Pacific Employers

MANAGEMENT ADVISOR

Celebrating 44 Years!

May 2008

TOP OF THE NEWS

YOU HAVE BEEN WARNED!

The Labor Department's Bureau of Labor Statistics recently reported more than 200,000 job losses so far in 2008. If they haven't already, many employers may soon find themselves having to make decisions about job cuts in the coming months. These decisions can expose employers to various liabilities. Focusing solely on finances and operations to the exclusion of employment laws can have a significant impact. By way of example, a week after filing for bankruptcy protection, ATA Airlines Inc. was hit with a class action brought by an employee who claimed ATA failed to give workers proper notice under the Worker Adjustment and Retraining Notification Act (WARN).

WARN is a federal law that became effective in 1989. The law was designed to protect workers, their families and communities by requiring employers to provide 60 days advanced notice of covered plant closings and covered mass layoffs. The notice must be provided to either affected workers or their representative, such as a labor union, to the State dislocated worker unit and to the appropriate unit of local government. In general, an employer is covered by WARN if it has 100 or more employees. California law requires notice for employers with 75 or more employees

"... PROVIDE 60 DAYS ADVANCED NOTICE ..."

An employer that fails to give proper notice is liable to each aggrieved employee for an amount including back pay and benefits for the period of the violation, up to 60 days. The employer may also be subject to a civil penalty up to $500 for each day of a violation.

Reductions in force may also affect a disproportionate number of older workers. This happens most often when the company makes a reduction in the middle manager positions which are the positions traditionally held by long term employees. That violates California Fair Employment and Housing laws.

Also, when making job cuts, an employer may decide to offer an affected employee severance money or benefits in exchange for the employee agreeing to give up any claims they may have against the employer, including age discrimination claims. In these situations, employers must be careful in drafting the paperwork waiving these claims in order to ensure compliance with the Older Workers Benefits Protection Act (OWBPA). [PE]

Military Leave Poster Enclosed!

President's Report

~Dave Miller~

A Sincere Thanks!

Recently, Pacific Employers had an opportunity to do something that few small businesses do. We celebrated our 44th Anniversary as well as my 40th year with an Open House. It was wall to wall people as we did it with flair and a tremendous collection of our closest friends. We wish to sincerely thank all who attended or sent congratulations.

We also had the good fortune to have had in attendance the founder of the organization, Stan Miller of S.L. Miller, Inc., and his lovely wife Helen who remarked that it doesn't take long to use up 44 years when you keep busy.

"... WALL TO WALL PEOPLE..."

Pacific Employers' founding organization was begun with the goal in mind that persists to this day; ***"To provide a resource for the employer to obtain and maintain control of their business."*** In the early days of the organization, employers were most concerned about the attempt by unions to take control of the employer's relationship with employees. Our staff was dedicated to help secure the employer's goal in interference free management.

Over the years, as unions became less of a problem, the "Big Mother Government" syndrome caused the federal, state and local governments to become more intrusive with rules on virtually every phase of employment, with a government administrative agency to provide a paid advocate to represent the employee.

Pacific Employers met the challenge with an unlimited, over the phone, labor & safety consulting service that allows an employer to know how to ***".. maintain control over their business"*** at a very reasonable cost. With a subscribing membership of over 650 employers, Pacific Employers addresses that challenge daily.

Many clients were able to visit, enjoy varied food from a large number of great eating establishments, drink champagne and other liquid refreshments, and enjoy the extensive redecorating of our Downtown Visalia office. Friends of over 40 years got a chance to sit and talk about the "good old days" and discuss, with some concern, the future freedom of employers to operate their businesses. All were able to leave the party with the knowledge that Pacific Employers has plans to continue to be their source for HR resources for many years to come. [PE]

The race is not always to the swift, but to those who keep on running.

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 **July 23rd, 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

Recent Developments

MILITARY SPOUSE LEAVE POSTER

The Department of Labor has released a new required poster regarding two recently created types of military family leave. On January 28, 2008, President Bush signed into law the National Defense Authorization Act for FY 2008 ("NDAA").

The NDAA amends the Family and Medical Leave Act (the "FMLA") by creating two new categories of military family leave. Section 585(a) of the NDAA provides for a 12 week "qualifying exigency" leave and a 26 week military caregiver leave.

A "qualifying exigency" leave entitles an employee to take up to 12 weeks of leave for a "qualifying exigency." This "qualifying exigency" must be due to a spouse, son, daughter, or parent being on active duty, or having been notified of an impending call to active duty, in support of a contingency operation. A "contingency operation" is a military operation in which 1) " members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force," or that 2) "results in the call or order to, or retention on, active duty of members of the uniformed services."

The new poster is included in this issue of the Pacific Employers' *Management Advantage.* [PE]

$1 Versus 77 Cents

Recently the United States celebrated the 12th anniversary of Equal Pay Day, the occasion set aside to reflect on the 77 cents a woman earns for every dollar a man makes.

In a Bloomber.com article the story went on to state; *"Startling as that number may be, it is an improvement from the 59 cents on the dollar that women made back in 1963, when the Equal Pay Act was signed.*

"At a rate of a half-cent improvement a year, it will be almost half a century before a working woman gets a buck for every dollar a working man gets. Grandmas everywhere can sleep soundly knowing their toddler granddaughters might have a shot at earning as much as their grandsons.

"The sorry state of affairs applies whether you are highly educated or never made it out of high school. College-educated women who work full time earn $50,000 a year on average, compared with $66,000 for college-educated male workers, according to the American Association of University Women." [PE]

Court Holds Accommodation Reasonable

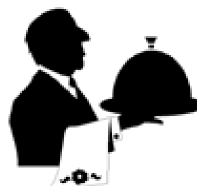
In ***EEOC v. Firestone Fibers & Textiles Co.***, the Fourth Circuit found an employer's accommodations of a lab employee's religious needs to be reasonable where the employer provided several ways for the employee not to work during his religious holidays and weekly Sabbath.

In this Title VII action, the employee alleged Firestone Fibers & Textiles discriminated against him based on his religion by refusing to relax its attendance policies to allow him to be absent for religious holidays and observances, including a weekly Sabbath beginning Friday at sundown and ending Saturday at sundown.

The EEOC argued that an employer provides a reasonable accommodation only when it *"eliminate[s] the conflict between the religious practice and the work requirement." "Put another way,"* the court explained, the EEOC argues *"that Title VII requires an employer, absent undue hardship, to totally accommodate an employee's religious observances."* The court disagreed with such an interpretation - stating *"If Congress had wanted to require complete accommodation, the court continued, it could have done so by using the words "totally" or "completely" or by omitting "reasonably" altogether as a modifier of the term accommodate."*

The Fourth Circuit wrote: *"Through various mechanisms, each significant in their own right, Firestone sought to assist the employee. These accommodations included preexisting company policies provided to all employees in the union contract and specific accommodations tailored to the employee's particular situation [e.g., altering his shift on Fridays]."* The court concluded that these accommodations, even though they did not completely eliminate the conflict between his religion and Firestone's work requirements, "plainly" satisfied Title VII's reasonable accommodation requirements. Thus, the Fourth Circuit upheld the district court's decision to dismiss the suit. [PE]

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.

Military Leave Poster Enclosed!

Human Resources Question with Candice Weaver

The Month's Best Question

At-Will — At Risk?

Q: ***"Can our handbook rules that provide for progressive discipline or other job protections invalidate our claims that we have at-will employment?"***

A: It is not unusual for employees to claim that some procedural safeguards contained in an employee handbook provide the employee with guarentees of continued employment, thereby invalidating the "at-will" policy of many employers.

A recent appellate court decision reviewed an agreement providing for:

1) written notice of termination; and,

2) a termination review procedure.

The appellate court decision has confirmed that such an agreement does not alter the at-will nature of the employment relationship. Specifically, in *Bernard v. State Farm Mutual Automobile Insurance Co.* the court held that a claimant could not pursue his contract-based cause of action for wrongful termination because he had an at-will employment relationship with his employer that was terminable at any time.

In that case, the parties had entered into an agreement that contained the following language:

III.A. You or [employer] have the right to terminate this Agreement by written notice delivered to the other or mailed to the other's last known address.

III.B. In the event we [employer] terminate this Agreement, you are entitled upon request to review in accordance with the termination review procedures approved by the Board of Directors of the Companies, as amended from time to time.

The former employee argued that extrinsic evidence of the contract's meaning should be admitted because the language was ambiguous. However, the court held that the plain language of the agreement was not reasonably susceptible to an interpretation requiring good cause for termination, and instead interpreted the agreement as having created an at-will employment relationship. The court also held that the termination review procedure referenced in the agreement did not substantively alter the at-will nature of the relationship.

The *Bernard* decision esssentially confirms that employers may include carefully-drafted provisions for termination notice and review procedures in employment agreements without sacrificing the at-will nature of an employment relationship.

If you have any questions about how languge in employment agreements may alter your desired "at-will" status, please contact our staff directly or by email at *peinfo@pacificemployers.com* [PE]

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.

2008 Topic Schedule

♦ **Family Leave -** Federal & California Family Medical Leave, California's Pregnancy Leave, Disability Leave, Sick Leave, Workers' Compensation, etc.; What are the Pitfalls & How do you handle them?

Thursday, May 15th, 2008, 10am - 11:30am

♦ **Wage & Hour and Exempt Status -** Overtime, wage considerations and exemptions.

Thursday, June 19th, 2008, 10am - 11:30am

♦ **Hiring & Maintaining "At-Will" -** From the thought to hire to putting to work, we discuss maintaining procedures that protect you from the "For-Cause" Trap!

Thursday, July 17th, 2008, 10am - 11:30am

♦ **Record Keeping -** Forms, Posters, Signs, Handouts, Fliers - Just what paperwork, posters, flyers and handouts does an Employer need?

Thursday, September 18th, 2008, 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 16th, 2008, 10am - 11:30am

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

Thursday, November 20th, 2008, 10am - 1:30am

There is No Seminar in December

Want Breaking News by E-Mail?
Just send a note to
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Tell us you want the News by E-Mail!

Military Leave Poster Enclosed!

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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.

Harris Ranch Award Upheld!

A **federal appeals court has upheld a nearly $1 million** jury award to a farmworker who sued one of the state's largest farming operations for sexual harassment and retaliation.

Olivia Tamayo claims Harris Farms did not act promptly after she reported that she had been raped by her supervisor several times. She also alleges she was subjected to intimidation for reporting her ordeal.

A federal jury in Fresno reached its verdict after deliberating for less than six hours.

The 9th U.S. Circuit Court of Appeals rejected the company's argument that the court should reject the 2005 jury award because the judge allowed evidence that the jury should not have seen. [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

Whistleblower gets $500,000

A government worker in Kentucky will receive $500,000 to settle a whistleblower lawsuit claiming she was punished for helping authorities who investigated state hiring practices.

Sarah Missy McCray filed the suit in 2005 claiming she was a victim of retaliation because she cooperated with the investigation into the hiring practices of Gov. Ernie Fletcher's Republican administration.

The investigation ran from 2003 until the end of Fletcher's term last December.

The former governor was charged with several misdemeanors but reached a deal with the state attorney general in which he apologized and the charges were dismissed. [PE]

Central Valley businessman accused of stealing employees' pensions

Patrick Neal Young, 40, formerly of Oakdale, has been indicted on charges of looting the pensions of some of the employees of Plyco Foundation Vents Inc. of Waterford when he was the company's operating officer.

A Federal Grand Jury in Fresno accused Mr. Young of embezzling $710,389 from Plyco, using the money to buy a home in Oakdale, landscape his yard, buy automobiles, travel, including a trip to Europe, and for other personal expenses.

The charges include four counts of tax evasion for the years 2001 through 2004 and for embezzlement of the employees' pension plan accounts. [PE]

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