

### WHAT'S NEWS!

#### Uber Drivers Are Employees

##### California Labor Commissioner Rules Uber Drivers Are Employees Not Independent Contractors

According to a California Labor Commissioner's decision, *Uber* drivers are employees not independent contractors, as currently classified by Uber.

The decision could increase costs for the smartphone-based ride service and impact the closely watched start-up's valuation.

The Labor Commission's decision could significantly impact the growing industry of providing services via smartphones, with potential implications for other "crowdsourced" services such as *Uber's* rival *Lyft*, chore service *TaskRabbit*, and cleaning service *Homejoy*. [PE]

#### FedEx Drivers Are Employees

**FedEx Agrees to \$228 Million Settlement in Independent Contractor Class Action.** Federal Express has announced settlement of a class action lawsuit, *Alexander v. FedEx Ground Package*, in which its drivers alleged they were misclassified as independent contractors and were instead employees.

According to executive vice president and general counsel Christine P. Richards, "FedEx Ground faced a unique challenge in defending this case given the decision of the Ninth Circuit Court of Appeals last summer.

This settlement resolves claims dating back to 2000 that concern a model FedEx Ground no longer operates." The Ninth Circuit had rejected FedEx's argument that its drivers were independent contractors.

California applies a "right to control" test to determine independent contractor versus employee status. Indicators of FedEx control over drivers included: setting regular schedules for the drivers; requiring drivers to wear FedEx uniform; and, requiring that vehicles were painted a certain color and marked with the FedEx logo. [PE]

#### DOL Issues Interpretive Guidance On Misclassification Of Workers As Independent Contractors

**The Wage and Hour Division (WHD) of the U.S. Department of Labor (DOL) has issued Administrator's Interpretation 2015-1: The Application of the Fair Labor Standards Act's "Suffer or Permit" Standard in the Identification of Employees Who Are Misclassified as Independent Contractors.** According to the DOL, "the misclassification of employees as independent contractors presents one of the most serious problems facing affected workers, employers, and the entire economy."

##### ... DISCUSSES THE FLSA'S DEFINITION OF "EMPLOY"

This is because misclassified employees are often denied access to benefits such as overtime compensation, minimum wage, family and medical leave, unemployment insurance and workers' compensation. Administrator's Interpretation 2015-1 analyzes how the Fair Labor Standards Act's (FLSA) definition of "employ" guides the determination of whether workers are employees or independent contractors under the law.

It discusses the breadth of the FLSA's definition of "employ," as well as provides guidance on the "economic realities" factors applied by courts in determining if a worker is an employee versus an independent contractor.

The *Interpretation* emphasizes that the "economic realities" test determines whether a worker is truly an independent business or economically dependent on the employer. [PE]

### Sick Leave Law Amendment Summary Enclosed!

#### President's Report

~Dave Miller~

#### California Paid Sick Leave Law Amended, Effective Immediately!

California Governor Jerry Brown has signed a bill intended to cure some of the ambiguities in the state's new paid sick leave law that have been a headache for employers.

The **Healthy Workplaces, Healthy Families Act of 2014 (AB 1522)** took full effect on **July 1, 2015** and requires employers of any size to provide paid sick leave, but employers have had many questions about some of its provisions.

Under the law as originally passed, there are detailed accrual, carryover, and use requirements, and the effect on employers with existing sick leave and PTO policies is not always clear.

In the months leading up to July 1, 2015, as employers readied themselves for compliance, it became apparent that some of the requirements of the law were unclear or onerous in operation.



On page two of this newsletter, we have provided an article reviewing 5 ways in which AB 304 amends AB 1522 in an effort to provide some clarity.

We have also enclosed a summary of all the major changes that AB 304 makes to California's Paid Sick Leave Law. You can be assured that AB 304 will not end the confusion or controversy that has been created by the Sick Leave Law.

We will therefore continue to provide updates on the Paid Sick Leave Law and its interpretation as they become available. And because of the spotlight the new law has created on employer policies, employers are strongly encouraged to review their paid sick leave and paid time off policies once again to ensure compliance with the law. [PE]

To sin by silence when they should protest makes cowards of men.  
Ella Wheeler Wilcox, poet (1850-1919)

## Recent Developments

### AB 304 Amends Sick Leave Law

**G**overnor Brown has signed AB 304, which amends the Healthy Workplaces, Healthy Families Act of 2014, California's new paid sick leave law. AB 304 clarifies certain provisions of the new paid sick leave law, including the 30-day eligibility period, the available accrual methods, and more specifics on the annual grant.

Here are some of the major amendments to California's paid sick leave law, which took effect immediately upon the Governor's signature of AB 304 on July 13, 2015. Therefore, the amendments apply to employers going forward. Here is a summary the most important amendments employers should note:

1. Employers may now use a different accrual method other than one hour of paid sick leave for every 30 hours worked.

- In order to simplify the math for employers, the law was amended to provide that an employer may use an alternative accrual method as long as it is (1) on a regular basis, and (2) the employee has no less than 24 hours or three days paid sick leave or paid time off by the 120th calendar day of employment, or each calendar year, or in each 12-month period.

2. If an employer pays out accrued paid time off to an employee at time of termination, the employer does not have to reinstate the previously accrued and unused paid sick days.

- The law requires that if an employee separates from employment, but is rehired within one year, the previously accrued and unused paid sick leave must be reinstated. This amendment clarifies that if the employer pays the accrued but unused sick leave out at the time of separation (which is not required under the sick leave law), then the employee is not entitled to reinstatement of the paid sick leave that was already paid out to them earlier.

3. If an employer provides unlimited paid sick leave or unlimited paid time off to an employee, the employer meets its reporting requirements on the employee's pay stub by indicating "unlimited" on the wage statement.

"... THE EMPLOYER CAN USE ANY OF THE FOLLOWING CALCULATIONS ..."

4. Employers have different options for calculating the amount of pay owed to employees while taking sick leave.

- The amendment clarifies that the employer can use any of the following calculations when determining how much to pay employees while on paid sick leave:

a) For non-exempt employees, the regular rate of pay can be calculated in the same manner as the regular rate of pay for overtime purposes in the workweek. This is a new option for employers provided under the amendment.

b) For non-exempt employees, the regular rate of pay can be calculated by dividing the employee's total wages, not including overtime premium pay, by the employee's total hours worked in the full pay periods of the prior 90 days of employment. This method was permitted for employers to use under the original law.

c) For exempt employees, employers can calculate paid sick leave in the same manner as the employer calculates wages for other forms of paid leave time.

5. Employers are not required to inquire into or record the purpose of why the employee uses paid leave.

- Employers have many other record keeping requirements under the new law, but now it is clear that they are not required to maintain the reasons why employees used the sick leave. The original requirement created under the paid sick leave law, and unchanged by these amendments, requires employers to document and keep records of the hours worked and paid sick days accrued and used by an employee for at least three years. Employees (as well as the Labor Commissioner) have the right to access these records. Failure to keep the required records creates a presumption against the employer that the employee is entitled to the maximum number of hours provided for under the law. [PE]

### NLRB Reversed for Ignoring "Common Sense"

**I**n *Southern New England Telephone Company v. NLRB*, the D.C. Circuit reversed an NLRB decision finding it unlawful to prohibit public-facing employees (including in-home service technicians) from wearing a particular t-shirt to work.

The t-shirt, promoted by the union representing the employees in question, said "Inmate" on the front and "Prisoner of AT&T" on the back. Judge Kavanaugh's opinion:

"THE COURT ALSO OBSERVED A LONGSTANDING EXCEPTION"

Judge Kavanaugh stated "Common sense sometimes matters in resolving legal disputes. This case is a good example. . . . No company, at least one that is interested in keeping its customers, presumably wants its employees walking into people's homes wearing shirts that say 'Inmate' and 'Prisoner'."

While recognizing that the law "protects the right of employees to wear union apparel at work," the court also observed a longstanding exception to that rule. A company "may lawfully prohibit its employees from displaying messages on the job that the company reasonably believes may harm its relationship with its customers or its public image."

Even though the court is generally deferential to the NLRB in these matters, the court found the NLRB's decision to be unreasonable and held that the employer was well within its rights to ban the wearing of the t-shirt by employees who interact with the public. [PE]



## Human Resources Question with Candice Weaver

### THE MONTH'S BEST QUESTION

#### Employee Information Form

**Q:** "Do I have to reissue the Employee Information Form to my employees following the adoption of the California Sick Leave Law?"

**A:** You can bet on it. In the Paid Sick Leave, Frequently Asked Questions (FAQ's) page of the California Department of Industrial Relations website, the state has issued the following rejoinder

Under the section "Required information to be provided to employees" the state has issued the following question and reply.

**Question --** *How will I learn of my rights to paid sick leave from my employer?*

**Answer --** Beginning January 1, 2015, employers are required to post in a conspicuous place at the workplace, a poster containing the following information: (1) that an employee is entitled to accrue, request, and use paid sick days; (2) the amount of sick days provided for and the terms of use of paid sick days; (3) that retaliation or discrimination against an employee who requests paid sick days or uses paid sick days or both is prohibited; and (4) that an employee has the right under this law to file a complaint with the Labor Commissioner against an employer who retaliates or discriminates against an employee. The new law required the Labor Commissioner to develop such a poster, and it is now available on the Labor Commissioner's website.

Second, after January 1, 2015, employers are required to provide most employees with an individualized Notice to Employee (required under Labor Code section 2810.5) that includes paid sick leave information. A revised Notice to Employee form (available to employers for download at DLSE's website) must be used for employees hired after January 1, 2015, and is optional for use prior to the January 1, 2015 effective date. Use of the revised form prior to January 1, 2015, will be deemed compliant with the new requirement as of January 1, 2015; otherwise, for employees hired prior to January 1, 2015, the employer is required to provide a revised Notice to Employee or otherwise inform each employee of the information regarding paid sick leave within 7 days of the change, using any of the alternative methods specified in Labor Code section 2810.5(b).

So there you have it. By the way, our Forms page has the new Employee Information Form under the hiring documents in PDF format for your download.

< <http://pacificemployers.com/forms.htm> > [PE]



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Call 733-4256 or 1-800-331-2592.

#### NO-COST EMPLOYMENT SEMINARS

**Pacific Employers** hosts 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.*

#### 2015 Topic Schedule

NOTE - There is No Seminar in August

◆ **Forms & Posters** - as well as Contracts, Signs, Handouts, Fliers - Just what paperwork does an Employer need?

**Thursday, September 17<sup>th</sup>, 2015, 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 15<sup>th</sup>, 2015, 10 - 11:30am**

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

**Thursday, November 19<sup>th</sup>, 2015, 10 - 11:30am**

There is No Seminar in December

#### Sexual Harassment & Abusive Conduct Training

**Visalia Chamber of Commerce & Pacific Employers**, will host a Supervisors' Sexual Harassment & Abusive Conduct Prevention Training Seminar & Workshop with a continental breakfast on October 21<sup>st</sup>, 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**

Sick Leave Law Amendment Summary Enclosed!

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### WAL-MART SUED OVER SPOUSES OF GAY EMPLOYEES

**Wal-Mart Stores Inc. was sued by an employee who alleged its prior policy of denying health insurance benefits to the same-sex spouses of gay employees violated gender discrimination laws.**

The lawsuit, filed in U.S. District Court in Boston, seeks nationwide class-action status. Wal-Mart, the largest private U.S. employer, began offering health insurance benefits to same-sex spouses last year, after the Supreme Court in 2013 struck down part of the Defense of Marriage Act that denied federal benefits to married gay couples. Jackie Cote, an office manager who has worked at Walmart stores in Maine and Massachusetts since 1999, said in the lawsuit that her wife, Diana Smithson, developed cancer in 2012 and that the denial of insurance led to \$150,000 in medical debt, hampering her recovery.

Cote and Smithson were married in Massachusetts in 2004, the same year a court ruling made the state the first in the country to allow gay nuptials. Smithson worked for Wal-Mart until 2008, when she left to care for Cote's elderly mother, according to the lawsuit.

The company then repeatedly denied requests by Cote to add her wife to her insurance policy. When Cote brought her claims to the U.S. Equal Employment Opportunity Commission, Wal-Mart said federal anti-discrimination laws did not apply to lesbian, gay, bisexual and transgender employees, so it did not have to offer benefits to their spouses. [PE]

### LA TO INCREASE MINIMUM WAGE TO \$15 BY 2020

**Los Angeles, the nation's second-largest city, voted to increase its minimum wage from \$9 an hour to \$15 an hour by 2020.**

The increase was passed by the City Council in a 14-to-1 vote. Several other cities, including San Francisco, Chicago, Seattle and Oakland, have already approved increases, and dozens more are considering doing the same. In 2014, a number of Republican-leaning states like Alaska and South Dakota also raised their state-level minimum wages by ballot initiative.

The effect of the increase is likely to be particularly strong in Los Angeles, where, according to some estimates, almost 50 percent of the city's work force earns less than \$15 an hour. Under the plan approved Tuesday, the minimum wage will rise over five years. [PE]

### U.S. SUPREME COURT RULES IN FAVOR OF MUSLIM WOMAN ON HIJAB ACCOMMODATION

**The U.S. Supreme Court has ruled in favor of a Muslim woman, Samantha Elauf, who alleged that Abercrombie & Fitch Stores (Abercrombie) failed to hire her because she wore a hijab (headscarf) in observance of her religion.**

The Court ruled 8-1 that Abercrombie failed to accommodate Elauf's religious needs when she was not hired on the basis that her hijab violated company dress policy. Abercrombie argued that Elauf could not prevail without establishing that the employer had "actual knowledge" of her need for a religious accommodation.

The Court disagreed and sent the case back to the lower court for further consideration, holding that, a job applicant need show only that his or her need for an accommodation was a motivating factor in the employer's decision, not that the employer had knowledge of the need. [PE]

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