Pacific Employers
Management Advisor
Celebrating 44 Years!
July 2008

Top of the News

Silencing Law Muted

Section 16645 of the California Government Code, provides that public employers and private employers that contract with the government are prohibited from using government funds to assist, promote, or deter union organizing.

In practicality, what the bill does is prohibit public employers and private employers doing business with the California government from influencing a union campaign and allows union organizing of such employers to be done without any counter campaigning from the employer. In other words, the law acts to silence any affected employer in a union organizing campaign.

"... must be left open to free debate ..."

Shortly after AB 1889 was enacted, other states began enacting similar provisions. In the meantime, the United States Chamber of Commerce sued claiming that the law violated the Constitutional right to free speech and was preempted by the National Labor Relations Act. The suit made its way up to the United States Supreme Court who issued its decision in *United States Chamber of Commerce v. Brown,* reversing a previous Ninth Circuit ruling.

In a 7-2 vote, with Justices Ginsburg and Breyer dissenting, it struck down the law and held that AB 1889 is preempted by the NLRA. More specifically, the Court held that in the NLRA Congress held that there were certain areas and conduct that must be left open to free debate without regulation and that AB 1889 was in violation of that intent. [PE]

E-Verify for Fed Contractors

This June, President George W. Bush signed an amendment to Executive Order 12989 requiring the more than 200,000 federal contractors to use E-Verify, the Department of Homeland Security's oft-criticized employment eligibility electronic verification system. While several states require employers to use E-Verify, this is the first time that the federal government has mandated private employer participation in the program.

The amendment to the Executive Order directs all federal departments and agencies to require contractors, as a condition of each future federal contract, to use an electronic employment eligibility verification system designated by the Secretary of Homeland Security to verify the employment eligibility of:

1. All persons hired during the contract term by the contractor to perform employment duties within the United States; and

2. All persons assigned by the contractor to perform work within the United States on the federal contract.

"... more than 200,000 federal contractors ..."

The Department of Homeland Security has designated E-Verify as that electronic verification system. Agencies responsible for the Federal Acquisition Regulations sent a Notice of Proposed Rulemaking (NPRM) to the Federal Register on June 9th soliciting public comment on proposed changes to these regulations. Publication may take several days. Thereafter, comments will be accepted for 60 days. After the comment period is over, the DHS will publish a final rule. [PE]

Heat Illness Flyer Enclosed!

President's Report
~Dave Miller~

MisTake on MisMatch

A federal appeals court ordered reinstatement for 33 janitors in Los Angeles who were fired because their Social Security numbers did not match the government's database, a ruling that could strengthen the case against a Bush administration proposal to pressure employers to terminate based on "No-Match Letters."

The decision by the Ninth U.S. Circuit Court of Appeals in San Francisco did not address the legality of the administration's so-called no-match rule, which a federal judge blocked in October. That rule would threaten employers with civil fines and criminal prosecution unless they fired workers who failed to clear up discrepancies between their Social Security numbers and government records.

But in ordering the Los Angeles janitors rehired with back pay, the court said employees can't be fired merely because the Social Security number they submit differs from the number in the government's files - a major issue in lawsuits over the administration's plan.

The case involving a grievance by workers fired based on SSN mismatches that raised concerns about suspected immigration violations, a district court decision vacating an award in favor of the union and workers on the ground that it violated public policy is reversed and the award confirmed where: 1) the employer did not establish constructive knowledge of any immigration violations; 2) constructive knowledge is to be narrowly construed in the immigration context and requires positive information of a worker's undocumented status; and 3) given the extremely short time that employer gave its employees to correct the mismatches at issue, and an arbitrator's finding that employer had no "convincing information" of immigration violations, employees' failure to meet the deadline simply was not probative enough of their immigration status to indicate that public policy would be violated if they were reinstated and given back pay. [PE]

"It is impossible for a man to learn what he thinks he already knows." — Epictetus

Recent Developments

Title VII Protects Women Who Have An Abortion

In a case of first impression, the U.S. Court of Appeals for the Third Circuit has ruled that the protections generally afforded pregnant women under Title VII, as amended by the Pregnancy Discrimination Act (PDA), also extend to women who have elected to terminate their pregnancies. *Doe v. C.A.R.S. Protection Plus, Inc.,*

The PDA prohibits discrimination "on the basis of pregnancy, childbirth, or related medical conditions."

Consistent with the legislative history of the PDA and the interpretive guidelines of the Equal Employment Opportunity Commission (EEOC), the Third Circuit found that an abortion is included in the "related medical conditions" referenced in the statute.

Although the Third Circuit never squarely addressed the issue of discrimination based on abortion, the legislative history surrounding the PDA provides that the Act's basic language was intended to cover women who chose to terminate their pregnancies. "Thus, no employer may, for example, fire or refuse to hire a woman simply because she has exercised her right to have an abortion." The EEOC's guidelines similarly include abortion as a right protected by the PDA.

After recognizing that Doe was protected by the PDA, the court clarified the elements of a prima facie case of discrimination under the PDA. To establish a prima facie case, an employee is required to show: (1) that she was pregnant and her employer had knowledge of her pregnancy; (2) she was qualified for her job; (3) she suffered an adverse employment decision; and (4) there is some nexus between her pregnancy and the adverse employment action. [PE]

Landmark California Ruling on Same-Sex Marriages Changes Employers' Responsibilities

The California Supreme Court issued its long-awaited and landmark same-sex marriage decision in May of this year. The 4-3 decision in ***In re Marriage Cases*** ordered issuance of civil marriage licenses to same-sex couples in California. Now that California has begun allowing same-sex marriages, employers face a changed landscape with respect to spousal and domestic partner obligations.

In re Marriage Cases held that denying same-sex couples the right to marry violated the equal protection clause of the California Constitution, and therefore was a form of unconstitutional discrimination based on sexual orientation. The decision requires California counties to issue marriage licenses to same-sex couples when the ruling becomes final. On June 4, the Court denied a petition for hearing. It ordered that the decision become final on June 16 at 5 p.m. San Francisco began issuing licenses immediately that evening.

California & Massachusetts Allow Same-Sex Marriages

The primary immediate impact on employers will be that any provision of California law referring to "spouse" now will include same-sex spouses as well. Thus, for example, employees will be eligible for family and medical leave under the California Family Rights Act to care for a same-sex spouse or to use sick leave under the "kincare" law for a same-sex spouse. California same-sex marriages will not be recognized under federal law. For purposes of federal law, DOMA provides that "'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." Thus, the same-sex marriages will not affect an employee's rights under the federal Family and Medical Leave Act or Social Security, for example.

If they are not subject to the federal Employee Retirement Income Security Act ("ERISA"), spousal benefits provided by employers will have to be extended equally to same-sex spouses. Not doing so could result in state law claims of sex or sexual orientation discrimination, both of which California law prohibits. Benefits covered by ERISA will not be affected because ERISA preempts California law and applies federal law.

Additionally, because federal law will not recognize same-sex marriages under DOMA, same-sex spouses' benefits will generally be taxed as income under federal law, even though opposite-sex spousal benefits are not. The exception is if the same-sex spouse also qualifies as the employee's dependent for tax purposes. California will not tax same-sex spouses' benefits. Currently, California does not tax domestic partner benefits, while federal law does, unless the employee's domestic partner qualifies as a dependent.

California Domestic Partnership Law Continues

The decision did not affect California's domestic partner law, nor will it convert existing domestic partnerships to same-sex marriages. Domestic partners who legally marry each other, however, will terminate their domestic partnership and become legally married in doing so. Currently, California allows a couple to register as domestic partners with the Secretary of State if the partners are of the same sex or if they are of the opposite sex and one of the partners is over age 62. California affords registered domestic partners the same rights under state law as spouses, with employers required to provide equal benefits to such employees under any insured benefits plan not covered by ERISA. Further, California recognizes civil unions and domestic partnerships from other states that afford substantially the same rights as California's law, such as Vermont, Connecticut, New Hampshire, and Oregon.

Constitutional Amendment May Overturn Decision

The unknown factor in this situation is a proposed constitutional amendment certified for the November 2008 ballot. California voters will vote on whether or not to add the same language from Proposition 22 to the California Constitution. If successful, the amendment would overturn the California Supreme Court's decision. The potential impact on same-sex marriages performed in the meantime is uncertain. [PE]

Heat Illness Flyer Enclosed!

Human Resources Question with Candice Weaver

The Month's Best Question

Confidentially

Q: ***"Our longest tenured office employee has access to all areas of our computer system, including employee records. She has been the unofficial system administrator for a long time. She has the payroll access because she used to do payroll and is still a backup for the payroll team. She last checked payroll in December.***

Now it is apparent that she has been looking at the office salaries and discovered that we recently gave an employee a raise when we added the HR duties to him.

The question now is how should I handle this? I am going to counsel her on her work performance today or tomorrow, and I think we should bring this up too. My dilemma is that we gave her access to the entire system so she could do her work as system administrator but when she looked at the HR employee's file, that was a clear breech of trust in my view. My first thought was to suspend her, but I don't have any evidence she looked at the file other than the HR employee's comments to me, unless she admits it."

A: The fact that an employee has access to certain confidential information does not change the fact that it is what they do with that information that makes a difference.

Bank employees know account balances, doctors know who has cancer, lawyers know who is guilty, Lawrence Livermore National Laboratory scientists know how to make an atom bomb, but when they use that information for personal or illegal purposes, they violate privacy laws.

She would be accountable for her misuse of information if she were to do so.

Now the question is, Has she done so? If you are not certain, that does not stop you from sitting down with her and explaining that she must maintain privacy of the records entrusted to her. Further, if she uses it for personal purposes, she will be disciplined, up to and including termination. [PE]

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No-Cost Employment Seminars

The 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.

2008 Topic Schedule

♦ **Hiring & Maintaining "At-Will" -** From the thought to hire to putting to work, we discuss maintaining procedures that protect you from the "For-Cause" Trap!

Thursday, July 17th, 2008, 10am - 11:30am

♦ **Record Keeping -** Forms, Posters, Signs, Handouts, Fliers - Just what paperwork, posters, flyers and handouts does an Employer need?

Thursday, September 18th, 2008, 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 16th, 2008, 10am - 11:30am

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

Thursday, November 20th, 2008, 10am - 1:30am

There is No Seminar in December

Supervisors' 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 July 23rd, registration at 7:30am — seminar 8:00 to 10:00am, at the Lamp Liter, Visalia.

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

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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Pacific Employers
306 North Willis Street
Visalia , CA 93291
559 733-4256
(800) 331-2592
www.pacificemployers.com
email - peinfo@pacificemployers.com

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Hands-Free Law Takes Effect July 1

Effective July 1, 2008, Senate Bill 1613 requires drivers in California to use a hands-free device when using a cell phone while driving.

The impact on employers will occur ***if employees are expected to use a cell phone while driving, as the employer must provide them with a hands-free device so they can perform their work and comply with the law.*** The device can be purchased by the company and distributed to employees, or the company can agree to reimburse employees for the reasonable cost.

If employees are not expected to use cell phones while driving but choose to do so solely for their own convenience, then the employer is not required to provide or pay for a device. As with any equipment issued to employees, they can be required to return it upon termination of their employment. Rules regarding deposits and wage deductions for equipment are highly technical. Employers should consult with their employment counsel before requiring a deposit or deducting the cost of a lost device from an employee's wages.

If a company has any employees who drive, even occasionally, in the performance of their work duties, it should immediately adopt a policy requiring safe driving habits. Implementing such a policy can reduce the likelihood that an employer will have to pay for an employee's tickets and reduce the potential liability if an employee is involved in a traffic accident. A sample policy was provided in the April Newsletter and is available on our Websit e on the Forms page. [PE]

Farmworker Died Of Heat Stroke

The San Joaquin County Coroner has confirmed that a young, pregnant farmworker who collapsed in a vineyard in May died of heat stroke.

Seventeen-year-old Maria Isabel Vasquez Jimenez was pruning grape vines at a Stockton-area vineyard when she fainted on May 14, after working a nine-hour shift in 100-degree heat.

" . . . REVOKING THE CONTRACTOR'S LICENSE PERMANENTLY. "

Last week, state officials shut down her employer, Merced Farm Labor, saying the company denied her proper access to shade and water.

On Wednesday, lawyers representing her mother filed a wrongful death suit in Merced County Superior Court against the farm labor contractor, its operator and the vineyard where she was working.

Labor Commissioner Angela Bradstreet is also in the process of revoking the contractor's license permanently. [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