Pacific Employers
Management Advisor
Celebrating 45 Years!
July 2009

What's New!

CA Supremes Empower ADA Suits

The California Supreme Court has ruled that businesses could be sued for damages if they lack accommodations for the disabled, even in the absence of discrimination.

The judgment made in the case of a San Bernadino man who couldn't get his wheelchair into the restroom at a fast-food restaurant, has many business advocates in the state decrying the lack of justice.

Under current law, business may be subject to fines of up to $4,000 for Americans with Disabilities Act (ADA) violations or three times the amount of the victims loss, whichever is greater. With the new ruling, the business' intent is no longer considered necessary to determine fault.

Organizations like the National Federation of Independent Business (NFIB) believe the court's decision is overreaching and will issue a flurry of litigation that will constrain and hurt small business owners who can't afford to fight allegations in court. Karen Harned, executive director of the NFIB's Small Business Legal Center, said the ruling creates an incentive for people to abuse the ADA, even when no violations occurred.

"Ruling that intentional discrimination is not needed in order for a plaintiff to collect damages for ADA violation further allows these plaintiffs and their lawyers to continue to extort small business owners who may or may not have violated the law," Harned said in a statement.

John Kabateck, executive director of NFIB in California, said there is now pressure on the Legislature to fix the law before needless court cases become the norm.

"The Legislature owes it to small business owners, the victims of those who abuse the ADA, to clarify standards of the law and require proof of intentional discrimination in order for a plaintiff to receive monetary damages for ADA violations." [PE]

Heat Illness Flyer Enclosed!

President's Report

~Dave Miller~

Things Slowing Down?

Employers know how fast "change" can come to workplace law under the new majority in Washington DC.

Congress passed the Lilly Ledbetter Fair Pay Act in January of this year, during the first week of the 111th Congress, and without any committee action, little floor debate, and no amendments. President Barack Obama quickly signed the bill into law.

The Ledbetter Fair Pay Act was a major change to the federal laws prohibiting pay discrimination. Under the new law, plaintiffs are no longer required to file charges of alleged pay discrimination within the 180/300-day statute of limitations measured from the alleged act of discrimination; instead, plaintiffs now may bring claims years or even decades after the action alleged to be discriminatory so long as the charge is filed within 180/300 days of the last paycheck received or, if the plaintiff is retired, within 180/300 days following the last benefit check.

The law applies to actions for pay discrimination because of race, color, religion, sex, national origin, age and disability.

Because the bill was rushed through Congress without proper debate (no "regular order") there is no legislative history to define what the new law's reference to "other (discriminatory) practice" might mean beyond pay discrimination. Business can now expect a litigation "gold rush" of stale claims from plaintiffs and their attorneys at a time when witnesses are unavailable, memories have faded, and records no longer exist to defend against the claims.

Luckily the pace of change has slowed. Congress is now working to find a variation of the Employee Free Choice Act (EFCA), known as the "Card Check Bill," that can pass the Senate cloture vote. Several Senators and some in organized labor are seeking an alternative to EFCA, which could survive a required 60-vote "cloture" petition to end a filibuster on the motion to take the bill to the Senate floor. Senate negotiations for a variation of EFCA have begun in earnest following the announcement by Senator Arlen Specter (D-PA) that he has switched political parties.

Senator Specter has stated that he would still vote against cloture on EFCA because he opposes both "card check" in place of secret ballot elections to determine union representation and compulsory first contract interest arbitration in place of free collective bargaining. Senator Blanche Lincoln (D-AR) also has announced her opposition - both on cloture and final passage. Several other Democratic Senators have expressed varying degrees of displeasure with EFCA as introduced, but would welcome an alternative bill.

An example is "final offer" government arbitration which has been discussed for first contracts where the parties cannot agree, similar to "baseball arbitration" where the two parties submit their final proposals to an arbitrator who chooses between them. The big difference is that baseball arbitration generally involves only issues of salary and duration of the contract, while in the workplace it would include all terms and conditions of employment.

Stay tuned for any changes in the Card Check law that may affect your relationship with your employees! [PE]

There is more to life than increasing its speed. - Gandhi

Recent Developments

Starbucks Tip Ruling Overturned

Earlier this year, a San Diego trial court issued a $100 million verdict against Starbucks Corporation in a controversial class action involving how Starbucks distributes tip jar monies. A California Court of Appeal has just reversed that ruling. In doing so, the court clarified one of the important rules that hospitality industry employers must follow when devising any tip sharing arrangements.

"... ordered Starbucks to pay some $100 Million ..."

Most Starbucks outlets have a tip jar by the cash register. Under Starbucks' tip pool arrangement, any monies in the tip jar are shared by all of the service providers ("baristas"), including the shift supervisors. Shift supervisors are virtually indistinguishable from the other baristas, perform all of the same tasks as baristas, but have some minor supervisory duties such as supervising employees when no manager is present, opening and closing the store, and depositing store receipts in the safe.

A barista filed a class action suit challenging the practice of permitting shift supervisors to share in the tip jar monies. Under the California Labor Code, employers and their "agents" are prohibited from taking any portion of the tips left for employees. The barista contended that shift supervisors are "agents" of Starbucks because of their supervisory responsibilities. As such, they are not allowed to be part of a tip pooling arrangement.

In a disastrous ruling at the trial court, the judge said the barista was right and ordered Starbucks to pay some $100 Million (including interest) to the class members. This sum represented the portion of the tip jar monies paid out to the shift supervisors.

The Court of Appeal disagreed with the trial court's stance on the supervisors' participation in the tip pool. The Court of Appeal ruled that it was lawful for the company to allow the shift supervisors to have a share of the tip monies, even though they do perform some low level supervisory duties.

The Court of Appeal declined to rule on whether shift supervisors are actually Starbuck's "agents" as that term is used in the tip pooling statute. Nevertheless, the Court ruled that the Labor Code permits agents like these to share in tips in cases where the customer intended the tip to be shared with the agent.

Significantly, Starbucks shift supervisors work along side baristas as part of the service team. From a customer perspective, they are just another barista. Under that scenario, the Court of Appeal has no trouble finding that when the customer put money in the tip jar, the customer intended to reward everyone who provided the service.

While the Court's decision saved Starbucks a bundle, the case should not be read too broadly. There's a good chance the court would have reached a different decision if the shift supervisors were not part of the service team or the tips were not left in a collective tip jar. The ruling may not be helpful at all in a typical restaurant situation, where tips are left on the table and the supervisory employees may not play any direct role in the table service.

Given the stakes in the case, the plaintiff's lawyers have already announced their intention to file an appeal with the California Supreme Court.

The Supreme Court has accepted review of another tip pool case, and several other cases are seeking Supreme Court consideration. Employers considering a mandatory tip pooling policy are cautioned to consult with PE Staff regarding compliance.[PE]

Forfeiture of Commissions Upheld

A California Court of Appeal issued a favorable decision for employers regarding post-termination commission claims.

In *Nein v. Hostpro, Inc.* the plaintiff was a salesman who suggested a transaction to his employer that was not consummated until a month after the employer terminated the plaintiff's employment. The plaintiff sued his former employer for failure to pay him any commission on the transaction.

The plaintiff's employment contract stated that he "will be eligible for commission pay ... so long as he remains employed with the Company." The Court of Appeal ruled that this language "is reasonably susceptible to only one interpretation - that once plaintiff ceased to be employed by defendant, he would no longer be eligible for commission pay." Consequently, the Court of Appeal affirmed summary judgment in favor of the employer because "pursuant to the plain language of the written employment agreement, plaintiff was not entitled to any further commissions after he was terminated."

"there is an exception to principle when a contract provision is unconscionable,"

The Court of Appeal, however, made clear that the outcome would not necessarily be so favorable for employers in other cases because "there is an exception to this principle when a contract provision is unconscionable," which the Court of Appeal did not consider in this case because the plaintiff did not make that argument. The Court of Appeal gave as an example a previous case where a provision in an employment agreement that a salesman forfeited his right to a commission if he terminated his employment before his employer received payment for the sale was found to be unconscionable and therefore unenforceable.

Accordingly, commission agreements need be carefully analyzed and drafted to maximize the likelihood that a court will uphold the language on which the employer bases its decisions regarding commission payments. [PE]

E-Verify Delayed Until September 8

The effective date of a final rule requiring federal contractors and subcontractors to use the E-Verify system has been delayed for a fourth time. The new effective date is September 8, 2009.

The U.S. Chamber of Commerce and other employer groups brought a lawsuit to block implementation of the rule. The latest delay is a result of an agreement reached among the litigants in that action, asking the Court to stay the proceedings until the Obama Administration can complete a review of the rule written in the final days of the Bush Administration. Implementation was originally scheduled to take effect on January 15, 2009. [PE]

Heat Illness Flyer Enclosed!

Human Resources Question with Candice Weaver

The Month's Best Question

Alternative Workweeks

Q: ***"How hard is it to set up an Alternative Workweek?***

A: It is fairly easy to set one up. Below are the 8 steps for doing so.

1. Identify work units to be covered. An alternative workweek must apply to a specified work unit. Existing rules define a work unit as a division, department, job classification, shift or separate location. In some situations, even a single employee may qualify as a work unit.

2. Prepare a written proposal. Describe the new schedule and its impact, including working over 8 hours in a day without overtime, on pay and benefits. You can propose a single schedule for all workers in the work unit or a menu of schedule options for employees to choose from. A schedule can fluctuate if the differences are specified in the proposal. Two consecutive days off are required under wage orders 1,2, 3, 6, 7, 8, 11, 12, and 13. Wage orders 4, 5, 9, 10, 16 and 17 do not require two consecutive days off.

3. Communicate with workers. Employers must meet with employees to discuss the impact of the alternative workweek scheduling proposal.

4. Hold a secret ballot election. Employees must ratify the agreement by a two-thirds majority in a secret ballot election.

5. Have employees select schedules if you propose a menu. Each employee should select, in writing, a fixed schedule from the menu. To simplify matters, have employees initial their schedule on the written agreement.

6. Election results must be reported. The employer must report election results within 30 days to the California Department of Industrial Relations, Division of Labor Statistics Research, P.O. Box 420603, San Francisco, CA 94142. It is best to do so before instituting the new schedule.

7. Get the schedule agreement signed. Many of the existing and reinstated wage orders require that at least two-thirds of your employees voluntarily sign a schedule agreement.

8. Accommodation of employees where necessary. Each employee in the work unit is subject to the new workweek arrangement, even if they voted against it. However, the employer must try to arrange a schedule that does not exceed eight hours in a day for employees who were eligible to vote, but cannot work the new schedule. And you must explore accommodations for workers whose religious beliefs or observances conflict with the schedule. If, after the election, an employee is hired who is unable to work the alternative schedule, you are permitted, but not required, to make an accommodation for the person.

Obtain the instructions, sample ballot and acknowledgment form on our Website Forms page - *http://www.pacificemployers.com/forms.htm* [PE]

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 22nd, 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

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.

2009 Topic Schedule

♦ **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, 2009, 10am - 11:30am

There is No Seminar in August or December

♦ **Forms & Posters -** as well as Contracts, Signs, Handouts, Fliers - Just what paperwork does an Employer need?
Thursday, Sept. 17th, 2009, 10am - 11:30am

♦ **Vicki Stasch is our Guest Speaker — Speaking on "Change and Conflict during downsizing or restructuring."** Vicki Stasch, M.S. has provided services to businesses since 1982. She offers the following: *Training, Coaching and Related Services, Leadership Training, One-One Personal and Leadership Coaching, Communication and Team Building, Strategic Planning, Facilitation of Team and Community Meetings, and Conflict Management.*
Thursday, Oct 15th, 2009, 10am - 11:30am

♦ **Discipline & Termination -** The steps to take before termination. Managing a progressive correction, punishment and termination program.
Thursday, Nov. 19th, 2009, 10am - 11:30am

Lemoore Chamber of Commerce

Employer Workshop presented
by Pacific Employers
"Forms & Posters"
Thursday, Sept. 10th 10-11:30 a.m.
Lemoore Depot, 300 E Street, Lemoore
Information & Reservations:
Lynda Lahodny - (559) 924-6401 or
ceo@lemoorechamberofcommerce.com

Want Breaking News by E-Mail?
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Consider Carefully Before Suing!

A recent decision by a California Court of Appeal should give employers pause before they use California's trade secret laws to try to stifle competition in violation of California law.

In the case of *FLIR Systems, Inc. v. Parrish,* the Court of Appeal affirmed a decision by the trial court awarding $1,641,216.78 in attorneys' fees and costs to two former employees who successfully defended a trade secret action brought by their former employer. The Court agreed with the trial court that the action was filed and maintained in bad faith within the meaning of the California Uniform Trade Secrets Act. [PE]

Law Provides Extended Medical Coverage

Michelle's Law provides that a group health plan that offers dependent coverage upon status as a full-time student, may not terminate the dependent's coverage when the dependent ceases to meet the "full-time" criteria due to a "medically necessary leave of absence."

This law is intended to protect parents of college students who lose "student status" due to illness from the financial burdens of COBRA. These provisions are effective for plan years beginning on or after October 3, 2009 [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

Business Gets Positive Ruling in Age Cases

In *Gross v. FBL Financial Services Inc.* the Supreme Court, in a divided 5-4 holding, gave businesses a stronger hand in deflecting claims from older workers who allege they were discriminated against because of their age.

The majority opinion said employees bringing federal age-discrimination claims bear the burden of proving their age was a primary factor in their reassignment by an employer. The split vote fell along ideological lines with conservatives in the majority and the court's liberal block registering an angry dissent.

The decision is a win for businesses that increasingly face age-discrimination lawsuits. But the ruling also drew an angry reaction from a top Senate Democrat on legal issues, who compared the ruling's outcome to an earlier worker-discrimination ruling Congress overturned with new law.

"The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age," Justice Clarence Thomas wrote for the majority. He added this legal rule applies "even when a plaintiff has produced some evidence that age was one motivating factor."

Justice John Paul Stevens, in the court's dissent, accused the majority of engaging "in an unabashed display of judicial lawmaking" that he said overturns earlier employment-discrimination precedent and disregards 1991 changes in federal civil-rights laws.

Karen Harned, executive director of the National Federation of Independent Business, said the opinion would help companies defend against age-bias claims. "Requiring claimants to show direct evidence that age played a substantial role in the challenged employment decision is the appropriate and fair standard," Ms. Harned said. [PE]