Pacific Employers
Management Advisor
Celebrating 45 Years!
August 2009

What's New!

Governator Protects Business

California's Governor has stopped the latest plot to get employers to fund their upside-down budget with a veto of a law that would have forced all businesses that use independent contractors and unincorporated businesses who perform services to prepay the taxes of these firms as if they were employees.

This law, SBX3 17, included a requirement imposing two new independent contractor withholding mandates: a 3 percent across-the-board withholding requirement on payments to resident independent contractors and 7 percent for non-residents.

In nearly 90% of the cases, the money withheld would have had to be refunded to the employer by the State and then to the contractor who was required to pay taxes in accordance with the law. That money could otherwise have been used to keep cash-strapped businesses afloat, many of which are experiencing losses and will not owe taxes.

The measures also shifted tax enforcement function onto the private sector. Franchise Tax Board (FTB), unlike business, is specifically designated to collect and enforce taxes. This bill inappropriately shifted onto business what should be FTB's enforcement burden and responsibility.

Multi-state companies would have had to create systems specific to California, or to modify existing systems that presently serve national or multi-state operations. Companies would have had an ongoing administrative burden of withholding and remitting the withheld amounts.

California would have been the only state with these costly mandates, effectively penalizing job-creating California companies and small businesses for choosing to operate in California." [PE]

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President's Report

~Dave Miller~

"Obama Care" Funding Dilemma

The Senate Finance Committee indicated that the plans to finance "Obama Care" with new taxes on employer-provided health benefits may have to be abandoned because of overwhelming public opposition to the idea. This information came from a senior Democrat on the panel.

While the proposal hasn't been dropped yet, senators working on health-care legislation believe it may be too hard to sell the idea to the public and that they must start examining alternative ways to offset the $1 trillion cost of revamping the system. Panel members have been considering ending a current income tax exclusion for employer-provided health-care benefits.

The income tax exclusion has been in the tax code over 50 years, and its repeal could have unintended consequences. For example, unless exceptions were made, repeal would also terminate the exclusion for employer-paid disability insurance, health care flexible spending accounts, and other benefits some consider useful. Removing the exclusion plays well with the promotion of class warfare as a recent Congressional report cites that "In addition, the federal income tax exclusion often is criticized as unfair since the workers' tax savings depend on their marginal tax rate. High income workers generally have greater savings than middle income workers, and the latter usually have more than low income workers. When these tax savings are viewed simply as an economic subsidy, this pattern strikes many people as wasteful and inequitable." CRS Report for Congress - The Tax Exclusion for Employer-Provided Health Insurance: Policy Issues Regarding the Repeal Debate - *http://assets.opencrs.com/rpts/RL34767_20081121.pdf*

The head of the Budget Committee said senators were informed of three opinion polls taken recently that examined public sentiment on health-care reform, and found the tax plan was opposed by some 70 percent of the American people. That is an amount equal to those who are covered by employer supplied plans and benefit from the exclusion.

During the 2008 Presidential Campaign, Mr. John McCain, the Republican presidential nominee, emphasized a free-market approach that he said would lower health care costs and make insurance affordable. Democrats demonized him saying McCain would "reform the tax code to eliminate the exclusion of the value of health." The shoe is clearly on the other foot. [PE]

When all is said and done, more is said than done. — Lou Holtz

Recent Developments

E-Verify ON, No Match OFF

After many months of false starts and stops regarding two controversial worksite immigration enforcement regulations, the Department of Homeland Security has announced it will implement the Federal Contractor E-Verify regulation, ***but will withdraw the Social Security No-Match regulation!***

Both regulations were created by the Bush Administration as part of an immigration crackdown on U.S. employers and were intended to increase employer responsibilities in verifying the employment authorization of U.S. workers. Unions, employers, and immigrant advocacy groups strongly opposed both rules and obtained a federal injunction against the Social Security No-Match rule. The Obama Administration postponed implementation of the regulations to permit a review of these measures.

With the DHS's July 8 announcement, the Federal Contractor E-Verify rule can take effect as early as September 8, 2009. DHS will propose a new regulation rescinding the No-Match rule.

Federal Contractor E-Verify Rule

E-Verify is DHS's voluntary electronic system that permits employers to verify new hires against DHS and Social Security Administration databases. To date, DHS estimates that over 134,000 employers have enrolled in the voluntary E-Verify program, although some were required to use it under state and local legislation.

Under the Federal Contractor E-Verify rule set to apply to federal solicitations and contract awards Government-wide, federal contractors and awardees will be required to conduct immigration verification of all new employees.

DHS has said that the new E-Verify rule will require an estimated 168,000 additional federal contractors to register and begin using E-Verify.

Because of the potential financial risks posed by the E-Verify requirements, federal contractors should assess the rule's impact and their internal procedures for compliance. Contractors should perform the following in advance of the proposed September 8 start date:

- Determine if an existing or anticipated federal contract is subject to the new rule;
- Determine which, if any, current and new employees will be subject to the rule;
- Determine if any exemptions apply or can be obtained;
- Review or create companywide E-Verify and I-9 programs, policies and procedures; and
- Institute corrective actions where needed, particularly with regard to employees with unconfirmed employment authorizations.

Social Security No-Match Rule

The 2007 Social Security No-Match rule was enjoined by federal court order shortly after being promulgated. It never took effect. Prior to the injunction, the Social Security Administration issued "No-Match" letters to employers on an annual basis. The letters listed employees who had discrepancies pertaining to the social security numbers they presented to employers.

The No-Match rule would have required employers to take steps to address their employees' social security discrepancies or risk being charged with "constructive knowledge" that their employees were undocumented. The regulation offered steps to take within certain time periods to reverify an employee or terminate the employee if the discrepancy could not be resolved. Rescission of the rule will eliminate these requirements.

It remains to be seen whether the Social Security Administration will continue to issue these letters to employers, what actions employers may take with respect to future No-Match letters if it does, and whether DHS Special Agents will continue to view No-Match letters and non-action on these letters as a basis to sanction employers. The new regulation rescinding the rule may provide guidance on these key points. [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*.
Call 733-4256 or Toll Free 800 331-2592.

Highly Cited Decision

The most consequential decision of the Supreme Court's last term got only a little attention when it landed in May.

"...CITED MORE THAN 500 TIMES IN JUST THE LAST TWO MONTHS.."

The lower courts, however, have certainly understood the significance of the decision, *Ashcroft v. Iqbal,* which makes it much easier for judges to dismiss civil lawsuits right after they are filed. It has been cited more than 500 times in just the last two months.

All a plaintiff had to do to start a lawsuit is to file what the rules call "a short and plain statement of the claim" in a document called a complaint. The *Iqbal* decision now requires plaintiffs to come forward with concrete facts at the outset, and it instructs lower court judges to dismiss lawsuits that strike them as implausible.

This approach, particularly when coupled with the American requirement that each side pay its own lawyers no matter who wins, gave plaintiffs settlement leverage. Just by filing a lawsuit, a plaintiff could subject a defendant to great cost and inconvenience in the pre-trial fact-finding process called discovery.

The *Iqbal* decision will allow for the dismissal of cases that would otherwise have subjected defendants to millions of dollars in discovery costs. Under the Iqbal decision, federal judges will now decide at the very start of a litigation whether the plaintiff's accusations ring true, and they will close the courthouse door if they do not. [PE]

Expired I-9's Extended

The U.S. Citizenship and Immigration Services ("USCIS") has announced that the current version of Form I-9, Employment Eligibility Verification, which is set to expire June 30, 2009, can continue to be used until a new version of the form is issued. No substantive changes are expected to be made when the updated form is released.

All documents presented during the I-9 verification process must be unexpired and employers cannot require employees to present specific documents from among those available. Under federal law, the employee selects which document(s) he or she wishes to present as part of the I-9 verification process. Violation of this and other Form I-9 requirements may lead to civil and criminal penalties.

We can assist employers in with I-9 verification procedures and processes and Department of Homeland Security audits and worksite investigation inquiries. [PE]

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Human Resources Question with Candice Weaver

The Month's Best Question

Employers Walk a Tightrope!

Q: ***"What are the new rules regarding racial bias in promotion exams?***

A: When a group of white firefighters came out on top in a promotional exam, a Connecticut Fire Department became worried about possible racial bias in the exam. The reason for their concern was that nearly all of the minority candidates failed to qualify for promotion, while nearly all of the successful candidates were white. To remedy the perceived problem, the fire department threw out the test results and searched for a new test that would not favor white candidates. The white firefighters who were denied the promotion sued, arguing they were the true victims of discrimination. The Supreme Court agreed with the white firefighters.

The Supreme Court stated that although the City's aim might have been "well intentioned or benevolent," it still "rejected the test results solely because the higher scoring candidates were white."

The Court also rejected the white firefighters' contention that they should win the lawsuit unless the employer was able to prove that the test had an illegal disparate impact on minority candidates. In the Court's view, this "would bring compliance efforts to a near standstill," and cause employers to "hesitate before taking voluntary action for fear of later being proven wrong" in a lawsuit and then held liable for disparate treatment.

On the other hand, the Court disagreed with the notion that the City could avoid disparate treatment liability altogether simply because it claimed to have acted in "good faith" or had "good cause" to believe it may be liable for disparate impact discrimination.

Rather, the Court came up with a new and difficult standard to follow: an employer must have a "strong basis in evidence" that its actions were necessary to avoid disparate impact liability. In other words, the Court will require more than a mere suspicion by the employer that the test discriminates, but less than actual certainty.

Although the Court did not further define this "strong basis in evidence" standard, it nevertheless found that the City failed to satisfy it. Even though the Court conceded "[t]he racial adverse impact here was significant," it found no "objective, strong basis in evidence" for the City to justify its fear that the test illegally discriminates against minority applicants.

The Supreme Court concluded "[f]ear of litigation alone cannot justify an employer's reliance on race to the detriment of individuals who passed the examinations and qualified for promotions."

This decision still allows employers to adjust their standards for future promotion or hiring decisions so as to minimize the risk for disparate impact liability. However, the Court's decision dramatically reduces employers' options for avoiding litigation based on statistical evidence of disparate impact after a test or other qualification standard is used.

For the time being, employers will need to be proactive to ensure in advance that promotion and qualification standards are neither biased, nor likely to result in a disparate impact based on race, gender or other unlawful factors. [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 October 21st, 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 Breakfast

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

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

♦ **Vicki Stasch is our Guest Speaker — Speaking on "Change and Conflict during downsizing or restructuring."** Vicki Stasch, M.S. has provided services to businesses since 1982. She offers the following: *Training, Coaching and Related Services, Leadership Training, One-One Personal and Leadership Coaching, Communication and Team Building, Strategic Planning, Facilitation of Team and Community Meetings, and Conflict Management.*
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 - 11:30am

Lemoore Chamber of Commerce

Employer Workshop presented
by Pacific Employers
"Forms & Posters"
Thursday, Sept. 10th 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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Employee Communications with Attorney through Personal E-mail Account from Work are Privileged

E-mail messages exchanged between an employee and her attorney through the employee's personal e-mail account are protected by the attorney-client privilege, despite being sent through her employer's computer and internet server, a New Jersey appeals court has ruled. [PE]

Ledbetter Act Prompts EEOC to Give Employees New Chance to Sue

Some complainants in Equal Employment Opportunity Commission's closed cases that involved wage issues may receive new right-to-sue notices from the agency. The Commission seems to be reviewing these cases in response to the signing of the Lilly Ledbetter Fair Pay Act early this year.

This is an important development for employers because Congress has provided that individuals may file a civil action within 90 days after the notice of right to sue is given by the EEOC. 29 C.F.R. § 1601.28(e)(1). Thus, a new right-to-sue notice statutorily confers on claimants an additional 90 days to commence suit in cases that would have been barred by the original statute of limitations. [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

Audits for Companies Receiving Stimulus Funds

The Office of Federal Contract Compliance Programs (OFCCP) will schedule compliance reviews of companies that have received funds tied to the American Recovery and Reinvestment Act of 2009 ("ARRA" or "stimulus package"). OFCCP announced that it intends to conduct at least 450 compliance audits on these companies by September 30, 2010.

The audits will occur outside the usual Federal Contractor Selection System (FCSS) followed by OFCCP. Therefore, they are not on the Corporate Scheduling Announcement Letters (CSAL) sent to the corporate office of employers earlier this year and are in addition to any other possible audits listed on the CSALs for the current OFCCP fiscal year.

Due to the types of projects and initiatives financed under the stimulus package, it is expected that this new slate of audits will affect the construction industry in particular. OFCCP has posted on its website an updated Construction Contractors Technical Assistance Guide (available at http://www.dol.gov/esa/ofccp/TAguides/ctaguide.htm) to aid construction industry employers in preparing federal affirmative action plans. OFCCP also will conduct at least 90 reviews of supply and service contractors receiving stimulus money. [PE]

EEOC Overhauls ADA Regulations

The U.S. Equal Employment Opportunity Commission voted to revise its regulations on the Americans with Disabilities Act ("ADA") to reflect changes made by the ADA Amendments Act ("ADAAA") of 2008. The ADAAA, which became effective on January 1, 2009, makes it easier for individuals seeking protection under the ADA to establish that they have a disability. The new requlations must be reviewed before release. [PE]