Pacific Employers
Management Advisor
Celebrating 42 Years!
July 2006

Top of the News

Permanent Heat Regs Adopted

Farmworkers, construction workers and others laboring in the hot sun will be assured of access to shade and water as a result of permanent regulations adopted Thursday by the state Occupational Safety and Health Standards Board. The rules are similar to emergency standards put in place last summer in the wake of numerous heat-related deaths, including several in the Central Valley.

"I am very proud that California is leading the nation in making sure outdoor workers are protected," said **Gov. Arnold Schwarzenegger** at a Capitol news conference. The rules were well received by business groups and the United Farm Workers union.

The Rules Require That Workers Get:

- Access to one quart of water per employee per hour for an entire shift.
- A right to a break in the shade of at least five minutes as a preventative measure or when suffering from heat illness.
- Training on preventative measures.

Fines can reach $25,000 per violation, said Dean Fryer, a spokesman for the Department of Industrial Relations. The rules will be in place year-round, as opposed to the emergency rules, which went into effect only in hot weather.

Other major differences include a provision that allows nonagricultural employees to replace shade with other cooling devices, such as misters, and a requirement that prevention training procedures be put in writing.

The rules still need administrative approval but are expected to be enacted within 60 days. The emergency regulations expire on Aug. 12.

The provisions only cover outdoor workers, but an advisory committee will look at possible rules for indoor workers, such as warehouse employees.

A total of 13 heat-related deaths were reported statewide.

Commission members were in favor of additional requirements, such as mandatory rest breaks at specified intervals, however, the recently adopted rules place the burden on employees to ask for breaks.

According to the provisions, *"employees suffering from heat illness or believing a preventative recovery period is needed, shall be provided access to an area with shade … for a period of no less than five minutes."* Canopies, umbrellas or other temporary structures may be used.

Employers bear some responsibility in getting employees to shade as other provisions of the law require a "safe and healthful working environment."

The new rules have the support of business groups such as the California Grape and Tree Fruit League. [PE]

A New Hiring Checklist Enclosed!

President's Report

~Dave Miller~

Interns & Externs

Employers are often asked to allow an employee to "work" for them without pay so that the worker can gain experience in the occupation or have some knowledge of the trade.

Your government is not totally against education or persons seeking experience. But if your company benefits from the trainee's work, you can be sure that some government agency will be demanding that you treat the trainee as a full fledged employee, with pay, overtime, withholding, Workers' Comp and the like.

The Wage and Hour Division has developed six factors to evaluate whether a trainee, intern, extern, apprentice, graduate assistant, or similar individual is to be considered an employee. If all of the following six factors are met, then an employment relationship does not exist:

- the training is similar to what would be given in a vocational school or academic educational institution;
- the training is for the benefit of the trainees or students;
- the trainees or students do not displace regular employees, but work under their close observation;
- the employer that provides the training derives no immediate advantage from the activities of the trainees or students, and on occasion the employer's operations may actually be impeded;
- the trainees or students are not necessarily entitled to a job at the conclusion of the training period; and
- the employer and the trainees or students understand that the trainees or students are not entitled to wages for the time spent in training.

The Wage and Hour Division noted that the typical externship or internship program involves a situation where the work activities are simply an extension of the student's academic program. In such cases, an employer-employee relationship does not exist. If no such relationship exists, the provisions of the FLSA do not apply.

If you are thinking of setting up such an arrangement, you may want to run the particulars of your trainee program by the staff at Pacific Employers' before proceeding. [PE]

If you can dream it, you can do it. — Walt Disney

Roofing Industry Action

Roofers Must Have License

Answering frequent complaints by contractors, Gov. Arnold Schwarzenegger has just signed legislation to crack down on workers' compensation insurance fraud plaguing the roofing industry.

The measure, Assembly Bill 881 by Assemblyman Bill Emmerson, R-Redlands, calls for insurers to conduct annual audits of roofing company payrolls and empowers the Contractors State License Board to strip roofing licenses from contractors who fail to carry state-mandated workers' compensation insurance.

Insurers and contractors are counting on the law to lower premiums for employers in the long run. Unscrupulous contractors will underreport the number of roofers on their payroll. Some won't carry coverage at all, while others may wait until a worker suffers an injury before claiming the employee as a new hire whose paperwork was delayed.

"People who don't skirt the law end up carrying the (financial) load," said John Beatty, chief executive officer of Hester Roofing in Sacramento. "People should obey the law."

Currently, roofers pay four to 10 times above the average workers' comp insurance premium, according to the Workers' Compensation Insurance Rating Bureau of California. For example, contractors pay $27.19 per $100 in payroll to insure roofers earning less than $20 an hour. For all industries, the average rate is $2.59.

For years, contractors have complained about rampant payroll fraud, with competitors skirting the insurance law and gaining a competitive edge when bidding for roofing jobs.

"It's been a major problem. You have contractors who are claiming they have no employees when in fact they do," said Ward Connerly, administrator for the Roofing Contractors Association of California. "The governor's signature ensures contractors will be protecting their employees."

The roofing industry and insurers have long suspected something was amiss because of an unusually high number of contractors claiming to be sole proprietors. By law, a one-person roofing operation can claim an exemption from the mandatory insurance.

The roofing contractors association contends 3,000 out of 5,900 licensed roofers in California claim no employees. The bill's proponents argued most one-person operations can't complete enough roofing jobs in a year to stay profitable.

The legislation, which will be effective from 2007 through 2010, essentially requires a contractor to have an employee to obtain workers' compensation insurance and receive a roofing license.

"AB 881 will provide real relief to California roofers suffering under the burden of exorbitant workers' compensation premiums," Emmerson said. [PE]

Jurors Gone Wild or has Tulare County gone Liberal?

Ouch! A Tulare County Jury has just awarded a former employee almost $300,000 in Comprehensive damages and was ready to deliberate on Punitive Damages before the case was settled against her former employer. Punitive Damages are calculated at seven times the Comprehensive award. Do the math.... the award could have been 2.4 million dollars!

In my 20 years of defending businesses against sexual and racial charges in Tulare County, I have never heard of such an award. I later learned that in the Court room next door a jury had awarded an accident victim $3 million dollars. What a shock!

Well, let's take a look at what went wrong and what we can do to prevent this from happening to your business. According to the business owner he allowed employees to tell jokes in the work place and had even participated. The business owner explained to the jury that he had allowed this bantor so as to ease tension in a stressful job atmosphere. Obviously the jury did not agree.

The owner went on to explain that the jokes were told in fun and that he was not aware that a certain employee was offended. Regardless, the jury held him responsible for two jokes. To the tune of $150,000 per joke. The Plaintiff had told the jury that the jokes were racially offensive.

He wasn't laughing when heard the verdict and could not believe what had just happened. As a matter of prevention, your business should have a "set in stone" policy of zero tolerance for jokes. You may think this is extreme and it may be, but can you afford to pay an award of this amount and keep the doors open? My business can't.

We further suggest business owners institute and maintain a monthly policy of allowing employees to answer a questionnaire indicating whether ANY offensive or inappropriate conduct or language has been used in the last month in the workplace. This will prevent an employee, at a later date, from complaining of this type of conduct for an extended period of time and "creating" damages. That is what was done in this case and it was effective.

I am still smarting from this case and can't emphasize enough to business owners the need to learn from this case and don't expose your business to this type of liability. Thanks for your time and next month we'll talk about the California Department of Justice allowing the private sector to perform live scan finger printing for businesses that are required to have their employees finger printed.

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News by E-Mail!

A New Hiring Checklist Enclosed!

Human Resources Question with Candice Weaver

The Month's Best Question

COBRA Responsibility

Q: "I've just purchased a business and the former owner is retiring. If I offer Health Insurance to my employees, will I be required to cover the former owner through COBRA on my new Health Plan?"

A: Yes. According to 26 CFR Part 54, the IRS states that, "in an asset sale, a purchaser of assets is considered a successor employer if the seller ceases to provide any group health plan to any employee in connection with the sale and if the buyer continues the business operations associated with those assets without substantial change or interruption."

Old Employer Becomes New Employee

Under these regulations, the general rule is that the buyer and seller may determine COBRA obligations by mutual agreement. However, when the contract does not address the issue or its terms are not followed, the regulations will determine which party is liable to provide COBRA continuation coverage.

An employer's COBRA obligation is triggered by a qualifying event with a loss of coverage, such as the termination of employment or a reduction in hours. The regulations apply to asset transfers and stock sales. A transfer of substantial assets, like a plant or division, or substantially all of the assets of a business is considered an asset sale. A stock sale is the transfer of stock in an entity so that the entity becomes a member of a different controlled group. For an asset sale, a qualifying event occurs when the transaction closes and the employees' employment with the seller terminates and they lose coverage under the seller's group health plan. In a stock sale, if the employment continues with the entity whose stock is sold, there is no qualifying event, therefore no COBRA obligation. [PE]

Employment Seminars

Sponsored by the Small Business Development Center (SBDC) and the **Workforce Investment Board** at 10:00 am on the 3rd Thursday monthly at 4025 West Noble Avenue, Suite A, Visalia. We ask that you RSVP to the Small Business Development Center at - 559 625-3051 or Fax - 559 625-3053.

2006 Seminar Schedule

♦ **Hiring & "At-Will" Employment -** From the Employment Application to the I-9 Form, we cover hiring. We also discuss maintaining an employee policy that protects you from the "For-Cause" Trap!

Thursday, July 20th, 10am - 11:30am

NO SEMINAR IN AUGUST

♦ **Posters, Signs, Forms, Handouts, Fliers -** With all the new laws out there, what posters, flyers and handouts does an Employer Need?

Thursday, September 21st, 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 19th, 10am - 11:30am

♦ **Progressive Discipline & Effective Termination -** In the last seminar of the year we discuss the steps to take before discharging an employee to avert a lawsuit! We examine how to set up a progressive instruction, correction, punishment and termination program.

Thursday, November 16th, 10am - 11:30am

These morning seminars are free of charge and include refreshments and handouts.

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.

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Return Service Requested

A New Hiring Checklist Enclosed!

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Celebrating 41 Years!

DISABILITY PAYMENTS TO RISE IN '07

Injured workers will get a boost in their disability payments. Workers injured in 2007 who are temporarily disabled, and those workers with 100 percent permanent disabilities on or after Jan. 1, 2003 will receive higher payments to reflect a 4.96 percent increase in the state's average weekly wage. So will the limited number of temporarily disabled workers who are still receiving payments two or more years after being injured.

The state's average weekly wage rose from $838.42 to $880 for the year that ended March 31. When California reformed the workers' compensation system in 2002, the state required that rates be adjusted each year to $840 or the state average weekly wage, whichever was larger. The maximum temporary disability rate for injuries on or after Jan. 1, 2007 will rise to $881.66, the institute said. The minimum temporary total disability rate increases to $132.25 from $126.

The higher state average weekly wage also affects cost of living adjustments required by another portion of the 2002 reforms. [PE]

Filling a Position During a Medical Leave

A California Court of Appeal determined that an employer acted properly when it terminated an employee upon her return from medical leave. The employer had filled her position with a full-time employee during the employee's leave and had no vacant positions for which she was qualified upon her return to work.

The court determined that the company's policy was beyond what the law required and it was implemented consistently. The court found that the employee failed to provide any evidence that she was able to work when her position was filled or that she was terminated because of a disability. To the contrary, the evidence demonstrated that at the time her position was filled, she was unable to perform her job even with accommodation. Further, the company had legitimate, non-discriminatory reasons for not reinstating her - there were no positions available for which she was qualified. The company followed its policy and implemented it in a non-discriminatory manner. *Williams v. Genentech, Inc.,*

Employers Should:

- Ensure your leave of absence policies comply with the law and that they are followed.
- Consistently communicate with employees on a leave of absence regarding medical certifications, return to work, and employee rights under company policy.
- Consult with Pacific Employers prior to terminating an employee upon return to work from, or during a leave of absence. [PE]

FREE & UNLIMITED CONSULTATION?

Yes FREE! A benefit of Pacific Employers' Membership is Free, Unlimited, direct, phone consultation on labor, safety or personnel question on the Pacific Employers' Helpline at: **(559) 733-4256 or Toll Free (800) 331-2592.**