Pacific Employers
Management Advisor
Celebrating 45 Years!
March 2009

What's New!

EFCA – Can It Pass?

The Employee Free Choice Act (EFCA) is legislation in the United States which aims to "amend the National Labor Relations Act to establish an easier system to enable employees to form, join, or assist labor organizations, to provide for mandatory injunctions for unfair labor practices during organizing efforts, and for other purposes."

Under current U.S. labor law, the National Labor Relations Board will certify a union as the exclusive representative of bargaining unit employees by card check process or secret ballot election, which is held if more than 30% of employees in a bargaining unit sign statements asking for representation by a union. If enacted, EFCA would require the NLRB to certify a bargaining representative without directing an election if a majority of the bargaining unit employees signed cards through the card check process.

"... BINDING ARBITRATION IF AN AGREEMENT CANNOT BE REACHED..."

Pursuant to the bill, a union can demand that an employer begin bargaining within ten days of certification of the union as the exclusive bargaining representative for an appropriate unit of employees via the card check. In addition, if the union and employer cannot agree upon the terms of a first collective bargaining contract within ninety days, either party can request federal mediation, which could lead to binding arbitration if an agreement still cannot be reached after thirty days of mediation.

Where government arbitration determines terms of the agreement, employees would lose their current right to ratify the terms of the agreement. Finally, the Act would provide for liquidated damages of three times back pay if employers were found to have unlawfully terminated pro-union employees. The EFCA also would impose a $20,000 penalty upon employers for each employer violation of the proposed legislation if the NLRB or a court deems the violation willful or repetitive.

On March 1, 2007, the House of Representatives passed the act by a vote of 241 to 185. The Senate on June 26, 2007 voted 51 to 48 on a motion to invoke cloture on the motion to proceed to consider the bill.

The bill failed to pass during the 110th United States Congress because of the 60 votes required to enforce cloture, which may be possible to obtain in the 111th United States Congress.

President Obama's nominee for Labor Secretary is Rep. Hilda Solis (D-Calif.) who is a strong supporter of the EFCA. Her confirmation has stalled because of unpaid taxes after it was disclosed that her husband had just paid about $6,400 to settle numerous tax liens against his business dating to 1993. [PE]

Labor Issues Flyer Enclosed!

President's Report

~Dave Miller~

Labor Issues!

Over the last few months a number of items on Big Labor's wish list have now become front and center in Congress. There is now little doubt that much of this agenda will become law. The insert in this issue of the ***Management Advisor*** provides information on these issues.

We reviewed them briefly last month, but the insert will help you understand them as we present them in greater detail.

Top Of The List - CA Supreme Court!

The *Brinker* and the *Brinkley* meal period cases have now been granted review by the California Supreme Court and the rest period rules will probably be addressed also. This may include the number of rest periods that must be provided during a day, when a second rest period must be permitted, when they should occur, and whether they can effectively be waived. Be careful how you operate during this time, as the statute of limitations for filing a claim for missed meals or breaks can be up to 3 years.

Free Choice Act!

Organized labor may be able to get their much needed Free Choice Act passed and signed in to law to replace the National Labor Relations Board's secret ballot elections. Another feature of the law is a requirement for the employer to agree on a contract in negotiations within 120 days or have an arbitrator impose a binding agreement.

The R.E.S.P.E.C.T. Act!

Another Issue that has the potential to become law is the R.E.S.P.E.C.T. Act (Re-Empowerment of Skilled and Professional Employees and Construction Trade Workers) which, by changing the legal definition of supervisor, would allow many exempt supervisors a chance to join the ranks of organized union labor, and would no doubt lead to conflict of interest and loyalty problems at many worksites.

Working Families Flexibility Act!

This law would establish a mandatory grievance procedure and allow employees to file a charge with the Department of Labor if they did not agree with employer decisions on pay, work hours or location. [PE]

Welcome to 2009!

We will be here to assist you as these laws develop. Our hope is to make it possible for you to successfully navigate this coming year. [PE]

The future is here. It's just not widely distributed yet. - William Gibson

Recent Developments

Obama Hands Union Bosses Pay-Back

DC Examiner Editorial:

Labor unions spent an estimated $300 million helping elect President Barack Obama last year and he is wasting no time paying them back. His latest gift for the union bosses is his new executive order encouraging Washington bureaucrats to require costly Project Labor Agreements (PLAs) on federally funded construction projects worth at least $25 million.

A PLA means only companies with unionized labor can bid on federal contracts. Costs increase as much as 20 percent as a result on contracts to build critically needed infrastructure like roads, bridges and office buildings.

"Obama's executive order thus bars from federal contracting thousands of companies that employ the 93 percent of private sector workers who are not union members.."

Obama's executive order thus bars from federal contracting thousands of companies that employ the 93 percent of private sector workers who are not union members. This is grossly discriminatory in addition to being a blatant pay-back to the labor bosses who control a tiny minority of all private sector workers. Forcing government contracts to include PLAs will also cost taxpayers more. Between 2001 and 2007 when PLAs were not mandatory for federal contracting, more than $123 billion in federal contracts were awarded. Those contracts would likely have cost federal taxpayers about $25 billion more had they included PLAs.

The negative effects of Obama's PLA payback to the labor bosses will extend to state and local government, too, as they often pattern their contracting practices after the federal government. And it is likely the government will have to devote more resources to defending the Obama order in court, as individuals and companies rightfully claim they are being denied equal protection of the law and freedom of association and seek legal redress. At a time of economic distress, the last thing government contracts ought to do is mandate sweetheart deals for union bosses, using tax dollars. [PE]

Supreme Court Expands Retaliation Protection

The U.S. Supreme Court's decision in January 2009 in *Crawford v. Metropolitan Government of Nashville* is said to be a logical interpretation of both the language of Title VII and the existing case law with respect to retaliation.

"Merely answering questions . . . . is sufficient. . ."

In *Crawford,* the Supreme Court reversed a decision of the United States Court of Appeals for the Sixth Circuit that Ms. Crawford had not been the victim of retaliation. In doing so, the Supreme Court rejected the Sixth Circuit's conclusion that Ms. Crawford had not engaged in opposition activity, holding that "opposition" did not require "active, consistent" activities. Rather, the Court held that:

Merely answering questions about alleged unlawful discrimination during an internal company investigation is sufficient to satisfy the "opposition" criteria of a retaliation claim; and

"Opposition" is deemed to include participation by employees in an internal company investigation, even if the employee did not initiate the investigation or participate in a "formal investigation, proceeding, or hearing. . ." pursuant to an actual charge of discrimination being filed under Title VII.

Justice Alito's concurrence raised, but did not answer, the question of whether "opposition" activity can occur if the employee's concern is not communicated to the employer.

The Opinion is just as important for what the Court did not rule.

The Supreme Court avoided the issue of whether Ms. Crawford's activities were protected by the "participation" clause. "Participation" has traditionally been interpreted as having a higher standard that has to be met by the employee (i.e., a "reasonable belief" that the activities being opposed violate Title VII). This higher standard frequently provides the basis for an employer to successfully pursue summary judgment in a retaliation case, and the Supreme Court's opinion kept this aspect of the defense of a retaliation case intact. [PE]

9th Circuit Finds Supervisor Not Liable

In *Lakeside-Scott v. Multnomah County,* the Ninth Circuit held that an employer's independent, legitimate decision to terminate an employee insulates a lower-level supervisor from liability despite the supervisor's retaliatory motive.

. . . not granted a "get out of jail free card" . . .

The Plaintiff, Lea Lakeside-Scott ("Scott"), filed a formal complaint alleging, among other things, that her supervisor Jann Brown ("Brown") gave preferential treatment to gays and lesbians in hiring and promotions. During a review of another County employee's email as part of an investigation into the employee's alleged misconduct, Brown (and other employees participating in the investigation) discovered Scott's journal, which contained discriminatory comments and excerpts of other employees' work documents. Joanne Fuller, the Department Director, placed Scott on administrative leave and imitated an investigation into Scott's possible violation of County policies. Brown's role in the investigation was limited to answering the investigator's questions.

Scott was eventually terminated and sued the County and Brown, alleging retaliation under Oregon's Whistleblower Act and 42 U.S.C. § 1983. The jury found in Scott's favor with respect to her claims against Brown. On appeal, the Ninth Circuit found that despite her retaliatory motive, Brown could not be held personally liable for retaliation based on her limited involvement in the chain of events that ultimately led to Scott's termination. In reaching this conclusion, the Court noted that there was no evidence that Brown influenced Fuller's termination decision. The Court noted that although it is important to prevent retaliation in the workplace, employees who engage in constitutionally protected conduct are not granted a "get out of jail free card" shielding them from legitimate discipline and/or termination.

This case illustrates, that it is important that an employer's investigation into employee misconduct is conducted by an independent and neutral investigator. An employer that terminates an employee with previous "whistleblower" complaints may still be found liable for retaliation where there is evidence that the decision was based on a retaliatory motive. Employers are cautioned to consult with labor counsel before terminating an employee who has engaged in protected activity. Employees who violate the Genetic Information Nondiscrimination Act of 2008 (GINA) will be vulnerable to employee lawsuits and government agency enforcement actions. [PE]

Labor Issues Flyer Enclosed!

Human Resources Question with Candice Weaver

The Month's Best Question

Love Contracts

Q: ***"We have several employees who are very close at the office and have a romantic relationship outside of work. As none of these is a supervisor, I suppose it's okay, but how can we keep from having a problem if and when they are no longer happy with their mutual relationship?"***

A: Office romances often start with dating, dinner and late night TV watching. However, it has been known to end with harassment, retaliation claims and court hearings.

It makes good business sense to get acknowledgement by these employees that a workplace relationship is consensual. Generally, just having employees agree that they are mutually enjoying each other's company should be enough, however, "what happens when the relationship goes sour and allegations fly?"

To protect themselves against lawsuits, employers have begun asking co-workers to sign written confirmations that they have entered into voluntary relationships.

These formal documents typically affirm that "neither party wants their relationship with each other to affect their jobs or the company in any way." Employees agree to abide by company-conduct policies while dating and after the relationship ends.

The documents usually are signed by both workers, who acknowledge that they understand all the workplace policies against harassment and will keep the relationship at arm's length — literally and figuratively — in the office.

Remember that this is not an acceptable relationship between supervisors and non-supervisory workers. The staff at Pacific Employers can help you with language on your office love bird's "Love Contract" [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 April 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

♦ **Equal Employment Fundamentals -** Harassment & Discrimination in the Workplace - The seven (7) requirements that must be met by all employers. "The Protected Classes."
Thursday, March 19th, 2009, 10am - 11:30am

♦ **Safety Programs -** Understanding Cal/OSHA's Written Safety Program. Reviewing the IIPP or SB 198 requirements for your business.
Thursday, April 16th, 2009, 10am - 11:30am

♦ **Family Leave -** Federal & California Family Medical Leave, California's Pregnancy Leave, Disability Leave, Sick Leave, Workers' Compensation, etc.; Making sense of them.
Thursday, May 21st, 2009, 10am - 11:30am

♦ **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

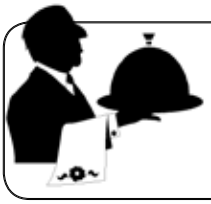
There is No Seminar in August

♦ **Forms & Posters -** as well as Contracts, Signs, Handouts, Fliers - Just what paperwork does an Employer need?
Thursday, September 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, October 15th, 2009, 10am - 11:30am

♦ **Discipline & Termination -** The steps to take before termination. Managing a progressive correction, punishment and termination program.
Thursday, November 19th, 2009, 10am - 1:30am

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 an unlimited dinner for two at the *Vintage Press*.
Phone us at 733-4256 or Toll Free 800 331-2592.

Want Breaking News by E-Mail?
Just send a note to
peinfo@pacificemployers.com
Tell us you want the News by E-Mail!

Labor Issues Flyer Enclosed!

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Pacific Employers
Management Advisor
Celebrating 45 Years!

Chamber Visalia Community • Advocacy • Education • Networking of Commerce
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.

J.C. Penney to Pay $50,000 to Settle EEOC Race Discrimination Suit

J.C. Penney Corporation, Inc. will pay $50,000 to settle a race discrimination lawsuit brought by the U.S. Equal Employment Opportunity Commission (EEOC), the agency announced today.

The EEOC had charged that J.C. Penney discriminated against Reinell Singh, an African American who worked as a greeter welcoming customers into Penney's Staten Island store at the Staten Island Mall on 140 Marsh Avenue. The EEOC's lawsuit says that Singh's supervisor referred to her several times using racially offensive names and subsequently fired her for racial reasons.

In addition to the $50,000 in compensatory damages to be paid to Singh, the three-year consent decree resolving the case (EEOC v. J.C. Penney Corporation, Inc., Civil Action No.06 5192 in the U.S. District Court for the Eastern District of New York) includes injunctive relief enjoining J.C. Penney from race discrimination or retaliation; requiring the adoption of a non-discrimination policy and complaint procedures; anti-discrimination training; posting of a notice about the EEOC and the lawsuit; a memorandum setting forth the requirements of Title VII of the Civil Rights Act of 1964 to all store employees; monitoring and reporting. [PE]

Guest Workers Rulings

Employers are not obligated to cover the moving costs and other expenses incurred by many immigrant workers, a federal appeals court has ruled in a case against a New Orleans hotelier that hired dozens of foreign workers after Hurricane Katrina.

The United States Court of Appeals for the Fifth Circuit ordered the dismissal of a suit that accused Decatur Hotels of exploiting foreign employees recruited in August 2005. [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

Defined Contribution Plans May Skip 2009 Minimum Required Distributions

The Worker, Retiree, and Employer Recovery Act of 2008 provides defined contribution plans with the opportunity to eliminate minimum required distributions for 2009. Plan sponsors will need to evaluate whether to implement this provision, particularly in light of the current economic crisis.

The minimum required distribution (MRD) rules generally require that a participant take annual minimum distributions after the participant reaches age 70½ (and usually only if the participant is no longer employed by the plan sponsor). Because many participants saw the account balances of their 401(k) and other defined contributions plans fall dramatically in 2008, the Act allows defined contribution plans to skip the MRD that would otherwise be required for 2009. The Congressional intent is to allow these participants to retain investments in their accounts and have a greater opportunity of recovering lost value on these investments.

Plans Covered

In addition to IRAs, the law applies to most defined contribution plans. This includes all 401(k) plans, profit sharing plans and 403(b) plans. A 457(b) eligible deferred compensation plan is covered only if it is a governmental plan. [PE]