

WHAT'S NEWS!

Leave Time for Crime Victims

SB 288 is titled “**Court Leave for Crime Victims.**” The key provisions of this new law authorize victims of certain felony crimes and their spouse, parent, child, sibling, or guardian to take time off to attend court proceedings.

The crimes covered include vehicular manslaughter while intoxicated, child abuse, domestic violence, physical abuse of an elder or dependent adult, stalking, solicitation for murder, hit-and-run causing death or injury, driving under the influence causing injury, and sexual assault.

Employees who are discharged or discriminated against for taking time off are entitled to reinstatement and reimbursement. Employees are generally required to give the employer “reasonable advance notice” of their intention to take time off unless this is “not feasible.”

Employees are entitled to use any paid vacation or personal leave that is otherwise available.

Prior law permitted victims of domestic violence or sexual assault to take time off to obtain a judicial protective order. A separate Labor Code provision also permitted victims of certain violent felonies, serious felonies, and thefts, and their immediate family members, to attend related criminal proceedings. [PE]

DOMESTIC WORKER BILL OF RIGHTS

The Domestic Worker Bill of Rights (AB 241) requires overtime pay for personal attendants (e.g., nannies and caregivers) after nine hours in a workday or 45 hours in a workweek.

“Personal attendant” means anyone employed in a private household to supervise, feed, or dress a child, a disabled adult, or the elderly. Personal attendants may not do other types of work (e.g., cleaning, housekeeping, or providing medical services) for a “significant amount” (20 percent or more) of their weekly hours.

The law exempts certain family members, employees of licensed health facilities, and babysitters if they are (1) minors or (2) adults who babysit only casually (irregularly, intermittently, and non-professionally).

The wages, hours, and working conditions for domestic workers in California have been regulated by Wage Order 15 (WO15), which covers “Household Occupations.” Under WO15 section 1(B), personal attendants had been completely exempt from overtime pay requirements [PE]

Labor Law Update Flyer Enclosed!

President's Report ~Dave Miller~

TWO STEP INCREASE

The minimum wage is set to increase by 25% in two steps. Beginning July 1, 2014, the minimum wage for California employees will increase from the current \$8.00 per hour to \$9.00 per hour. On January 1, 2016, the minimum wage will increase to \$10.00 per hour.

There are a number of legal ramifications resulting from the increases of the minimum wage, including but not limited to standards for exempting certain employees from overtime or other requirements.

One requirement for California’s “white collar” overtime exemptions (executive, administrative, or professional) to apply is that the employee receive a monthly salary that is no less than two times the California minimum wage for full-time employment (40 hours per week). The current minimum monthly salary is \$2,774. The minimum salary will increase to \$3,120 in July 2014 and \$3,467 in January 2016.

In order for a commissioned salesperson to be exempt from overtime, one requirement is that the salesperson’s total earnings result in an effective hourly rate that is more than one and one-half times the state minimum wage, currently \$12.00 per hour. That rate will increase to \$13.50 per hour in July 2014, then \$15.00 per hour in January 2016. The increase of the minimum wage will also impact the meal and lodging



credits against the minimum wage permitted by the Industrial Welfare Commission Wage Orders. As the minimum wage increases, these credits are adjusted.

Employers are required to provide and maintain certain hand tools required for employees to perform their jobs. Employees who are required to furnish their own hand tools must receive at least twice the minimum wage (currently \$16.00 per hour, but increasing to \$18.00, then \$20.00, per hour).

Employers, such as contractors, whose employees travel in their work need to be alert to determine whether local laws require higher minimum wage protections. Several municipalities have also increased their minimum wage effective January 1, 2014. For example, San Francisco will increase their minimum wage from \$10.55 per hour to \$10.74 per hour. In San Jose, the minimum wage will increase from \$10.00 per hour to \$10.15 per hour.

Employers should review their compensation plans and take action to conform to the new minimum wage laws, including amending pay plans and increasing minimum wage thresholds when paying draws against commissions. [PE]

This country has come to feel the same when Congress is in session as when the baby gets hold of a hammer.
-Will Rogers, humorist (1879-1935)

Recent Developments

NLRB Poster - Dead?

The National Labor Relations Board (NLRB) has decided not to seek U.S. Supreme Court review of two appeals court decisions against a posting rule, and probusiness groups are claiming victory.

In 2011, the NLRB issued a rule that would have required all employers under Board jurisdiction—including nonunion employers—to display a poster explaining that employees have the right to act together to improve wages and working conditions; to form, join, and assist a union; to bargain collectively with their employer; and to refrain from those activities. The rule was never implemented because of court challenges.

The U.S. Court of Appeals for the District of Columbia Circuit ruled against the poster requirement in May 2013, and the 4th Circuit did the same in June.

The deadline for the NLRB to seek Supreme Court review passed on January 3, and the Board announced on January 6 that it had decided against going to the high court.

When the deadline passed, National Right to Work Foundation President Mark Mix issued a statement praising the development. “By promulgating this sweeping new requirement, the NLRB clearly overstepped its statutory authority in a heavy-handed attempt to force more workers into forced unionism ranks,” he said. “The NLRB’s rule would have required almost every job provider in America to post biased, one-sided notices about workers’ rights.”

Jay Timmons, president and CEO of the National Association of Manufacturers (NAM), also praised the demise of the poster rule. “Manufacturers start off the new year with great news in our fight against an overreaching NLRB,” he said. “This is the culmination of the NAM’s aggressive legal pursuit against a government-imposed regulation that would create a hostile work environment while injecting politics into manufacturers’ day-to-day business operations.” [PE]

Accommodations for Victims of Violence

Governor Jerry Brown has signed into law SB 400, “Accommodations for Victims of Violence,” a statute that adds “stalking” to the list of crimes for which victims may take time off to obtain relief (such as a temporary restraining order).

This law requires employers to provide reasonable accommodations for employees who are victims of domestic violence, sexual assault, or stalking, unless it causes an undue hardship. It specifies that a reasonable accommodation may include the implementation of safety measures, including a transfer, reassignment, modified schedule, changed work telephone, changed work station, installed lock, ... an implemented safety procedure, or another adjustment to a job structure, workplace facility, or work requirement ... or referral to a victim assistance organization.

Employers need not provide accommodations that cause an undue hardship on business operations or that would violate the employer’s duty to maintain a safe and healthy workplace.

It prohibits discharging or discriminating against employees because of their status as a victim of domestic violence, sexual assault, or stalking.

This bill was designed to encourage employees to report that they are victims of threats or violence without fear of retribution.

Proponents cited studies that found (1) nearly 50% of survivors of sexual assault lost their jobs or quit following the assault, and (2) nearly 40% of survivors of domestic violence in California reported either being fired or fearing termination due to the incident. [PE]

Recovery Period for Outdoor Workers

California Labor Code currently provides that an employer may not require an employee to work during a meal or rest period that is mandated by state law or an order of the Industrial Welfare Commission.

Following the passage of S.B. 435, the scope of California’s Labor Code section 226.7 will be expanded to prohibit an employer from requiring an employee to work during a meal, rest, or recovery period, which is mandated by state law, or an applicable regulation, standard, or order of the Industrial Welfare Commission, Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health. “Recovery period” is defined as a “cool down period afforded an employee to prevent heat illness.”

While Cal-OSHA regulations have been in place for several years mandating employers in California to protect outdoor employees from the hazards of heat illness, the sole remedy under the current law for a violation is a citation issued by the Department of Occupational Safety and Health. Lawmakers felt that the current system of issuing citations for Cal-OSHA violations was not adequately enforcing the heat illness prevention regulations, and so the legislature included a penalty for such violations.

Under the newly revised Labor Code section 226.7, an employer who fails to provide the mandated recovery period will be required to pay the employee one additional hour of pay at the employee’s regular rate of compensation for each work day that a recovery period was not provided. Thus, the Division of Labor Standards Enforcement and workers themselves will now be able to bring an action if the employer fails to provide a work-free recovery period. [PE]

Specific Industries Hiring Rules

New legislation now provides specialized hiring rules for specific industries.

- **Private School Background Checks (AB 389):** --- Requires private elementary and high schools to obtain criminal background checks on all employees and to fingerprint employees who will have contact with minors. This bill standardizes the requirements for employee background checks for public and private schools. It will also permit the Department of Justice to notify private schools when employees have been arrested. Effective January 1, 2014.

- **Child Care Facilities & Sex Offenders (AB 1108):** --- Prohibits registered sex offenders who have committed an offense against a minor from living, working, or volunteering in licensed and unlicensed children’s day care or residential facilities, or in child welfare services placements. Violations will be a misdemeanor. Effective January 1, 2014.

- **Displaced Concession Workers (SB 71):** --- Applies the Displaced Janitor Opportunity Act (Labor Code sections 1060–1065) to food and beverage workers at certain publicly-owned entertainment venues. Designed to require the Honda Center (home of the Anaheim Ducks hockey team) to retain unionized workers formerly employed by Aramark after the Center cancelled its contract. Effective June 27, 2013; expires December 31, 2014. [PE]



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Human Resources Question with Candice Weaver

THE MONTH'S BEST QUESTION

Piece Rate Problems

Q: "What are the consequences for employers with the new "Piece-Rate" rulings?"

A: The immediate problem with these rulings is the never-ending dispute over what constitutes productive and non-productive time. However, in the end, employees may lose if employers are forced to eliminate incentive pay.

Up till now, both California and federal law have provided considerable leeway to compensation agreements between employers and employees so long as the minimum wage has been satisfied based on total hours worked and compensation paid. Indeed, the historical view has been that "straight-time wages above the minimum wage are a matter of private contract between the employee and the employer." See *Schachter v. City Group, Inc.*

But this principle as applied to California law continues to be eroded as state and federal courts have interpreted California law to prohibit averaging a piece rate for productive work to include periods on the clock when piece rates are not being produced. See, e.g., *Gonzalez v. Downtown LA Motors*.

The practical consequence of these rulings is to add opportunities for employees to claim they have not been paid at least the minimum wage for so-called "unproductive time," even though their effective hourly rate may be far above the minimum wage for all hours worked when considering all of the clocked productive and non-productive time.

In the past, fluctuations of productivity could be factored into a piece rate. Employees could agree to enjoy the fruits of high productivity as well as the downside of low periods of productivity (which could be impacted in part by machine breakdowns or problems caused in part by the employees' skills and efforts). With regard to wages above the minimum wage (which remain protected), the employees, in effect, could agree to experience both the benefit and detriment of productivity in the work place. These new interpretations of the law minimize an employee's risk of reduced income caused by periods of inefficiency or downtime.

These decisions meddle unnecessarily into an employer's ability to contract freely with its employees for compensation above the minimum wage. In the end, many employers have already eliminated piece rates in favor of alternative methods of compensation, including reverting to a totally hourly rate method.

Another consequence of invading an employer's right to contract for incentive pay is that courts have also second-guessed whether employees who are paid by piece rate are actually being paid while taking short rest breaks mandated by California law or whether salespersons paid by commission are actually being compensated separately for non-productive periods. The net effect is an increasing tendency for employers to respond to these rulings by supplementing compensation through various methods to account for what arguably could be considered as "downtime" or "non-productive time." [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 23rd, 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

Future 2014 Training dates: 7-23-14, 10-22-14

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.

2014 Topic Schedule

◆ **Employee Policies** - Every employer needs guidelines and rules. We examine planning considerations, what rules to establish and what to omit. [Note this is the 4th Thursday]
Thursday, February 27th, 2014, 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 20th, 2014, 10 - 11:30am

◆ **Safety Programs** - Understanding Cal/OSHA's Written Safety Program. Reviewing the IIPP or SB 198 requirements for your business.
Thursday, April 17th, 2014, 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 15th, 2014, 10 - 11:30am

◆ **Wage & Hour and Exempt Status** - Overtime, wage considerations and exemptions.
Thursday, June 19th, 2014, 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 17th, 2014, 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 18th, 2014, 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 16th, 2014, 10 - 11:30am

◆ **Discipline & Termination** - The steps to take before termination. Managing a progressive correction, punishment and termination program.
Thursday, November 20th, 2014, 10 - 11:30am

There is No Seminar in December

Labor Law Update Flyer Enclosed!

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WORKERS' COMP FRAUD

Fresno business owner ordered to pay restitution in workers' comp fraud. A farm labor contractor in Fresno was sentenced in Kings County Superior Court on December 4 on one felony count of insurance fraud and ordered to pay restitution of nearly \$4.2 million to the State Compensation Insurance Fund (SCIF), SeaBright Insurance, and the Employment Development Department (EDD).

The owner of ROC Harvesting, Richard Lopez Escamilla Jr., 47, was sentenced to serve six years in prison for defrauding two insurance companies by underreporting employee payroll and for unemployment insurance tax evasion.

In a joint investigation by the Kings County District Attorney's Office and the EDD, investigators uncovered evidence that Escamilla misrepresented previous claim information to his insurer so he could illegally reduce his workers' compensation premiums. Also, he was found to have underreported his employee payroll to further reduce his premium costs. [PE]

HOTEL FRANCHISEE AGREES TO PAY BACK WAGES

Days Inn franchisee in San Bernardino has agreed to pay \$123,678 in back wages and liquidated damages to 16 housekeeping employees after an investigation by the U.S. Department of Labor's (DOL) Wage and Hour Division (WHD) found minimum wage, overtime, and record-keeping violations.

Investigators determined that the employees' actual hourly wage averaged less than \$5 an hour, well below the federal minimum wage of \$7.25 per hour. Investigators found franchisee Sahkar Hospitality Corp. also failed to pay the overtime premium required for hours worked beyond 40 per week. Investigators claimed that employees typically worked more than eight hours of overtime per week during the hotel's busiest periods.

The employer also is accused of violating the record-keeping requirements of the Fair Labor Standards Act (FLSA) by not maintaining records of the hours employees worked or recording the portion of their wages paid in cash. [PE]

Whistleblower To Be Paid Over \$1.9 Million

Employer ordered to pay whistleblower over \$1.9 million. A former chief financial officer (CFO) who was fired after reporting conduct he believed was detrimental to the company's shareholders will collect more than \$1.9 million, according to a September announcement from the Occupational Safety and Health Administration (OSHA).

An OSHA investigation found that the company violated whistleblower provisions of the Sarbanes-Oxley Act (SOX). Clean Diesel Technologies Inc., based in Ventura, California, formerly headquartered in Stamford, Connecticut, fired the former CFO in April 2010 after he warned the board about ethical and financial concerns raised by a proposed merger.

He provided information to the company's board based on his belief that there was a conflict of interest involving the chair of the company's board. "This order should send a clear message to publicly traded companies that silencing those who try to do the right thing is unacceptable," Dr. David Michaels, assistant labor secretary for OSHA, said. [PE]

Rescue Personnel Leave

Rescue Personnel Leave (AB11) requires employers with 50 or more employees to permit reserve peace officers and emergency rescue personnel to take up to 14 days of leave annually for fire or law enforcement training.

"Emergency rescue personnel" include both paid and volunteer members of public and private firefighting agencies, sheriff's departments, and police departments. Existing law prohibits discrimination against volunteer firefighters, reserve peace officers, and emergency rescue personnel for absences occasioned by emergency duties. In addition, volunteer firefighters working for employers with 50 or more employees have also been entitled to take up to 14 days of leave annually for training. This bill extends the right to 14 days of training time annually to reserve peace officers and emergency rescue personnel. [PE]