Pacific Employers
Management Advisor
Celebrating 44 Years!
February 2008

Top of the News

Support for Medical Marijuana goes to Pot!

Employers can fire workers found to have used medical marijuana even if it was legally prescribed, the California Supreme Court ruled Thursday in another setback for California in its increasingly rancorous clash with federal law over medical pot use.

The high court upheld a Sacramento telecommunications company's firing of a man who flunked a company-ordered drug test. Gary Ross held a medical marijuana card authorizing him to legally use marijuana to treat a back injury sustained while serving in the Air Force.

"No state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law," Justice Kathryn Werdegar wrote for the 5-2 majority.

The company, Ragingwire Inc., successfully argued it rightfully fired Ross because all marijuana use is illegal under federal law, which does not recognize the medical marijuana laws in California and 11 other states.

The state Supreme Court said the so-called Compassionate Use Act passed by California voters in 1996 had nothing to do with employment laws.

"Nothing in the text or history of the Compassionate Use Act suggests the voters intended the measure to address the respective rights and duties of employers and employees," Werdegar wrote. "Under California law, an employer may require preemployment drug tests and take illegal drug use into consideration in making employment decisions."

"No state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law."

A 2005 U.S. Supreme Court decision declared that state medicinal marijuana laws don't protect users from prosecution. The Drug Enforcement Agency and other federal agencies have been actively shutting down major medical marijuana dispensaries throughout the state over the last two years and charging their operators with serious felony distributions charges.

Ragingwire said it fired Ross because it feared it could be the target of a federal raid, among other reasons. [PE]

Labor Law Update Enclosed!

President's Report
~Dave Miller~
"44 Years Old!"

We don't look that old do we? However, it was way back in 1964 that we got the big idea to help employers deal with labor problems in a new way, and the Pacific Employers you know today was formed.

Yeah, we called it Tulare-Kings Employers Council back then, and spent most of the time fighting with unions, but while the name changed to get away from the supposed geographical limitations, the concept of helping employers with labor problems has stayed the same even though now it's the government and trial lawyers that create most of the torment for employers.

To Celebrate - We will be holding an Open House on April 18th from 2:00 to 6:00 PM. Join us in celebrating 44 Years of serving California employers with a unique combination of safety, human resources and labor relations services.

Come see the extensive redecorating we have undertaken on our Downtown Visalia offices as we will set the counters with a wide array of comestibles and libations *(eats & drinks)* and gather round for an afternoon of camaraderie based on many years of good relationships. [PE]

What's New Page

We have added a new page to our website that will help you determine "What's New." It is named appropriately, the What's New Page.

On this page we have put the information you need today. Items such as the specific language for the Earned Income Tax Credit notice that must go to all employees, or the new I-9 Form are now located there. We also have the EITC notice and the I-9 Form available there in Spanish.

The "What's New Page" can be accessed from our home page. It is the first button on the list. You will even find links to our most recent E-News articles to help you keep up on what's new.

We invite you to take a look. If there is something new that needs to be added, give us a call or drop us an email. [PE]

Pleasure in the job puts perfection in the work. — Aristotle

New Rullings

Employers May Limit Union E-mail

In a long-awaited decision, the National Labor Relations Board, held that employers have the right to implement and enforce a policy prohibiting employees from using the company's e-mail system for "non-job-related solicitations." In *The Guard Publishing Company*, the Board held that employees do not have a statutory right to use the employer's e-mail system to solicit on behalf of unions. The Board, in this 3-2 decision, stated that employers may: "*. . . draw a line between charitable solicitations and noncharitable solicitations, between solicitations of a personal nature (e.g. a car for sale) and solicitations for the commercial sale of a product (e.g. Avon products), between invitations for an organization and invitations of a personal nature, between solicitations and mere talk, and between business-related use and non-business related use.*"

The Board noted that in each of the above examples, the fact that a union solicitation would fall in the prohibited side of the line did not violate the National Labor Relations Act (Act).

The Board also held that the company's policy itself was not discriminatory. The policy, which prohibited the use of the e-mail system for non-work-related solicitations was consistent with past Board precedent that employees do not have a right under the Act to use an employer-owned equipment for union business. Although this decision was in the context of a union organized company, the holding will be equally applicable to employers who are not presently unionized, both in the context of a possible union organizing campaign or with respect to employees who may be engaged in protected concerted activities as defined in the Act. Give us a call on the creation and implementation of a lawful e-mail policy or how this decision may affect your current policy.

Employers have the right to implement and enforce a policy prohibiting employees from using the company's e-mail system for "non-job-related solicitations." [PE]

Illegals Enjoy Employment Status

A federal circuit court of appeals has given a huge win to unions that organize illegal aliens. Federal law prohibits employers from knowingly hiring workers who cannot prove their legal right to work in the United States, but, as one employer recently learned, an employer must bargain with a union elected by apparently undocumented workers. *Agri Processor Co. v. National Labor Relations Board* is the latest in a line of cases granting illegal aliens full "employee" status under federal law.

According to Agri Processor, a kosher meat products wholesaler in New York, it unknowingly hired workers who had provided false Social Security numbers. After the company's workers voted to unionize, the company discovered that a majority of the voters in the union election were illegal aliens. Crying foul, the company refused to bargain. The National Labor Relations Board upheld an unfair-labor-practice finding, rejecting the notion that workers who should not have been hired in the first place cannot be considered employees under federal labor law.

The Board majority rejected the suggestion that saddling an employer with an obligation to bargain with employees the employer would have to fire under immigration law produces a "peculiar" result. Agri Processor took its case to the United States Circuit Court of Appeals for the District of Columbia. The court agreed with the Board.

The court decreed that the plain language of the National Labor Relations Act (NLRA) and the United States Supreme Court decision in a 1984 decision – *Sure-Tan, Inc.* – compelled the sustaining of the unfair labor practice.

In *Sure-Tan*, the United States Supreme Court had held that undocumented aliens fit squarely within the NLRA definition of employee. In 1986 Congress passed the Immigration Reform and Control Act (IRCA), which made it unlawful to employ undocumented workers.

According to the two judges deciding against Agri Processor, Congress will have to expressly amend the definition of "employee" under the NLRA before illegal aliens will lose their rights under the NLRA. [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*. Phone us at 733-4256 or Toll Free 800 331-2592.

Labor Law Update Enclosed!

Human Resources Question with Candice Weaver

The Month's Best Question

Can We Consider Age?

Q: "Would it be considered age discrimination if I required a retired employee, who is eligible for Social Security Medicare benefits, to make Medicare the primary provider and reduce their coverage on my retiree Health Insurance Plan?"

A: No, the US Equal Employment Opportunity Commission (EEOC) now says employers are exempt from the Age Discrimination in Employment Act (ADEA) when they cut retiree benefits for those old enough to qualify for Social Security Medicare benefits.

In the "final rule" issued by the EEOC, employers were handed a long awaited green light to require Medicare to become the primary provider and the retiree health insurance plan secondary, allowing the employer to reduce skyrocketing health insurance costs. In opposition to the ruling was AARP saying that the rule gives employers free rein to use age as a basis for reducing or eliminating health-care benefits for retirees 65 or older.

In the decision the EEOC agreed that employer-sponsored retiree health benefits provide an important source of health coverage for older Americans when health care needs are potentially at their greatest. However, they also pointed out that employers are not mandated to provide health benefits and recognized that rather than forcing employers to discontinue health benefits for retirees all together, it would be more prudent to allow them flexibility in managing their plans, resulting in this narrow exemption from the ADEA. [PE]

Speaking of older guys... I would like to personally invite you to our Open House on April 18th of this year. We will be celebrating Pacific Employers' 44 years in business but more impressively the 40 years that David Miller has been our Commander in Chief. Save the date as it is sure to be a great event. [Candice]

Want Breaking News by E-Mail?
Just send a note to
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Tell us you want the News by E-Mail!

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.

2008 Topic Schedule

♦ **Employee Policy Review -** Every employer needs guidelines and rules. We discuss planning considerations, what must be included and what you may want to omit.
Thursday, February 21st, 2008, 10am - 11:30am

♦ **Equal Employment Fundamentals -** Harassment & Discrimination in the Workplace - The seven (7) requirements that must be met by all employers. "The Protected Classes."
Thursday, March 20th, 2008, 10am - 11:30am

♦ **Safety Programs -** Understanding Cal/OSHA's Written Safety Program. Reviewing the IIPP or SB 198 requirements for your business.
Thursday, April 17th, 2008, 10am - 11:30am

♦ **Family Leave -** 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?
Thursday, May 15th, 2008, 10am - 11:30am

♦ **Wage & Hour and Exempt Status -** Overtime, wage considerations and exemptions.
Thursday, June 19th, 2008, 10am - 11:30am

♦ **Hiring & Maintaining "At-Will" -** From the thought to hire to putting to work, we discuss maintaining procedures that protect you from the "For-Cause" Trap!
Thursday, July 17th, 2008, 10am - 11:30am

No Seminar in August or December

♦ **Record Keeping -** Forms, Posters, Signs, Handouts, Fliers - Just what paperwork, posters, flyers and handouts does an Employer need?
Thursday, September 18th, 2008, 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 16th, 2008, 10am - 11:30am

♦ **Discipline & Termination -** The steps to take before termination. Managing a progressive correction, punishment and termination program.
Thursday, November 20th, 2008, 10am - 11:30am

Labor Law Update Enclosed!

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Celebrating 43 Years!

Arbitration Agreements Must Be Separate

The courts and the legislature seem to have a love/hate relationship with employer arbitration. While they support it in principle to lessen the load on the courts, they are constantly making rules that often delegitimatize the many agreements that are currently in effect.

Pacific Employers has long established a policy, when creating handbooks, to keep the arbitration agreement and language out of the handbook and provide a separate, stand alone agreement. It appears that such a practice is a good one based on a new decision.

In a recent California decision, the court considered an agreement to arbitrate set forth in an employee handbook and ruled that it was not enforceable.

In order for such an agreement to be enforceable, there must be an offer and an acceptance which is both clear and unmistakable indicating mutual assent. In the absence of such assent, an arbitration provision set forth in an employee handbook may not be worth more than the paper it is written on, leaving the employer vulnerable to defending employee claims in a much more costly judicial forum- an outcome originally thought to have been safeguarded against. [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

Showing Up is an Essential Function

Employees taking unexcused absences on short notice fail to show that they are qualified to perform the essential functions of a job under the federal Americans with Disabilities Act (ADA) if they cannot demonstrate regular and reliable attendance at work, particularly when the job is caring for seriously ill patients in need of dialysis.

This is in contrast with a job that could be performed off-site or put off until another time, according to the 8th Circuit Court of Appeals (covering Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota and South Dakota). Further, if an accommodation is requested or required, employees must provide employers with sufficient notice of their need. *Rask v. Fresenius Medical Care of North America* [PE]

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