Pacific Employers
MANAGEMENT ADVISOR
49 Years of Excellence!
June 2013

WHAT'S NEWS!

COURT STRIKES DOWN NLRB POSTER!

The U.S Court of Appeals for the D.C. Circuit recently struck down the National Labor Relations Board's August 2011 Notice Posting Rule, which would have required employers to conspicuously display a notice informing employees of their rights under the National Labor Relations Act (the "Act"). *In National Association of Manufacturers, et al. v. NLRB,* the court invalidated the rule because it found all three of the rule's enforcement mechanisms unlawful. A majority of the court also found that the rule exceeded the Board's rulemaking authority as delegated by Congress.

The Board's challenged rule would have forced six million employers throughout the country to post the Board's mandatory notice of employee rights to organize unions (and related topics), under threat of an unfair labor practice finding by the agency. Moreover, failure to post the required notice would have permitted the Board to extend the usual six-month statute of limitations period in unfair labor practice cases. The rule also permitted the Board to consider an employer's refusal to post the notice as evidence of unlawful motive in unfair labor practice cases.

A broad coalition of business groups challenged the rule in the federal courts. After two conflicting district court decisions were issued in 2012, the coalition appealed to the D.C. Circuit Court of Appeals.

The court began its analysis by focusing on Section 8(c) of the National Labor Relations Act, which states: "The expressing of any views, argument, or opinion, or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice" (with the exceptions of prohibited threats or promises). The court reasoned that 8(c) equally protects employers' rights to speak or to choose not to disseminate views about unions in the workplace.

The court further rejected the Board's argument that the mandatory notice poster was "government speech," rather than employer speech. The court explained that the Board was free to post the messages contained in the poster on its own website, but could not compel employers to disseminate the Board's message. Consequently, the court concluded that the Board's rule violated Section 8(c) because it made an employer's failure or refusal to post the Board's notice an unfair labor practice, and because it treated such a failure or refusal as evidence of anti-union animus.

The court also rejected the rule's provisions that would have tolled the Act's six-month limitations period for filing unfair labor practice charges based on a failure to post the notice, if the charging employees were unaware of the posting requirement. The Board presented no evidence that Congress intended to allow the sort of tolling that the Board included in the rule. Moreover, the court explained, courts do not generally recognize lack of knowledge of the law as a basis for equitable tolling. For these reasons, the court held that the rule's tolling provision was also unlawful.

Having found that each of the enforcement provisions underlying the rule were unlawful, the court held that the remaining provisions of the rule could not be severed or otherwise allowed to stay in effect. Two of the three judges on the court panel also declared that the Board lacked the authority under its general rulemaking power to promulgate a rule of this type, because it could not be shown to be "necessary" to enforcement of the Act. [PE]

Child Labor Laws Enclosed!

President's Report
~Dave Miller~

Besides Being Eco Friendly, On-Line Learning Has Many Advantages

Sometimes we don't have the time or means to make it to a seminar. That is one of the reasons why webinars are so popular. They can be attended from anywhere, and often at any time, in our connected world. They save time and the cost of travel. **It's truly a win-win proposition...**

1. On-line courses are convenient and offer flexibility.

The biggest advantage of an on-line course is that your course is available 24 hours a day, seven days a week. On-line courses give employees the flexibility to complete their training quickly, even with continually changing work schedules, business trips or multiple business locations.

2. On-line courses are cost effective.

On-line courses reduce costs for your company. Save time, money and the environment by reducing the need for an employee to take time away from the office for training. Remove the hassle and expense (travel time, mileage, parking, and meal fees) of off-site trainings.

3. On-line courses expand your company's learning plan.

On-line courses expand traditional learning styles and reach more people. In addition to classroom training, workshops, and on-the-job training, on-line learning expands your training program and creates a "blended learning" style for your company.

Pacific Employers has partnered with California Employers Association (CEA) to present webinars including the Labor Law Update Webinar presented in February of this year. We are now able to offer Harassment webinars.

CEA offers California's AB1825 Sexual Harassment Training for Supervisors & Managers and Harassment & Discrimination for Non-Supervisors on-line courses. The cost is $35 for CEA or PE members and $55 for non -members.

Go to - *http://www.employers.org/on-line-training* - for more information or to register. [PE]

"The welfare of the people in particular has always been the alibi of tyrants, and it provides the further advantage of giving the servants of tyranny a good conscience."
-- Albert Camus -- (1913-1960) French Algerian author

Recent Developments

Union Says Repeal or Reform ACA

The United Union of Roofers, Waterproofers and Allied Workers, which endorsed President Barack Obama in 2008 and 2012 and helped get health care reform passed in Congress, now is calling for repeal of the Affordable Care Act (ACA).

Kinsey M. Robinson, Roofers Union President, issued the following statement:

"Our Union and its members have supported President Obama and his Administration for both of his terms in office.

But regrettably, our concerns over certain provisions in the ACA have not been addressed, or in some instances, totally ignored. In the rush to achieve its passage, many of the Act's provisions were not fully conceived, resulting in unintended consequences that are inconsistent with the promise that those who were satisfied with their employer sponsored coverage could keep it.

These provisions jeopardize our multi-employer health plans, have the potential to cause a loss of work for our members, create an unfair bidding advantage for those contractors who do not provide health coverage to their workers, and in the worst case, may cause our members and their families to lose the benefits they currently enjoy as participants in multi-employer health plans.

"I REFUSE TO REMAIN SILENT, OR IDLY WATCH . . "

For decades, our multi-employer health and welfare plans have provided the necessary medical coverage for our members and their families to protect them in times of illness and medical needs. This collaboration between labor and management has been a model of success that should be emulated rather than ignored. I refuse to remain silent, or idly watch as the ACA destroys those protections.

I am therefore calling for repeal or complete reform of the Affordable Care Act to protect our employers, our industry, and our most important asset: our members and their families." [PE]

Supreme Court Rules For Employer

The U.S. Supreme Court, in a 5-4 ruling last week, upheld a lower court's ruling dismissing as moot a Fair Labor Standards Act overtime lawsuit where the employer made an offer of judgment to the plaintiff for the amount she sought in her claim.

In *Genesis Healthcare Corporation et al. v. Laura Symczyk,* Symczyk, a former registered nurse at Pennypack Center in Philadelphia, sued under the FLSA on behalf of herself and "other employees similarly situated."

Symczyk alleged that her employer violated the FLSA by automatically deducting 30 minutes of time worked per shift for meal breaks for certain employees, even when the employees performed compensable work during those breaks.

Symczyk, who remained the sole plaintiff throughout the proceedings, sought statutory damages for the alleged violations.

When her employer answered the complaint, it simultaneously served Symczyk with an offer of judgment under Federal Rule of Civil Procedure 68. The offer included $7,500 for alleged unpaid wages, in addition to "such reasonable attorneys' fees, costs, and expenses… as the court may determine."

Symczyk ignored the offer of judgment, and it expired.

After which, a district court found that no other individuals joined her suit and that the Rule 68 offer fully satisfied her claim. The court therefore concluded her suit was moot and dismissed it for lack of subject-matter jurisdiction.

The U.S. Court of Appeals for the Third Circuit reversed, holding that Symczyk's individual claim was moot but that her collective action was not.

It explained that allowing defendants to "pick off" named plaintiffs before certification with calculated Rule 68 offers would frustrate the goals of collective actions.

The Third Circuit remanded the case to the district court, allowing Symczyk to seek "conditional certification," which, if successful, would relate back to the date of her complaint.

The U.S. Supreme Court, in its April 16 opinion, held that because Symczyk had no personal interest in representing putative, unnamed claimants, nor any other continuing interest that would preserve her suit from mootness, her suit was appropriately dismissed for lack of subject-matter jurisdiction.

Justice Clarence Thomas authored the majority's opinion. Chief Justice John Roberts and Justices Antonin Scalia, Anthony Kennedy and Samuel Alito joined in the opinion. Justice Elena Kagan dissented and was joined by Justices Ruth Bader Ginsburg, Stephen Breyer and Sonia Sotomayor.

In its 12-page decision, the majority declined to rule on an underlying issue of whether the unaccepted offer mooted the claim.

Appellate circuits are split on the question.

The plaintiff in this case conceded the point in both the district court and Third Circuit, therefore she could not properly raise the issue before the nation's high court. [PE]

Part-Time Workforce - The New Normal?

Darrell McCall, 29, worked full time as a salesperson at Juicy Couture's flagship store in New York City for two and a half years. He had health insurance and a 401(k). "It was one of the few good jobs on Fifth Avenue," he says. "I was able to get by."

That changed last year when Juicy started letting full-time workers go and replacing them with part-timers who accepted lower pay and no benefits, McCall says. According to Yana Walton of the Retail Action Project (RAP), an organization of retail workers dedicated to improving labor conditions, nearly half the employees at the Juicy flagship used to be full-timers. Now, only 19 of the store's 128 employees work full-time. Juicy Couture could not be reached for comment.

The "part-time only" trend picked up steam during the recession. Analysts say one reason is the passage of the Affordable Care Act—commonly called Obamacare—and the mandate that businesses with 50 full-time employees or more must provide health insurance, which has become even more expensive. In January 2006, there were about 4.6 million involuntary part-time workers. In January of 2013, there were about 8.6 million—almost double, according to the BLS.

"Many employers are looking to make the employment relationship more flexible, and so are increasingly relying on part-time work and a variety of arrangements known as 'contingent work,'" said Federal Reserve Governor Sarah Bloom Raskin in a speech last month. "[It's] a sensible response to today's competitive marketplace…and allows firms to maximize workforce flexibility in the face of seasonal and cyclical forces."

Before Obamacare, there was no legally accepted definition of full- or part-time. Under the new act, which takes effect on January 1, 2014, a worker is considered full-time if he or she works at least 30 hours per week.

The practice isn't limited to the retail industry: Many fast food franchisees of chains such as Burger King, McDonalds and Taco Bell are considering a shift in hiring structures to circumvent the new rules. A 2012 study by the Mercer consulting firm found that of retail and wholesale firms that don't currently offer insurance coverage, 67 percent "are more inclined to change their workforce strategy so that fewer employees meet that [30 hour a week] threshold" specified in the ACA. [PE]

Human Resources Question with Candice Weaver

The Month's Best Question

SHPT - Here, There & On-Line!

Q: ***"Is a small firm required to do Sexual Harassment Prevention Training?"***

A: Most employers know that if they have 50 or more employees, they must do Sexual Harassment Prevention Training. But what about small employers who have fewer than 50 employees?

Both the Federal and State discrimination laws require employers to provide harassment information to all employees. California requires new employees be provided harassment information upon hire, and all regular employees are to receive harassment information annually if the employer has 5 or more employees.

While employers with less than 50 employees don't have the strict "2 year and 2 hour" training mandate, they still must to do supervisor and employee training. Those same Federal and State laws require special training for supervisors so that they can protect employees they are responsible for and to learn their liability for harassment or failure to report or confront harassment they are aware of in the workplace.

There are several ways to get the training you need, for both your supervisors and non-supervisory staff.

Pacific Employers can come to your place of business and present training for any size group of supervisors or rank and file employees.

Quarterly the **Visalia Chamber of Commerce** and Pacific Employers jointly host a Supervisors' Sexual Harassment Prevention Training Seminar & Workshop with a continental breakfast. See the display ad below.

However, so often one employee can't attend the training, We have an anwer for that. We partner with **California Employers Association (CEA)** who conduct on-line training.

CEA offers AB1825 Sexual Harassment Prevention Training options for supervisors (two hours) as well as a general (one hour) harassment awareness training for employees.

Each employee is set up with an online course. Once the course is complete, a printable Certificate of Completion is available as well as HRCI certification. For more information on the on-line courses, go to: *http://www.employers.org/online-training* --- [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 Trainings on 10-23-13

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

♦ **Wage & Hour and Exempt Status -** Overtime, wage considerations and exemptions.
Thursday, June 20th, 2013, 10 - 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 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

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.

Child Labor Laws Enclosed!

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FB Job Complaints are Protected

The National Labor Relations Board (NLRB) held that the **Bettie Page** clothing company unlawfully fired employees who used Facebook to discuss complaints about their supervisor's conduct and other work-related concerns, rejecting the employer's claim it was tricked into firing the workers. *Design Tech. Grp. LLC d/b/a Bettie Page Clothing*

The ALJ concluded that this theory was "nonsensical," and the NLRB agreed. The Board observed that "(t)here is no credited evidence that the employees' actions were undertaken to entrap the Respondent into committing an unfair labor practice. But even if the employees were acting in the hope that they would be discharged for their Facebook postings, the Respondent failed to establish that the employees' actions were not protected by the Act." Accordingly, the Board concluded that **Bettie Page** had violated Section 8(a)(1) of the Act in discharging the employees for engaging in protected concerted activity. [PE]

Handbook Arbitration Enforceable

An arbitration agreement contained in an employee handbook was not invalid simply because the employer could change the handbook at its discretion, the California Court of Appeal has ruled. *Serpa v. California Surety Investigations, Inc.,*

Reversing an order denying the employer's motion to compel arbitration, the Court held that the implied covenant of good faith and fair dealing limited the employer's right to alter the agreement unilaterally; thus, the agreement was not illusory or unconscionable for lack of mutuality, as the plaintiff argued. [PE]

One-Sided Arbitration Unenforceable

A California Court of Appeal recently held that an arbitration agreement was unenforceable because it was unconscionably one-sided. *Compton v. American Management Services LLC*

The agreement, which was required to be signed by all job applicants, was unenforceable because it required arbitration of employment issues such as discrimination, but allowed the employer access to the courts for disputes over trade secrets and unfair competition. [PE]

Fresno Care Giver Hit With Citations!

Bedford Care Group Inc., an assisted living provider located in Fresno, has been hit with citations totaling $1,625,468 for labor law violations including unpaid minimum wage and overtime, meal and rest break violations, as well as the failure to issue itemized wage statements.

"Residential caregivers perform some of the most important work in our communities, providing reliable, compassionate care to those who need it, but they can work very long hours without proper overtime pay," says California Labor Commissioner Julie Su. "These live-in employees were on call and often required to work 24 hours a day and were not paid for all hours worked. This is wage theft, and we will do everything in our power to ensure workers are paid all the wages they have earned. "

The Labor Commissioner ordered Bedford Care Group to pay $1,398,890 in unpaid overtime, $17,025 in unpaid minimum wage, and $95,053 in meal and rest period premiums to eleven workers employed at six of the Bedford Care Group facilities in Fresno and Clovis. The company was also fined $114,500 in penalties.

Bedford Care Group owns and operates six assisted living facilities within Fresno County.

"Workers across all industries in the state should know that they are entitled to pay for all work performed and any employer who pockets the wages of their own workers will be held accountable," says Christine Baker, director of the Department of Industrial Relations. The Labor Commissioner's Office is a division within DIR. [PE]