

### TOP OF THE NEWS

#### State Supreme Court Settles Workers' Comp Apportionment Issues

**A** unanimous ruling last week by the California Supreme Court settles the issue of how to apportion an employer's liability for a permanent disability.

In a long-awaited decision, the court ruled that the appropriate method for calculating a permanent disability award after apportionment is through the percentage method. As a result, employers are only responsible for the percentage of the employee's disability attributable to the current industrial injury for which the permanent disability award applies.

*"... billions of dollars saved ..."*

The Supreme Court decision was the final stop in the case of *Welcher v. Workers' Compensation Appeals Board et al.*, along with the cases of *Strong v. Workers' Compensation Appeals Board et al.*, *Lopez v. Workers' Compensation Appeals Board et al.*, *Williams v. Workers' Compensation Appeals Board et al.* and *Brodie v. Workers' Comp. Appeals Board et al.* The *Welcher* decision is the leading case on whether workers' compensation cases should apportion an employer's liability for a permanent disability by subtracting percentages of an

employee's disability as a result of a work-related injury - the approach supported by the California Chamber of Commerce - or by subtracting the dollar value of the injury.

In the opinion the court explained that SB 899 (Poochigian; R-Fresno) of 2004 and the *"history behind them reflect a clear intent to charge employers only with that percentage of permanent disability directly caused by the current industrial injury."*

"It was only a few years ago that California's workers compensation system was a huge drag on our economy, with escalating costs spiraling out of control," said CalChamber President Allan Zaremborg. "Governor Schwarzenegger made fixing this problem a priority and reached a balanced, bipartisan compromise with the Legislature to reform our broken system. The workers' compensation reforms of SB 899 have been successful for both employers and employees: costs and premiums to employers have been reduced dramatically, while workers have seen improved medical treatment guidelines and a promising increase in return-to-work rates."

*"The billions of dollars saved due to workers' compensation reform have allowed California businesses to expand and create more jobs and tax revenue, while local governments and school districts have had more money to spend on public services, such as schools, roads and public safety. That is why the CalChamber led the effort for reform and why we joined in defending against this lawsuit by filing an amicus brief."* [PE]

### Heat Illness Flyer Enclosed!

#### President's Report

~Dave Miller~

#### Every Two Years, Already?

**Seems like only last year, but here we are again, preparing for the arrival of the biennial requirements of AB 1825 that mandates Sexual Harassment Prevention Training for Supervisors.**



California Assembly Bill 1825 (AB 1825) requires California employers with 50 or more employees to give their supervisors a minimum of two hours of sexual harassment prevention training every two years.

The Visalia Chamber of Commerce and Pacific Employers jointly present a quarterly seminar series that will answer the employer's need for training supervisors in California's Sexual Harassment Prevention Training requirements.

Next session will be held at the Lamp Liter on Thursday, July 18th from 8:00 to 10:00am with registration at 7:30am. This includes a breakfast and resource book. Cost for Pacific Employers and Chamber members is \$25 if you RSVP in advance. Call the Chamber at 734-5876 to reserve a spot. October 17th will be the next seminar. On site training is still available from Pacific Employers for \$300 per session at your location. [PE]

#### Heat Illness Prevention Programs

**California's Heat Illness Prevention Standard requires all employers** with outdoor worksites to take 4 basic steps to prevent heat illness:

- Provide heat illness prevention training to all employees, including supervisors.
- Provide enough fresh water so that each employee can drink at least 1 quart per hour if they want to, and encourage them to do so.
- Provide access to shade for at least 5 minutes of rest when an employee believes he or she needs a preventative recovery period.
- Develop and implement written procedures for complying with the heat illness prevention standard.

This new law also requires an employer's heat illness prevention procedures to be in writing and made available to employees and to representatives of Cal/OSHA upon request. These written procedures must include:

- How the employer will comply with the heat illness standard requirements.
- How the employer will respond to symptoms of possible heat illness, including how emergency medical services will be provided should they become necessary.
- How the employer will contact emergency medical services, and if necessary, how employees will be transported to a point where they can be reached by an emergency medical service provider.
- How the employer will ensure that, in the event of an emergency, clear and precise directions to the work site can and will be provided as needed to emergency responders.

If you need a program or help in including the required language in your Written Safety Program, the staff at Pacific Employers can help you comply. [PE]

Imagination is more important than knowledge. - Albert Einstein

## COURT CASES

### THREE YEAR STATUTE!

**W**hen the evil forces of former California Governor Gray Davis went about restoring the “Daily Overtime” regulations that had been done away with by the Republican Governor Wilson, they also brought with them a host of new laws that were intended to treat employers like criminals in wage and hour matters.

One of those issues had to do with penalties that were assessed when workers did not receive rest breaks or when the employer failed to provide a 30 minute, uninterrupted meal period. The new California Labor Code § 226.7 provides that an “employer shall pay the employee one additional hour of pay at the employee’s regular rate of compensation for each workday that the meal or rest period is not provided.”

The question that was most pressing following the law’s passage was whether this was to be considered a penalty or a wage claim. Much was dependant on the determination as the difference was substantial in the terms of liability for employers. A penalty has a one year statute of limitations and there are no additional penalties that can be levied on the penalty itself.

“ . . . STATUTES . . . ARE TO BE LIBERALLY CONSTRUED . . . ”

However, if the penalties could be interpreted as a wage claim, a three year period of liability would be covered as well as making the wage claim subject to additional penalties and interest claims.

In April of this year, the California Supreme Court issued its highly anticipated decision in John Paul Murphy v. Kenneth Cole Productions, Inc., a significant ruling affecting California employers. The Court ruled that an employee will have up to three years to bring a claim arising out of an employer’s failure to provide a meal or rest period. By making a penalty into a wage claim, the decision increases the employer’s liability by over 500%.

In the court decision in Murphy, the Supreme Court determined that this additional hour of pay constitutes a “wage,” which has a three-year statute of limitations, and not a “penalty,” which has only a one-year statute of limitations. Thus, non-exempt employees who bring claims for unpaid meal or rest periods now may seek recovery of the additional hour of pay for each workday in which an alleged violation occurred during the three-year period prior to bringing the claim.

In analyzing whether the additional hour of pay for meal or rest period violations constitutes a wage or a penalty, the State Supreme Court looked primarily at the statute’s

administrative and legislative history. It remarked upon the fact that the legislature had removed the word “penalty” from the final language of the statute. The Court also concluded that while the word “penalty” frequently appeared in the legislative history, its usage was similar to the way it was used in the overtime context. Specifically, the court noted that, similar to overtime pay, the additional hour of pay contemplated in Labor Code § 226.7 has a central purpose of providing compensation to employees for their time, and only a secondary function of attempting to shape employer conduct or creating a penalty for their actions. Accordingly, it concluded that the additional hour of pay in the meal and rest period context also should be considered a wage. Finally, the court reminded the parties to the court’s actions that its interpretation of the statute was consistent with its prior holding that “statutes regulating conditions of employment are to be liberally construed with an eye to protecting employees.”

There are two great risks the employer now faces. First is the problem of misclassification as seen by the Murphy case. Exempt employees are neither required to keep time cards nor to take or record meals and breaks. If a non-exempt employee is misclassified as exempt, substantial liability can exist.

The second big hazard is based on allowing meal and break periods but not requiring employees to take them or document that they have been taken. Interruptions in the meal periods can also render them as having not been taken. As can be seen from the size of the penalty in the Murphy case, these matters should be taken seriously and reviewed immediately. If you are not certain that your program complies with the law, give a call to Pacific Employers at 559-733-4256 for a quick review. [PE]

### FedEx Settles Bias Suit

**F**edEx Corp. has agreed to pay out \$53.5 million to settle a class action lawsuit charging that the company’s express delivery unit, FedEx Express, discriminated against African-American and Latino workers. The settlement, which is believed to be among the 10 most expensive discrimination settlements in U.S. history, affects about 20,000 employees in the company’s Western region. The region encompasses California and 13 other states.

The suit, filed in the federal court in San Francisco, alleged that FedEx violated federal and state antibias laws by discriminating against black and Latino workers with respect to promotions, pay, evaluation, and discipline. Plus, the suit charged that a “Basic Skills Test” administered for employment had a discriminatory impact on workers of color.

“MASSIVE RACE BIAS SETTLEMENT”

In addition to the hefty payout, the company will also make changes in its selection, evaluation, and discipline procedures. FedEx has denied that it violated the law, stating that it voluntarily entered into this [settlement] because it believes the actions it has agreed to undertake demonstrate its strong commitment to diversity and equal employment opportunity. [PE]

*Heat Illness Flyer Enclosed!*



## Human Resources Question with Candice Weaver

### THE MONTH'S BEST QUESTION

#### Violent Behavior Signs

**Q:** "How do we spot an employee with violent behavior?"

**A:** In the wake of the recent horrific violence at Virginia Tech, employers across the nation are asking themselves whether their own workplaces could be vulnerable to a similar tragedy and what can be done to prevent it.

Unfortunately, not all violent incidents can be predicted or headed off. But employers can take affirmative steps to lower the risk that workplace violence will erupt. Among the preventive measures employers can take include: forming a crisis team to spearhead efforts to avoid workplace violence; assessing your organization's vulnerability; creating a zero-tolerance policy; educating supervisors; publicizing your violence prevention program widely and often; conducting background checks; and using caution with terminations.

One of the keys to preventing violence is to understand the warning signs that a worker might be headed for violent behavior. Here's a list of stress factors, cues, and signals that many psychologists believe may indicate potential for violent behavior in the workplace. Of course, just how significant any of these factors are will depend on the particular situation:

- Fascination with (not simply ownership of) weapons.
- Alcohol or drug abuse.
- Severe stress, possibly from personal problems such as divorce or bankruptcy.
- Anguish over a pending or recent demotion, termination, or corporate downsizing.
- Poor response to a recent negative performance review.
- Decreased or inconsistent job performance.
- Increase in noncompliance with company rules and procedures.
- History of violent incidents, threats, or reckless or antisocial behavior.
- References to notorious incidents of workplace violence or mass shootings.
- Psychological deterioration, such as bizarre behavior or sudden unreliability
- Social isolation or poor peer relationships.
- Incidents of inappropriately crossing a co-worker's or supervisor's physical boundaries, such as following someone to the parking lot or home, making calls to a supervisor's home, or going into someone's office with a grievance too many times.
- Poor personal hygiene, especially deteriorated hygiene.

You may also note other major personality changes, such as appearing inappropriately withdrawn, agitated or out of touch with reality. [PE]

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## EMPLOYMENT SEMINARS

The Small Business Development Center and Pacific Employers will host the 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.

### 2007 Topic Schedule

◆ **Wage & Hour and Exempt Status** - Overtime, wage considerations and exemptions.

*Thursday, June 21st, 2007, 10am - 11:30am*

◆ **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 19th, 2007, 10am - 11:30am*

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

*Thursday, September 20th, 2007, 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 18th, 2007, 10am - 11:30am*

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

*Thursday, November 15th, 2007, 10am - 11:30am*

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



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**Heat Illness Flyer Enclosed!**

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### **Minimum Wage Increase Vetoed**

**P**resident Bush vetoed a spending bill to which a minimum wage increase was attached. The president's veto message stated that he supports an increase in the federal minimum wage, but vetoed the bill because it included a timetable for the withdrawal of American troops from Iraq.

The minimum wage provision in the bill called for raising the rate to \$7.25 per hour over a period of 26 months and linked the increase to \$4.8 billion in tax breaks for businesses. The federal minimum wage currently stands at \$5.14 per hour, although many states—including California—have higher minimum wage rates. [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.*

### **San Francisco's Paid Sick Leave**

**O**n Feb. 5, 2007, San Francisco's landmark paid sick leave ordinance (adopted as Chapter 12W of the San Francisco Administrative Code) took effect, providing paid sick leave for full- and part-time employees working in the City and County of San Francisco.

To help clarify the new law, the Office of Labor Standards Enforcement (OLSE) had published a set of frequently asked questions. Although helpful for employers and employees, the FAQs provide only guidelines as to the OLSE's enforcement

position and are not binding on courts. Thus, the OLSE has now proposed a set of formal rules governing paid sick leave compliance. The proposal covers notice, verification, breaks in service, pay rates, how the ordinance applies employees who telecommute from San Francisco, and more. [PE]

### **Regulations to Change Again**

**T**he story continues in the Fair Employment and Housing Commission's efforts to draft regulations to implement A.B. 1825, the law requiring sexual harassment training for California supervisors. On March 27, 2007, the FEHC adopted revisions to the version of the training regulations that were published in February. The agency is now in the process of reviewing public comments on the latest revisions and will hold a public meeting on April 23, 2007 to consider whether further changes are needed.

Earlier this year, the Office of Administrative Law, which must approve the regulations before they can become final, rejected the FEHC's draft regulations and asked the agency to make several changes, including with respect to who qualifies as a subject matter expert or trainer. [PE]

### **CHP Probes Fuel Carrier in East Bay Blast**

**S**abek Transportation Inc., the Bay Area fuel carrier and employer of the driver of the trailer that exploded on the East Bay's MacArthur Maze, has been involved in dozens of lawsuits in San Mateo and Santa Clara counties, including disputes over unpaid workers' compensation insurance for drivers. California Highway Patrol officials have opened a review of the safety and maintenance history of the company. [PE]