Pacific Employers
Management Advisor
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August 2013

What's News!

White House delays employer mandate requirement until 2015

In a move applauded by employers, the Obama administration delayed implementation of the employer health coverage mandate under the Affordable Care Act by one year.

The employer "play-or-pay" mandate, which applies to employers with at least 50 full-time-equivalent employees, will require employers to offer affordable health coverage to employees who perform at least 30 hours of service per week, or pay stiff tax penalties.

The employer mandate was previously scheduled to become effective January 1, 2014, and is now deferred until January 1, 2015. (Details about the mandate, its penalties, and how to count full-time employees can be found in our January 16, 2013 alert: Prompt action required by employers on health care reform: IRS issues "play or pay" regulations.)

The administration states that this delay is in response to a number of concerns raised by stakeholders, such as complaints about the complexity of the "play-or-pay" regulations issued earlier this year, and the need for more time to implement reporting systems. The administration says it intends to use the one-year delay to revamp and simplify the insurer and employer reporting requirements, and provide employers time to adapt health coverage and reporting systems to comply with the new mandates.

The Treasury Department intends to issue transitional guidance soon and to publish proposed rules implementing the new insurer and employer reporting provisions. The administration also encouraged employers to implement voluntary information reporting in 2014 in hopes that real-world testing of reporting systems in 2014 will contribute to a smoother transition to full implementation in 2015.

NOTE: This delay does not affect other provisions of the Affordable Care Act slated to go into effect in or before 2014, including:

- A 90-day maximum on eligibility waiting periods;
- Monetary caps on annual out-of-pocket maximums;
- Total elimination of lifetime and annual limits (including expiration of waivers that permitted certain "mini-med" plans and stand-alone Health Reimbursement Arrangements to stay in place through plan years beginning in 2013);
- New wellness plan rules;
- Revised Summary of Benefits and Coverage templates;
- Patient Centered Outcomes Research Institute (PCORI) excise taxes and transitional reinsurance program fees;
- A notice informing employees of the availability of the new health insurance Exchanges (a model notice is available on the U. S. Department of Labor website); and
- Insurance market reforms. [PE]

Commission Pay Fact Sheet Enclosed!

President's Report
~Dave Miller~
Outside "Our" Box

Over the phone consultation on labor and safety matters continues to be the focus and the vast majority of Pacific Employers' activity. We began business in 1964 with a rather narrow area of practice that expanded, based on our member's needs. However, employers do contact us for help with **services that we do not directly provide.**

We get regular requests for these "Outside Our Box" services:

• ADA Access Compliance • Ag Hazardous Materials Business Plans
• Background Checks • Conflict Resolution • Drug Testing
• Harassment Investigations • Health Insurance & Retirement Programs
• Payroll • Safety Training • Secure Fuel Purchases • Temporary Workers
• Webinars • Workplace Violence & Security • Workers Comp Coverage

In order to provide access to all these service, and more, we have identified resources and created partnerships with experts in these areas.

Guest Speaker Seminar

Our October Guest Speaker Seminar will present Strategic Partners and be an opportunity for you to meet some of our major resources including Kim Parker, Executive Vice President and Craig Strong, Regional Director from ***California Employers Association.***

Prevailing Wage Seminar

If you are a contractor doing Public Works jobs, which is any type of construction that is done with taxpayer funds, then you are subject to the Prevailing Wage Laws. We present a PW Law Seminar at the Builders Exchange on August 15th, from 9:00 am to noon. Cost is $45 and sign-ups are with the Builders Exchange at (559) 732-4568.

ObamaCare Seminar

In addition to our regular September Seminar on ***"Posters and Forms,"*** *(see page 3)* we will be having an **ObamaCare Seminar** to bring you up to date on what is happening in the Federal and State mandated programs under the **Affordable Health Care Act**. There is no charge and will be at the Builders Exchange on Sept. 5th from 10:00 to noon.

Commission Pay Fact Sheet

Our good friends at California Employers Association have provided us with a Fact Sheet that gives you the "Facts" that you need to know on the California requirement that commissioned employees have a written Commission Agreement. The "Fact Sheet" is enclosed.

NOTE: **The 2013 Spanish All-In-One Poster is now available at our office.** [PE]

To learn who rules over you, simply find out who you are not allowed to criticize.
Voltaire, philosopher (1694-1778)

Recent Developments

Flat Rate / Piece Rate Ruling Stands

The California Supreme Court denied review of a California Court of Appeal case, which held that piece-rate-paid employees are entitled to separate hourly pay for "waiting" time. *Gonzalez v. Downtown LA Motors.*

Due to the Supreme Court's action, the Court of Appeal decision is now a binding precedent. In its decision, the appellate court noted that California law provides: "Every employer shall pay to each employee, on the established payday for the period involved, not less than the applicable minimum wage for all hours worked in the payroll period, whether the remuneration is measured by time, piece, commission, or otherwise."

"Hours worked" is defined as "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so."

The appellate court held the general rule that "employers must pay for all hours worked and may not average paid, productive hours with non-paid, non-productive hours" applies to piece-rate employees. Therefore, the class of technicians was "entitled to separate hourly compensation for time spent waiting for repair work or performing other non-repair tasks directed by the employer during their work shifts."

As a consequence of these decision, all California employers who pay employees on a piece rate or commission basis, including flat-rate technicians and salespersons, should immediately review their pay plans to mitigate the risks posed by the *Gonzalez v. Downtown LA Motors* decision.

Employers should:

- Modify piece rate and commission compensation to avoid so-called "uncompensated" hours, but pay at least minimum wage directly for each hour worked (including non-piece rate work and work indirectly related to sales);
- Review itemized pay statements to ensure compliance with Labor Code section 226, which requires pay statements to show information, including total hours worked by employees, the number of piece rate units earned and any applicable piece rate, and all applicable hourly rates in effect during the pay period and the corresponding number of hours worked;
- Implement arbitration agreements to control exposure to class-action lawsuits; and
- Consult with qualified labor and employment counsel to determine whether piece rate and commission pay plans require modification, and whether any other action is appropriate to mitigate risk based on the *Gonzalez* case. [PE]

FMLA Now Includes Same Sex Spouses

The US Supreme Court recently issued two decisions that will have a significant effect on administering employee benefits.

First, the US Supreme Court mandated that same-sex couples married in states that recognize their marriages are entitled to federal spousal benefits.

Second, the US Supreme Court justices reinstated same-sex marriages in California, which joins 12 other states and Washington DC in legalizing single gender marriages.

What does this mean for employers?

In these jurisdictions, employees in same-sex marriages will be eligible for federal workplace spousal benefits, including FMLA leave to care for a sick spouse. [PE]

Supreme Court Narrows Definition of "Supervisor" Under Title VII

The United States Supreme Court narrowed the definition of "supervisor" for purposes of employment-related claims under Federal law.

In *Vance v. Ball State University, et al.,* under the Federal Title VII discrimination statute, an employer can be held vicariously liable for an employee's unlawful harassment only where that particular employee has been empowered with the authority "to take tangible employment actions against the victim."

The Court's 5-4 decision resolves a circuit split concerning the extent of authority an employee must exercise and be granted to be classified as a "supervisor."

> "..Vance likely does not have any impact on ... California courts ..."

While this decision is extremely important to employers with respect to Title VII harassment claims, the Court's decision in *Vance* likely does not have any impact on how California courts will interpret the term "supervisor" in harassment claims made by employees under California's Fair Employment and Housing Act ("FEHA").

Under FEHA, the term "supervisor" is broadly defined to include persons who have the "responsibility to direct" employees. Since FEHA's definition of "supervisor" is more lenient than the definition accepted in *Vance*, California employees will likely continue to bring harassment claims against employers under the FEHA instead of Title VII.

Nevertheless, *Vance* also serves as an important reminder for all employers to review job descriptions to make sure any and all employees defined as a "supervisor" receive Sexual Harassment Prevention Training. [PE]

Court Favors Farmers Insurance on IC Issue

The Second Appellate District in *Beaumont-Jacques v. Farmers Group Inc.* concluded as a matter of law that a worker's ability to exercise meaningful discretion in her job-related efforts rendered her an independent contractor, regardless of Farmers' input regarding the "quality and direction of her efforts."

The court held that Farmers did not exercise the "control of the details" of the appellant worker's efforts necessary to create an employer/ employee relationship. The court held that the key consideration was the right to control the manner and means of how the worker performed her duties.

The court further held that summary judgment was proper notwithstanding that some of the minor elements of the independent contractor test arguably supported an employer/employee relationship. [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 October 23rd, 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

Human Resources Question with Candice Weaver

The Month's Best Question

Travel Pay

Q: "I'm confused about when I have to pay my employees travel time. Can you help?

A: Yes, we can clear up some of the legal confusion for you.

1. Travel time. Travel time is considered compensable work hours (time on the clock) if the employer requires its employees to meet at a designated place, use the employer's transportation to and from the work site, and prohibits employees from using their own transportation.

2. Compulsory travel time longer than the employee's normal commute is considered compensable time. (You must pay them for this time.) However, travel time to a job site within reasonable proximity of the employee's regular work site is not compensable. If an employee has no regular job site, travel time to the new job site each day is not compensable. If an employee has a temporary work location change, the employee must be compensated for any additional time required to travel to the new job site in excess of the employee's normal commute time.

3. The definition of "hours worked" can be found in the Industrial Welfare Commission Orders and means the time during which the employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so.

4. Out of town work. State law does not distinguish between hours worked during the "normal" working hours or hours worked outside "normal" working hours, nor does it distinguish between hours worked in connection with an overnight out-of-town assignment. If an employer requires an employee to attend an out-of-town business meeting, training session, or any other event, the employer cannot disclaim an obligation to pay for the employee's time in getting to and from the location of that event. Example: Time spent driving, or as a passenger on an airplane, train, bus, taxi cab or car, or other mode of transportation, in traveling to and from this out-of-town event, and time spent waiting to purchase a ticket, check baggage, or get on board is considered time spent carrying out the employer's directives. Because the employee is subject to the employer's control they must be paid for these "hours worked".

5. Breaks. Time spent taking a break from travel in order to eat a meal, sleep or engage in purely personal pursuits not connected with traveling or making necessary travel connections (such as, for example, spending an extra day in a city before the start or following the conclusion of a conference to sightsee), is not considered work time and is not compensable.

6. Travel rate of pay. The rate at which the travel must be paid depends upon the nature of the compensation agreement. If the employee has agreed to pay a fixed hourly rate of pay for any work performed, then travel time must be paid at that regular hourly rate, or if applicable, the required overtime rate. An employer may establish a separate rate of pay for travel before the work is performed for hourly employees, provided the rate does not fall below the statutory minimum wage.

7. Non Exempt employees. Non-exempt employees (even if on a salary) must be paid at the appropriate overtime rate for any hours worked in excess of 8 in a day or 40 in a week, computed by converting the weekly salary to an hourly rate. (Labor Code Section 515)

8. Expenses. All necessary expenses incurred in connection with employer-required travel must be reimbursed to the employee. *(Labor Code Section 2802)* [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.

2013 Topic Schedule

♦ **Prevailing Wage Seminar** - If you are a contractor doing Public Works jobs, which is any type of construction that is done with taxpayer funds, then you are subject to the Prevailing Wage Laws. Cost is $45 and sign-ups are with the Builders Exchange at (559) 732-4568. Note time -- This is a 3 hour seminar.
Thursday, August 15th, 2013, 9:00am - Noon

♦ **ObamaCare Seminar** - In addition to our regular September Seminar on ***"Posters and Forms,"*** *(see page 3)* we will be having an **ObamaCare Seminar** to bring you up to date on what is happening in the Federal and State mandated programs under the **Affordable Health Care Act**.
Thursday, September 5th, 2013, 10 - 11:30am

♦ **Forms & Posters -** as well as Contracts, Signs, Handouts, Fliers - Just what paperwork does an Employer need?
Thursday, September 19th, 2013, 10 - 11:30am

♦ **We have established a strategic partnership with California Employers Association.** Our Guest Speaker Seminar will feature **Kim Parker, Executive Vice President, Sacramento office, and Craig Strong, Regional Director of the Madera office**.
Thursday, October 17th, 2013, 10 - 11:30am

♦ **Discipline & Termination -** The steps to take before termination. Managing a progressive correction, punishment and termination program.
Thursday, November 21st, 2013, 10 - 11:30am

There is No Seminar in December

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Furniture Maker Ordered To Pay Back Wages

The U.S. Department of Labor (DOL) has obtained a consent judgment in federal court ordering an El Monte furniture designer and manufacturer to pay 21 current and former employees $72,472 in back wages and liquidated damages plus more than $6,000 in penalties.

The judgment comes after an investigation by the DOL's Wage and Hour Division (WHD) found the company willfully violated the Fair Labor Standards Act's (FLSA) overtime, minimum wage, and record-keeping provisions. Investigators found that employees of S.O.L.E Design and Best Upholstery were paid straight time for all hours worked and didn't receive an overtime premium for hours worked beyond 40 in a workweek.

Additionally, several employees working as upholsterers were paid piece-rate wages that amounted to less than the federal minimum wage in some workweeks. Investigators also found that the employers paid some wages in cash and off the books and falsified payroll records by excluding overtime hours worked by the employees. [PE]

EEOC Answers Disability Questions

New EEOC documents address specific disabilities. The Equal Employment Opportunity Commission (EEOC) has issued revised documents on how the Americans with Disabilities Act (ADA) applies to applicants and employees with cancer, diabetes, epilepsy, and intellectual disabilities. The documents are available on the agency's website at "Disability Discrimination The Question and Answer Series" - *www.eeoc.gov/laws/types/disability.cfm*

The documents reflect the changes to the definition of disability made by the ADA Amendments Act (ADAAA) that make it easier to conclude that individuals with a wide range of impairments, including cancer, diabetes, epilepsy, and intellectual disabilities, are protected by the ADA.

Each of the documents also answers questions about topics such as when an employer may obtain medical information from applicants and employees, what types of reasonable accommodations individuals with these disabilities might need, how an employer should handle safety concerns, and what an employer should do to prevent and correct disability-based harassment. [PE]

Can Move, But Not Hide!

California Garment maker cited for wage, registration violations. The state has issued citations totaling $282,582 to a Los Angeles garment maker accused of moving and changing its business name to avoid previous citations.

The state labor commissioner said violations issued to 5 Plus 2, Inc., include paying 19 employees below minimum wage and not paying overtime.

Fines also were levied and garments made at the business were confiscated as a result of not properly registering the business. [PE]

$8M Prevailing Wage Collection

The California Labor Commissioner has collected over $8 million in wages for a San Diego public works job. California's labor commissioner has collected $8,072,273 in unpaid prevailing wages on behalf of 2,051 workers who built the Hilton San Diego Bayfront Hotel from 2006 to 2008.

The workers, employed by prime contractor Hensel Phelps Construction Company and 172 subcontractors during construction of the 1,190-room hotel, will receive the full prevailing wages they earned on the public works project. The project was determined to be a public work because it was paid for out of public funds from a $46.5 million rent credit provided by the San Diego Port District, which leased the land to the hotel owner. [PE]