

WHAT'S NEW!

EQUAL PAY BILLS – COMING SOON?

The Democratic-led U.S. House of Representatives has overwhelmingly passed two pay discrimination bills—the **Lilly Ledbetter Fair Pay Act (H.R. 11)** and the **Paycheck Fairness Act (H.R. 12)**. These laws were written to remove employer defenses to discrimination claims.

Senator Hillary Clinton (D-NY) is expected to introduce companion legislation in the Senate. Similar legislation passed the House in early 2008 but failed to overcome a Republican filibuster in the Senate. Even if last year's bill had passed in the Senate, President Bush had vowed to veto it. With Obama in the White House, expect it to become law.

"... EXPECT IT TO BECOME LAW."

The **Ledbetter Fair Pay Act**, which follows a controversial 2007 U.S. Supreme Court decision gives employees more time to file pay discrimination lawsuits by restarting the clock on the statute of limitations with each paycheck. The **Paycheck Fairness Act** amends the Equal Pay Act of 1963 to clarify that plaintiffs alleging gender-based pay discrimination can seek both compensatory and punitive damages. In addition, it puts the burden on employers to prove that pay disparities are not gender-based, and prohibits retaliation against employees who raise pay discrimination complaints.

Take proactive measures, such as conducting a self-audit, to avoid pay bias lawsuits. Our staff is prepared to help you audit your hiring and pay practices to determine if you need to make changes in your policies and procedures.

If either or both bills are ultimately enacted, employers can expect a new rash of pay related litigation. Following the time-tested philosophy that "an ounce of prevention is worth a pound of cure," the House's vote is a good reminder that now is the right time to review your pay practices. [PE]

E-VERIFY POSTPONED TO FEB. 20, 2009

The Department of Homeland Security (DHS) announced that the implementation of the regulation requiring certain federal contractors to use E-Verify will be postponed from January 15, 2009 to February 20, 2009.

The E-Verify regulation that was scheduled to take effect on January 15th requires certain federal contractors to use internet-based E-Verify system to verify the work eligibility of their employees.

"... TEMPORARY RELIEF..."

While this announcement may come as a temporary relief to employers, it is still crucial that employers review federal contracts to determine if they may become subject to the E-Verify requirement if ultimately imposed. [PE]

Labor Law Update Enclosed!

President's Report ~Dave Miller~ New Laws?



Enclosed in this issue of the MANAGEMENT ADVISOR is our annual Labor Law Update. The new list of laws and court decisions is not earthshaking considering the times.

However, there is a great deal for the average employer to be concerned about with regard to new laws and court decisions that are expected in 2009.

TOP OF THE LIST - CA SUPREME COURT!

The *Brinker* and the *Brinkley* meal period cases have now been granted review by the California Supreme Court and the rest period rules will probably be addressed also. This may include the number of rest periods that must be provided during a day, when a second rest period must be permitted, when they should occur, and whether they can effectively be waived. Be careful how you operate during this time, as the statute of limitations for filing a claim for missed meals or breaks can be up to 3 years.

FREE CHOICE ACT!

Organized labor may be able to get their much needed Free Choice Act passed and signed in to law to replace the National Labor

Relations Board's secret ballot elections. Another feature of the law is a requirement for the employer to agree on a contract in negotiations within 120 days or have an arbitrator impose a binding agreement.

THE R.E.S.P.E.C.T. ACT!

Another Issue that has the potential to become law is the R.E.S.P.E.C.T. Act (Re-Empowerment of Skilled and Professional Employees and Construction Trade Workers) which, by changing the legal definition of supervisor, would allow many exempt supervisors a chance to join the ranks of organized union labor, and would no doubt lead to conflict of interest and loyalty problems at many worksites.

WORKING FAMILIES FLEXIBILITY ACT!

This law would establish a mandatory grievance procedure and allow employees to file a charge with the Department of Labor if they did not agree with employer decisions on pay, work hours or location. [PE]

WELCOME TO 2009!

We will be here to assist you as these laws develop. Our hope is to make it possible for you to successfully navigate this coming year. [PE]

The future is here. It's just not widely distributed yet. - William Gibson

Recent Developments

New FMLA Notice Requirements in Effect

Beginning in January 2009, employers have been required to comply with the new Family and Medical Leave Act (FMLA) regulations issued by the Department of Labor in November 2008. The new regulations change the employer's FMLA notice obligations by requiring employers to provide employees:

(1) General Notice about the FMLA, which the employer must provide either in an employee handbook or in other written materials concerning benefits and leave or, if the employer does not have such materials, at the time of hire;

"THE NEW REGULATIONS ALSO REVISED THE MEDICAL CERTIFICATION REQUIREMENTS . . ."

(2) Eligibility Notice, which the employer must provide within five business days of the date an employee requests FMLA leave, or the employer acquires knowledge that an employee's leave may be FMLA-qualified. This Notice addresses whether the employee meets the statutory requirements of the FMLA (that is, employment by the employer for 12 months; 1,250 hours of service in the 12-month period immediately preceding the request for leave; and employment at a worksite where 50 or more employees are employed within 75 miles);

(3) Rights and Responsibilities Notice, which the employer must provide simultaneously with the Eligibility Notice and which provides detailed information to the employee about his or her rights and responsibilities under the FMLA; and

(4) Designation Notice, which requires the employer to notify the employee whether a leave of absence will be designated as FMLA leave. The employer must provide this notice within five business days, absent extenuating circumstances, of when the employer has sufficient information to determine whether the leave is being taken for an FMLA-qualifying reason.

The new regulations also revised the medical certification requirements for leave taken because of the employee's own serious health condition or the serious health condition of a family member and set forth requirements for certification supporting leave for a qualifying exigency and military caregiver leave.

Employers should ensure that their FMLA forms meet the requirements of the new regulations, either by using the model forms the DOL provided when it issued the new regulations or ensuring that their forms contain the same information as the model forms. If you have questions regarding the new regulations or need assistance reviewing and revising your policies or implementing the new notice procedure, contact Pacific Employers. [PE]

Use of New I-9 Form Required on 2-2-09

Effective February 2, 2009, employers will have to complete a new, revised I-9 form for all new hires and for reverification of certain employees with temporary work authorization. The new form incorporates the following changes regarding the types of documents that employers may accept to prove identity and employment authorization:

- All documents presented during the verification process will

Want Breaking News by E-Mail?
Just send a note to
peinfo@pacificemployers.com
Tell us you want the News by E-Mail!

now have to be unexpired. Previously, certain expired documents (e.g., U.S. passports) were acceptable.

- Acceptable List A identity and employment authorization documentation will no longer include Form I-688, Temporary Resident Card; Form I-688A, Employment Authorization Card; and Form I-688B, Employment Authorization Card. All these cards are now obsolete.

"THE NEW FORM SHOULD NOT BE COMPLETED FOR EXISTING EMPLOYEES."

- List A will now include foreign passports containing certain machine-readable immigrant visas. Also added to List A are passports from the Federated States of Micronesia and the Republic of the Marshall Islands if presented with an I-94 or I-94A arrival/departure record.

The new I-9 form will be available on our Forms page on the Pacific Employers Website or requested by calling our office.

The new form should not be completed for existing employees. It must be used only for new hires and for reverification of current employees who only have temporary work authorization upon expiration of that authorization. [PE]

Genetic Info Nondiscrimination Act

On May 21st, President Bush signed The Genetic Information Nondiscrimination Act of 2008 ("GINA") into law. According to the National Institutes of Health's National Human Genome Research Institute, "GINA protects Americans from being treated unfairly because of differences in their DNA that may affect their health. The new law prevents discrimination from health insurers and employers."

The new law, which becomes effective in November 2009, is the culmination of a decade-long debate and a series of legislative efforts to deal with the specter of genetic discrimination. Supporters of the law cited a few instances of genetic discrimination, but not widespread abuse.

"EMPLOYERS ARE PROHIBITED FROM ACQUIRING GENETIC INFORMATION, . . ."

Adding to the anti-discrimination provisions in Title VII of the Civil Rights Act of 1964, GINA prohibits employers from discriminating against employees on the basis of genetic information.

The term "genetic information" means information about (i) an employee's genetic tests, (ii) the genetic tests of family members of an employee, and (iii) the manifestation of a disease or disorder in family members of an employee. Under item (iii), knowledge that an employee or family member has an inherited (or inheritable) disease may trigger GINA.

Employers are prohibited from acquiring genetic information, with certain exceptions. Some exceptions include: (1) where an employer inadvertently requests or requires family medical history of the employee or family member of the employee; (2) indirectly, as part of a wellness program; (3) as part of an FMLA medical certification; (4) where the information involved is to be used for genetic monitoring of the biological effects of toxic substances in the workplace; and in a few limited other circumstances.

In the event that an employer does acquire genetic information, the new law requires strict confidentiality, in the manner dictated by the ADA.

Employees who violate GINA will be vulnerable to employee lawsuits and government agency enforcement actions. [PE]

Labor Law Update Enclosed!



Human Resources Question with Candice Weaver

THE MONTH'S BEST QUESTION

Who Needs RESPECT?

Q: "I have heard that the "R.E.S.P.E.C.T. Act," if it becomes law, will take supervisors, lead-men and foremen and put them into the ranks of the line employees. Could that make them part of a unionization campaign?"

A: Yes, the R.E.S.P.E.C.T. Act which would allow many exempt supervisors a chance to join the ranks of organized union labor, and would no doubt lead to conflict of interest and loyalty problems at many worksites.

The Supreme Court redefined the term "supervisor" with their rulings in NLRB v. Kentucky River Community Care, Inc. and NLRB v. HCR. This required the National Labor Relations Board (NLRB) to modify the way it had been interpreting the term "supervisor" in the context of the National Labor Relations Act (NLRA). This angered Organized Labor, which had been successful in getting the NLRB to recognize a supervisor as non-working management, rather than a crewleader, leadperson or foreman. The revised definition of "supervisor" under Section 2(11) of the NLRA would read as follows:

Any individual having authority, in the interest of the employer, and for a majority of the individual's work time, to hire, transfer, suspend, lay-off, recall, promote, discharge, ~~assign~~, reward, or discipline other employees, ~~or responsibility to direct them,~~ or to adjust their grievances or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. (Underlined added; strikethrough deleted.)

Changing the definition of "supervisor" would significantly affect many workplaces by:

- Creating divided loyalties among front-line supervisors who assign work to employees. Under the RESPECT Act, such supervisors would be covered by the NLRA and could then form, join or assist labor organizations; be eligible to vote in NLRB supervised elections; solicit signatures for union authorization cards from "co-workers;" or picket, go on strike or engage in other work stoppages that would be inconsistent with a supervisor's duty.

- Fundamentally tipping the balance between the dual functions of the national labor policy:

- (1) to protect the rights of rank-and-file employees in exercising their rights to form, join or assist a union without managerial or supervisory interference, while at the same time

- (2) ensuring supervisors act as agents in the interests of their employers in matters of labor-management relations.

- To the extent that the NLRA definition is changed, there may also be changes to the FLSA's definition, triggering litigation involving individuals currently classified, as "supervisors" but who may not meet a new definition

Planning for change can help. For questions regarding ways you can plan, contact Pacific Employers. [PE]

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.

2009 Topic Schedule

- ◆ **Employee Policies** - Every employer needs guidelines and rules. We examine planning considerations, what rules to establish and what to omit.

Thursday, February 19th, 2009, 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 19th, 2009, 10am - 11:30am

- ◆ **Safety Programs** - Understanding Cal/OSHA's Written Safety Program. Reviewing the IIPP or SB 198 requirements for your business.

Thursday, April 16th, 2009, 10am - 11:30am

- ◆ **Family Leave** - Federal & California Family Medical Leave, California's Pregnancy Leave, Disability Leave, Sick Leave, Workers' Compensation, etc.; Making sense of them.

Thursday, May 21st, 2009, 10am - 11:30am

- ◆ **Wage & Hour and Exempt Status** - Overtime, wage considerations and exemptions.

Thursday, June 18th, 2009, 10am - 11:30am

- ◆ **Hiring & Maintaining "At-Will"** - Planning to hire? Putting to work? We discuss maintaining "At-Will" to protect you from the "For-Cause" Trap!

Thursday, July 16th, 2009, 10am - 11:30am

There is No Seminar in August

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

Thursday, September 17th, 2009, 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 15th, 2009, 10am - 11:30am

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

Thursday, November 19th, 2009, 10am - 1:30am

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 an unlimited dinner for two at the *Vintage Press*.

Phone us at 733-4256 or Toll Free 800 331-2592.

PRSR STD
U.S. Postage
PAID
VISALIA, CA
Permit # 441

Return Service Requested

Pacific Employers

306 North Willis Street

Visalia, CA 93291

559 733-4256

(800) 331-2592

www.pacificemployers.com

email - peinfo@pacificemployers.com

Labor Law Update Enclosed!



Small Business
of the Year

MANAGEMENT ADVISOR

Celebrating 45 Years!

Pacific Employers

Articles in this Newsletter have been extracted from a variety of technical sources and are presented solely as matters of general interest to employers. They are not intended to serve as legal opinions, and should not be deemed a substitute for the advice of proper counsel in appropriate situations.

Military Leaves Under FMLA

The amended FMLA provides two new leave entitlements for families of military servicemembers:

QUALIFYING EXIGENCY LEAVE

- Eligible employees with a spouse, child, or parent on active duty or called to active duty in the National Guard or Reserves in support of a contingency operation may take up to the normal 12 weeks of leave because of any "Qualifying Exigency."
- "Qualifying Exigencies" are: (1) short-notice deployment; (2) military events and related activities; (3) childcare and school activities; (4) financial and legal arrangements; (5) counseling; (6) rest and recuperation; (7) post-deployment activities; and (8) additional activities agreed to by the employer and the employee.
- Note that Qualifying Exigency leave is available only to families of servicemembers in the National Guard or Reserves—not to families of servicemembers in the Regular Armed Forces.

MILITARY CAREGIVER LEAVE

- An eligible employee who is the spouse, son, daughter, parent or next of kin of a covered servicemember (includes a current member of the Regular Armed Forces, as well as the National Guard or Reserves) may take up to 26 weeks of leave to care for such servicemember with a serious injury or illness incurred in the line of duty on active duty.
- Unlike other forms of FMLA leave, an employer may not select the 12-month period used for computing available Military Caregiver leave. Rather, the 12-month period begins on the first day the employee takes leave for this purpose and ends 12 months thereafter.
- Military Caregiver leave entitlement applies on a per-covered servicemember, per-injury basis. [PE]

Auto Group Closes Work Comp Plan

Managers for the Preferred Auto Dealers Self-Insured Program, a 70-member self-insured group (SIG), confirmed last night that the group is a victim of the current credit crunch and will disband. Dealers will go into the regular insurance market.

"Given the state of the credit market they could not find an uncollateralized surety bond that would allow them to grow the program," says Peter Barden, a spokesman for CRM Holdings. "While it's been a successful program, if they can't grow it there's some real concern that it won't remain successful. So they've decided at this point to go ahead and close it down as the prudent thing to do."

Amid the nation's on-going credit crisis and a drop in consumer spending, auto dealers have been one of the hardest hit sectors. Dozens of dealerships around the state have closed and others still are threatened.

SECOND CLOSURE

But the auto dealers group is not the only CRM-affiliated group closing. OSIP also confirmed last night that the Vintners and Independent Producers Self Insurance Program of California -- a 30-member self-insured group for the wine-making industry - also filed to close down operations. [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