Pacific Employers
MANAGEMENT ADVISOR
48 Years of Excellence!
March 2012

WHAT'S NEWS!

COURT REJECTS "TRIAL BY FORMULA"!

The California Court of Appeal, First District, in *Duran v. U.S. Bank.* considered whether class action plaintiffs may use statistical sampling and representative evidence to establish liability on a class-wide basis. The court gave a resounding "no" to that question, reversing a $15 million judgment on the basis that the trial plan had unconstitutionally deprived U.S. Bank of due process.

The Court of Appeal also **ordered that the class should be decertified,** because the trial court had erred in assuming that liability for a class of 260 members could be extrapolated from findings based on testimony from a trial sample of 20 plaintiffs.

The *Duran* court rejected all arguments that the trial court's use of statistics was acceptable or compatible with its prior ruling in the Bell III litigation. The trial plan did not use a true random sample because it included the two named plaintiffs and there was no evidence from any expert that the use of a 20-person sample was statistically significant or representative for the purpose of extrapolating findings to the entire class. The "response rate" was not "extremely high" because six of the original "random witnesses" did not respond: four took the second opportunity to opt out; one was removed by the court; and one did not testify. There was a "measurement error" because several witnesses testified to working a range of hours without specifying how often they worked at the top of the range or at the bottom of the range, and there was no evidence as to the probable distribution of hours worked by class members who were not among the randomly selected witnesses.

> ". . COURT PARTICULARLY TROUBLED BY THE 43.3 PERCENT MARGIN OF ERROR . ."

The court was particularly troubled by the 43.3 percent margin of error, which it found to be a due process violation on its own. It had the potential to increase the bank's aggregate liability by "close to double that which would be warranted if the low end of the margin were applied." The restitution calculations used in the second phase of the trial were necessarily flawed because they were based on the court's statement of decision which was, itself, based on constitutionally suspect data.

This decision provides much needed support for what would seem to be some very basic principles of common sense and fairness – principles that sometimes seem to get lost in class action litigation. First, a case presenting a defense of exempt status or other issues turning on individualized facts – like how or where employees spend their time – should not be certified for class treatment. Second, if such a case is certified, employers must be able to present evidence by or about individual members of the class to meet their burden of proving the exemption. Third, *Duran* provides a reminder of the serious – and as yet insurmountable – obstacles to proving liability on the basis of statistical extrapolations. Lastly, it provides a detailed primer on what can go wrong when courts put speedy and efficient results ahead of more laborious justice by using flawed statistical models. [PE]

Hiring Checklist Enclosed!

President's Report
~Dave Miller~

Wage Form FAQ Update!

The California Division of Labor Standards Enforcement (DLSE) recently modified the answers to two of its Frequently Asked Questions (FAQs) concerning the wage notice required by the California Wage Theft Prevention Act (WTPA) in Labor Code section 2810.5.

It also added 10 new FAQs and answers. The key additions, changes, and advice contained in the modifications to the wage notice provision's FAQs are:

- The DLSE considers it to be a "best practice" for employers to provide the wage notice to all current employees, though the statute only requires the notice be provided to new hires and to employees whose wage-related information has changed. (FAQ 2.)
- Compensation data that cannot be included on the notice itself may be set forth on sheets attached to the wage notice, as long as the attachments are clearly described in the notice. (FAQs 12 and 18.)
- A reminder that notice of modifications to information relating to an employer's workers' compensation carrier may be provided by the postings already required by Labor Code sections 3550-3551, if posted within seven days of the change (FAQ 22.)
- In wage notices to new hires, employers need only include rates of pay that are ascertainable in dollar amounts ("known and determinable") at the time of the notice. An employee's eligibility for payment by a "regular rate of pay" (a distinct and important categorization) may be designated on the notice as a rate "which is subject to upward adjustment when other specified forms of wages are earned during the applicable pay period." (FAQ 19.)
- The DLSE template and FAQs continue to view an employment agreement relating to wage information as being either written or oral only, but not both written and oral. (FAQ 21.)

A failure to comply with the FAQs (including following what they term as the "best practice of providing notice to all current employees") is that it only constitutes a violation of advice from the agency responsible for administering the new law, not a violation of a validly adopted regulation, or of a statute.

A link to the FAQ's is on our website *pacificemployers.com* at our **What's New** and the **Forms** pages. [PE]

It's better to be careful one hundred times than to get killed once.—Mark Twain (author, humorist)

Recent Developments

NLRB Posting Requirement

Effective April 30, 2012, absent a court stay or further extension (the effective date was recently changed from January 31, 2012), the National Labor Relations Board ("NLRB") will require employers to post an official government notice advising employees of their legal rights under the NLRA.

"There are significant remedies for noncompliance."

The notice must be placed where other employment notices are customarily posted, as well as on a company's "intranet or internet site if the employer customarily communicates with its employees about personnel rules or policies by such means." Among other things, the notice (1) informs employees of their right under the NLRA to unionize and/or engage in other "protected concerted activity" unrelated to union organizing, (2) lists examples of unlawful employer conduct, (3) provides information for employees on filing charges against an employer, and (4) offers contact information for the NLRB. There are significant remedies for noncompliance.

There are numerous potential ramifications resulting from the new posting requirement. For example, the notice mentions "protected concerted activity," a right covered by the NLRA. In 2011, the NLRB expanded its focus on employer policies and practices relating to this NLRA right. Therefore, it is important for employers — whether fully unionized, partially unionized or union-free — to determine now whether any of their HR policies inadvertently could violate the NLRA based on these new interpretations. If you have not had your employee handbook and other workplace policies reviewed for NLRA compliance, it is recommended that you do so.

Policies that have come into question include, but are not limited to, confidentiality, social and other media, codes of conduct, non-harassment, related investigations, discipline, electronic communications and solicitation/distribution. [PE]

Ministerial Exception Confirmed

The US Supreme Court confirmed the ministerial exception to the discrimination laws when it issued its decision in Hosanna-Tabor v. Equal Employment Opportunity Commission, confirming a "ministerial" exception to discrimination laws.

". . infringes on the group's right to shape its own faith and mission . . ."

Cheryl Perich worked as a "called" teacher for Hosanna-Tabor Evangelical Lutheran Church and School. The term "called" means that she underwent a religious "commission" to teach for the school. Perich developed narcolepsy and began the 2004-2005 school year on disability leave. In January 2005 she notified the school principal that she would be able to report to work in February. The principal responded that he had already hired another teacher to work in February. The principal also expressed concern that Perich was not ready to return to the classroom. The Church offered to pay a portion of Perich's medical insurance costs in exchange for her resignation. Perich refused to resign and told the principal she had spoken with an attorney and intended to assert her legal rights. The Church then terminated Perich for insubordination and disruptive behavior.

Perich next filed a charge with the Equal Employment Opportunity Commission alleging she was terminated in retaliation for threatening to file a lawsuit in violation of the Americans with Disabilities Act. At the District Court level Hosanna-Tabor argued that the lawsuit was barred by the "ministerial" exception to the ADA provided by the First Amendment. The District Court agreed and granted summary judgment in Hosanna-Tabor's favor. The Sixth Circuit Court of Appeals vacated that decision because it found that Perich was not a minister under the exception.

The U.S. Supreme Court overturned the Court of Appeals' decision and held that there is a ministerial exception to the ADA and that Perich was included within that exception. The Supreme Court explained that the Free Exercise and Establishment Clauses of the First Amendment provide a "ministerial" exception to the ADA. The Court wrote that imposing an unwanted minister on a religious group infringes on the group's right to shape its own faith and mission through its appointments. The Court further explained that Perich was a minister because she had a significant amount of religious training followed by a formal religious commissioning by the school, she held herself out as a minister, and her job duties included conveying the Church's message in religious instruction. Therefore, the Court concluded that Perich fell within the "ministerial" exception and could not make a discrimination claim against Hosanna-Tabor.

The Court's ruling is a positive one for religious organizations. It assures them a greater freedom to make employment decisions. However, the Court did not provide much guidance regarding what organizations qualify as a "religious organization" or which employees would qualify as "ministers" to fit within the "ministerial" exception. Organizations that have concerns about whether they fit within this exception may want to review their exemption standing before relying on the exception in making employment decisions. [PE]

Court Clarifies Administrative Exemption Test

In a major wage/hour ruling, the California Supreme Court clarified the test used to analyze whether the administrative exemption to overtime applies to employees.

Historically, courts have applied the administrative/production worker dichotomy test. This dichotomy distinguishes between administrative employees who are primarily engaged in administering the business affairs of the enterprise (exempt employees) and production-level employees whose primary duty is producing the commodities that the business exists to produce and market (non-exempt employees).

However, in *Harris v. Superior Court,* the Supreme Court held that the administrative/production worker dichotomy is not a dispositive test and should only be applied in limited circumstances. Instead, courts should first analyze whether the work performed by the employee is (1) directly related to management policies or general business operations of the employer or its customers and (2) both qualitatively and quantitatively administrative.

". . . the Court disregarded DLSE opinion letters . . ."

Significantly, the Court disregarded Department of Labor Standards Enforcement ("DLSE") opinion letters relied upon by the appellate court, stating "it is ultimately the judiciary's role to construe the language." [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 April 25th, registration at 7:30am — Seminar 8:00 to 10:00am, at the Lamp Liter, Visalia.

Quarterly Seminars also on 7-25-12 and 10-24-12

RSVP Visalia Chamber - 734-5876 – $25
Certificate – Forms – Guides – Full Breakfast

Human Resources Question with Candice Weaver

The Month's Best Question

Pregnancy Law Confusion

Q: ***Under the new law, "What if the employee does not pay for her portion of the health plan while she is out on PDL?"***

A: With the recent passage of Senate Bill 299, it is easy to be confused on how to continue coverage for an employee on a pregnancy disability leave (PDL) when the employee has a co-pay obligation but does not have any wages. Does the employer have to collect the co-pay? Does the employer pay for the full premium while the employee is out on leave and then ask for a reimbursement when the employee returns?

SB 299 states: It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification:

(a) (1) For an employer to refuse to allow a female employee disabled by pregnancy, childbirth, or a related medical condition to take a leave for a reasonable period of time not to exceed four months and thereafter return to work, as set forth in the commission's regulations. The employee shall be entitled to utilize any accrued vacation leave during this period of time. Reasonable period of time means that period during which the female employee is disabled on account of pregnancy, childbirth, or a related medical condition. An employer may require an employee who plans to take a leave pursuant to this subdivision to give the employer reasonable notice of the date the leave shall commence and the estimated duration of the leave.

(2) (A) For an employer to refuse to maintain and pay for coverage for an eligible female employee who takes leave pursuant to paragraph (1) under a group health plan, as defined in Section 5000 (b)(1) of the Internal Revenue Code of 1986, for the duration of the leave, not to exceed four months over the course of a 12-month period, commencing on the date the leave taken under paragraph (1) begins, at the level and under the conditions that coverage would have been provided if the employee had continued in employment continuously for the duration of the leave. Nothing in this paragraph shall preclude an employer from maintaining and paying for coverage under a group health plan beyond four months.

Attempts to get clarification failed. We can only suggest that you give a written notice to the employee going out on PDL that the co-pay must be paid by a certain date.

If you cancel the insurance the first time the employee fails to make a payment on the date set by the employer, the potential liability from such an act outweighs the few hundred dollars the employer might be out if the employee never returns.

If the employee fails to pay during her period of leave, but then returns to work, the employer can attempt to get a written authorization to make the additional deduction from pay, but if the employee refuses, the employer's only alternative is to seek compensation in court.

While this is an unfair burden on the employer we recommend you pay first and ask for reimbursement. [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.

2012 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 15th, 2012, 10 - 11:30am

♦ **Safety Programs -** Understanding Cal/OSHA's Written Safety Program. Reviewing the IIPP or SB 198 requirements for your business.
Thursday, April 19th, 2012, 10 - 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 17th, 2012, 10 - 11:30am

♦ **Wage & Hour and Exempt Status -** Overtime, wage considerations and exemptions.
Thursday, June 21st, 2012, 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 19th, 2012, 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 20th, 2012, 10 - 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, 2012, 10 - 11:30am

♦ **Discipline & Termination -** The steps to take before termination. Managing a progressive correction, punishment and termination program.
Thursday, November 15th, 2012, 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.

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Workers' Comp Fraud Convictions Spiral

Dishonest employees continue to prey on the workers' compensation system by making fraudulent claims and seeking to extend benefits longer than necessary, but employers are playing a vital role in identifying the cheats. New data from the California Department of Insurance show that prosecutors were able to secure convictions against 103 individuals in 2011 for various fraudulent acts against the workers' comp system.

Los Angeles County prosecutors sealed the deal on the conviction of a former school safety officer in a case that cost the county north of $400,000.

Recently convicted, Christie Ann Murphy was sentenced to 180 days in jail and given 5 years probation for failing to disclose information and making a false or misleading statement in support of a claim. A source in the Sutter County District Attorney's office says she was also ordered to repay Travelers nearly $37,000 in restitution for her crime.

And in Ventura County, prosecutors won a conviction against Hector Rocha Villasenor in a case that included an estimated $42,000 in fraudulent payments. Villasenor was convicted of making a knowingly false or fraudulent statement to obtain compensation. [PE]

ICE Build-Up a Worry for Employers

The Obama Administration is launching another round of worksite investigations—this time, returning to employers that have already been the subject of I-9 inspections during the last three years. Approximately 500 employers are being re-visited by Special Agents to confirm that noncompliant activity identified during prior reviews has been remedied, according to U.S. Immigration and Customs Enforcement.

Generally, businesses must make sure they are hiring only people who can work legally in the U.S. Businesses that previously have received warning letters or administrative fines may now be the subject of treble damages if ICE Special Agents find that, notwithstanding the prior review, the employer continues to make the same mistakes.

The Obama Administration's worksite strategy differs from that of the previous administration, which focused on high-profile raids and arrests of workers. ICE still conducts raids, but now they are "silent" and have resulted in employers terminating significant portions of their workforce. The Administration's recent audits of small businesses have drawn such criticism that larger employers must be ready for the spotlight in ICE's latest program. [PE]

Significant Changes to ALRA

California's Agricultural Labor Relations Act (ALRA) was amended for the new year in ways that will likely help unions organize agricultural employees in California and obtain favorable labor contracts with agricultural employers.

The ALRA has been amended to: (1) permit the Agricultural Labor Relations Board (ALRB), if it finds that an agricultural employer committed significant misconduct affecting the result of a union election, to issue an order requiring the employer to recognize and bargain with a union even if a majority of the employees voted against union representation in the election; (2) require the ALRB to process election objections and challenged ballot disputes within an expedited timeframe; (3) enable the ALRB to obtain injunctive relief more easily; (4) shorten the time within which the ALRB may compel mandatory mediation/interest arbitration of a first collective bargaining agreement; and (5) prevent an employer's appeal to an appellate court from stopping commencement of the ALRA's mandatory mediation process.

These changes place significant new weapons in the hands of unions seeking to represent agricultural employees. [PE]