Pacific Employers
Management Advisor
48 Years of Excellence!
July 2012

What's News!

Getting Soaked with Liquidated Damages

In the past it has been advantageous for employees who had a wage claim alleging payment of less than the minimum wage, to file those claims in court, instead of with the State Labor Commissioner's Office, as California courts in the past have allowed for the collection of liquidated damages.

However, last year Governor Brown signed legislation amending the Labor Code Sections 98 and 1194.2 which now contain new provisions that give new power to the Division of Labor Standards Enforcement (DLSE) and the Labor Commissioner's Office. The amended statutes will allow the Labor Commissioner to award liquidated damages to a successful employee.

Most employers are not aware of the full effects of these changes. The changes in the law entitles employees "to recover liquidated damages in an amount equal to the wages unlawfully unpaid and interest thereon." The law also guarantees compensation of all necessary legal expenses arising from the implementation of the law. The Labor Commissioner can now obtain those liquidated damages that previously were available only in court actions.

Liquidated damages are considered as an award of damages or penalties assessed against employers proven to have violated the wage law. Under the California Labor Code, the amount of liquidated damages is equal to the unpaid or lost wages.

The Labor Commissioner will also have the discretion, as the court now does, to award reduced or no liquidated damages if the employer proves that it acted in good faith and that it had reasonable grounds for believing that its act or omission was not a violation of any provision of the Labor Code relating to the minimum wage, or an order of the commission.

The code does protect employers from frivolous claims, as the employee must prove the employer's willful violation of the law. It now becomes much more important for employers to contest wage claims, as liquidated damages can far more than double the claim.

Additionally the revised Labor Code now permits the Labor Commissioner to require an employer that is convicted of a wage violation or failure to satisfy a judgment, to maintain a bond for two years . If the bond is not maintained, the Labor Commissioner can require an accounting of the employer's assets. An employer that fails to comply will be subject to a civil penalty of up to $10,000. [PE]

Brinker & Enterprise Zone Flyers Enclosed!

President's Report
~Dave Miller~

No Seats for Clerks & Cashiers

In a much anticipated decision, a federal judge in California's Southern District ruled last week that CVS Pharmacy was not required to provide its cashiers with seats to use while operating cash registers.

The plaintiff is a former customer service representative ("clerk/cashier") at CVS who filed a lawsuit on behalf of all California customer service representatives alleging that CVS violated Wage Order 7–2001, section 14(A) when it failed to provide its clerks/cashiers with suitable seats during the performance of their job duties. Section 14 of Wage Order 7–2001 provides:

> All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats.
>
> When employees are not engaged in the active duties of their employment and the nature of the work requires standing an adequate number of suitable seats shall be placed in reasonable proximity to the work area and employees shall be permitted to use such seats when it does not interfere with the performance of their duties.

In ruling on the motion for summary judgment, the court first considered the interplay between subsections A and B, and ultimately held that the two subsections were mutually exclusive. In doing so, the court rejected the plaintiff's argument that the phrase "nature of the work" refers to any particular duty that an employee performs during the course of her work. Instead, the court agreed with the defendant that the "nature of the work" performed by an employee must be considered in light of that individual's entire range of assigned duties in order to determine whether the work permits the use of the seats or requires standing. It is not enough to simply look at certain tasks in isolation to determine whether those tasks could be performed while seated, the court held. Instead, the court's inquiry was whether or not the job as a whole permitted the use of a seat or required standing. The court held that if the nature of the work requires standing, subsection B applies. [PE]

"Socialism is a philosophy of failure, the creed of ignorance, and the gospel of envy, its inherent virtue is the equal sharing of misery..." -- Winston Churchill

Recent Developments

Class-Action Waivers Found Valid

In a precedent-toppling decision last week, a California appellate court held that a class-action waiver in an employment arbitration agreement was valid after concluding that a California Supreme Court decision to the contrary has now been overruled by the U.S. Supreme Court.

"... INSUFFICIENT TO TRUMP THE FAR REACHING EFFECT OF THE FAA."

In *Iskanian v. CLS Transport*, the California Court of Appeals, 2nd District, applied the U.S. Supreme Court's landmark decision in *AT&T Mobility v. Concepcion*, which held that state law rules disfavoring arbitration are displaced by the Federal Arbitration Act.

The court found that *Concepcion* has overruled the California Supreme Court's decision in *Gentry v. Superior Court*, which allowed state courts to invalidate class-action waivers where class arbitration would be a more effective way to vindicate the rights of aggrieved employees.

In unequivocal terms, the *Iskanian* court found that *Concepcion* "conclusively invalidates the Gentry test," strengthening the validity of class waivers in employment arbitration agreements. In doing so, the court noted that *Concepcion's* interpretation of the FAA prohibits the imposition of class arbitrations on employers who did not agree to it contractually.

The court found "states cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons. The sound policy reasons identified in *Gentry* for invalidating certain class waivers are insufficient to trump the far reaching effect of the FAA." [PE]

Refusing to Sign Is Insubordination

When you present an employee a warning (or a review, etc.), and you ask the employee to sign the document to acknowledge receipt of a copy, and the employee refuses to do so, that is called "insubordination" and is a legitimate reason to fire an employee. Better, still: it's "misconduct" and the employee may be disqualified from unemployment benefits.

The employer does not have to discharge the employee, but it could. Where this "refuse to sign" notation came from, or when employees decided to tell employers what they will and will not sign became vogue, it is hard to say, but perhaps this decision will change things a bit.

"HE WAS TOLD HE WOULD BE FIRED IF HE DID NOT SIGN ..."

In *Paratransit v. UIAB*, the employee was in a union. The union contract required the employer to obtain the signature of the employee on disciplinary action notices, but the notices had to have a disclaimer that says the employee is only acknowledging receipt of the document. So, an employee was rude to a customer, the employer tried to give him a disciplinary notice. The employee refused because he feared it would be deemed an admission of guilt, despite the clear disclaimer. He was told he would be fired if he did not sign the document, and he refused. So his employer, Paratransit fired him.

So, the employee then applied for unemployment, which Paratransit contested. The Unemployment Ins. Appeals Board granted benefits, overturning the decision of an Administrative Law Judge. Paratransit then sought relief in court. The Superior Court agreed with Paratransit, and the employee appealed to the Court of Appeal.

If you're fired for "misconduct" you are disqualified from receiving unemployment. What is misconduct? Unemployment Ins. Code Section 1256 has the answer, as explained by the court:

Section 1256 provides in relevant part: "An individual is disqualified for unemployment compensation benefits if . . . he or she has been discharged for misconduct connected with his or her most recent work." Misconduct within the meaning of section 1256 is limited to "conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or the employee's duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed "misconduct" within the meaning of the statute . . .

The Court of Appeal held that refusing to sign an acknowledgment, in violation of a direct order to do so, was insubordination and, therefore, misconduct:

> "Under the circumstances presented, we conclude Claimant's failure to sign the disciplinary memo violated his obligations to Employer under Labor Code section 2856. (See Lacy v. California Unemployment Ins. Appeals Bd., supra, 17 Cal.App.3d at p. 1133 [employee must comply unless the employer's directive imposes a duty that is both new and unreasonable].) The remaining question is whether such insubordination was misconduct under section 1256 or a good faith error in judgment."
>
> "As described above, an intentional refusal to obey an employer's lawful and reasonable directive qualifies as misconduct. But where an employee, in good faith, fails to recognize the employer's directive is reasonable and lawful or otherwise reasonably believes he is not required to comply, one might conclude his refusal to obey is no more than a good faith error in judgment.
>
> Claimant was told to sign the disciplinary memo and that, if he did not, he would be subject to termination. Instead, Claimant requested union representation. He was then told he had no right to union representation at the meeting. Claimant was then instructed to sign the memorandum without union representation. By refusing to do so, Claimant was not seeking redress by other means. He was directly disobeying the employer's command." [PE]

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.

Human Resources Question with Candice Weaver

The Month's Best Question

No to Non-Attendance

Q: ***"An employee has health issues that create attendance problems. We would like to know how much non-attendance do we have to accommodate?"***

A: At times, an employee with a disability needs a "reasonable accommodation" —a change to the work environment or the way the job is performed that allows the employee to perform the job's essential functions. Temporary changes to attendance requirements and leaves of absence may be forms of reasonable accommodation in certain circumstances. **However, employers are not required to remove essential job functions.** The U.S. Ninth Circuit Court of Appeals in *Samper v. Providence St. Vincent Medical Center,* addressed when regular attendance is an essential job function under the Americans With Disabilities Act (ADA).

Monika Samper was a neo-natal nurse. She was diagnosed with fibromyalgia, which limited her sleep and caused her chronic pain. Providence's attendance policy permitted Samper to take five unplanned absences per year, in addition to other permitted absences. Samper regularly exceeded the number of permitted unplanned absences. Many of her unplanned absences were unrelated to her fibromyalgia, but Providence made exceptions to the policy for her.

Also, Providence provided Samper with various accommodations related to her fibromyalgia. Eventually, however, Providence discharged Samper because of her attendance-related problems, including exceeding the number of permitted unplanned absences.

Samper sued, claiming Providence violated the ADA because it did not provide her with a reasonable accommodation. She asserted Providence should have waived the attendance policy for her and allowed her to take an indeterminate number of unplanned absences.

Upholding the district court's grant of summary judgment to Providence, the Ninth Circuit panel reasoned that regular attendance was an essential function of Samper's job. Samper's regular, physical presence was necessary because her position required teamwork, face-to-face interaction with patients and their families, and working with medical equipment. Because Samper could not attend work reliably with or without reasonable accommodation, she was not a "qualified" individual with a disability, and therefore not protected by the ADA.

The court did not create a blanket rule making regular attendance an essential job function for every job. The court considered the specific evidence in the case, including Samper's job description, which showed that attendance was an essential job function. Samper's job required specialized training, it was difficult to find a replacement when she was unavailable, and her absences could have serious (potentially fatal) consequences. The court distinguished Samper's case from a previous opinion involving a medical transcriptionist, Humphrey v. Huntington Memorial Hospital, because the duties of a medical transcriptionist did not require the employee's physical presence. [PE]

No-Cost Employment Seminars

The Tulare-Kings Builders Exchange and Pacific Employers host 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.

2012 Topic Schedule

♦ **Hiring & Maintaining "At-Will" - Thursday, July 19th, 2012, 10 - 11:30am --** Planning to hire? Putting to work? We discuss maintaining "At-Will" to protect you from the "For-Cause" Trap!

There is No Seminar in August

♦ **Forms & Posters - Thursday, September 20th, 2012, 10 - 11:30am -- A**s well as Contracts, Signs, Handouts, Fliers - Just what paperwork does an Employer need?

♦ **Guest Speaker Seminar - Thursday, October 18th, 2012, 10 - 11:30am --** Annually we bring you a speaker for a timely discussion of labor relations, HR and safety issues of interest to the employer.

♦ **Discipline & Termination - Thursday, November 15th, 2012, 10 - 11:30am --** The steps to take before termination. Managing a progressive correction, punishment and termination program.

There is No Seminar in December

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 25th, registration at 7:30am
Seminar 8:00 to 10:00am, at the Lamp Liter, Visalia.

Quarterly Seminar also on 10-24-12

RSVP Visalia Chamber - 734-5876

PE & Chamber Members $35 - Non-members $45
Certificate – Forms – Guides – Full Breakfast

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Can Employers Block Paycheck Talk?

The State of California says NO! California Labor Code sections 232 and 232.5 preclude employers from disciplining or discriminating against employees who discuss their pay or working conditions. The statutes also prohibit employers from making it a condition of employment or asking an employee to sign a document that he/she will not discuss pay or working conditions.

Note that these provisions do not mean that employers may not bar employees from discussing trade secret, proprietary or other confidential information by policy or agreement. They do mean, however, that employers need to consider the source of any discussion of wages – if the source is an employee discussing his/her pay or a co-worker's because that co-worker voluntarily shared the information, the employees are protected. On the other hand, if an employee discloses pay information of other employees by improperly accessing or misusing access to private files, employers are in a position to investigate and take action as appropriate. Employers should review any policies related to discussion of pay, benefits and/or work conditions to ensure compliance with the NLRA and state law. [PE]

Requiring Employees to Use FMLA Leave

What happens in a situation in which an employee needs to take leave that qualifies as FMLA leave but does not want the employer to designate the time as FMLA leave.

According to the FMLA regulations, "The employer is responsible in all circumstances for designating leave as FMLA-qualifying, and for giving notice of the designation to the employee . . . When the employer has enough information to determine whether the leave is being taken for a FMLA-qualifying reason (e.g., after receiving a certification), the employer must notify the employee whether the leave will be designated and will be counted as FMLA leave within five business days absent extenuating circumstances" (29 CFR § 825.300(d))

Thus, the employer can require that a leave of absence be designated as FMLA if the employee is eligible and the reason for the leave qualifies under FMLA. [PE]

CA Jobless Dropped From Rolls

The number of people unemployed in California was 1,994,000 – down by 12,000 over the month, and down by 182,000 compared with May of last year.

In May 93,000 people who ran out of their unemployment benefits were taken off the rolls of those looking for jobs. In reality we were down 105,000 jobs in May and up only 89,000—at the most—over the past year. More than that moved to other States. [PE]

California WC Cost Raised by 45.3%

California Insurance Commissioner Dave Jones went against a unified front of labor and employer representatives siding with the insurance industry and the Workers' Compensation Insurance Rating Bureau (WCIRB) in approving a 8.3% increase mid-year rate hike for California employers.

Added to the 37% rate increase he approved for January, July and later renewals are facing an average rate increase of 45.3% over last year at the same time. [PE]