Pacific Employers
MANAGEMENT ADVISOR
Over 50 Years of Excellence!
February 2015

WHAT'S NEWS!

Supreme Court - No Pay For Going Through Security

In order to prevent employee theft, some employers — particularly in the retail arena — require their employees to undergo security screenings before leaving the employer's facilities. The United States Supreme Court recently ruled that Integrity Staffing Solutions, Inc. (Integrity), a staffing company used by Amazon.com, did not need to pay employees for such time spent going through post-work security screenings. *Intergrity Staffing Solutions Inc., v. Busk, et al.*

Integrity employed individuals to work at **Amazon.com** packaging facilities throughout the United States. As part of their employment, Integrity required that its employees undergo security screening before leaving the warehouse at the end of each day. During this screening, employees removed items such as wallets, keys, and belts from their possession and passed through metal detectors. Integrity did not pay the employees for time spent going through this security protocol.

Several former employees filed a class action lawsuit contending that they were entitled to be paid for the time spent undergoing security screenings before leaving the warehouse, which they estimated took 25 minutes per day. The District Court dismissed the lawsuit, holding that the time spent in screenings was postliminary, noncompensable time, as it was not integral and indispensable to the employees' principal activities of retrieving items and packing boxes.

The Ninth Circuit reversed that decision, concluding that activities that might normally be considered postliminary and noncompensable become compensable if they are required by the employer and performed for the employer's benefit.

The US Supreme Court reviewed the issue of whether the time spent going through security is compensable. **A unanimous Court concluded that it was not, reversing the Ninth Circuit's decision.**

The Court first explained that Congress passed the Portal-to-Portal Act, which amended the Fair Labor Standards Act (FLSA) in order to respond to an "economic emergency" created by the broad judicial interpretation given to the FLSA's undefined terms "work" and "workweek." The Portal-to-Portal Act exempts employers from FLSA liability for claims based on "activities which are preliminary to or postliminary" to the performance of the principal activities that an employee is employed to perform. In order to be covered by the Portal-to-Portal Act, the activities in question must be "integral and indispensable" to the principal activity.

The Court observed that the principal activity in this case was retrieving items in the warehouse and packing boxes. The Court held that the security screenings at issue were not integral and indispensable to the performance of the principal activity, primarily because Integrity Staffing could have completely eliminated the security screenings altogether without impairing the safety or effectiveness of the employees' principal activities. This is why the security screenings were differentiated from other work-related activities that have been found to be covered by the FLSA, such as requiring pre-shift donning and doffing of protective gear.

The Integrity Staffing decision provides an important and clear answer for employers on post-shift security screenings under similar circumstances, which have become more common in the workplace and, in particular, for employers who are concerned about employee theft. [PE]

Labor Law Update Enclosed!

President's Report
~Dave Miller~

"SRO" at Seminar!

We had Standing Room Only (SRO) at our Labor Law Update last month and everyone was there to talk about one new law -- "3 Day Sick Leave."

In this month's insert you will note that there are many new labor laws that will affect various employers, but the new **3 Day Sick Leave Law** is one that seems to affect all employers, even if they already have a generous sick leave plan.

If you were one of those who we heard from that were unable to attend our January **Labor Law Update Seminar** in Visalia, and wish that you had another chance to do so, **then you are in luck!** The Tulare Chamber of Commerce has requested that we bring our Labor Law Update seminar to their members at 10:00 am on February 24th at the Tulare Chamber, 220 E. Tulare Ave, Tulare, CA 93274 . Their phone is (559) 686-1547.

Judging from what we are hearing, this month's Visalia seminar on **Employment Policies And Handbooks** will also be a full house as we will have an opportunity to help employers consider language for their policies and handbooks to make the necessary changes before the July 1st deadline to have 3 Day Sick Leave in place. Read more in Dawn's Column on page 3. [PE]

Posters - Spanish & English

The all new 2015 All-In-One Posters in both English and Spanish will soon be available at our office.

Actually we have a sufficient quantity of the English Posters in the office now, but are anticipating the printing and delivery of the 2015 All-In-One Poster in Spanish any day now. We suggest that you call in first for the Spanish poster.

Our offices are normally open no later than 9:00 AM to 5:00 PM Monday thru Thursday and 9:00 AM to 4:00 PM on Friday.

The office is also a good place to get your California Department of Industrial Relations Wage Order. There are 17 different Wage Orders for California employers. Stop by the office and we will help you determine which Wage Order is right for your business.

The office also has DVD & VHS safety videos that you may borrow for conducting your safety training. [PE]

Good judgment comes from experience, and a lot of that comes from bad judgment. — Will Rogers

Recent Developments

NLRB Give Unions Workers' Email Addresses And Phone Numbers

Labor unions got an early Christmas present from the National Labor Relations Board: access to non-union workers' email addresses and phone numbers.

The NLRB issued new rules for how and when union organizing elections can take place within workplaces. Under the new rules, unions will have access to employees' private information as they make their sales pitch, and employers will have less time to respond to workers' demands before a unionization election can take place.

"... DISTRIBUTION OF EMPLOYEES' PERSONAL CONTACT INFORMATION."

Geoff Burr, vice president of the Associated Builders and Contractors Inc., a national trade association for non-union construction companies, said the new rules "will lead to the unsolicited distribution of employees' personal contact information."

The NLRB says the changes are meant to streamline the process of holding elections and stop employers from stalling. Opponents of the changes say they will unfairly give unions an upper-hand in convincing workers to unionize.

"Simplifying and streamlining the process will result in improvements for all parties," NLRB chairman Mark Pearce said in a statement announcing the new rules. "With these changes, the Board strives to ensure that its representation process remains a model of fairness and efficiency for all."

All any union would have to do then is tell the NLRB…"Hey we're interested in holding an election at John Doe's used cars, Stateside Trucking Co., McDonalds". . What's an employer to do? [PE]

The NLRB's New "Quickie Elections"

The National Labor Relations Board has issued its long-awaited final rule governing the conduct of representation elections. The rule is intended to reduce the time between the filing of a representation petition and the election through procedural changes.

The 700 page rule, described by many as the "Quickie Election" rule, will take effect April 14, 2015. According to the Board, the new rule will "simplify representation-case procedures, codify best practices, and make them more transparent and uniform across regions." While the new rule is expected to be challenged in court, union organizing efforts are certain to get a boost.

The practical impact of the rule is that it will:

- Shorten the period in which employers may educate employees as to the stakes of unionization;
- Make it difficult for employers to seek pre-election clarification of the eligible voting group and identification of statutory supervisors;
- Burden employers with immediate procedural mandates upon receipt of an NLRB petition;
- Require employers to provide to the union (through the NLRB) within two days of the filing of a petition a list of eligible voters, including telephone numbers and email addresses.
- The ultimate result is that employers will have less time to mount a campaign and additional challenges in doing so.

With a greater potential for elections under the new Quickie Election rules employers should give careful consideration to workforce education, legal and communications strategies well in advance of the NLRB processes. [PE]

NLRB Makes Sweeping Changes to Arbitration Deferral Standards

The National Labor Relations Board (Board) abandoned over 30 years of precedent and significantly modified the standards for the deferral of certain unfair labor practice charges to contractual arbitration procedures. This change likely will call into question the finality of arbitration awards in future cases involving Unfair Labor Practice Charges against employers arising under Sections 8(a)(1) and (3) of the National Labor Relations Act.

In *Babcock & Wilcox Construction Co.,* 361 NLRB No. 132 (2014), the Board made sweeping changes to its long-standing post-arbitral deferral standards, through which it determines whether underlying unfair labor practice allegations have been addressed sufficiently by the arbitrator. If the Board determines that the arbitrator adequately addressed the unfair labor practice issues, the Board will defer to the arbitrator's decision and not conduct an independent investigation.

Under the new standard, the burden of proof has shifted onto the party seeking deferral to show not only that that proceedings were "fair and regular" and the parties agreed to be bound, but also that (1) the arbitrator was explicitly authorized to decide the unfair labor practice issue, (2) the arbitrator was presented with and considered the "statutory issue" or was prevented from doing so by the party opposing deferral, and (3) Board law "reasonably permits" the award.

The standard enunciated by the Board likely will pose many issues for parties seeking to avoid duplicative litigation and who believe that contractual arbitration is an efficient means of resolving their disputes. [PE]

Seminar Topic Talk with Dawn

Employee Policies & Handbook Seminar

Employees and their related expenses are probably one of the largest, if not THE largest cost to running your business. It is also likely that your employees contribute significantly to your company's bottom line. As a result, it is wise to think in terms of your Employer Policies.

In light of California's new three day sick leave law we will discuss what your Company Policies should look like. Do you have the recommended guidelines in place? Have you omitted essential content from your employee handbook that is necessary to properly protect your business and comply with the multitude of State and Federal laws?

Don't be caught with an out-of-date or flawed employee handbook. Attend our free Employer Policies Seminar on Thursday February 19 from 10-11:30am at the Tulare-Kings Builders Exchange (1223 S. Lover's Lane in Visalia).

Dave Miller and Candice Weaver will be our presenters. RSVP to Pacific Employers at 733-4256 to make sure you have a spot. [PE]

Human Resources Question with Candice Weaver

The Month's Best Question

"Abusive Conduct"

Q: "We now have to teach about 'abusive conduct.' And just what is that?"

A: California employment law has always been a creature of politics, creating results that are often barely logical. For example, for the past few years, employers have provided two hours of mandatory sexual harassment training to supervisors. That's a fine idea, except why limit it to sexual harassment? Why not cover harassment based on race, religion, and national origin, too? Shouldn't we also train employees on discrimination while we are at it? Moreover, if I had to pick one area of mandatory training, it would cover leave and disability accommodation because it is the most difficult area of supervisor compliance.

Now, starting on January 1, 2015, mandatory training will be expanded to include training on "abusive conduct," which is behavior that "a reasonable person would find hostile, offensive and unrelated to an employee's business interests." Why add that provision? Because workplace bullying is the issue of the day, and Sacramento politicians won't pass up the opportunity to make a useless but loud splash in the public opinion pool. So bullying has been added to the training requirement, while the toughest and most needed parts of supervisor training remain unmandated.

But despite the training requirement, there is still no law prohibiting "abusive behavior." Bullying is a great topic for general management training, and such behavior ought to be a violation of your personnel policies. But to include mandatory training on a topic that's neither well-defined nor legally prohibited is an unwise use of a limited resource: **time**.

I oppose a harsh management style as a matter of policy and productivity, as well as bullying by any employee, but it isn't illegal, and I'm not sure that it should be.

As the new law requires, we will put "abusive conduct" in our training, with the expectation that the audiance will get it pretty fast. But we should also spend time explaining about reasonable accommodations, employee and supervisor responsibilities, and the counterintuitive but critical parts of working in a place of business. [PE]

Sexual Harassment & Abusive Conduct Training

Visalia Chamber of Commerce and Pacific Employers, will jointly host a state mandated Supervisors' Sexual Harassment & Abusive Conduct Prevention Training Seminar & Workshop with a continental breakfast on April 22nd, 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 2015 Training dates: 7-22-15, 10-21-15

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.

2015 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, 2015, 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 19th, 2015, 10 - 11:30am

♦ **Safety Programs -** Understanding Cal/OSHA's Written Safety Program. Reviewing the IIPP or SB 198 requirements for your business.
Thursday, April 16th, 2015, 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 21st, 2015, 10 - 11:30am

♦ **Wage & Hour and Exempt Status -** Overtime, wage considerations and exemptions.
Thursday, June 18th, 2015, 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 16th, 2015, 10 - 11:30am

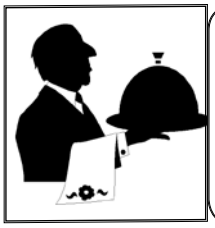
There is No Seminar in August

♦ **Forms & Posters -** as well as Contracts, Signs, Handouts, Fliers - Just what paperwork does an Employer need?
Thursday, September 17th, 2015, 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 15th, 2015, 10 - 11:30am

♦ **Discipline & Termination -** The steps to take before termination. Managing a progressive correction, punishment and termination program.
Thursday, November 19th, 2015, 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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Labor Law Update Enclosed!

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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.

Ruby Tuesday -- Sex Discrimination Against Men

International restaurant chain Ruby Tuesday, Inc. allegedly discriminated against male employees for temporary assignments to a Utah resort, the U.S. Equal Employment Opportunity Commission (EEOC) has charged in a lawsuit. According to the EEOC's suit, in the spring of 2013 Ruby Tuesday posted an internal announcement within a 10-state region for temporary summer positions in Park City, Utah with company-provided housing for those selected.

Andrew Herrera, a Ruby Tuesday employee since 2005 in Corvallis, Oregon, wanted to apply because of the chance to earn more money in the resort town. However, the announcement stated that only females would be considered and Ruby Tuesday in fact selected only women for those summer jobs, supposedly from fears about housing employees of both genders together. [PE]

Workers Sue for Race and Sex Discrimination

Ten former McDonald's workers are suing the company and one of its franchisees, alleging racial and sexual discrimination, which allegedly occurred at three franchised restaurants in Virginia.

The lawsuit includes claims that supervisors at the restaurants made statements such as "there are too many black people in the store" and used racial and ethnic slurs. The lawsuit also includes four defendants: McDonald's Corp., McDonald's USA LLC, franchise Soweva Co. and the franchise's owner, Michael Simon.

According to the lawsuit, about 15 black workers were terminated May 12, including nine of the plaintiffs. "When they asked why they were being terminated, Soweva's owner told them that they were good workers, but they 'didn't fit the profile' of his organization," the lawsuit says. Further, according to the lawsuit, when some of the workers complained to McDonald's corporate offices, the company did not take action. The lawsuit comes a month after the National Labor Relations Board — in an unrelated matter — determined McDonald's and it franchisees could be considered jointly responsible for employment issues. [PE]

On-Call Rest Periods Are Lawful

In a victory for California businesses, the 2nd District Court of Appeal has ruled in an unpublished opinion that on-call rest periods are lawful.

The 2nd District Court of Appeal reversed a trial court decision, concluding that "on-call rest breaks are permissible." In forming its decision, the appeals court analyzed the Industrial Welfare Commission (IWC) Wage Order No. 4, and California Labor Code sections 226.7 and 512.

The court found that while subdivision 11(A) of Wage Order No. 4 requires that an employee be "relieved of all duty" during a meal period, subdivision 12(A) of Wage Order No. 4, which pertains to rest periods, does not include a similar requirement.

The court emphasized that meal and rest break periods are different from one another; meal breaks are unpaid and rest breaks are mandated to be paid. This implies, the court wrote, that "rest periods are normally taken while on duty, i.e., while subject to employer control."

The court determined that while Section 226.7 states that "An employer shall not require an employee to work during a meal or rest or recovery period," simply being on-call does not constitute performing "work." The court also referred to a California Division of Labor Standards Enforcement (DLSE) opinion letter in 1993 wherein the DLSE declined to "take the position that simply requiring [a] worker to [remain on call] is so inherently intrusive as to require a finding that the worker is under the control of the employer' and must be compensated for 'on-call' time." [PE]

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