

WHAT'S NEW!

DRIVER'S EMPLOYER LACKED PROOF

Under the California Code of Regulations, employees who transport hazardous materials are exempt from the rules regarding overtime compensation. Addressing this exemption, the Division of Labor Standards Enforcement Policies and Interpretations Manual states that it "only applies to employees whose regular duty is that of a driver, not any other category of worker." The Manual also states, "any driver who does not drive or operate a truck for any period of time during an entire workday is entitled to overtime premium compensation for all overtime hours worked performing duties other than driving during that day."

"... THE EMPLOYER FAILED TO OFFER EVIDENCE ..."

The plaintiffs worked as service representatives for a respiratory services and medical equipment provider. Their duties included transporting oxygen, oxygen concentrators and liquid oxygen systems and setting up the equipment for homebound patients. The plaintiffs worked eight-hour shifts, Monday through Friday; if they worked more than eight hours in a day as part of their regular hours, they were paid overtime. They also carried pagers or cell phones to respond to patient phone calls after hours and on the weekend.

The employer's on-call policy required the plaintiffs to respond to pages within 30 minutes and to be available to respond to patient calls, in person, within two hours. The plaintiffs were prohibited from consuming alcohol while on call, but otherwise were free to

engage in personal activities. When the plaintiffs made service visits after hours, they were compensated at their regular rate of pay. If they were able to resolve the customer's problem by telephone without making a service visit, they were instructed not to record that time, and they were not compensated for it.

The plaintiffs sued the employer, among other things, for allegedly unpaid compensation and overtime. The employer moved for summary adjudication on the plaintiffs' wage claims, arguing that they were exempt from overtime under the motor carrier exemption of the California Labor Code because they transported hazardous materials. The trial court granted the employer's motion, and the plaintiffs appealed.

The Court found that the employer failed to offer evidence showing that the plaintiffs drove a vehicle containing hazardous material every workday. The plaintiffs did not drive every day, the Court said, and they did not always have the employers' vans with them when they were on call. Accordingly, it held that the employer failed to prove that the motor carrier exemption applied and that the trial court had erred in granting summary disposition on this claim.

This case reminds employers that overtime exemptions are interpreted narrowly and that they need to pay close attention to the specific requirements of any exemption to avoid liability. Employers should review their policies and practices regularly to ensure compliance. The staff of Pacific Employers is available for training on California's complex wage and hour requirements or to conduct audits of time records to ensure compliance with federal and state wage and hour laws. [PE]

Child Labor Law Flyer Enclosed!

President's Report ~Dave Miller~

Give Thanks for Little Gifts

In response to complaints regarding the inflexibility of California's alternative workweek schedule provisions, modest changes have been enacted to add flexibility to those schedules. The changes, which are effective now, allow employers to offer a regular schedule of five eight-hour days in a workweek as an option as well as allowing more frequent switches between various menu options under an alternative workweek schedule, if multiple options were approved.

The definition of "work unit" found in the wage order now defines a "work unit" as "a division, a department, a job classification, a shift, a separate physical location, or a recognized subdivision thereof." This provision makes clear that a work unit should have a common thread along these specified lines. The "work unit" requirement, effective in 2000, eliminated in most cases the previous ability of an employer and employee to agree to an alternative workweek schedule for a single employee.

However, like the wage orders, the new rules provide that a single employee can qualify as a work unit "as long as the



criteria for an identifiable work unit in this section is met," however, the same election process must be followed for a single-employee work unit.

Also, the menu options offered to employees may include a regular schedule of five eight-hour days in a workweek, with daily overtime due after eight hours under that option. This change rejected the Labor Commissioner's interpretation that a schedule of five eight-hour days could not be offered because it was not an alternative schedule. As a result, employees who do not wish to work an alternative workweek schedule now may choose to work the regular five eight-hour days schedule, if approved in an election, while other employees in the work unit can work an alternative option.

Finally, addressing how frequently employees may move between particular schedule options offered under a menu of options, the rules now provide that employees "who adopt a menu of work schedule options may, with employer consent, move from one schedule option to another on a weekly basis." This change rejected another interpretation by the Labor Commissioner, which had taken the position that an employee could move between menu options only once every several months. [PE]

"Think it more satisfactory to live richly
than die rich." — Sir Thomas Browne

PE Expands Staff NEW SERVICES TARGETED

For many years it has been our desire to help our members deal with the bilingual nature of California's employment arena. While we have offered translations and interpreting from firms and associates closely related to our firm, we have not had anyone on staff that was able to directly communicate with the Spanish speaking employees and employers with whom we serve.

Irma Marquez joined the staff at Pacific Employers last year as we were working to expand our services into a number of areas that have been requested by clients.



Irma is fluent in Spanish and has a background in helping employers in hiring, training and I-9 Form documentation. She has also proven capable of working with supervisors and owners to resolve conflicts and performance problems.

As part of her work with Pacific Employers, clients may call on her services to review the hiring steps and document verification now required by Department of Homeland Security, U.S. Immigration and Customs Enforcement (ICE).

... HIRING, TRAINING AND I-9 FORM DOCUMENTATION."

Irma is also involved in Sexual Harassment Prevention Training as well as helping employers with the process of handling sexual harassment complaints. [PE]

New Voice on the Phone



If you have called our office lately, you will have noticed that there is a new voice answering our phone.

Meet Tamera Segler who is our new receptionist and will greet you at the door and on the phone.

... HELPING WITH YOUR BASIC NEEDS.

Tamera is our Manager of First Impressions who is here to help with your basic needs, from providing information on the upcoming seminar, RSVP'ing, ordering new posters and safety videos.

Tamera can help you with directions on the Website and supply you with the forms and documents you need. [PE]



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*.
Call 733-4256 or Toll Free 800 331-2592.

Recent Developments

9th Circuit Asks Guidance on Outside Sales Exemption

Several class action lawsuits are pending before the Ninth Circuit and federal district courts in California challenging the exempt classification of pharmaceutical sales representatives under the outside salesperson exemption and administrative exemption.

... SELLING TANGIBLE OR INTANGIBLE ITEMS OR OBTAINING ORDERS OR CONTRACTS. ..."

One of these cases, D'Este v. Bayer Corporation is currently before the Ninth Circuit. Earlier this week the Ninth Circuit certified questions of California law to the California Supreme Court regarding the scope of these exemptions, reasoning that it is unclear under California law whether these exemptions apply to pharmaceutical sales representatives and the outcome of several pending cases depends on clear guidance on these issues. The specific questions certified to the California Supreme Court are as follows:

1. The IWC's Wage Orders 1-2001/4-2001 define "outside salesperson" to mean "any person, 18 years of age or over, who customarily and regularly works more than half the working time away from the employer's place of business selling tangible or intangible items or obtaining orders or contracts for products, services or use of facilities." Does a pharmaceutical sales representative (PSR) qualify as an "outside salesperson" under this definition, if the PSR spends more than half the working time away from the employer's place of business and personally interacts with doctors and hospitals on behalf of drug companies for the purpose of increasing individual doctors' prescriptions of specific drugs?

2. Wage Order 4-2001 defines a person employed in an administrative capacity as a person whose duties and responsibilities involve (among other things) "[t]he performance of office or non-manual work directly related to management policies or general business operations of his/her employer or his employer's customers" and "[w]ho customarily and regularly exercises discretion and independent judgment." Is a PSR, as described above, involved in duties and responsibilities that meet these requirements?

The California Supreme Court has discretion whether to accept the Ninth Circuit's request for certification. [PE]

Court Rejects Anti-SLAPP Motion

In *World Financial Group, Inc. v. HBW Insurance & Financial Services, Inc.* the California Court of Appeal for the Second Appellate District rejected an Anti-SLAPP motion to strike in a breach of contract, theft of trade secrets, and unfair competition case.

... SOLICITATION OF CUSTOMERS IN A BUSINESS CONTEXT WAS NOT PROTECTED ..."

The defendants moved to strike the complaint under California's Anti-SLAPP statute, claiming that their activities in soliciting the customers and employees of their previous employer were protected speech involving a "matter of public interest," namely their pursuit of employment under the public policies expressed in California Business and Professions Code section 16600 (California's prohibition against restraint of trade). The court upheld the trial court's denial of the motion, finding that solicitation of customers in a business context was not protected activity for the purposes of the anti-SLAPP statute.

[Editor] To challenge a lawsuit as a SLAPP, you need to show that the plaintiff is suing you for an "act in furtherance of [your] right of petition or free speech under the United States or California Constitution in connection with a public issue." [PE]

Child Labor Law Flyer Enclosed!



Human Resources Question with Candice Weaver

THE MONTH'S BEST QUESTION

USERRA Re-employment

Q: "We had an employee out on military leave who is due to return soon. May we process him through our return-to-work procedure, or must we immediately let his replacement go?"

A: Generally, the Uniformed Services Employment and Re-employment Rights Act ("USERRA") provides re-employment rights for employees returning from military service and protection from employment discrimination following re-employment.

A Sixth Circuit Court of Appeals' decision which found an employer had violated the USERRA when it delayed the re-employment of a returning Army reservist by adhering to its neutral return-to-work process.

In this case the employee, Brian Petty, who had served in Kuwait, returned to his former employer, Metro Police Department, to request reinstatement. As it did of all officers who had been away from the Police Department for an extended time, Metro required Petty to complete its return-to-work process. Petty returned to work at Metro but was not returned to his original position of patrol sergeant or a substantially similar position. He was assigned a desk job, which, he claimed, was traditionally staffed by officers facing discipline or who were otherwise "disempowered." Petty was not compensated during the return-to-work process.

Many employers use neutral return-to-work policies for employees returning from leaves which may include drug testing or criminal background checks. Consistent with the Department of Labor's informal guidance, this case suggests that even if an employer has a standard return-to-work process for employees returning from other types of leaves, such a process cannot be used to avoid or delay re-employment under USERRA.

The Sixth Circuit also found that the employer did not properly place Petty into any of the positions of employment mandated by USERRA. Depending on an employee's duration of service with the employer prior to the military leave, employers are required to reinstate qualified service members under USERRA to one of the following:

1. a position of employment the person would have held if the continuous employment of such person had not been interrupted by military service;
2. a position of employment in which that person was employed on the date of commencement of service; or
3. a position of like seniority, status and pay for the position the person would have had or did hold, the duties of which the person is qualified to perform. [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

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

Thursday, June 18th, 2009, 10am - 11:30am

◆ **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

◆ **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, 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

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Small Business
of the Year



Articles in this Newsletter have been extracted from a variety of technical sources and are presented solely as matters of general interest to employers. They are not intended to serve as legal opinions, and should not be deemed a substitute for the advice of proper counsel in appropriate situations.

Michelle Obama Calls for More Family-Friendly Workplace Policies

Michelle Obama said workers should have paid sick days. Speaking in support of sick days with pay and flexible work schedules, Mrs. Obama said that, as challenging as her new life may sometimes seem, hers is a "very blessed situation, because I have what most families don't have" -- support from her mother and a staff.

Absent personal assistants for all, Mrs. Obama said workers should have paid sick days, schedules that give them time for their family responsibilities, such as picking up children or taking them or parents to doctors' appointments, and quality child care on the job. — *FoxNews - May 08, 2009* [PE]

EEOC sues Fresno Sam's Club on behalf of Latinos

The U.S. Equal Employment Opportunity Commission claims some Hispanic employees at a Fresno Sam's Club were subjected to a hostile work environment.

The suit filed Thursday in U.S. District Court against parent company Wal-Mart Stores Inc. alleges that managers failed to stop repeated verbal harassment, including the use of derogatory words, against employees of Mexican origin. — *Forbes - May 08, 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

IRS Eyes Employers for COBRA Subsidies

The IRS is moving quickly to make sure the new COBRA subsidy doesn't get abused by employers that claim a payroll tax credit they're not entitled to.

The Service already has a system in place to check payroll tax returns as they come in and flag questionable claims employers make for reimbursement of the subsidies, which are designed to help laid off workers keep their health coverage under their old employer's plan.

First notices questioning credits claimed will go out to employers in mid-May. Firms that receive a notice should expect an IRS examiner to follow up a month later.

The Service feels there's no time to waste because the new continued coverage subsidy law casts a wide net: The federal government is picking up the tab for 65% of the monthly premium for Consolidated Omnibus Budget Reconciliation Act (COBRA) medical coverage for up to nine months for employees who are involuntarily terminated between Sept. 1, 2008, and Jan. 1, 2010.

Employers pay the subsidy up front and then are reimbursed by taking a credit against their payroll taxes. The employer must receive the ex-worker's 35% share before claiming the credit. If the amount of the subsidy that a firm pays out is more than its payroll tax liability, it can request a refund from the IRS. But if those IRS computers spot a problem on a return, the refund will be frozen until the issue is cleared up.

Although the extra documentation may be a headache, it could have been worse: The IRS recently shelved plans for a new information return that companies would have had to file to show the amount of subsidy that ex-workers received. Instead, the IRS will rely on employment tax exams to turn up any hanky-panky in this regard. [PE]