

## WHAT'S NEWS!

### Doffing & Donning Decision

**In a unanimous decision, the Supreme Court gave the win to U.S. Steel in their long running "Donning and Doffing" matter. The case involves U.S. Steel employees working at mills in Michigan and Illinois.**

The U.S. Supreme Court ruled Jan. 27 in *Sandifer, et al. v. U.S. Steel Corp., No. 12-417*, that U.S. Steel is not required to pay workers for the time spent donning and doffing protective equipment and then traveling to and from their workstations.

The Fair Labor Standards Act states that an employer does not need to compensate employees for time spent "changing clothes." The whole argument revolved around the question - "Does changing into required safety gear constitute "changing clothes" under the Fair Labor Standards Act?"

And the answer is "Yes." Justice Antonin Scalia delivered the opinion of the 9-0 majority. The Court held that safety gear falls within the parameters of "clothes" for the purposes of the Fair Labor Standards Act. Because the statutory context makes it

clear that the concept of "clothes" refers to items that are necessary for job performance, there is no need to construe the term more strictly. And, since "changing" clothes does not require the substitution of one outfit for another, the act of donning or doffing safety gear can be considered "changing clothes" for the purposes of the Act. [PE]

### Update to Affordable Care Act

If you have been making calculations to determine if your business is required to offer health insurance to its employees, you have probably been keeping close tabs on how the Affordable Care Act will impact your business.

The original health care law (2010) required employers with fifty or more full-time equivalent employees to offer health insurance under the Affordable Care Act or pay a penalty beginning in 2014. Last year the requirement was delayed to 2015 and in February 2014 another delay was made to the health mandate. The most recent delay gives employers with 50-99 employees another year until they will have to comply or pay a fee. Employers with up to 99 full-time equivalent employees now have until 2016 to offer health insurance or pay the cost imposed. [PE]

## Minimum Wage Poster Enclosed!

### President's Report ~Dave Miller~

#### MINIMUM WAGE POSTER RELEASED

**A**lthough there are some exceptions, almost all employees in California must be paid the minimum wage as required by state law. Effective July 1, 2014, the minimum wage in California is \$9.00 per hour. Effective January 1, 2016, the minimum wage in California is \$10.00 per hour.

There is an exception for learners, regardless of age, who may be paid not less than 85% of the minimum wage rounded to the nearest nickel during their first 160 hours of employment in occupations in which they have no previous similar or related experience.

"THE FEDERAL GOVERNMENT IS PLANNING TO INCREASE THE MINIMUM WAGE . . ."

The executive branch of the federal government is planning to increase the minimum wage and most employers in California are subject to both the federal and state minimum wage laws. The effect of this dual coverage is that when there are conflicting requirements in the laws, the employer must follow the stricter standard; that is, the one that is the most beneficial to the employee. Thus, since California's current law requires a higher minimum wage rate than does the federal law, all employers in California who are subject to both laws must pay the state minimum wage rate unless their employees are exempt under California law.



There are some employees who are exempt from the minimum wage law, such as outside salespersons, individuals who are the parent, spouse, or child of the employer, and apprentices regularly indentured under the State Division of Apprenticeship Standards. **We have enclosed the new state poster.** [PE]

#### NEW ALL-IN-ONE SPANISH POSTER

**B**ecause of the numerous changes in the posters available for our Spanish All-In-One poster, we have issued a new Spanish poster that incorporates those changes.

We have reprinted the Spanish poster and now have a good stock of them in the office for you to pick up at any time.

We also have the current 2014 English language All-In-One poster in stock in the office so that you may pick them up and save the postage cost.

Our office is at 306 N. Willis Street in Downtown Visalia, and we are just north of the Vintage Press and across the street from the A & W. Stop by and pick up the posters that you need. [PE]

"Do not expect justice where might is right."- Plato (429-347 BC)

## Recent Developments

### No Daily Overtime in CBA?

**I**n a new decision issued on January 22, 2014, the California Court of Appeal has just confirmed an important exemption to “daily overtime” where employees are covered by collective bargaining agreements, awarding summary judgment to the employer and shutting down the plaintiffs’ attempt to read the exemption in a manner that would negate it.

**“NOT ‘DAILY OVERTIME,’ BUT ‘OVERTIME.’”**

A section of the California Labor Code – Labor Code 514 – provides an exemption from “daily overtime” for employees covered by a collective bargaining agreement whereby they receive at least 30% more than the state minimum wage and premium pay for “overtime.” Not “daily overtime,” but “overtime.” The plaintiffs nevertheless argued that employees covered by a qualified collective bargaining agreement must still receive some amount of premium compensation for “daily overtime.”

The California Court of Appeals summarily rejected this argument, explaining that employees covered by qualified collective bargaining agreements are not entitled to premium pay for “daily overtime,” but are only entitled to premium pay for “overtime,” as defined by the employer and union. There, the employer and union had defined “overtime” as time worked beyond 40 hours in a week or 12 hours in a day. And that, the Court concluded, was all the “overtime” the plaintiffs could get.

The confirmation of this important exemption – and the ability of an employer and union to define “overtime” for the purposes of Labor Code section 514 -- is a welcome development for employers who face claims like those brought by the plaintiffs. Barring California Supreme Court review and reversal, it would seem to shut down the argument to negate the exemption in future cases, including class actions. [PE]

### Workers’ Compensation Fraud

**A** Fresno business owner ordered to pay restitution in workers’ comp fraud. A farm labor contractor in Fresno was sentenced in Kings County Superior Court on December 4 on one felony count of insurance fraud and ordered to pay restitution of nearly \$4.2 million to the State Compensation Insurance Fund (SCIF), SeaBright Insurance, and the Employment Development Department (EDD).

**“. . . SENTENCED TO SERVE 6 YEARS IN PRISON FOR DEFRAUDING 2 INSURANCE CO.S . . .”**

The owner of ROC Harvesting, Richard Lopez Escamilla Jr., 47, was sentenced to serve six years in prison for defrauding two insurance companies by underreporting employee payroll and for unemployment insurance tax evasion.

In a joint investigation by the Kings County District Attorney’s Office and the EDD, investigators uncovered evidence that Escamilla misrepresented previous claim information to his insurer so he could illegally reduce his workers’ compensation premiums. Also, he was found to have underreported his employee payroll to further reduce his premium costs. [PE]

### Deduction Allowed by 9th Circuit

**I**n *Ward v. Costco Wholesale Corp.*, the Ninth Circuit Court of Appeals upheld a trial court’s decision that Costco Wholesale did not violate the Fair Labor Standards Act (FLSA) or the California Labor Code when it deducted the outstanding balances due on company-guaranteed credit cards from the final paycheck of each discharged employee.

The lead plaintiff in the collective action, Carrie Ward, worked for

Costco from 2003 to May 2006. While still employed by Costco, Ward applied for a company-guaranteed credit card. At the time of her discharge from Costco, she earned \$13.37 per hour and owed \$1,139 on her card. Costco deducted the \$1,139 balance from her final paycheck.

Ward and 18 other similarly situated former employees sued Costco, alleging violations of the FLSA and the California Labor Code. Costco claimed that each employee who applied for a company-guaranteed credit card had signed an application agreeing that any outstanding balance on the credit card could be deducted from his or her final paycheck.

As to the FLSA claim, the Ninth Circuit panel found that 1) the FLSA does not require employers to pay all accrued vacation and sick pay to employees upon termination; 2) the amount that Costco deducted under the credit card agreement did not exceed the amount of employees’ balance of vacation and sick pay; and 3) employees’ hourly wages exceeded minimum wage and overtime requirements.

The Ninth Circuit rejected the claim that the deductions were a violation of the California Labor Code. In arriving at this conclusion, the court found it relevant that each employee had agreed that any remaining balance on the credit card would be deducted from the employee’s “final paycheck upon separation of employment with Costco.” The court noted that because “no earned, unpaid wages remain[ed] outstanding upon termination,” Costco did not violate the Labor Code. The court further noted that this conclusion is based on the fact that the employees had elected to receive some of their compensation in the form of credit card balances rather than in cash.

The *Ward v. Costco Wholesale Corp.* case appears to be a very narrow decision. This is because the guaranteed nature of the credit cards required the employer to pay a portion of the employees’ wages to a third party as specifically authorized by the employees. Employers should be cautious in applying this unpublished holding to deductions from the final wage payments to employees in any circumstances other than those addressed in the decision. [PE]

### NLRB Revives Quickie Election Rule

**T**he National Labor Relations Board has just revived a sweeping proposed rule that would streamline and speed union-organizing elections at private-sector companies, positioning the federal agency for a fight with business groups that had opposed the failed measure in 2011.

The NLRB said the proposal is aimed at modernizing the election process, increasing transparency, becoming more efficient and reducing unnecessary litigation and delay. The rule would usher in some of the biggest procedural changes for union-organizing elections in decades, and would mark a victory for unions that often complain it takes too long to schedule a vote.

The changes would delay employers’ ability to complete legal challenges that can drag out the process of voting to unionize. Unions contend this would eliminate employer litigation used to stall the election process, but business groups say it would limit employers’ ability to launch timely challenges and counter union-organizing campaigns.

The changes would also require employers to provide the union with email addresses of employees who would be eligible to vote, and would allow for electronic filing of election materials—two hot-button issues that business representatives have strongly opposed. [PE]



## Human Resources Question with Candice Weaver

### THE MONTH'S BEST QUESTION

#### How Long an Introductory Period?

**Q:** "California law now sets a 60 day maximum before employees get health benefits. What should be the Introductory Period, 60 or 90 days?"

**A:** Many employers have a 90-day introductory period before employees are considered Regular Employees and start to enjoy fringe benefits. During that time, the employer and the employee are supposed to evaluate each other and determine if they're each satisfied with the employment relationship.

If the employee stays, they often get more benefits, including health care coverage, and vacation and/or paid holidays. If either is unhappy, the employment terminates. There has always been some sort of prize for making it through the 90-day introductory period.

As many employers have realized, employers can no longer wait 90 days to provide healthcare in California. That is because California has a "special" version of the Affordable Care Act where the maximum eligibility waiting period after date of hire is 60 days, not 90. Of course things are always different in California!

So how does that impact the introductory period? In reality, it just confuses it.

You can still have a 90-day introductory period, but you have to give healthcare benefits after no more than 60 days. In fact, because health benefits must be in place on the 60th day of employment, many employers are starting benefits at the first day of the month following 30 days of employment.

So getting benefits is no longer a prize to employees who pass an introductory period. Sure you can give health care benefits at one date, and hold off on accruing paid vacation or getting paid holidays until after the introductory period, but that isn't as much of a prize as it used to be. Plus, terminating someone with healthcare benefits is more costly and administratively burdensome than terminating someone without them.

Another option is to change your introductory period to 60 days to maintain the synchronization of the two.

With either option, the practical impact is that California employers should implement steps to evaluate their new hires more quickly, preferably within the first 30 days, rather than waiting a full 60 or 90 days.

Remember that firing someone during the introductory period does not mean you can skip documenting performance problems. In fact, some documentation of your objective reasons for termination is always advisable.

The best practice is to hire carefully, and if someone isn't working out, the best strategy is to document it early and move them out quickly. [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 23<sup>rd</sup>, 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 2014 Training dates: 7-23-14, 10-22-14

**Dinner for 2 at the *Vintage Press!***  
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### NO-COST EMPLOYMENT SEMINARS

Pacific Employers hosts 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.*

#### 2014 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 20<sup>th</sup>, 2014, 10 - 11:30am**

◆ **Safety Programs - Understanding Cal/OSHA's Written Safety Program.** Reviewing the IIPP or SB 198 requirements for your business.  
**Thursday, April 17<sup>th</sup>, 2014, 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 15<sup>th</sup>, 2014, 10 - 11:30am**

◆ **Wage & Hour and Exempt Status - Overtime, wage considerations and exemptions.**  
**Thursday, June 19<sup>th</sup>, 2014, 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 17<sup>th</sup>, 2014, 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 18<sup>th</sup>, 2014, 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 16<sup>th</sup>, 2014, 10 - 11:30am**

◆ **Discipline & Termination - The steps to take before termination. Managing a progressive correction, punishment and termination program.**  
**Thursday, November 20<sup>th</sup>, 2014, 10 - 11:30am**

There is No Seminar in December

Minimum Wage Poster Enclosed!

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### \$700,000 IN ATTORNEYS' FEES

Following a trial on an employee's discrimination claims, the jury awarded her only \$27,280 in damages. Both sides considered that a victory, so they each sought to recover attorneys' fees as a successful party.

But the court rejected the employer's claim for fees and instead awarded the employee her attorneys' fees — more than 25 times what the jury awarded her in damages!

Because the amount of the attorneys' rates and their number of hours expended were reasonable, the U.S. 9th Circuit Court of Appeal (whose rulings apply to all California employers) upheld the award. [PE]

### PENSION BENEFITS RESTORED AFTER INVESTIGATION

A U.S. Department of Labor (DOL) investigation of a California trucking company has resulted in the restoration of \$1,979,779 in 401(k) pension benefits to 515 drivers working on U.S. Postal Service contracts.

Lange Trucking Inc. as well as its president and other officers have been debarred from eligibility for further service contracts with any U.S. government agency for three years because of a failure to pay drivers required fringe benefits. The DOL's San Francisco Wage and Hour Division district office found that the company failed to fully fund the drivers' 401(k) plan, resulting in violations of the McNamara-O'Hara Service Contract Act.

Lange Trucking paid \$500,000 of the unpaid benefits. Hoovestol Inc., based in Eagan, Minnesota, acquired the company after the violations and voluntarily agreed to fund the remaining \$1.48 million in benefits. [PE]

### Unions Blame Republicans for Deportations

The AFL-CIO launches immigration ad campaign. The AFL-CIO in November released a television advertising campaign criticizing Republican efforts against comprehensive immigration reform.

The ads were to run in Spanish and target districts with large Latino constituencies in Bakersfield, California; Denver, Colorado; Atlanta, Georgia; and Orlando, Florida.

The ads also were to be broadcast in English in the Washington, D.C., metropolitan area. In addition to the ads, the labor organization planned to launch in-district mobilizations to increase pressure on House Republicans to support immigration reform.

"Every day, over 1,000 people are deported while House Republicans refuse to act on immigration reform with a roadmap to citizenship and workers' rights," AFL-CIO President Richard Trumka said. "We won't stop until the deportation crisis ends and aspiring Americans have the roadmap to citizenship they deserve." [PE]

### E-Verify Security Change Announced

The U.S. Citizenship and Immigration Services (USCIS) has announced a change in the E-Verify program aimed at combating identity fraud by identifying and deterring fraudulent use of Social Security numbers (SSNs) for employment eligibility verification.

USCIS offers an example of an employer entering information into E-Verify that appears valid—such as a matching name, date of birth, and SSN—but was in fact stolen, borrowed, or purchased from another individual. The new safeguard enables USCIS to lock an SSN that appears to have been misused, protecting it from further potential misuse in E-Verify.

If someone tries to use a locked SSN, E-Verify will generate a "Tentative Nonconfirmation," and the employee will have the opportunity to contest the finding at a local Social Security Administration (SSA) field office. [PE]