provided vehicles or transportation optional, not mandatory; and (2) not impose restrictions limiting the personal use of that vehicle by the employee (such as restricting use for “work purposes only,” prohibiting passengers, etc.).

The decision in *Rutti v. Lojack Corp.* confirms that de minimis amounts of work need not always be compensated. To receive the benefit of the de minimis rule, the employer must show that: (1) it would be practically and administratively difficult to record the time; (2) the total amount of time worked is relatively small; and (3) the additional work is not regularly performed. Employers, of course, may avoid the de minimis issue entirely by prohibiting employees from working before or after their shift, and by restricting employees' ability to access to electronic data off-site, such as e-mails, web-sites, or intranet sites. [PE]

Workplace Violence Seminar Flyer Enclosed!

President's Report

~Dave Miller~

N/L On the Website

For several years our monthly newsletter has been posted on the Pacific Employers website.

We generally get it posted at the same time we send it to the printer, which is nearly always before the first of the month.

We plan to begin announcing its arrival on the website with a email newsletter that links to the new Newsletter and its insert.

Those currently receiving the “Management e-Advisor” will be getting the alert by email. If you would like to receive the E-mail Alert and the Management e-Advisor just drop us a line at peinfo@pacificemployers.com — If you would rather only receive the Newsletter on the Internet, to save the environment or limit clutter, you may request we discontinue sending it by mail.

The link to the Pacific Employers' Newsletter website page is <http://www.pacificemployers.com/newsletters.htm>



Violence in the Workplace

The problem of violence in the workplace is coming front and center again with new acts of workplace rage and mayhem back in the news.

Q. — Have your employees or supervisors ever been threatened by a disgruntled worker or terminated co-worker?

Q. — Do you have a plan to secure your employees and your place of business, and, are you aware of what you need to do?

Under CA law, every employer must maintain a written safety program addressing the potential for violence in the workplace and must train employees in the hazards specific to their jobs.

Pacific Employers, along with several other firms involved in workplace safety, will be providing this information at a Workplace Violence Seminar on May 11, 2010 at the International Agri-Center.

There will be several speakers including local law enforcement, nationally recognized security experts and attorneys to answer all of your questions and most importantly provide you with information so that you will be prepared to deal with these types of issues in your business in this challenging economy. For further details see the flyer Enclosed. [PE]

“It's never just a game when you're winning.” - George Carlin (1937 - 2008)

Recent Developments

Senate Approves COBRA Subsidies & Unemployment Benefits through 2010

The U.S. Senate has approved a tax extender package (H.R. 4213, Tax Extenders Act of 2009) that contains an extension of tens of billions of dollars in tax breaks and other provisions aimed at creating jobs. The bill also provides extensions through December 31, 2010, of health insurance subsidies for unemployed workers under the Consolidated Omnibus Budget Reconciliation Act (COBRA) and emergency unemployment insurance benefits.

Additionally, to encourage companies to continue their defined benefit pension programs, the bill provides for temporary relief from statutory pension funding obligations. The bill also contains an assortment of tax breaks, program extensions, and other provisions.

A temporary measure signed by President Barack Obama on March 2, 2010, extends COBRA subsidies to unemployed workers until March 31, 2010, and emergency UI benefits until April 5, 2010.

While the Senate bill is similar to the one passed by the House on December 9, 2009, the Senate-approved bill contains many substitutes and amendments the House has not considered. According to new House Ways and Means Committee Chair Sander Levin, the next step for the bill may be a reconciliation conference between the Senate and House. Creating a conference committee, of course, will prolong the process of the bill. [PE]

Court Awards Employer \$4.5M from EEOC

The Equal Employment Opportunity Commission has been ordered to pay approximately \$4.5 million of a defendant's attorneys' fees and expenses because, in the judge's opinion, the agency's actions in pursuing the multi-victim sexual harassment lawsuit were "unreasonable, contrary to the procedure outlined by Title VII and imposed an unnecessary burden upon [the defendant] and the court." *EEOC v. CRST Van Expedited, Inc.*

... "FRIVOLOUS, UNREASONABLE OR WITHOUT FOUNDATION" ...

The EEOC's Chicago District Office sought relief for 270 women who the agency alleged were subjected to a hostile work environment by their employer, a trucking company. As pre-trial discovery progressed, the district court granted a series of motions that reduced the number of women remaining eligible for relief to 67. Chief Judge Linda Reade then barred relief even for the 67 and dismissed the lawsuit. She found the agency did not, prior to the filing its lawsuit, investigate specific allegations or attempt to conciliate relief for any of the 67 women. The EEOC has appealed the dismissal of the lawsuit to the Eighth Circuit Court of Appeals.

In ruling on the employer's motion for attorneys' fees and expenses, Judge Reade determined that the EEOC's lawsuit met the standard of being "frivolous, unreasonable or without foundation" to warrant

granting the employer's motion. According to the Judge, the agency pursued a strategy of "sue first, ask questions later," which she found to be "anathema to Congressional intent." The EEOC argued its actions were not unreasonable because the court's dismissal was "unexpected." This was a "red herring" in an attempt to avoid attorneys' fees by arguing the merits of the sexual harassment claims, the court ruled.

The EEOC's appeal of the dismissal of its lawsuit likely will affect EEOC pattern-and-practice of investigations and lawsuits. In these cases, the EEOC frequently identifies alleged victims as the litigation unfolds. If the dismissal is upheld, the agency may decide to identify all alleged victims during its investigation and conciliate meaningfully on each and every alleged victim prior to filing a lawsuit. This likely would bring more protracted EEOC investigations. However, such a change also would provide employers with concrete information on which to make early settlement assessments. [PE]

Obama Signs HIRE Bill

On March 18, 2010, President Obama signed the Hiring Incentive to Restore Employment Act (HIRE Act), also referred to as the Jobs Bill. This bill provides significant tax credits to businesses that hire unemployed workers.

Employer Exemption of 6.2% Social Security Payroll Contribution

The HIRE Act provides for employer tax credits totaling \$18 billion, in addition to \$20 billion available in funding for highway and transit programs. At its core, the bill grants employers an exemption for their 6.2% Social Security (FICA) payroll contribution for every new employee hired after February 3, 2010, and before January 1, 2011. The exemption is granted up to the FICA wage cap, \$106,800. This means employers could save a maximum of \$6,621 if they hired an unemployed worker and paid that worker at least \$106,800 by the end of the year. On a different scale, if an employer paid an employee \$53,400, it could save a maximum of \$3,310.

To qualify, a worker must certify by signed affidavit that he or she has not been employed more than 40 hours during the preceding 60-day period, is not being employed to replace another employee (except one who quit voluntarily or was fired for cause), and is not "related" to the employer under rules set forth in the U.S. tax code.

Starting March 19, 2010, the exemption will be applied to wages. To ease IRS implementation of the payroll tax exemption, the allowable exemptions from payroll taxes for the first calendar quarter of 2010 under the HIRE Act will be treated as an advance payment of taxes owed for the second calendar quarter.

Additional \$1,000 Tax Credit Available

An additional \$1,000 income tax credit is available to employers for every new employee retained for 52 weeks, to be taken on the employer's 2011 income tax. To qualify, the wages paid to the employee during the last 26 weeks must be at least 80% of wages paid for the first 26 weeks. [PE]

New Federal Employment Poster

The Department's Employment and Training Administration and Wage and Hour Division published a final rule implementing changes to the H-2A program effective March 15, 2010. One of the requirements in the rule is for employers who employ H-2A workers to display a new H-2A poster where employees can readily see it. The poster is also available in Spanish. It will be made available in other languages in the coming months. Poster is available on our Website's What's New and Forms page.

<http://www.pacificemployers.com/forms.htm>

<http://www.pacificemployers.com/whatsnew.htm>

[PE]



Dinner for 2 at the *Vintage Press*?

That's right! When a business that you recommend joins Pacific Employers, we treat you to dinner for two at the *Vintage Press*.
Call 733-4256 or 1-800-331-2592.

Workplace Violence Seminar Flyer Enclosed!



Human Resources Question with Candice Weaver

THE MONTH'S BEST QUESTION

Doing Background Checks

Q: *"We would like to weed out protentional problems during the hire process. Are background checks a good way to do it?"*

A: There is no question that background checks can help screen out potential problems and it is something we recommend. The problem is that the EEOC has also discovered that employers are using background checks to screen out more than troublemakers. Those who are not hired may claim that the employer is screening out those of a protected race or cultural group.

A recent surge in employment discrimination claims based on background checking has the Equal Employment Opportunity Commission keeping a closer watch on how employers evaluate job applicants.

The increase was so dramatic that the EEOC has launched the E-RACE initiative (Eradicating Racism and Colorism from Employment) aimed specifically at combating discrimination in employment selection.

A background check provides an employer with information about potential job candidates through reports such as criminal records, driving records and credit history that can help eliminate those who could pose a risk to the company.

In some cases the mere act of running the check can land employers in a costly lawsuit. Because certain minority groups have a disproportionate rate of negative records, such as convictions, arrests and poor credit ratings, screening for that information in background checks can exclude higher numbers of those applicants.

If a background check is necessary, employers should take steps to help reduce the risk of an employment discrimination claim:

- Clearly define job requirements and keep background screening limited to relevant positions. For example, only check driving records for position that involve operating a vehicle.
- Develop specific criteria for background checking and put it in writing.
- Apply testing criteria the same way to all applicants.

All employers should take the time to evaluate their use of background checks in hiring new employees. By eliminating unnecessary screening, they can eliminate the risk of a costly and damaging legal battle. [PE]

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 28th, registration at 7:30am — Seminar 8:00 to 10:00am, at the Lamp Liter, Visalia.

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

No-COST EMPLOYMENT SEMINARS

The Tulare-Kings Builders Exchange, along with 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.

2010 Topic Schedule

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

Thursday, April 15th, 2010, 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 20th, 2010, 10 - 11:30am

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

Thursday, June 17th, 2010, 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 15th, 2010, 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 16th, 2010, 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 21st, 2010, 10 - 11:30am

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

Thursday, November 18th, 2010, 10 - 11:30am

There is No Seminar in December

Want Breaking News by E-Mail?
Just send a note to
peinfo@pacificemployers.com
Tell us you want the News by E-Mail!

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

PRSR STD
U.S. Postage
PAID
VISALIA, CA
Permit # 441

Return Service Requested



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.

COBRA Subsidy Extended Again

On Tuesday, March 2, 2010, the President signed into law H.R. 4691, the "Temporary Extension Act of 2010," which provides short-term COBRA extensions.

Under H.R. 4691, the 65 percent, 15-month premium subsidy for laid-off workers is extended to those involuntarily terminated from March 1 through March 31.

Without the extension, employees laid off after Feb. 28 would have been ineligible for the COBRA subsidy. [PE]

Discrimination Complaints Near Historic High

In a year-end review, the Equal Employment Opportunity Commission reported that workplace discrimination complaints in 2009 reached the second-highest level in history. In total, 93,277 claims were filed with the Commission in 2009, resulting in a record-high \$294 million in payments or penalties through administrative enforcement and mediation.

The most frequently filed charges in 2009 were complaints alleging race-based discrimination (36 percent), retaliation (36 percent), and sex discrimination (30 percent). However, the data shows that three other types of discrimination complaints are on the rise. Disability complaints increased by 10 percent over 2008 levels, while national origin complaints rose 5 percent and religious discrimination claims were up 3 percent. Age-based claims dipped slightly from their record-high numbers in 2008.

Discharge claims continue to be the most costly. In this economic climate, every claim of discriminatory or retaliatory discharge carries greater economic risk, as the complainant will likely find it much harder to obtain new employment with comparable compensation. [PE]

Les Schwab Tire To Pay \$2M In Discrimination Case

The U.S. Equal Employment Opportunity Commission (EEOC) said it's reached a \$2 million settlement of its gender-based hiring lawsuit against Les Schwab Tire Centers.

The EEOC suit, in U.S. District Court for the Western District of Washington in Seattle, alleged that the Bend-based tire sales company "failed to hire qualified women for sales and service (tire changing) jobs at its stores in Washington, Oregon, California, Idaho, Montana, Nevada and Utah starting in 2004."

"While the parties have engaged in extensive litigation the past four years, we are pleased to work with Les Schwab to bring this case to a resolution and to start a new era of cooperation," EEOC Regional Attorney William Tamayo said in a statement.

In addition to the \$2 million, Les Schwab also agreed to submit reports to the EEOC detailing its compliance with the terms of the consent decree.

Les Schwab officials said they were pleased that the litigation with the EEOC is over.

"Resolution of this dispute allows Les Schwab to continue its strong focus on supporting our employees so that they can deliver excellent customer service," said Jodie Hueske, vice president of human resources for Les Schwab, in a statement. [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