Pacific Employers
Management Advisor
Celebrating 44 Years!
August 2008

Top of the News

"Small Business Of the Year"

Pacific Employers has much to celebrate in 2008! Several years ago we realized a long time dream of moving to Downtown Visalia. We then purchased an office building and began to remodel and redecorate. In April we celebrated 44 years in business with an Open House in the fully remodeled office. At that time we also celebrated Dave Miller's 40th anniversary with the company.

Visalia Chamber of Commerce Recognition

Most recently, the Visalia Chamber of Commerce honored Pacific Employers with an award of "Small Business of the Year" at its 55th Annual Awards Celebration done to the theme of a "Tropical Tribute." The entire evening was done in a Polynesian Style gala with island tropical dress as the uniform of the evening.

We Are Proud of Who we Serve!

What Pacific Employers has become has to do with a vision that began with the organization's non-profit founding. That has been to serve its subscribers by providing the answer to how do we deal with organizations, agencies and laws that control employment relationships,

Pacific Employers has endeavoured to deliver the correct answer to a waiting client with a minimum of cost and confusion. A vision is nice, but it takes a staff to implement it, and our organization has been blessed with individuals who have held to the vision in a way that has established the organization as a model for the industry.

"Pacific Employers has much to celebrate in 2008!"

Much of what we do has been because of the respect that we have for the business owners and operators that provides the financial and productive foundation for our country on which virtually all other activities reside. Our support of business persons, be they farmers, shopkeepers, contractors or manufacturers, recognizes the contribution they make to our way of life. [PE]

RSVP for ICE Seminar In October! *see Seminars - page 3*

President's Report
~Dave Miller~

Employer Waived Protections

A recent Ninth Circuit's decision in *Quon v. Arch Wireless Operating and The Ontario Police Department* can serve as a notice that employers can inadvertently waive the benefits of company confidentiality policies. These policies generally state that the computers, blackberries, and other electronic devices are owned by the company and that the company reserves the right to review all emails, text messages, and so on that are sent on Company equipment.

The major affect of these policies is that employees should have no expectation of privacy or confidentiality when using these resources; and that sending inappropriate, derogatory, harassing, or sexual messages or material is grounds for discipline, including termination of employment.

"Employers Need To Be Careful To Avoid Waiving The Protections Of Written Computer And Email Policies"

In *Quon,* the City of Ontario had contracted with Arch Wireless for text-messaging services. The City distributed the pagers, including to the two employees who were sergeants with the Ontario Police Department. The City had a typical "Computer Usage, Internet and E-mail Policy" that applied to all employees.

Under the City's contract with Arch Wireless, each pager was allotted 25,000 characters, after which the City was required to pay overage charges. The lieutenant in charge of the contract implemented an informal policy by telling employees that if they paid the overage on their assigned pager, then he would not have to audit the messages to determine whether the messages were work-related or personal.

The sergeants had gone over the monthly character limit a few times and had paid the City for the overages. In time, the lieutenant let it be known that he was tired of being a bill collector with employees who exceeded the allotted number of characters on their text pagers. The lieutenant requested transcripts of the pagers for auditing purposes and found that many of the messages were personal in nature and sexually explicit.

The sergeants sued both Arch Wireless and the city and others. The Court held that in light of the lieutenant's informal policy that he would not audit a pager if the user paid the overage charges, the plaintiffs had a reasonable expectation of privacy in their text messages as a matter of law – notwithstanding the City's written policies to the contrary.

This case cautions employers that it is possible to lose the benefits of their written computer and email policies. Employers wishing to maintain their rights should ensure that managers and supervisors do not inadvertently undermine the policies by adopting inconsistent practices or making inconsistent promises to employees. [PE]

"The difference between fiction and reality? Fiction has to make sense." - Tom Clancy

Recent Developments

Supreme Court Places Greater Burden on Employers

The United States Supreme Court has held that an employer sued under the Age Discrimination in Employment Act (ADEA) has the burden of establishing the reasonableness of its explanation for a suspect employment practice. This ruling carries significant adverse consequences for employers, exposing them to greater risk of liability under the ADEA when decisions are made to reorganize or reduce their workforce. *Meacham v. Knolls Atomic Power Laboratory.*

The ADEA prohibits employers from taking any action regarding an employee 40 years of age or older which would *"in any way . . . deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age."*

Congress recognized, in drafting the law, that unlike traits protected by Title VII such as race or religion, age can sometimes have a correlation to job performance. Therefore, Congress included a provision in the ADEA offering a valuable defense for employers, stating that *"[i]t shall not be unlawful for an employer . . . to take any action otherwise prohibited . . . where the differentiation is based on a reasonable factor other than age."*

In an earlier case, the Supreme Court held that the ADEA permits "disparate impact" claims where a specific employment practice (such as a layoff) has the effect of adversely harming older workers even though there was no intent to discriminate. In *Smith v. City of Jackson,* the Court noted that the "reasonable factors other than age" (usually abbreviated as RFOA) provision in the ADEA was an important safeguard against employer liability. But since the Court held that the employment practice in Smith was "unquestionably reasonable," it did not decide who had the burden of persuasion on the RFOA issue.

> "Employers sued under the ADEA will now have a more difficult time avoiding liability."

Disparate impact cases under discrimination laws are typically governed by a three-step analysis. Under this traditional approach, an employee must first identify a specific employment practice and establish that this practice is discriminatory. Second, the burden shifts to the employer, which may then offer a legitimate "business necessity" for the practice. Third, the burden shifts back to the employee to show that the demonstrated business necessity either does not support the employment practice or that an equally effective alternate practice would have been less discriminatory.

Because *Smith v. City of Jackson* did not address which party has the burden of persuasion on the RFOA issue, it also left open the issue of how and to what extent the RFOA provision affects the traditional "business necessity" analysis.

Facts of the Case

Knolls Atomic Power Laboratory designs nuclear propulsion systems for the US Navy. Budget cuts forced Knolls Atomic to reduce the size of its workforce by about five percent. After an initial round of voluntary job reductions, the company determined that additional job eliminations were necessary. It implemented an "involuntary reduction in force" using a matrix method that ranked employees based on objective factors – such as performance and years of service – as well as subjective factors, such as flexibility and criticality. The employees with the lowest scores were targeted for job elimination. Before making a final decision, Knolls Atomic analyzed the targeted employees for disparate impact under factors such as race and gender, but no similar analysis was performed for age. Of the 31 workers laid off, 30 were over the age of 40 and therefore protected by the ADEA.

Twenty-eight workers eventually filed suit against the company alleging disparate impact under the ADEA. A jury found Knolls Atomic liable and awarded the employees $6 million. On appeal, the U.S. Circuit Court of Appeals for the Second Circuit affirmed the jury verdict.

The Supreme Court agreed to consider the case but remanded it to the Second Circuit for reconsideration in light of its ruling in *Smith v. City of Jackson*. On remand, a divided Second Circuit reversed the jury verdict and held in favor of the company, finding that the Supreme Court's emphasis on RFOA in the Smith case had modified the traditional three-step analysis by replacing the "business necessity test" with a "reasonableness test." Significantly, the Second Circuit also held that the burden of persuasion regarding the reasonableness test rests with the employee. The Supreme Court agreed to decide one simple question with far-reaching implications: which side has the burden of persuasion regarding the RFOA issue?

A Troubling Ruling for Employers

The Court ruled that the RFOA defense is an affirmative defense, which means that employers now carry the burden both to produce evidence supporting the defense and to persuade the jury that the defense has merit.

The Court rejected the use of the "business necessity" test in ADEA disparate impact cases, holding that the test has no place in this type of litigation. The Court reasoned that it would be wasteful and confusing to apply both a business necessity test and the RFOA defense. Accordingly, the employee must establish that an employer's business practice had a disparate impact among older workers, and the employer must then prove that any disparate impact was based on reasonable factors other than age.

The Court deflected anticipated criticism of its ruling by maintaining that an employee cannot simply show a disparate impact, but rather must show the specific practice that caused the disparate impact. Critics of the decision will point out that in many cases this will be a hollow distinction and that the employer is presumed to be liable and must therefore carry the primary burden of proof.

Effect on Employers?

Employers sued under the ADEA will now have a more difficult time avoiding liability. Although the ADEA was intended to have a narrower scope of liability than Title VII, this ruling does not support that intent. The result, as the Court even recognized in its opinion, is that ADEA cases will be harder and costlier for employers to defend. Accordingly, there will likely be an increase in the number of disparate impact claims brought under the ADEA, as well as an increase in the number of cases where the employee prevails.

Employers who are considering streamlining their workforce in light of changing market conditions may wish to reconsider. Employers would be well served to ensure that lay-off decisions and other RIFs do not affect workers over 40 in a disproportionate manner.

For additional information on how this ruling may affect your business plans, please contact the staff at Pacific Employers. [PE]

RSVP for ICE Seminar In October! *see Seminars - page 3*

Human Resources Question with Candice Weaver

The Month's Best Question

WARN Act Basics

Q: ***"We are contemplating a major layoff. What do we need to know about the state and federal laws regarding letting our staff know?"***

A: With the current state of the economy, many businesses are facing the necessity of reducing their staff to cut costs. Once you decide on a layoff, you may want to accomplish it right away. However, before proceeding with a reduction, you should consider whether you are subject to the 60-day notification requirements under the federal Worker Adjustment and Retraining Notification (WARN) Act, and/or the California law (commonly referred to as a mini WARN Act). The requirements of these laws are rather detailed, but here are the basics.

Are You Subject to the WARN Act?

The federal WARN Act applies to employers who have 100 or more employees, not counting part-time employees (i.e. employees who have worked less than six of the last 12 months, or employees who work an average of less than 20 hours per week). However, California's notification requirements apply to any business facility that employs or has employed 75 or more employees, excluding employees who have worked less than six of the last 12 months during the past year.

The WARN Act covers "employment losses" that occur in connection with "covered plant closings" and "covered mass layoffs." Under the WARN Act, a covered plant closing is where all or part of an employment site is shut down which results in the employment loss for 50 or more employees during any 30-day period. California's equivalent to a federal plant closing is called a "termination" and includes part-time employees. It requires the employer to give a 60-day notice if it ceases or substantially ceases its business operations in a covered establishment, regardless of the number of affected employees.

A covered mass layoff under the WARN Act is a layoff that does not result from a plant closing, but which, during any 30-day period, results in an employment loss at the employment site for 500 or more employees, or for 50-499 employees if they constitute at least 33% of the employer's active workforce. Under California's mini WARN Act, a mass layoff is one that, during any 30-day period, will result in the layoff of 50 or more employees at a covered establishment, regardless of what percentage of the employer's active workforce the group comprises.

Even if the employer might not be required to give notice because the event is not considered a plant closing, termination or mass layoff, California law requires the employer to give notice if it is relocating all or substantially all of its business to a different location 100 or more miles away. Literally construed, the California provision requires that notice be given even if the employee is offered and accepts continued employment at the new location.

The Notice Must State:

* Whether the planned action is expected to be permanent or temporary. And, if the entire facility is to be closed, a statement to that effect.

* The expected date that the covered action (i.e. plant closing, mass layoff, termination, or relocation) will commence, and the expected date of that specific employee's employment separation.

* An indication of whether or not any bumping rights exist.

* The name and telephone number of a company representative to contact for further information.

The WARN Act and California's mini WARN Act have other important stipulations which include notice requirements when there is a sale of a business, and provisions concerning damages and penalties for violations of the notice requirements.

Once you have determined that a layoff may be in your firm's future, you may contact the staff at Pacific Employers to review your plans. [PE]

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

♦ **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

~ No Seminars in August & December ~

Guest Speaker Seminar ICE Raids

NEWS: For the last several months, agents of Immigration and Customs Enforcement (ICE) have carried out well-publicized immigration raids in factories, meatpacking plants, janitorial services, and other workplaces employing immigrants.

IRCA, Immigration Reform and Control Act prohibits the employment of illegal aliens and imposes criminal and civil penalties (fines between $250 and $10,000, and six months imprisonment) against persons who knowingly hire unauthorized aliens.

♦ **ICE Raids - What to expect from the U.S. Immigration and Customs Enforcement agents when they target your employees. Guest Speaker - The Law Office Of Lazaro Salazar.**
What are your liabilities, penalties, etc. for knowingly hiring illegals?
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

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

RSVP Visalia Chamber - 734-5876 – $25
Includes: Certificate – Forms – Guides – and a Full Breakfast

RSVP for ICE Seminar In October! see page 3

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Celebrating 43 Years!

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.

IRS Increases Mileage Rates

Effective July 1, 2008, the optional standard mileage rate increased from 50.5 cents per mile to 58.5 cents per mile for determining the reimbursed amount of employee expenses in operating an automobile for business purposes.

"IRS Increases Mileage Rates Through December 31, 2008"

The revised standard mileage rates apply to mileage allowances that are paid both:

(1) to an employee on or after July 1, 2008, or

(2) with respect to transportation expenses paid or incurred by the employee on or after July 1, 2008.

The 50.5 mileage rate continues to apply

(1) to mileage rates paid to employees prior to July 1, 2008, and

(2) with respect to transportation expenses paid or incurred by the employee before July 1, 2008. [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

Barack Backs Unions

Senator Barack Obama has given new impetus to a bill that would change the nation's labor law to a degree unknown since 1947.

Although no action has been taken on the Employee Free Choice Act ("EFCA") since its passage by the United States House of Representatives in March of last year, the presumptive Democratic presidential nominee has revitalized interest in the labor-backed measure by placing it high on his political agenda and announcing support for it recently at a major union convention.

"EFCA is at the forefront of Obama's platform. . ."

EFCA seeks to amend three areas of labor law. Key components of the legislation, changes the bill would make to current law if enacted, and possible issues the National Labor Relations Board (the "Board") and the courts would face are summarized here:

- Union Certification: "Card Checks" Replace Secret Ballot Elections
- Initial Bargaining: Strict Timetables, Mediation and Binding Arbitration
- Employer Penalties for Violating the Amendments

EFCA is at the forefront of Obama's platform and has drawn much attention from employers who have not witnessed an amendment to labor law of this magnitude since 1947, when Congress enacted the Taft-Hartley amendments. [PE]