

January 2009

### WHAT'S NEW!

#### PACIFIC EMPLOYERS TURNS 45!

#### How will Pacific Employers handle the challenges facing Employers as it enters its 45th year in business?

Like the law, Pacific Employers will continue to evolve. With the change in administrations, it is certain that the federal government will tend to become more liberal in terms of employment law, and big unions will find the government agencies more sympathetic to their demands.

Our business model necessitates that we be at the ready to respond to phone calls, emails and faxes which keeps us in the office most of the time.

However, ICE raids, government mandated sexual harassment prevention training, safety checks and compliance audits, among a host of other activities, keep us in the field more than we want.

Luckily we have been able to increase staff to provide clients with hands-on help in their places of business and job-sites.

#### CARD CHECK ELECTIONS:

Obama will reward a special interest group that spent millions to get him elected by awarding a key position in his White House cabinet.

That cabinet position is the Labor Secretary post and his designate is Rep. Hilda Solis, D-CA. Anna Burger, chairman of the radical union coalition, "Change to Win," joyfully notes that Solis sponsors the Employee Free Choice Act (EFCA). EFCA is Big Labor's top priority – ending employees' right to a secret

ballot in union representation elections in the workplace. Labor leaders claim EFCA is the only way they can reverse the decades long decline in union membership from nearly a third of all American workers to less than 10 percent today.

"... OUR FUTURE WILL PROBABLY RESEMBLE OUR PAST."

In its early years, the staff of Pacific Employers spent the majority of their time involved in matters concerning labor unions. That included helping employers who were faced with union elections, negotiating initial union collective bargaining agreements and renegotiating union contracts at term expirations. With the near certainty that Barack Obama will approve the Employee Free Choice Act, which creates unionization without an election, our future will probably resemble our past.

While big labor's return to unionizing will require a reallocation of resources on our part, Pacific Employers will not ignore the other great issues that will increase pressure on the employer. Such as:

In all likelihood, the Family Leave Act will be amended to require coverage by employers with as few as 25 employees.

A bunch of "Fairness" laws will be passed, including the Arbitration Fairness Act – which would outlaw employers' arbitration employments by prohibiting arbitration which involve "parties of unequal bargaining power."

And finally, with former South Dakota Sen. Tom Daschle in line for Health and Human Services Secretary, it is clear that Daschle was picked to lead health reform efforts for a nationalized health care program to be funded by employers.

As you can see, even at our age, we have much to prepare for. [PE]

### Cal/OSHA Form 300 Enclosed!

#### President's Report

~Dave Miller~

#### Never Ending Saga

**I**N July, 2008, a California Court of Appeal Issued the Brinker decision that provided employers with some hope that the state rules regarding meal and rest periods would be interpreted in a reasonable and sensible manner.

By establishing realistic standards that employers could follow for compliance with the law, the decision appeared to allow employees greater flexibility and control over their breaks while reducing the number of class action lawsuits that might be filed over these matters. The recent increase in layoffs, downsizing and other business closings has spawned a new surge of filings with various government agencies.

In the July 22 decision the Court of Appeal concluded that the employees who brought the case could not pursue their meal period, rest period, and off-the-clock work claims in a class action. It also stated that employers fulfill their obligations by making meal and rest periods available; conversely, they need



not "ensure" that employees actually take them. The Court of Appeal decision was consistent with a number of recent federal decisions reaching similar conclusions.

#### CA SUPREME COURT JUMPS IN

The *Brinker* case has now been appealed to the California Supreme Court, which effectively operates to nullify the binding effect of the Court of Appeal decision. It also creates uncertainty in the area that will linger until the Supreme Court issues its own decision. Moreover, while several federal court decisions in the past 12 months are undoubtedly helpful for employers and may be viewed as persuasive, they are not binding on California courts.

The Supreme Court is also expected to address California's rest period rules. 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.

While this matter is under consideration by the Court, operate in the most conservative fashion while providing meal and rest breaks. Any questions, just give the staff at PE a call. [PE]

We've gotten to the point where everybody's got a right and nobody's got a responsibility. -  
Newton Minow (FCC chairman)

## Form 300 Rules

**California employers in high hazard industries with 10 or more employees are required to comply with Cal/OSHA's Form 300 recordkeeping standard.** With this issue we supply you with the Form 300; on its reverse side we include the Summary, which is the part of the form that you actually are required to post.

Employers are required to complete both OSHA Form 300 Log of Work-Related Injuries and Illnesses and OSHA Form 300-A Summary of Work-Related Injuries and Illnesses, however, only the latter, the Form 300-A, is required to be posted in the workplace.

The reason you post only the Summary is that it does not have the privacy concerns of the Form 300 and the former Log 200.

You must post the Summary only, not the Log, by February 1<sup>st</sup> of the year following the year covered by the form and keep it posted until April 30<sup>th</sup> of that year. [PE]

## Recent Developments

### Court Delays SS No-Match Rule

**The U.S. District Court for the Northern District of California** has denied the Department of Homeland Security's request to expedite consideration of its Supplemental Final Rule on Social Security no-match letters, effectively blocking implementation of the safe harbor rule until next year.

The Final Rule, originally issued in August 2007, was blocked by a court injunction on October 10, 2007. The court enjoined implementation of the rule to consider challenges raised by employer associations which asserted that the rule violates the law, violates workers' rights, imposes burdensome obligations on employers, and will cause discrimination against workers perceived to be immigrants. In response to the injunction, DHS released its Proposed Supplemental Final Rule for public comment on March 26, 2008, followed by its Supplemental Final Rule on October 23, 2008. DHS then returned to the District Court to request an expeditious decision so that the Supplemental Final Rule could be implemented.

*.. FINAL RULE IS NOT EXPECTED UNTIL FEBRUARY OR MARCH 2009 ...*

The rule provides a "safe harbor" from liability for the unlawful employment of aliens to employers who receive a no-match letter from the Social Security Administration or a "notice of suspect document" from DHS. Receipt of a notice from SSA or DHS will not impute "constructive knowledge" of the employee's unauthorized status to the employer if the employer follows the procedures set forth in the rule for responding to the SSA or DHS notice.

In his December 8, 2008 ruling, U.S. District Judge Breyer denied the government's request, setting instead a standard schedule with written arguments due in February 2009. A decision on implementation of the Supplemental Final Rule is not expected until February or March 2009, at the earliest. We will provide you with further updates. [PE]

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## Union Is Caught Up in Bribe Case

**The Service Employees International Union** has long boasted that it is on the cutting edge of the labor movement. But the union found itself badly embarrassed when it was named in the federal criminal complaint charging Gov. Rod R. Blagojevich of Illinois with maneuvering to secure financial gain from the appointment of the state's next senator.

*.. SEEKING A POSITION THAT PAID \$250,000 TO \$300,000 A YEAR..*

The complaint said Mr. Blagojevich's chief of staff, John Harris, had suggested to a service employees official that the union should help make the governor the president of Change to Win, a federation of seven unions that broke away from the A.F.L.-C.I.O. The complaint said Mr. Blagojevich, a Democrat, was seeking a position that paid \$250,000 to \$300,000 a year.

In exchange, the complaint suggested, Mr. Blagojevich had expected the service employees union and Change to Win to seek to persuade him to name President-elect Barack Obama's first choice, Valerie Jarrett, to succeed Mr. Obama in the Senate. The union would also receive help from the Obama administration, presumably for its legislative agenda.

Several union officials in Chicago and Washington said the service employees official approached by Mr. Harris was Tom Balanoff, the president of the union's giant janitors local in Chicago and head of the union's Illinois state council. Mr. Balanoff, one of the union officials closest to Mr. Obama, is widely seen as an aggressive, successful labor leader, who has helped unionize thousands of janitors not just in the Chicago area but also in Texas. [PE]

## Pensions Get a Reprieve in Congress

**Companies whose pension funds suffered big losses this year will not have to replenish the money quickly** under a relief measure that flew through the Senate and will next go to the president for his signature.

*.. THE BILL ALSO OFFERS RELIEF TO PEOPLE OVER THE AGE OF 70 ...*

Because of strong market performance, big contributions made in the past, and a two-year phase-in of tougher financing rules passed in 2006, many companies have not had to pump much money into their pension funds in the last few years. But they suddenly faced the prospect of having to come up with a lot of cash because of this year's financial crisis.

The bill also offers relief to people over the age of 70 who would normally be required to withdraw money from their 401(k) plans and individual retirement accounts or face big penalties. When law, the measure will suspend the minimum-distribution rules in 2009, so that people do not have to pull money out at a time when many investments have lost value.

The Pension Protection Act was meant to discouraging companies from investing their pension funds in volatile assets. It gave them seven years to bring their pension funds into balance, with 100 percent of the money needed to pay for the benefits they had promised. The law made no exceptions for a pension fund that lost money while working its way toward the 100 percent target — the company still had to find a way to get it up to 100 percent within seven years.

The new relief measure eases that requirement, giving companies that have big investment losses lower targets to shoot for over the seven-year time frame. [PE]

**Cal/OSHA Form 300 Enclosed!**



## Human Resources Question with Candice Weaver

### THE MONTH'S BEST QUESTION

#### Forced Union Agreements?

**Q:** "I have heard that the "Employee Free Choice Act," if it becomes law, it will mandate a forced union contract within 120 days of the union getting support cards signed. How can that be legal in a free country?"

**A:** The recent political campaigns have familiarized many employers with a bill called the "Employee Free Choice Act" (EFCA) which would take away the right of employees to secret ballot election to determine representation by a labor union.

#### EFCA SAYS IN SECTION 2 THAT:

"[W]henever a petition shall have been filed by [a union] alleging that a majority of employees in a unit appropriate for the purposes of collective bargaining wish to be represented by [the union], ... [if] the Board finds that a majority of the employees ...has signed valid authorizations designating [the union] as their bargaining representative..., the Board shall not direct an election but shall certify the [union] as the representative. . . ."

EFCA would require mediation and then arbitration of any bargaining "dispute" in first contract negotiations, and then bind the parties to the arbitration panel's "decision" that settles the dispute for a period of two years.

#### SECTION 3 OF THE BILL PROVIDES:

"Whenever collective bargaining is for the purpose of establishing an initial agreement following certification or recognition,....:

(1) Not later than 10 days after receiving a written request for collective bargaining [from the union], or within such further period as the parties agree upon, the parties shall meet and commence to bargain collectively and shall make every reasonable effort to conclude and sign a collective bargaining agreement.

(2) If after [90 days], or such additional period as the parties may agree upon, the parties have failed to reach an agreement, either party may notify the Federal Mediation and Conciliation Service ["FMCS"] of the existence of a dispute and request mediation.

(3) If after ...[30 days], the [FMCS] is not able to bring the parties to agreement by conciliation, the [FMCS] shall refer the dispute to an arbitration board established in accordance with such regulations as may be prescribed by the Service. The Arbitration panel shall render a decision settling the dispute and such decision shall be binding upon the parties for a period of two years, unless amended ...by written consent of the parties. [DE]



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#### NO-COST EMPLOYMENT SEMINARS

**T**he 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

◆ **Labor Law Update** - The courts and legislature are constantly "Changing the Rules" - Learn about the recent changes to both the California and U.S. laws that affect employers of all types and sizes.

**Thursday, January 15<sup>th</sup>, 2009, 10am - 11:30am**

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

**Thursday, February 19<sup>th</sup>, 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 19<sup>th</sup>, 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 16<sup>th</sup>, 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 21<sup>st</sup>, 2009, 10am - 11:30am**

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

**Thursday, June 18<sup>th</sup>, 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 16<sup>th</sup>, 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 17<sup>th</sup>, 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 15<sup>th</sup>, 2009, 10am - 11:30am**

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

**Thursday, November 19<sup>th</sup>, 2009, 10am - 1:30am**

There is No Seminar in December

# Pacific Employers

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## FedEx Settles IC Lawsuit for \$27m!

**F**edEx Ground/Home Delivery has agreed to a \$27 million judgment that includes payment of \$14.5 million to 203 California drivers who were misclassified by the company as independent contractors, according to the law firm for the workers.

“ . . . DAMAGES RANGING FROM \$2000 UP TO \$280,000 . . . ”

The case (Estrada vs. FedEx Ground Package System, Inc.) was the first to challenge the shipping giant’s independent contractor scheme. It ground through the legal system for ten years. Final court approval of the stipulated judgment is expected soon.

The courts have ruled that the workers were actually employees of FedEx, and were not running separate, independent, businesses.

Approximately 27,000 FedEx drivers nationwide now have a multi-district lawsuit against the company for misclassification pending in South Bend, Ind. As in the California case, the drivers are asking the court to find that FedEx treats them like employees and rule that they are entitled to the same legal rights of employees.

“The 203 drivers will receive damages ranging from \$2000 up to \$280,000, with an average recovery of about \$70,000,” says Lynn Rossman Faris of Leonard Carder LLP, of Oakland, lead counsel for the California drivers. “If the 27,000 FedEx drivers in our nationwide case achieve similar results, FedEx could be facing a multi-billion dollar judgment.”

FedEx says while it remains in disagreement with the rulings, it’s pleased to put the case behind it. [PE]

## 2009 IRS Mileage Rate

**A**s of January 1, 2009, the Internal Revenue Service (IRS) decreased the standard mileage deduction for business use of a motor vehicle to 55 cents per mile. The deduction was increased to 58.5 cents per mile, effective July 1, 2008 to Dec. 31, 2008.

Employees or the self-employed may use this optional amount in computing the deductible cost of operating an automobile, van, pickup or panel truck for business purposes. Employers that use the IRS rate or lower may deduct that amount as a business expense. However, employees who are reimbursed at a higher rate may be required to pay taxes on the difference between their reimbursement rate and the IRS standard mileage deduction because the IRS considers that amount to be wages. [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*

## Fred Meyer Paying To Settle Suit

**P**ortland-based Fred Meyer Stores, Inc. will pay \$485,000 to three female victims of sexual harassment and retaliation to settle a lawsuit brought by the U.S. Equal Employment Opportunity Commission, the EEOC reported. [PE]