Pacific Employers
MANAGEMENT ADVISOR
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February 2012

What's News!

Split Shift And Reporting Time Pay

A California Court of Appeal construes wage order split shift and reporting time pay provisions in a pro-employer way in *Aleman v. Airtouch Cellular* that employees were not entitled to additional "reporting time" pay when they came into work for scheduled meetings. Additionally, when the employees worked split shifts, they were entitled only to the difference between what they actually earned for the day, and what they would have earned had they been paid the minimum wage for the day, plus an extra hour.

This ruling is the first published California appellate court opinion to address these issues.

"THE COURT REJECTED A CONTRARY POSITION TAKEN BY THE DLSE . . "

Two Airtouch Cellular employees claimed that when they came into work specifically for a scheduled meeting that lasted less than four hours, they were entitled to a minimum of four hours of "reporting time pay." They also claimed that on days where they worked two separate shifts, they were entitled to a split-shift premium of one hour at the minimum wage, above and beyond their hourly pay. The trial court rejected both of these claims as matter of law, and the employees appealed.

The Court of Appeal also rejected these claims. In doing so, the Court noted that California's "reporting time" pay provisions apply only when an employee works less than half of the usual or the scheduled day's work. Accordingly, if an employee is scheduled to come in to work only for a one-hour meeting, the employee is not entitled to reporting time pay unless the meeting lasts less than half of the scheduled duration (i.e. less than 30 minutes).

The Court distinguished this scenario from a case decided earlier this year, *Price v. Starbucks,* which held that an employee was entitled to 2 hours of reporting time pay when he was called into work for an unscheduled "talk," during which he was promptly fired. In that case, the "meeting" had not been scheduled and was not set for a specific length. Here, because the meetings attended by **Airtouch** employees were scheduled at least 4 days in advance, and the meetings lasted more than half their scheduled length, employees were not owed additional reporting time pay.

It is noteworthy that, in reaching this conclusion, the Court of Appeal rejected a contrary position taken by the California Division of Labor Standards Enforcement. The significance of this holding is that an employer can schedule employees to come to work solely for a short meeting, and need only pay the hours worked in the meeting rather than a minimum 2 hours of reporting time pay, so long as the meeting lasts at least half the scheduled length. [PE]

Labor Law Update Enclosed!

President's Report
~Dave Miller~

Meal Period Decision Soon!

Employers will likely have to wait until April 17th for a decision from the California Supreme Court in the long-awaited Brinker case involving whether employers must ensure that employees take meal periods or simply provide them.

The Court permitted additional briefing to address whether certain of its ultimate holdings should apply prospectively or retroactively, which will extend the deadline for a decision.

The *Brinker Restaurant Corp. et al. v. Superior Court of San Diego* wage and hour class action case primarily involves two issues: (1) whether employers must ensure that employees take meal periods or simply provide them and (2) whether a second meal period must be provided within five hours of the first meal, rather than after ten hours of work per day (as stated in Labor Code Section 512(a)).

A win in *Brinker* means that the employer must "provide" a meal period, but that employees may ignore or fail to take the meal period provided.

A loss means several years of backlogged cases against employers will move forward with many new class action suits claiming meal period violations. [PE]

On-Duty Meals?

On duty meals? The state law regarding "On-duty Meal Breaks," as listed in the Industrial Welfare Commission Wage Orders, states that employees may take on-duty meal breaks when the nature of the work prevents an employee from being relieved of all duty.

However, because the Office of the State Labor Commissioner is not in agreement with the law, it prosecutes employers who use the law's provisions. The Labor Commissioner has decided that there exists virtually no situation in which "*the nature of the work prevents an employee from being relieved.*"

We will learn soon from the State Supreme Court what the true reading of the law should be. However, because of the potential for claims going back as much as 4 years if the Court rules against the permissive interpretation of "provide," we caution employers against using the on-duty meal period agreement because of the spotlight that will be shown upon any pay practice that is not fully compatible with the states High Court ruling in April.

For this reason, we must recommend that you be very circumspect when using the on-duty meal agreement. [PE]

When small men begin to cast big shadows, it means that the sun is about to set.
Lin Yutang, writer/translator (1895-1976)

Recent Developments

NLRB Posting Requirement

Effective April 30, 2012, absent a court stay or further extension (the effective date was recently changed from January 31, 2012), the National Labor Relations Board ("NLRB") will require employers to post an official government notice advising employees of their legal rights under the NLRA.

"There are significant remedies for noncompliance."

The notice must be placed where other employment notices are customarily posted, as well as on a company's "intranet or internet site if the employer customarily communicates with its employees about personnel rules or policies by such means." Among other things, the notice (1) informs employees of their right under the NLRA to unionize and/or engage in other "protected concerted activity" unrelated to union organizing, (2) lists examples of unlawful employer conduct, (3) provides information for employees on filing charges against an employer, and (4) offers contact information for the NLRB. There are significant remedies for noncompliance.

There are numerous potential ramifications resulting from the new posting requirement. For example, the notice mentions "protected concerted activity," a right covered by the NLRA. In 2011, the NLRB expanded its focus on employer policies and practices relating to this NLRA right. Therefore, it is important for employers — whether fully unionized, partially unionized or union-free — to determine now whether any of their HR policies inadvertently could violate the NLRA based on these new interpretations. If you have not had your employee handbook and other workplace policies reviewed for NLRA compliance, it is recommended that you do so.

Policies that have come into question include, but are not limited to, confidentiality, social and other media, codes of conduct, non-harassment, related investigations, discipline, electronic communications and solicitation/distribution. [PE]

Ministerial Exception Confirmed

The US Supreme Court confirmed the ministerial exception to the discrimination laws when it issued its decision in Hosanna-Tabor v. Equal Employment Opportunity Commission, confirming a "ministerial" exception to discrimination laws.

". . infringes on the group's right to shape its own faith and mission . . ."

Cheryl Perich worked as a "called" teacher for Hosanna-Tabor Evangelical Lutheran Church and School. The term "called" means that she underwent a religious "commission" to teach for the school. Perich developed narcolepsy and began the 2004-2005 school year on disability leave. In January 2005 she notified the school principal that she would be able to report to work in February. The principal responded that he had already hired another teacher to work in February. The principal also expressed concern that Perich was not ready to return to the classroom. The Church offered to pay a portion of Perich's medical insurance costs in exchange for her resignation. Perich refused to resign and told the principal she had spoken with an attorney and intended to assert her legal rights. The Church then terminated Perich for insubordination and disruptive behavior.

Perich next filed a charge with the Equal Employment Opportunity Commission alleging she was terminated in retaliation for threatening to file a lawsuit in violation of the Americans with Disabilities Act. At the District Court level Hosanna-Tabor argued that the lawsuit was barred by the "ministerial" exception to the ADA provided by the First Amendment. The District Court agreed and granted summary judgment in Hosanna-Tabor's favor. The Sixth Circuit Court of Appeals vacated that decision because it found that Perich was not a minister under the exception.

The U.S. Supreme Court overturned the Court of Appeals' decision and held that there is a ministerial exception to the ADA and that Perich was included within that exception. The Supreme Court explained that the Free Exercise and Establishment Clauses of the First Amendment provide a "ministerial" exception to the ADA. The Court wrote that imposing an unwanted minister on a religious group infringes on the group's right to shape its own faith and mission through its appointments. The Court further explained that Perich was a minister because she had a significant amount of religious training followed by a formal religious commissioning by the school, she held herself out as a minister, and her job duties included conveying the Church's message in religious instruction. Therefore, the Court concluded that Perich fell within the "ministerial" exception and could not make a discrimination claim against Hosanna-Tabor.

The Court's ruling is a positive one for religious organizations. It assures them a greater freedom to make employment decisions. However, the Court did not provide much guidance regarding what organizations qualify as a "religious organization" or which employees would qualify as "ministers" to fit within the "ministerial" exception. Organizations that have concerns about whether they fit within this exception may want to consult with counsel before relying on the exception in making employment decisions. [PE]

Court Clarifies Administrative Exemption Test

In a major wage/hour ruling, the California Supreme Court clarified the test used to analyze whether the administrative exemption to overtime applies to employees.

Historically, courts have applied the administrative/production worker dichotomy test. This dichotomy distinguishes between administrative employees who are primarily engaged in administering the business affairs of the enterprise (exempt employees) and production-level employees whose primary duty is producing the commodities that the business exists to produce and market (non-exempt employees).

However, in *Harris v. Superior Court,* the Supreme Court held that the administrative/production worker dichotomy is not a dispositive test and should only be applied in limited circumstances. Instead, courts should first analyze whether the work performed by the employee is (1) directly related to management policies or general business operations of the employer or its customers and (2) both qualitatively and quantitatively administrative.

". . . the Court disregarded DLSE opinion letters . . ."

Significantly, the Court disregarded Department of Labor Standards Enforcement ("DLSE") opinion letters relied upon by the appellate court, stating "it is ultimately the judiciary's role to construe the language." [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 April 25th, registration at 7:30am — Seminar 8:00 to 10:00am, at the Lamp Liter, Visalia.

Quarterly Seminars also on 7-25-11 and 10-24-11

RSVP Visalia Chamber - 734-5876 – $25
Certificate – Forms – Guides – Full Breakfast

Human Resources Question with Candice Weaver

The Month's Best Question

Meal Period Status

Q: ***"What is the State of California's current position on Meal Periods?"***

A: It's been over two years since the California Supreme Court granted review in *Brinker Restaurant Corp. v. Superior Court.* During that time, employers in California have lacked definitive guidance on whether they must simply provide nonexempt employees with their statutory meal and rest periods, or whether they must somehow ensure that the employees take them.

In the meantime, California appellate courts have sided fairly consistently with the ***Brinker*** ruling in question before the California Supreme Court. The Supreme Court had 90 days from November 8, 2011, the date of oral arguments, to issue its final decision, which meant that businesses could anticipate a decision no later than February 6, 2012. However, on December 16, 2011 the Supreme Court granted permission for the parties involved in the ***Brinker*** case to submit additional post hearing briefs until January 17th, extending the 90 day period that the court had to render a decision to April 12, 2012.

So, here we are waiting again and while we wait, employers should be very cautious in how they handle employees meal periods. At the current time it is prudent for employers to make sure their employees are not only taking the meal periods but documenting that they have done so by clocking out at the start and back in at their return from the meal periods.

There is only one, very narrow, exception to this requirement. The California Industrial Welfare Commissions Wage Order No. 5-2001 regulating the wage, hours and working condition requirements in the Public Housekeeping Industry. The specific exception to the meal period applies when, "Employees with direct responsibility for children who are under 18 years of age or who are not emancipated from the foster care system and who, in either case, are receiving 24 hour residential care, and employees of 24 hour residential care facilities for the elderly, blind or developmentally disabled individuals may be required to work on-duty meal periods without penalty when necessary to meet regulatory or approved program standards and one of the following two conditions is met:

(1) (a) The residential care employees eats with residents during residents' meals and the employer provides the same meal at no charge to the employee; or

(b) The employee is in sole charge of the resident(s) and , on the day shift, the employer provides a meal at no charge to the employee.

(2) An employee, except for the night shift, may exercise the right to have an off-duty meal period upon 30 days' notice to the employer for each instance where an off-duty meal is desired, provided that, there shall be no more than one off-duty meal period every two weeks."

As you can see the exception to the rule is very limited. Stay tuned for a decision by the Supreme Court some time in April. Till then, document, document, document. [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.

2012 Topic Schedule

♦ **Employee Policies -** Every employer needs guidelines and rules. We examine planning considerations, what rules to establish and what to omit.
Thursday, February 16th, 2012, 10 - 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 15th, 2012, 10 - 11:30am

♦ **Safety Programs -** Understanding Cal/OSHA's Written Safety Program. Reviewing the IIPP or SB 198 requirements for your business.
Thursday, April 19th, 2012, 10 - 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 17th, 2012, 10 - 11:30am

♦ **Wage & Hour and Exempt Status -** Overtime, wage considerations and exemptions.
Thursday, June 21st, 2012, 10 - 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 19th, 2012, 10 - 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 20th, 2012, 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 18th, 2012, 10 - 11:30am

♦ **Discipline & Termination -** The steps to take before termination. Managing a progressive correction, punishment and termination program.
Thursday, November 15th, 2012, 10 - 11:30am

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 dinner for two at the *Vintage Press.*
Call 733-4256 or 1-800-331-2592.

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Wage Theft Prevention Act Is Now In Effect

On January 1, 2012, the California Wage Theft Prevention Act of 2011 ("WTPA") became effective. Most significantly, the WTPA adds section 2810.5 to the California Labor Code, which requires employers to provide non-exempt employees at the time of hire with a notice specifying various employment details such as rate of pay and the employer's regular paydays (among others).

The DLSE recently issued a template notice and Frequently Asked Questions. Employers must also adhere to written notice requirements for changes in the rate or basis of pay.

The Notice is available on both the What's New page and the Forms page of our website <*www.pacificemployers.com*> [PE]

Pres. Obama Makes NLRB Recess Appointments

In a political shocker, President Barack Obama recently announced that he will make recess appointments to immediately fill three NLRB Board Member vacancies. President Obama's appointees include two Democrats, union lawyer Richard Griffin and Labor Department official Sharon Block, and one Republican, NLRB lawyer Terence Flynn.

The move is attracting political heat for two reasons. First, President Obama did not allow much time for the confirmation process considering that Griffin and Block were nominated only weeks ago. Flynn, on the other hand, was nominated in January 2011 but his confirmation has stalled.

Second, the recess appointments were made while the Senate was not technically in recess. To avoid recessing, the Senate has been holding pro forma sessions, many of which last only seconds. Making recess appointments while the Senate is not technically in recess has never been done. Such a move will unquestionably cast doubt over the validity of the Board's actions in the coming year and is likely to face legal scrutiny.

The appointments come days after the expiration of former NLRB Board Member Craig Becker's recess appointment, which was expected to lead to a Board shutdown given that the Board lacks the three members required to reach a quorum. Once the appointments are finalized, the Board will be restored to five members for the first time since August 2010. [PE] [PE]

NLRB Finalizes "Quickie Elections" Rule

The National Labor Relations Board (the NLRB, or "Board") promulgated a final version of the so-called "quickie" or "ambush" elections rule, which modifies the union representation election process in several important respects. Under the new quickie elections rule, representation elections will occur more quickly, and employers will have fewer opportunities to challenge problems with the election process.

The rule is scheduled to take effect on April 30, 2012. The Board asserts that the quickie elections rule is "intended to eliminate unnecessary litigation, delay, and duplicative regulations." However, opponents of the rule, including NLRB Member Brian Hayes, have suggested that the rule is a partisan rule, merely intended to speed up the union election process, while limiting employers' ability to participate in that process.

The quickie elections rule makes several changes to the representation election process. For example, hearing officers will be authorized to limit pre-election hearings only to matters relevant to the issue of whether there is a question of representation (i.e., whether a petition as described by § 9(c) of the National Labor Relations Act has been filed, concerning a unit appropriate for the purpose of collective bargaining), and also will be authorized to prohibit briefing after a pre-election hearing. Additionally, employers will be unable to file pre-election appeals to seek Board review of a Regional Director's decision to direct an election, but rather, would have to wait until after an election to appeal to the Board. [PE]