Pacific Employers
Management Advisor
Celebrating 42 Years!
February 2006

Top of the News

Doffing & Donning!

The U.S. Supreme Court ruled some 50 years ago that time spent by employees on activities that are "integral and indispensable" to the employee's "principal activity or activities" is compensable under the Fair Labor Standards Act (FLSA). However, § 4(a) of the Portal-to-Portal Act exempts from this requirement:

> 1. walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform; and
>
> 2. activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

Recently the Court addressed the question whether the time employees spend walking between the changing area and the production area, and vice-versa, in the course of "donning" (putting on) or "doffing" (taking off) required protective gear or safety equipment is compensable under the FLSA.

The Court ruled, unanimously, that because "donning" and "doffing" protective gear is "integral and indispensable" to the employee's principal activity, the time the employee spends walking between the changing and production areas is all part of a "continuous workday" and, accordingly, all of this time is compensable. However, time spent waiting to receive gear before the shift begins was not compensable work time under the facts of these cases because such time was too far removed from productive activity.

Justice **Stevens** explained that *"during a continuous workday, any walking time that occurs after the beginning of the employee's first principal activity and before the end of the employee's last principal activity is . . . covered by the FLSA."*

Employers should review those activities that they require an employee to pursue before, during and after the end of the workday, and question those that are not paid. An example would be an employee who works at several locations during the day, and is not paid to travel between them. If employees can wear their uniforms to work, no pay for putting them on at work. But if they are required to change at work, you must pay for the change into and out of. (donning and doffing.)

Pacific Employers can help you review current practices to keep you in compliance. [PE]

Labor Law Update Enclosed!

President's Report

~Dave Miller~

Good Practices for 2006

At the beginning of the year, Pacific Employers holds a seminar to review the changes in labor law. The legislature, courts and administrative agencies of our government are usually busy all year telling employers how to run their businesses. The enclosures contained in this edition of the newsletter review in very short detail the subjects of change that were covered at our first seminar of the year at the Workforce Investment Board.

Another thing that we provide our clients that attend the presentation is a list of Good Practices for 2006. At the meeting we had an opportunity to discuss these points in much greater detail, but for our newsletter, we will be brief;

- **Take Sex Harassment Rules Seriously** — Major court decisions and new law (AB 1825) have created substantially greater complexity to sex harassment rules, it is not to be messed with.
- **Review "Salary-exempt" Positions** — Overtime penalties are substantial for misclassified personnel.
- **Employee Clockouts For Meal Periods** — With little hope for reform, protect yourself with proof of meal periods.
- **Get On-duty Meal Agreements Signed** — If employees must work at meals, get agreements signed.
- **Review Pre- & Post Duty Responsibilities** — Putting on uniforms, and washing up, may be working time.
- **Consider Everyone As A Protected Class Employee** — Everyone is a victim, begin from that premise.
- **Learn The "Interactive Process"** — Always get more information on how you can accommodate.
- **Bring Handbooks Up To Date** — The laws change, your policies need to change with the law.
- **Create Or Review Sales Commission Agreements** — You're the author, so make sure they protect you in every way possible. [PE]

> Courage is fear that has said its prayers.
> — Karl Barth

NLRB RULE IS DANGEROUS

Confidentiality Rules

Under a host of new laws, employers must protect the privacy of their employees' and clients' medical, mental, criminal, credit & financial records, Social Security Numbers as well as other personal information. Recognizing that identity theft has become one of this decade's top crimes, businesses must now cross-shred confidential documents they wish to dispose of.

Now comes the National Labor Relations Board (NLRB or Board), with a new mandate for employers to lift the lid of privacy on all their confidential records.

The NLRB is the federal agency that is charged by Congress with the responsibility of promoting collective bargaining. By most anyone's definition, that would mean that the Board is to help unions within the context of the National Labor Relations Act. Allowing an employee to share company information with a union can help the union to organize the employer.

To promote their agenda, the NLRB often issues decrees that conflict with general employer practice and sometimes, common sense. The Board has just again issued such an edict that suggests that virtually every employer should remove from their policy manuals language that protects the privacy and confidentiality of the data they possess.

The NLRB has now ruled that an employee handbook that includes a broad confidentiality policy or restricts reasonable employee speech violates federal labor law by rejecting a policy that included "violating a confidence or unauthorized release of confidential information" as among behaviors that could result in disciplinary action. The NLRB decided that the handbook content violated federal labor law because employees could reasonably understand it to restrict discussion of wages and other terms and conditions of employment with fellow employees and with the union. *Cintas Corp., 344 NLRB No. 118.*

While California law also prohibits employers from maintaining rules prohibiting employees from disclosing the amount of their wages or information about working conditions, it doesn't suggest that an employer must allow employees to plunder the company files for confidential information that they can release to the detriment of the company, its employees and customers.

Should you make all of your confidential information available to the public through a disgruntled employee as suggested by the NLRB? In Charles Dickens' Oliver Twist, he put it rather bluntly: "'If the law supposes that,' said Mr. Bumble, 'the law is a ass — a idiot.'"

Recognizing the liability a business incurs for the release of Social Security Numbers and credit card information, and realizing how devastating to a company's business it could be to release customer data, business secrets, and secret formulae, an employer would be foolish to follow such a course of action.

Employers should check their employee handbooks and employment and confidentiality policies to be sure they do not prohibit or discourage employees from discussing their wages, but to go farther would be the height of foolishness, no matter what the NLRB says.

The chance that you will run afoul of the NLRB is infinitesimal compared to the real possibility that your employees may intentionally or accidentally compromise someone's privacy or aid in identity theft. [PE]

What Does "At-Will" Mean?

The California Supreme Court will get a chance to decide the plain meaning of "at will" in the employment context. The crux of the legal issue is the plain meaning of termination "at will" as described in a letter offering employment that could end "at any time." In *The employee v. Arnold Worldwide LLC,* pending before the California Supreme Court, the employer's offer letter said that employment could be terminated "at will." The letter also explained that "at will" employment "simply means" employment that can end "at any time."

The California Court of Appeal held that the offer letter was ambiguous because it defined employment "at will" as employment that can be terminated "at any time" but did not include the phrase "and for no cause." The lower court went on to find that the employee's 90-day "assessment period" was inconsistent with employment "at will." The court also held that statements made during the interview process, such as the employer has a "family atmosphere" and was looking for a "long term solution" for its Los Angeles office, created a jury question regarding whether the employee was employed "at will" or under a contract requiring "good cause" for termination.

The employer sought and obtained California Supreme Court review of the appellate court's decision. The issues before California's high court include whether 1) the definition of employment "at will" was ambiguous, permitting the employee to introduce evidence to explain the meaning, called "parol" evidence, and 2) statements such as the employer has a "family atmosphere" and is looking for a "long term solution" for its office are sufficient to create a contractual expectation of employment that cannot be terminated without good cause, or are sufficiently specific to constitute an actionable "misrepresentation."

"Merely because an employer expresses a desire to hire an effective manager who will remain in its employ for a long term does not limit the employer's right to terminate employment at the employer's will," wrote D. Gregory Valenza, of the attorney firm of Jackson Lewis, who co-authored a friend of the court brief, together with the Atlantic Legal Foundation. *"If this Court upholds the Court of Appeal's decision, companies' hiring personnel will be reduced to reading candidates legal disclaimers such as those heard at the end of advertisements on the radio."*

The brief points out that the statement in the employment agreement that "at will" means the employee can be terminated "at any time" echoes precisely the definition of "at will" in an earlier opinion of the California Supreme Court in an earlier case.

The brief contains a strong argument in favor of introductory periods, pointing out to the Supreme Court their many applications having nothing to do with termination of employment. For example, introductory periods can be used to set initial production quotas, benefit levels, eligibility for employer insurance, and the like.

"We are pleased to have worked with Martin Kaufman of the Atlantic Legal Foundation on behalf of the Southern California Chapter of the Association of Corporate Counsel to persuade the California Supreme Court to reverse this erroneous decision," Valenza said.

Atlantic Legal Foundation is a non-profit public interest law firm whose mandate is to advocate and protect the principles of limited government, the free-market system and individual rights. It seeks to advance this goal through litigation and other public advocacy and through education.

Labor Law Update Enclosed!

Human Resources Question with Candice Weaver

The Month's Best Question

Haz Mat Bus Plan

Q: "I have been told that I may need to have a Hazardous Materials Business Plan created. What is a Hazardous Materials Business Plan and why do I have to have one?"

A: A Hazardous Materials Business Plan (Business Plan) is a comprehensive program designed to assist first responders in incidents involving hazardous materials as well as aid in planning for such incidents.

Reporting Rules

The State of California requires businesses to create a Business Plan and file a copy with their local administering agency when certain minimum reportable quantities of hazardous materials are handled or stored at their facility. In most cases the administering agency will be the local Environmental Health Services Division.

A Business Plan must contain the following items to be in compliance:

1. Business Plan Registration
2. Hazardous Materials Inventory
3. Site Map and Facility Diagrams
4. Accidental Release Prevention Program Registration
5. Emergency Response Plans & Procedures
6. Immediate Report of Release or Threatened Release

A Business Plan must be submitted for each facility location a business operates. In addition businesses must file an updated plan within 30 days of certain changes to the business' activities and at a very minimum an Annual Business Plan Review Form must be submitted to the local administering agency by March 1st of every year along with the appropriate Annual Permit Fees.

Should your business need assistance in creating and/or filing a Business Plan, Pacific Employers can assist. [PE]

Employment Seminars

Sponsored by the Small Business Development Center (SBDC) and the **Workforce Investment Board** at 10:00 am on the 3rd Thursday monthly at 4025 West Noble Avenue, Suite A, Visalia. We ask that you RSVP to the Small Business Development Center at - 559 625-3051 or Fax - 559 625-3053.

2006 Seminar Schedule

♦ **Employee Handbook Development -** Every employer needs a handbook. The law and the courts tells us what to put in it. We discuss planning considerations; What to put in and what to leave out. Protect your right to manage!
Thursday, February 16th, 10am - 11:30am

♦ **Harassment & Discrimination in the Workplace -** How does your firm handle this hot topic? Learn about the seven (7) requirements that must be met by all employers. "What are the Protected Classes." Equal Employment Fundamentals.
Thursday, March 16th, 10am - 11:30am

♦ **Understanding SB-198 - the IIPP! -** If you have one or more employees, you must have the IIPP! Developing & Using Cal/OSHA's Written Safety Programs.
Thursday, April 20th, 10am - 11:30am

♦ **Leaves -** Federal & California Family Medical Leave, California's Pregnancy Leave, Disability Leave, Sick Leave, Workers' Compensation, etc.; What are the Pitfalls & How do you handle them? We will discuss implementing them all.
Thursday, May 18th, 10am - 11:30am

♦ **Exempt Status -** Salary? From what are they Exempt? Does a Title make them Exempt? Do specific Duties make them Exempt? What makes/keeps them Exempt?
Thursday, June 15th, 10am - 11:30am

♦ **Hiring & "At-Will" Employment -** From the Employment Application to the I-9 Form, we cover hiring. We also discuss maintaining an employee policy that protects you from the "For-Cause" Trap!
Thursday, July 20th, 10am - 11:30am

♦ **Posters, Signs, Forms, Handouts, Fliers -** With all the new laws out there, what posters, flyers and handouts does an Employer Need?
Thursday, September 21st, 10am - 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 19th, 10am - 11:30am

♦ **Progressive Discipline & Effective Termination -** In the last seminar of the year we discuss the steps to take before discharging an employee to avert a lawsuit! We examine how to set up a progressive instruction, correction, punishment and termination program.
Thursday, November 16th, 10am - 11:30am

These morning seminars are free of charge and include refreshments and handouts.

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.

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Labor Law Update Enclosed!

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Management Advisor
Celebrating 41 Years!

IBM STRIKES OUT ON RELEASE

Court invalidates Agreement

In a decision of potentially great practical significance for employers, the United States Court of Appeals for the Eighth Circuit invalidated a release of claims used by IBM in a reduction in force (RIF) because the court found that the release language was "ambiguous." In *Thomforde v. IBM Corporation,* the Eight Circuit Court held that IBM's release did not comply with the specific requirements of the Older Workers Benefit Protection Act (OWBPA), an amendment to the federal Age Discrimination in Employment Act (ADEA).

The release was ruled ineffective to waive claims under the ADEA and, as a result, the former employees terminated in the reduction in force were able to proceed with their age discrimination suit against IBM despite having received severance pay in exchange for signing a release.

The OWBPA amended the ADEA by providing that "an individual may not waive any right or claim under [the ADEA] unless the waiver is knowing and voluntary. . . ".The waiver must, "at a minimum," satisfy several requirements, one of which is that it is embodied in an agreement between an individual and an employer "that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate."

When the employee asked for an explanation the local representative refused to comply. The Court of Appeals held that the "lack of clarity" in the Agreement coupled with the fact that IBM declined to explain the language in the Agreement demonstrated that the waiver did not meet the OWBPA requirements. [PE]

FREE & UNLIMITED CONSULTATION?

Yes FREE! One benefit of Pacific Employers' Membership, is Free, Unlimited, direct, phone consultation on safety matters, Cal/OSHA or any labor question on the Pacific Employers' Helpline at: **(559) 733-4256 or Toll Free (800) 331-2592.**

SICK POLICY MAY VIOLATE ADA

In *Transport Workers Union of America v. New York City Transit Authority,* the federal district court addressed whether the asserted business necessity of curbing sick leave abuse and ensuring workplace safety justified an employer's policy that inquired into employees' health and medical conditions as a prerequisite to paid sick leave. The court held the sick leave policy was overly broad and limited its application only to those employees in safety sensitive positions and to those with chronic absentee records.

The sick leave policy provided for three levels of inquiry into an employee's absence before approving applications for sick leave. **First**, when seeking sick leave, employees were required to give notice at least one hour prior to the start of the shift as well as give a brief statement explaining the nature of their illness. **Second**, upon returning to work, employees were required to submit a form to their respective supervisors explaining the "nature of the disability" which caused him/her to be unfit for work due to "illness." **Third**, depending on an employee's job classification (e.g., bus drivers), or circumstances, a "doctor's certification" may have been required to certify the illness.

Under the ADA, employers are prohibited from making inquiries that "may tend to reveal a disability," unless the inquiry is "job-related and consistent with business necessity."

The district court held that the information sought from employees as a condition for sick leave constituted a medical inquiry under the ADA. The employer could request the doctor's certificate, but the employer may not require that the certificate reveal the nature of the illness or treatment. [PE]