Pacific Employers

Management Advisor

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March 2015

What's News!

Bankruptcy Code Preempts California State Pension Laws!

In a February 2015 opinion, the bankruptcy judge presiding over Stockton, California's Chapter 9 municipal bankruptcy case approved Stockton's bankruptcy plan of adjustment saying that broke California cities can slice pensions.

Judge Christopher Klein rejected the pension fund's argument that California cities could not reduce pension benefits even in bankruptcy. The decision could dramatically change the way pensions are handled in future bankruptcy proceedings, even though the judge upheld the city's workout plan, which leaves existing pensions untouched while "impairing" creditors.

The judge was clear: When California cities go bankrupt, pensions can be cut. After Klein made that point in his verbal ruling in October, CalPERS shot back in a statement: "The ruling is not legally binding on any of the parties … or as precedent in any other bankruptcy proceeding …." Now it seems legally binding and precedential.

According to Klein, it is doubtful CalPERS, which administers municipal pension plans but doesn't guarantee any payouts, even has the authority to get involved in these proceedings. As the judge noted, CalPERS doesn't face much risk of loss in a bankruptcy. The agreement is between Stockton taxpayers and current and future retirees.

"Although … it is doubtful that CalPERS even has standing to defend the city pensions from modification, CalPERS has bullied its way about in this case with an iron fist insisting that it and the municipal pensions it services are inviolable," Klein explained. "The bully may have an iron fist, but it also turns out to have a glass jaw." The judge termed as "constitutionally infirm" CalPERS' argument that California law trumps the federal bankruptcy code.

CalPERS largely is governed by public employees, retirees, union members, and union-allied politicians — so it has taken a lead role in protecting pensions at any cost, even if it means higher costs to taxpayers and reduced quality of municipal services.

The most fascinating part of the ruling details one specific way CalPERS bullied Stockton officials. For instance, municipalities can switch to another administrator (or create their own system), but CalPERS makes it difficult for anyone to leave. The judge found it "has a policy of, by overt and passive aggression, resisting attempts to make such shifts."

The pension fund maintains a termination pool. When, say, a special district shuts down, CalPERS shifts its accumulated contributions to an investment fund with a much lower yield than the general fund — around 3 percent, rather than its typical 7.5 percent expected rate of return. In public pension funds the size of the unfunded liabilities, or debt to pay pension promises, is determined by the predicted rate of return. Higher returns obviously mean lower debt.

When Stockton went into bankruptcy and mulled cutting its pension obligations, CalPERS threatened to place the city in that termination pool — something the judge called a "poison pill" that would have **increased the city's debt by $1.6 billion,** instead of working with Stockton on a plan to help it reduce benefits and stay solvent. [PE]

3 Day Sick Leave Policy Enclosed!

President's Report
~Dave Miller~

Front Load Sick Pay

One of the big things we found in talking to our members regarding the implementation of California's new 3 Day Sick Leave law, trying to track one hour's credit for every 30 hours worked is going to be a royal pain.

In order to help you implement a program that skips the accrual method (1 hour for every 30 hours worked) for accumulating and reporting sick pay, we are suggesting a Front Load Sick Pay Plan.

As an insert in this month's Newsletter, we are including a Front Loaded Sick Leave Policy that allows you to pre-load the year's sick pay allocation at the beginning of the year. As long as you initially start on July 1, 2015, your pre-load date after that can be the employee's anniversary year, the calendar year or on July 1 of each year thereafter.

You may contact our staff as we can also help you with other variations on the same theme such as integrating your sick pay program to your PTO or Vacation Program. [PE]

Policies & Handbook Seminar

The Tulare Chamber of Commerce has requested we bring our Employee Policies & Handbook Seminar to their members at 10:00 am on Tuesday March 10th at the Tulare Chamber, 220 E. Tulare Ave, Tulare, CA 93274. RSVP the Chamber at (559) 686-1547.

The seminar on **Employment Policies And Handbooks** will give us an opportunity to help employers consider language for their policies and handbooks to make the necessary changes before the July 1st deadline to have 3 Day Sick Leave in place.

Tulare Chamber and **Pacific Employers**, will jointly host a state mandated **Supervisors' Sexual Harassment Prevention Training Seminar & Workshop** with a continental breakfast on March 17th, registration at 7:30am Seminar 8:00 to 10:00am, at the Tulare Chamber 220 East Tulare Avenue, Tulare. RSVP the Chamber at (559) 686-1547. [PE]

"We cannot solve our problems with the same thinking we used when we created them."- Albert Einstein

Recent Developments

Court Grants Review of IC Case

The California Supreme Court granted the employer's petition for review in *Dynamex v. Superior Court,* an independent contractor misclassification case in which the Court of Appeal held that the test for independent contractor versus employee status depends on whether the employee is alleging a violation of wage order provision or not.

. . . HOW ANY WORKER WOULD NOT QUALIFY AS AN "EMPLOYEE".

If alleging a violation of a wage order (e.g. failure to pay required overtime, failure to reimburse expenses specified in the applicable wage order), then the definitions of "employ" and "employer" in the wage order apply to determine whether a worker is an "employee" or an independent contractor. Of course, the wage orders generally define these terms extremely broadly to include anyone "suffered or permitted to work." Under that definition, it is difficult to conceive how any worker would not qualify as an "employee" rather than an independent contractor. Application of these definitions also makes it much easier to obtain class certification in a case challenging misclassification of a group of workers.

The *Dynamex* decision is contrary to the well-established multi-factor framework courts traditionally have used to analyze employee versus independent contractor status. That test, known as the Borello test, focuses primarily on the extent to which the employer has a right to control the details of the work. It also considers factors, including but not limited to whether the employer or the worker pays for tools and equipment, whether the worker has a right to hire others to assist with the work, the length of the worker's service, whether the work is unique or is part of the employer's regular course of business, and whether the worker performs work for other entities as well or is restricted to working only for the employer. This multi-factor test provides for a fairer assessment than the wage order definitions and in many cases makes class certification inappropriate because application of the factors varies from worker to worker.

Employers with independent contractors will want to monitor this case as it develops before the California Supreme Court. [PE]

Iskanian v. CLS Transportation Now Law

Last summer, the California Supreme Court ruled in *Iskanian v. CLS Transportation Los Angeles, LLC* that the Federal Arbitration Act (FAA) preempted California's policy against enforcement of class action waivers in arbitration agreements.

"U.S. SUPREME COURT REFUSES TO HEAR APPEAL."

It was a victory for California employers, because it meant that class action waivers in employment arbitration agreements were generally enforceable. The victory, however, was only partial; in the same case, the California Supreme Court ruled that a certain kind of class action claim – namely, representative collective action claims brought pursuant to California's Private Attorneys General Act of 2004 (PAGA) – could not be waived in arbitration agreements.

CLS Transportation appealed the PAGA arbitration waiver issue to the U.S. Supreme Court, which announced that it would not hear the case. By denying *CLS Transportation's* petition for review, the California Supreme Court's *Iskanian* ruling remains in effect, and it is binding on California state courts and, by extension, on California employers.

The split between state and federal courts in California means that, for the time being, the enforceability of representative class action waivers in employment arbitration agreements will depend in large part on whether a state or federal court is hearing the case. In the short term, we may see an uptick in the number of representative class action claims brought under PAGA, as well as increased efforts by employers to transfer PAGA cases filed in state courts to federal courts, which are viewed as more employer-friendly venues. In the longer term, conflicting decisions between California state and federal courts make it likely that the question will eventually make its way again to the U.S. Supreme Court for review. [PE]

Second Meal Period Waivers Invalid For Health Care Workers When Working More Than 12 Hours

In *Jazmina Gerard v. Orange Coast Memorial Medical Center,* the California Court of Appeal held that the wage orders health care companies have been following for years were wrong and contrary to the California Labor Code.

"THE COURT. . . DECLARED SECTION 11(D) OF WO NO. 5 PARTIALLY INVALID."

Health care workers sued their hospital employer for alleged Labor Code violations and related claims. Their primary contention was that the hospital's policy illegally let health care employees waive their second meal periods on shifts longer than 12 hours.

Labor Code section 512(a) requires two meal periods for shifts longer than 12 hours. On the other hand, Industrial Welfare Commission (IWC) Wage Order No. 5 authorizes employees in the health care industry to waive one of those two required meal periods on shifts longer than 8 hours. Thus, pursuant to Wage Order No.5 and meal period waivers, Plaintiffs all signed second meal period waivers and occasionally worked shifts longer than 12 hours without being provided a second meal period.

The principal issue was whether the IWC order was valid. The Court concluded that the IWC exceeded its authority and declared section 11(D) of Wage Order No. 5 partially invalid to the extent it authorizes health care workers to waive their second meal periods on shifts longer than 12 hours because it was in direct conflict with Labor Code section 512(a).

Employers in the health care industry should review their meal and rest period policies and ensure they are compliant with California statutes and court decisions. [PE]

Sexual Harassment & Abusive Conduct Training

Visalia Chamber of Commerce and Pacific Employers, will jointly host a state mandated Supervisors' Sexual Harassment & Abusive Conduct 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
PE & Chamber Members $35 - Non-members $50
Certificate – Forms – Guides – Full Breakfast
Future 2015 Training dates: 7-22-15, 10-21-15

Human Resources Question with Candice Weaver

The Month's Best Question

"Healthy Families Act"

Q: "When does the new 3 day sick leave law go into effect? And if we already have some kind of sick leave, what do we have to do to be compliant?"

A: California's new paid sick leave law goes into effect this July. Under the Healthy Workplaces, Healthy Families Act of 2014, effective July 1, 2015, all California employers (both public AND private) will be required to provide paid sick leave to their employees.

All Employees are eligible, not just full-time employees, but everyone in the company — full-time, part-time, exempt, nonexempt, and temporary employees, as long as they've worked for you 30 days or more. Only very specific, very limited exemptions exist.

Naturally, the new law results in more requirements including the following:

- Keeping records of accrual and usage of paid sick leave and certain record retention rules will apply;
- Changing pay stubs — the employee now needs to be able to see the record of accrued and paid sick leave for each pay period; and
- One of the most controversial demands is that the State now says that employers must include paid sick leave information on your organization's Wage Theft Prevention Act Notice— and that this will need to be reissued to all employees.

For more information or assistance on revising existing policy to comply with the new requirements, contact our office. [PE]

Seminar Topic Talk with Dawn

Workplace Discrimination & Harassment Seminar

Equal Employment Fundamentals - Harassment & Discrimination in the Workplace - The seven (7) requirements that must be met by all employers regarding waivers for certain "Protected Classes."

Learn complainent's burden to prove age discrimination. Be informed with a review of the requirements and standards at Pacific Employers' free **Equal Employment Fundamentals** Seminar on Thursday, March 19th from 10-11:30am at the Tulare-Kings Builders Exchange (1223 S. Lover's Lane in Visalia).

Dave Miller and **Candice Weaver** will be our presenters. Please call Pacific Employers at 733-4256 to reserve your spot today! [PE]

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.

2015 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, 2015, 10 - 11:30am

♦ **Safety Programs -** Understanding Cal/OSHA's Written Safety Program. Reviewing the IIPP or SB 198 requirements for your business.
Thursday, April 16th, 2015, 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 21st, 2015, 10 - 11:30am

♦ **Wage & Hour and Exempt Status -** Overtime, wage considerations and exemptions.
Thursday, June 18th, 2015, 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 16th, 2015, 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 17th, 2015, 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 15th, 2015, 10 - 11:30am

♦ **Discipline & Termination -** The steps to take before termination. Managing a progressive correction, punishment and termination program.
Thursday, November 19th, 2015, 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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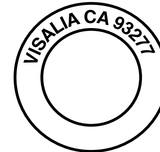

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3 Day Sick Leave Policy Enclosed!

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EEOC Releases 2014 Enforcement and Litigation Data

The U.S. Equal Employment Opportunity Commission (EEOC) has released a comprehensive set of fiscal year 2014 private sector data tables providing detailed breakdowns for the 88,778 charges of workplace discrimination the agency received.

The number of charges filed decreased compared with recent fiscal years. The percentage of charges alleging retaliation reached its highest amount ever: 42.8 percent. The percentage of charges alleging race discrimination, the second most common allegation, remained steady at approximately 35 percent, followed by sex discrimination at 29.3 percent and disability discrimination at 28.6 percent. In fiscal year 2014, the EEOC obtained $296.1 million in total monetary relief through its enforcement program prior to the filing of litigation.

The number of lawsuits on the merits filed by the EEOC's Office of General Counsel throughout the nation was 133, up slightly from the previous two fiscal years. A lawsuit on the merits involves an allegation of discrimination, compared with procedural lawsuits, which are filed mostly to enforce subpoenas or for preliminary relief. Monetary relief from cases litigated, including settlements, totaled $22.5 million. [PE]

Sexual Harassment Claims - 30% of EEOC Charges

The Equal Employment Opportunity Commission (EEOC) has released its Fiscal Year 2014 Enforcement and Litigation Data, which advises that sex discrimination (which includes pregnancy and sexual harassment) constituted almost 30% of the charges filed with the EEOC in 2014. Sexual harassment is a form of sex discrimination that violates Title VII of the Civil Rights Act of 1964. Title VII applies to employers with 15 or more employees, including state and local governments.

It also applies to employment agencies and to labor organizations, as well as to the federal government. In California, sexual harassment is prohibited by the Fair Employment and Housing Act (FEHA), which applies to employers with 5 or more employees. Because sexual harassment claims can result in significant liability for employers, it is important to implement effective measures to prevent sexual harassment in the workplace including:

- Implement a strong anti-harassment policy;
- Train each employee on its contents;
- Train managers and supervisors on its contents;
- Vigorously follow and enforce it.

California employers must also ensure that managers and supervisors receive the required AB 1825 sexual harassment training. [PE]

No Proof of Electronic Signature

A new case from the California Court of Appeal, Fourth Appellate District, Division Two, *Ruiz v. Moss Bros. Auto Group, Inc.*, addresses an area of interest for many employers – electronic signatures on arbitration agreements. Employers must build safeguards into such systems to be able to prove the employee electronically signed the document.

In the *Ruiz* case, an employer filed a petition to compel arbitration of the employment-related claims. The trial court denied the petition on the ground that the employer failed to meet its burden of proving the parties had an agreement to arbitrate the controversy. The employer could not establish to the court's satisfaction that the employee signed the agreement. (Code Civ. Proc., § 1281.2.) The Court of Appeal affirmed the lower court's ruling, on the basis that the employer "did not present sufficient evidence to support a finding that Ruiz electronically signed the 2011 agreement."

As technology continues to advance, and as employers continue to move towards paperless systems, it will be important for employers to understand the issues which may arise from these changes. Being able to understand (and explain) how the technology works is as important as understanding how to use it. [PE]

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