Pacific Employers
Management Advisor
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August 2012

What's News!

Charter Cities Exempt From Prevailing-Wage

California charter cities do not have to comply with a state law mandating payment of prevailing wages on municipal construction projects, the state Supreme Court ruled.

The state's high court rejected 5 to 2 an appeal by the Building and Construction Trades Council of California AFL-CIO, comprising 131 local unions, aimed at forcing the city of Vista, near San Diego, to pay prevailing wages on city building projects.

The city argued that state law does not apply to charter cities, which have greater autonomy than general-law cities, according to the court.

The state's 120 charter cities include the largest, such as Los Angeles, San Jose, San Francisco and San Diego. It also includes Visalia, Tulare, Fresno, Merced, Modesto and Bakersfield.

The unions argued the prevailing-wage law is of statewide concern, giving the state primary legislative authority.

"The city responds that the matter is a municipal affair and therefore governed by its local ordinances," Justice Joyce Kennard wrote for the majority. "We agree with the city."

California enacted the state's prevailing wage law in 1931 to require contractors on public works projects to pay "the general prevailing rate of per diem wages for work of a similar character in the locality," according to the opinion.

The law was intended to prevent government contractors from undercutting the local labor market by importing cheap labor from other areas, according to the court.

Vista successfully argued that the law "invades Vista's constitutionally guaranteed autonomy as a charter city."

Vista voters approved a sales tax of 0.5 percent in 2006 for new fire stations, a civic center, a sports park and a city amphitheater, as well as seismic retrofits on firehouses. In 2007, the city moved to become a charter city to give it the option of not paying prevailing wages on the projects and thus saving millions of dollars, according to the court.

City voters approved the plan by 67 percent of the votes cast. Under terms of the ordinance, Vista would not be required to pay prevailing wages unless compelled by the terms of a state or a federal grant, or unless the wage was specifically authorized by the city, according to the court.

The unions sued to force the city to comply with state law. "We conclude that no statewide concern has been presented justifying the state's regulation of the wages that charter cities require their contractors to pay to workers hired to construct locally funded public works," Kennard wrote.

A charter city may establish any form of government, including a strong-mayor system, unlike a general-law city, which must be governed by a five-member city council.

Charter cities set their own election dates and rules, establish criteria for city office and are not required to comply with bidding statues, provided the charter exempts it.

The case is *State Building and Construction Trades Council of California, AFL-CIO, v. City of Vista*. [PE]

Law Coverage Flyer Enclosed!

President's Report
~Dave Miller~

FEHC Eliminated

Gov. Brown has signed Senate Bill 1038 which eliminates the California Fair Employment and Housing Commission (FEHC) and transfers its duties to the Department of Fair Employment and Housing (DFEH). The new law takes effect on January 1, 2013.

"... also abolishes the DLSR ..."

These duties will now be transferred to the DFEH. The bill creates a Fair Employment and Housing Council within the DFEH and the council will assume the powers and duties of the former commission.

SB 1038 also abolishes the Division of Labor Statistics and Research (DLSR) under the Department of Industrial Relations. The DLSR's duties will be transferred to the Division of Occupational Health and Safety and the Division of Labor Standards Enforcement. [PE]

Ambush Election Rule Blocked!

The United States District Court for the District of Columbia just ruled that the NLRB lacked a valid 3-member quorum to adopt its "ambush election" rulemaking in December 2011.

The rule amended the procedures for determining whether a majority of employees wish to be represented by a labor organization for purposes of collective bargaining.

The rule allowed votes by employees for union representation to be accelerated. Unions loved the idea, but it has been vehemently opposed by business organizations, nonprofits and some members of Congress.

The court issued its opinion in *U.S. Chamber of Commerce and Coalition for a Democratic Workplace v. National Labor Relations Board*, stating the rule is invalid because the NLRB did not have the necessary quorum to have a vote to approve the rule. [PE]

'The nearest thing to eternal life we will ever see on this earth is a government program.' - Ronald Reagan

Recent Developments

Trucker Exemption on Meals & Breaks

California trucking companies have recently defeated California meal and rest break claims by arguing that the laws are preempted by the Federal Aviation Administration Authorization Act (FAAAA). *Esquivel v. Vistar Corp.*, and *Dilts v. Penske Logistics*. These cases held that California meal and rest break laws do relate to the rates, routes, and services of the defendant trucking companies, and consequently, were preempted by the FAAAA.

Agreeing with the decision in *Dilts and Esquivel,* the court in *Campbell v. Vitron Express*, recently agreed that driver claims for missed meal and break periods under California law are preempted by the FAAAA as a matter of law. In Campbell, a city driver for Vitran Express claimed that Vitran did not allow meal and rest breaks and did not pay the plaintiffs for the missed meal breaks. Vitran moved for judgment on the pleadings, claiming that the FAAAA preempted the California meal and rest break claims.

"... MEAL AND REST BREAKS WILL AFFECT THE SCHEDULING ..."

In a succinct opinion, the court held that as a matter of law, California's meal and rest break requirements related to the rates, services, and routes offered by Vitran. Citing *Dilts* and *Esquivel*, the court found that meal and rest breaks will affect the scheduling of transportation since the same route will take longer to complete if the driver is required to take breaks.

Additionally, the court found that companies will be restricted to routes that can accommodate scheduled breaks. For these reasons, the court held that the FAAAA's broad preemptive scope displaces California meal and rest break laws and granted the motion for judgment on the pleadings. [PE]

Pharmaceutical Sales Reps are Exempt!

The United States Supreme Court issued its decision in *Christopher v. SmithKline Beecham,* holding that pharmaceutical sales representatives are exempt outside salespersons under the Federal Fair Labor Standards Act (FLSA).

This is a very favorable decision for the pharmaceutical sales industry, which has been plagued with class action lawsuits seeking overtime compensation for these typically highly paid sales representatives.

"..THE COURT FLATLY REJECTED DOL'S NARROW INTERPRETATION OF THE TERM "SALES"."

To qualify as an exempt outside salesperson under the FLSA, an employee's primary duty must be sales and must customarily and regularly work away from the employer's premises in performing those sales duties. In this case, the issue in dispute was whether the employee's duties qualified as "sales" duties because the pharmaceutical rep's work is not sales work in the common sense of the term--that is, the reps do not actually sell products in exchange for money.

Instead, the rep's job is to meet with physicians with the goal of promoting certain drugs and encouraging physicians to write prescriptions for those drugs. The plaintiffs in the case, as well as the Federal Department of Labor, argued that this activity is not "sales" and that for it to constitute sales, there would have to be a consummated transaction involving a transfer of title to property that is the subject of the transaction. A federal district court rejected this narrow interpretation of "sales," and held that the rep's work was sales and that they qualified for the outside sales exemption. The Ninth Circuit agreed.

Not to be deterred, the plaintiffs sought further review by the Supreme Court, which has now agreed with the lower courts that the rep's work is sales and that they are exempt outside salespersons, not entitled to overtime compensation under the FLSA.

In its ruling, the Court flatly rejected DOL's narrow interpretation of the term "sales" as requiring an actual transfer of title to property, holding that the DOL's interpretation was "unpersuasive" and not entitled to deference. The Court practically reasoned that the term "sales" has to be viewed in the context of the industry involved and that in the pharmaceutical sales industry, securing a physician's nonbinding commitment to prescribe certain drugs is the most a sales rep can do to "sell" the drug in the unique context of the highly regulated pharmaceutical sales industry.

While the Supreme Court's ruling is favorable for the pharmaceutical sales industry and provides a favorable interpretation of the meaning of "sales" that may carry over into other industries, California employers are cautiously reminded that for their sales employees to qualify as outside salespersons, they must meet the requirements of California's outside sales exemption test and not just the FLSA test.

California's test requires the employees to spend more than 50% of their work time away from the employer's premises engaged in sales duties. [PE]

Non-Exempt Salaries Threatened

AB2103 would eliminate agreements with non-exempt employees to pay a fixed salary covering regular and overtime hours. Specifically, AB 2103 provides that such a fixed salary "shall be deemed to provide compensation only for the employee's regular, non-overtime hours, notwithstanding any agreement to the contrary."

"... TAKES AIM AT – AND OVERTURNS – THE DECISION ..."

AB2103 expressly takes aim at – and overturns – the decision in *Arechiga v. Dolores Press* that recognized and enforced an agreement to pay a non-exempt employee a fixed salary for 66 hours of work per week. Advocates claim the bill would restore California law to its pre-Arechiga status. The Assembly passed AB2103 on May 7, and the bill is now pending review before the Senate's Committee on Labor and Industrial Relations. [PE]

Partnerships Subject to Anti- Retaliation

A California court of appeal revived an emergency room physician's retaliation claim against the partnership of which she is a member. The physician claimed that the partnership removed her from her regional director position and created a hostile working environment for her because she reported that officers and agents of the partnership were sexually harassing female employees.

The partnership argued, and the trial court agreed, that the anti-retaliation protections applied only to employees and did not extend to members of the partnership. The appellate court disagreed, finding the statutory language and legislative purpose support a broader reading of the statute and recognizing protection for partners who oppose sexual harassment of the partnership's employees. [PE]

Human Resources Question with Candice Weaver

The Month's Best Question

Alternative Workweeks

Q: ***"How do you establish an Alternative Workweek."***

A: Here are the steps to establish an Alternative Workweek.

1. Identify work units to be covered. An alternative workweek must apply to a specified work unit. Existing rules define a work unit as a division, department, job classification, shift or separate location. In some situations, even a single emplowyee may qualify as a work unit.

2. Prepare a written proposal. Describe the new schedule and its impact, including working over 8 hours in a day without overtime, on pay and benefits. You can propose a single schedule for all workers in the work unit or a menu of schedule options for employees to choose from. A schedule can fluctuate if the differences are specified in the proposal, unless workers are covered by Wage Orders 2, 3, 6, 7, 8, 11, 12 or 13. These Wage Orders require that schedules be consistent from week to week and include no more than four workdays. Wage Order 1 specifies that employees must be scheduled for 40 hours of work a week and at least four hours a day. And under most wage orders (except 4, 5, 9 and 10) employees must be scheduled for two consecutive days off.

3. Communicate with workers. Prior to the secret ballot vote, make a disclosure in writing to the affected employees, including the effects of the proposed arrangement on the employees' wages, hours, and benefits. Advise employees and then hold one or more meetings, at least fourteen (14) days prior to voting, for the specific purpose of discussing the effects of the alternative workweek schedule. If at least five (5) percent of the affected employees primarily speak a non-English language, they must be notified of the alternative workweek plan in that language. You must mail the written disclosure to any employees who do not attend the meeting. Failure to comply with this paragraph shall make the election null and void.

4. Hold a secret ballot election. Employees must ratify the agreement by a two-thirds majority in a secret ballot election.

5. Have employees select schedules if you have proposed a menu. Each employee should select, in writing, a fixed schedule from the menu.

6. The employer must report election results within 30 days to the California Department of Industrial Relations, Division of Labor Statistics Research, P.O. Box 420603, San Francisco, CA 94142.

7. Get the schedule agreement signed. Many of the existing and reinstated wage orders require that at least two-thirds of your employees voluntarily sign a schedule agreement.

8. Accommodation of employees where necessary. Each employee in the work unit is subject to the new workweek arrangement, even if they voted against it. However, the employer must try to arrange a schedule that does not exceed eight hours in a day for employees who were eligible to vote, but cannot work the new schedule. You must explore accommodations for workers whose religious beliefs or observances conflict with the schedule. If, after the election, an employee is hired who is unable to work the alternative schedule, you are permitted, but not required, to make an accommodation for the person. [PE]

No-Cost Employment Seminars

The Tulare-Kings Builders Exchange and Pacific Employers host 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.

2012 Topic Schedule

There is No Seminar in August!

♦ **Forms & Posters - Thursday, September 20th, 2012, 10 - 11:30am --** As well as Contracts, Signs, Handouts, Fliers - Just what paperwork does an Employer need?

Guest Seminar
DATE CHANGED TO Oct 11th

♦ **Protect Yourself From ADA Predators - Guest Speaker Seminar - Thursday, October 11th, 2012, 10 - 11:30am --** Employers need to be aware of the access rules for employees and the public as they build, remodel, update and hire. Our speaker has been through it all.

♦ **Discipline & Termination - Thursday, November 15th, 2012, 10 - 11:30am --** The steps to take before termination. Managing a progressive correction, punishment and termination program.

There is No Seminar in December

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.

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 24th, 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 $45
Certificate – Forms – Guides – Full Breakfast
Future Training on 1-23-13, 4-23-13, 7-24-13, 10-23-13

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

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Individual Mandate Upheld - "Power To Tax"

In a split decision, the Supreme Court on June 28, 2012 upheld the Affordable Care Act's (the ACA's) "individual mandate," which requires almost everyone to have health insurance coverage or pay a penalty. In a bit of a surprise, a majority of the Court based its decision on Congress's power to levy taxes, saying that the penalty for not buying health insurance is a tax.

Also in a split decision, the Court upheld the constitutional challenge to the portion of the ACA requiring all states to drastically expand Medicaid coverage in order to receive new funding or even keep existing Medicaid funding (at the discretion of the federal government). Referring to this provision of the ACA as "a gun to the head," the Court determined that the ACA unconstitutionally left States with no real option but to acquiesce in the Medicaid expansion. Thus, States can choose whether to participate in the Medicaid expansion and a choice not to participate will not risk existing Medicaid funding. The Court did not invalidate the ACA's expansion of Medicaid, which still stands. The Court evaluated whether other aspects of the ACA would be invalidated and determined that the rest of the ACA "need not fall" in light of this constitutional holding.

The main opinion was written by Chief Justice John Roberts, who began by stating that the individual mandate exceeds Congress's power to regulate commerce under the Commerce Clause. While four other Justices agreed with that conclusion, which would be a majority, a different majority upheld the individual mandate based on an independent ground — the government's backup argument — that is, the mandate is within the taxing power of Congress. [PE]

Unions Cannot Force Non-Members To Pay Agency Fees Subsidizing Political Speech

The U.S. Supreme Court issued its opinion in *Knox v. Service Employees International Union, Local 1000,* No. 10-1121.

Based on precedent establishing that public sector union fees levied on non-members represent an "impingement" on non-members' First Amendment rights, a 5-4 majority held that public sector unions must provide non-members with the opportunity to opt out of certain special assessments and unexpected fee increases.

The majority sent strong signals that the Court could go even further and find those opt-out procedures for non-members paying union fees unconstitutional if the question comes before it. [PE]

NLRB Writes Again On Social Media

In its third letter offering guidance to employers on social media, the National Labor Relations Board said employees cannot be prohibited from discussing their jobs on Facebook or Twitter and should not be told not to friend co-workers.

The memorandum, issued by Acting General Counsel of the NLRB Lafe Solomon, focused on recent cases challenging the social media policies of seven companies seeking to regulate employee usage of sites like Facebook and Twitter. With topics ranging from intellectual property to privacy, the agency found portions of six of the companies' social media policies unlawful. It upheld the entire policy of just one company.

Examining General Motors' social media policy, the NLRB said that a provision "instructing employees to 'Think carefully about "friending" co-workers' is unlawfully overbroad because it would discourage communications among co-workers."

Further, the carmaker's rule requiring an employee to receive permission prior to posting photos, music, videos, quotes, or personal information – including employer logos and trademarks – is also unlawful, the NLRB said. Without further explanation, employees might believe that such limitations could include photos of picket signs containing the company's logo or employees working in unsafe conditions, which would constitute protected activity. "Although the employer has a proprietary interest in its trademarks, including its logo, we found that employees' non-commercial use of the employer's logo or trademarks while engaging in [protected activity] would not infringe on that interest," Solomon wrote. [PE]