Pacific Employers
MANAGEMENT ADVISOR
49 Years of Excellence!
July 2013

WHAT'S NEWS!

COURT REJECTS MULTI-TASKING MANAGERS!

A California state appellate court in Los Angeles recently addressed the "multi-tasking" responsibilities of managerial employees and interpreted California's wage and hour laws in a manner different from FLSA regulations. In *Heyen v. Safeway, Inc.,* the Court of Appeals decided in favor of a grocery store assistant manager whom the jury and court found did not qualify for the executive exemption from overtime compensation under California law because the assistant manager regularly spent more than 50 percent of her work hours doing "non-exempt" tasks such as bagging groceries, bookkeeping, and stocking shelves.

Under the CA Wage Order, an exempt executive employee must be (1) "primarily engaged" in duties that meet the executive test of the exemption, and (2) must spend "more than one-half [of her] work time" engaged in such duties.

The *Heyen* case appears to be the first appellate decision in California to directly rule on whether time spent on the "concurrent performance of exempt and non-exempt" work can count toward "exempt time" so as to meet the 50 percent threshold for the executive, administrative, or professional exemption. In Heyen, the trial court gave the following jury instruction on concurrent performance of exempt and non-exempt work:

The test to determine whether defendants have met their burden to show that the plaintiff spent more than 50% of her time engaged in exempt tasks is quantitative. The test requires, first and foremost, you must look to the actual tasks performed by the plaintiff.

If a party claims that an employee is engaged in concurrent performance of exempt work and non-exempt work, *you must consider that time to be either an exempt or a non-exempt activity depending upon the primary purpose for which the employee undertook the activity at that time.* The nature of the activity can change from time to time.

In 2004, the U.S. Department of Labor promulgated new Title 29 Part 541 regulations which defined the terms "executive, administrative, professional and outside sales employees," and added a new section to the executive regulations entitled "Concurrent Duties." That section provides that "concurrent performance of exempt and nonexempt work does not disqualify an employee from the executive exemption if the requirements of §541.100 are otherwise met."

Safeway argued that this provision supported its contention that the "concurrent performance of exempt and non-exempt" work should count toward "exempt time" so as to meet the 50 percent threshold. The court rejected this argument, noting that "in the nine years that have passed since the Secretary of Labor adopted these amended regulations, neither the California legislature nor the IWC has elected to follow them. We therefore have no authority to do so."

The *Heyen* decision serves to remind employers that the provisions of California's state wage and hour laws, even when facially very similar to provisions in federal law and even when they expressly refer to federal regulations, are likely to be interpreted differently by California courts and the California Division of Labor Standards Enforcement. [PE]

Spanish Labor Law Posters Available!

President's Report
~Dave Miller~
Spanish Posters - Olé!

Through the joint effort of California Employers Association (CEA) and Pacific Employers, the new Spanish All-In-One Poster is now available at our office.

When the State and Federal governments create new posters, generally the posting of their new creations are mandated on all employers as of a certain date. Employers with a significant proportion of Spanish language employees are required to post these notices in Spanish by the same date.

However, it is not unusual for both the State and the Fed's to be extremely tardy in releasing their Spanish language posters. We often joke that it may be possible that they are unable to find someone who speaks Spanish in the state!

Well, this year was no exception to the often overdue Spanish poster. So, with the help of CEA, we jointly created and printed our own posters. **Our clients will find that the 2013 Spanish All-In-One Poster is now available at our office.** [PE]

Private Property Right Lost!

The U.S. Supreme Court upheld the rights of union pickets on private property in California when it denied an appeal by Ralphs Grocery Co. to hear its constitutional challenge of California laws that protect union rights to picket near entryways of retail stores and other businesses.

"COURT RULES ON RIGHT TO PICKET ON PRIVATE PROPERTY"

The California Supreme Court upheld the laws in December, but Ralph's appealed to the U.S. Supreme Court.

The high court's decision ends a five-year legal battle by Ralph's to keep United Food and Commercial Workers Union Local 8 - Golden State pickets off storefront areas. with a loss for all private property owners. [PE]

"Three groups spend other people's money: children, thieves, politicians. All three need supervision."
-- Dick Armey (1940-) U.S. Congressman, TX-R

Recent Developments

Unpaid Wage, Meal & OT = $584,635.97

Adult care facilities accused of labor violations. Three Bay Area-based adult care facilities have been cited for wage theft, including minimum wage, overtime, and meal break violations. Citations total $584,635.97.

Two of the three facilities cited, Dream Care, LLC, doing business as Evergreen Terrace of San Ramon, and New Hope Community Care, Inc., doing business as Angela's Residential Care Home of Sunnyvale, are residential adult care facilities, while the third, Research and Results Team, LLC, doing business as Beyond Potential Learning Center of Milpitas, is an adult day program serving people with developmental disabilities.

Right to Privacy Lost!

Public employer required to provide union with addresses and phone numbers of union and non-union employees alike.

In a case just decided, Los Angeles County has been ordered to provide the union representing its employees under an "agency shop" agreement with the home addresses and telephone numbers of all county employees, including non-union employees, the California Supreme Court has ruled. *County of Los Angeles v. Los Angeles County Employee Relations Comm'n (Serv. Employees Int'l Union, Local 721)*

"... SIGNIFICANTLY OUTWEIGHED THEIR PRIVACY RIGHTS."

Although the Court recognized the non-union employees had a right to privacy in their home addresses and telephone numbers under the California Constitution and their disclosure was a serious invasion of that right, the Court determined the union's interest in communicating with employees significantly outweighed their privacy rights. The Court further ruled the Court of Appeal erred in imposing procedural requirements limiting the disclosure of the non-union employees' contact information. [PE]

Nurses Accuse Union Of ULP

Three nurses at Thousand Oaks Surgical Hospital have filed unfair labor practice charges with the National Labor Relations Board (NLRB) saying they're being unfairly forced into a union, according to a statement from the National Right to Work Foundation, which provided free legal assistance to the nurses.

In late November 2012, Hospital Corporation of America (HCA) Holdings, Inc.-owned Los Robles Hospital purchased Thousand Oaks Surgical Hospital, and in late April 2013, HCA and Los Robles management announced that Thousand Oaks workers would be represented by the Service Employees International Union (SEIU) Healthcare Workers West and would be attached to the preexisting Los Robles-SEIU bargaining units. [PE]

City of Stockton Reaches Deal With Retirees' Health Benefits

After almost 15 months of talks, a deal has been tentatively reached between the city of Stockton and its retired municipal employees over their health benefits.

The city has agreed to allocate $5.1 million in its eventual plan of adjustment under its Chapter 9 bankruptcy to be divided among those who were eligible for retiree health benefits at the time the city filed for bankruptcy.

The liability for retiree medical benefits is estimated to be in the hundreds of millions of dollars for the 1,100 retirees with bankruptcy claims.

The settlement will be a lump sum payment made when the plan of adjustment goes into effect.

Retirees are the city's largest group of unsecured creditors. The agreement will become part of the city's plan of adjustment, expected to be filed with the Bankruptcy Court in the late summer or fall. All creditors, including retirees, will have an opportunity to vote on the plan of adjustment as part of the Chapter 9 process. [PE]

Must You Hire a Criminal?

Won't hire convicted criminals? Uncle Sam might have a problem with that. If you've got a policy against hiring anyone with a criminal record, you better review guidelines issued by the Equal Employment Opportunity Commission.

The EEOC has recently filed lawsuits against BMW's manufacturing plant in Spartanburg, S.C., and Dollar General, which is based in Goodlettsville, Tenn. The agency contends the companies' policies against hiring people who have been convicted of a crime violate the Civil Rights Act because they disproportionately cost African-Americans jobs.

Several employees who had worked at BMW's plant for years as employees of a logistics services company lost their jobs as a result of BMW's policy. Their employer, UTi Integrated Logistics, only reviewed criminal convictions for the previous seven years. But when UTi ended its contract with BMW, its employees at the facility had to re-apply for their jobs with a new contractor. BMW ordered the new contractor to follow its criminal background policy, which has no time limit as far as criminal convictions. Several employees failed this test, and were denied jobs as a result.

"DOLLAR GENERAL HAS 10,000 STORES IN 40 STATES . ."

EEOC's lawsuit against Dollar General, which has 10,000 stores in 40 states, grew out of a discrimination lawsuit filed by two rejected black applicants. Dollar General also requires criminal background checks as a condition of employment, according to the EEOC. One of the rejected applicants had a 6-year-old drug conviction, but had previously worked at another discount retailer for four years. The other rejected applicant was fired by Dollar General due to an inaccurate criminal background report.

In both cases, the EEOC alleges the companies' policies had a disparate impact against African-Americans. The agency is seeking back pay for the workers who lost their jobs and an injunction to prevent future discrimination.

EEOC Chair Jacqueline Berrien said the agency has advised employers since the 1980s that "under certain circumstances" their use of arrest and conviction records to deny employment opportunities "could be at odds" with Title VII of the Civil Rights Act. [PE]

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 24th, registration at 7:30am
Seminar 8:00 to 10:00am, at the Lamp Liter, Visalia.

RSVP Visalia Chamber - 734-5876
PE & Chamber Members $35 - Non-members $50
Certificate – Forms – Guides – Full Breakfast
Future 2013 Training on 10-23-13

Human Resources Question with Candice Weaver

The Month's Best Question

How Affordable is PPACA?

Q: "We are a landscaping company with nearly 100 full time employees. We must begin offering coverage to all of our workers 1-1-2014. I don't expect a groundswell of enrollments from these lower-wage workers when they get the facts. I believe most of my workers will *"opt out"* of the new health care coverage because they'd rather have the cash than pay the employee portion of the premium.

These employees earn an average of $10.50 an hour, they would love to have insurance, but can't afford the estimated $140 monthly cost for their share of the premium next year.

So, if they can't contribute, what do we do?"

A: Many similarly situated employers may struggle to figure out how many of their low-wage workers will opt in for employer coverage in 2014, remaining uninsured next year, despite the law's subsidies and penalties. The answer is to work with a broker to find a plan that will be as affordable as possible for your workers. Evaluate different plans, but you must also consider the company's bottom line.

For instance, in one scenario, where all 270 employees participate and pay no more than 9.5% of their income to the premiums, it would cost the company $1 million a year— essentially wiping out the company's profits.

Companies with fifty or more full-time employees will soon have choices to make to comply with the Affordable Care Act as they will need to offer health insurance to all their workers who average 30 or more hours a week.

In addition, employers must not ask employees to contribute more than 9.5% of their income to health-insurance premiums. Otherwise, the employer could face penalties. Employers don't face any penalties if they offer affordable health-insurance benefits and their employees don't sign up.

Also come January, under the law's individual-mandate provisions, most U.S. residents will be required to have health insurance or pay a penalty. Low-wage earners who can't afford their employers' plans may seek coverage through Medicaid, if they are eligible, or through an individual plan available through a government-run exchange.

Alternatively, the workers may forgo insurance altogether and pay the small penalty, which could be their most affordable option.

The health tax penalty for not purchasing health insurance, whenever an individual's income allows them to, will start as low as $95 per individual or 1 percent of annual income, enacted as the individual mandate.

By the year 2016, the health tax penalty for not purchasing health insurance hits $695 a year or 2.5 percent of annual income, whichever number is higher. Beyond that time frame, the IRS will collect monies based on cost-of-living adjustments.

Low-wage workers who forgo employer-sponsored insurance may be able to claim a hardship exemption from the penalty. [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.

2013 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 18th, 2013, 10 - 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 19th, 2013, 10 - 11:30am

♦ **We have established a strategic partnership with California Employers Association.** Our Guest Speaker Seminar will feature **Kim Parker, Executive Vice President, Sacramento office, and Craig Strong, Regional Director of the Madera office**.
Thursday, October 17th, 2013, 10 - 11:30am

♦ **Discipline & Termination -** The steps to take before termination. Managing a progressive correction, punishment and termination program.
Thursday, November 21st, 2013, 10 - 11:30am

There is No Seminar in December

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Fast-Food Settles Disability Suit

Alia Corporation, a franchisee with more than 20 fastfood chain restaurants in Central California, has agreed to pay $100,000 to settle a disability discrimination lawsuit filed by the Equal Employment Opportunity Commission (EEOC).

The agency filed suit against the Merced based company in 2011 on behalf of a former floor supervisor with an intellectual disability.

The supervisor had been promoted by previous management in 2008, but the EEOC contended that when Alia took over, management demoted him to a janitorial position, cut his hours, and reduced his hourly wages, thereby forcing him to find other employment and resign by June 2009.

The EEOC argued that Alia had engaged in disability discrimination that violated the Americans with Disabilities Act (ADA). [PE]

Union Unlawfully Discharged Negotiator

A National Labor Relations Board (NLRB) administrative law judge has found that a labor union violated the National Labor Relations Act (NLRA) when it conditioned the granting of concessions in collective bargaining with the discharge of a member of the employer's negotiating team.

The judge found on April 4 that Council 30 of the United Catering, Cafeteria and Vending Workers International Union unlawfully caused the employer, Awrey Bakeries, LLC, to fire its HR director the same day the union membership ratified a new contract. Another member of the negotiating team was to be fired within 60 days.

The union had represented employees at the Livonia, Michigan, facility for decades and was bargaining for a successor contract. After union members rejected the first proposal, the union indicated it could win support if the employer agreed to discharge two members of the negotiating team.

The judge noted that a union violates the NLRA when it interferes with the employer's representatives to adversely affect how they perform their duties. The judge rejected the union's arguments that the evidence didn't establish a nexus between the union's conduct and the firing [PE]

PW Violations, Fines - $1.8 Million!

California Labor Commissioner Julie A. Su has ordered three contractors to pay $1,821,453 in wage, training fund, and penalty assessments after investigations alleging violations on public works projects at UCLA, Saddleback Community College in Orange County, and the Global Green Generational Charter School in Pacoima.

Three separate investigations into B.A. Marble & Granite, Inc., of North Hollywood, Phoenix Floors of Orange, and Johnson Business Holdings, doing business as Production Plumbing of Rancho Santa Margarita, revealed willful labor law violations that adversely affected 94 workers, according to a statement from Su. [PE]

Garment Maker Accused Of Wage Theft

The State Labor Commissioner has accused a Los Angeles garment contractor of failing to pay overtime and keeping improper records. Citations were issued against **O&K Apparel Inc.**, requesting $113,785 in overtime wages for 110 employees plus penalties of $61,450 for failing to pay proper overtime and $307,250 for issuing improper itemized/deduction statements.

The company pays its employees by the piece. Under the law, garment contractors are required to provide accurate itemized statements to employees showing total hours worked.

If employees are paid by the piece, the statements must show the number of pieces produced for specific manufacturers and the rate of pay for each piece in addition to the total hours worked. [PE]