Pacific Employers
Management Advisor
Celebrating 45 Years!
May 2009

What's New!

Union Contracts Can Limit Bias Suits

Workers can't sue for age discrimination when the union representing them has agreed that any bias claims should go to arbitration rather than court, the U.S. Supreme Court ruled.

The justices, voting 5-4, ruled in favor of Temco Services Industries Inc. on a discrimination lawsuit by three men who were demoted from positions as night watchmen at a New York City office building. The suit invokes the U.S. Age Discrimination in Employment Act. (*14 Penn Plaza v. Pyett, 07-581)*

> Congress has chosen to allow arbitration of ADEA claims,"

"Congress has chosen to allow arbitration of ADEA claims," Justice Clarence Thomas wrote for the majority. "The judiciary must respect that choice."

The court's reasoning may also let unions and companies direct other types of discrimination suits into arbitration. One of the dissenting justices, John Paul Stevens, said the provisions in the ADEA are "not meaningfully distinguishable" from those in Title VII, the main federal statute targeting race and gender discrimination.

Thomas left open the possibility that an employee might be able to sue when a union refuses to press an arbitration grievance on the worker's behalf -- something the three workers say occurred in the Temco case. Thomas said that a "substantive waiver of federally protected civil rights will not be enforced."

That reasoning might limit the practical impact of the case, according to another dissenter, Justice David Souter. He said that in most cases "the union controls access to and presentation of employees' claims in arbitration."

Temco Workers

The three workers, all Temco employees, lost their positions as watchmen in 2003 when the building's owner started using licensed security guards provided by another company. The men were reassigned to positions as night porters and light-duty cleaners in the building.

The men sued Temco and the property owner, 14 Penn Plaza LLC. New York-based Temco is a building services and cleaning contractor.

The workers were covered under a collective bargaining agreement struck by the Service Employees International Union and the group that bargains on behalf of the New York real estate industry.

The workers' Supreme Court lawyer said the biggest impact of the decision might come in negotiations over collective bargaining agreements.

"It raises the stakes for what statutory claims are subject to arbitration," he said in an e-mail. The ruling "may end up having more of an effect in the negotiations over a CBA than in litigation over claims arising under the agreement."

Temco's lawyer, said the ruling "firmly enshrines in the law the important principle that collective bargaining arbitration agreements are every bit as valid and enforceable as those covering employment discrimination claims in the non-unionized workplace." [PE]

COBRA General Notice Enclosed!

President's Report
~Dave Miller~

U.S. To Target Employer!

Homeland Security Secretary Janet Napolitano will soon direct federal agents to emphasize targeting American employers for arrest and prosecution over the illegal laborers who sneak into the country to work for them, Department of Homeland Security officials said Monday.

The new rule is in keeping with comments that President Barack Obama made during last year's campaign, when he said past enforcement efforts have failed because they focused on illegal immigrants rather than the companies that hire them by the hundreds.

The changes come as a result of a broad review of all immigration and border security programs and policies that Napolitano launched in her first days in office. "She is focused on using our limited resources to the greatest effect, targeting criminal aliens and employers that flout our laws and deliberately cultivate an illegal workforce," an official said.

The Homeland Security officials emphasized that the department will not stop conducting sweeps of businesses while more structural changes to U.S. immigration law and policy are being contemplated.

The law governing employer enforcement requires proof that a business knowingly hired illegal workers. So without an effective way for employers to verify workers' status, it is very easy for that "knowingly" to be a big loophole.

Conservatives have warned that the administration will ease enforcement efforts against illegal workers, resulting in more of them coming into the country and competing for jobs held by American workers. Immigrant rights groups have complained that the lack of reform measures to date suggests the White House was backing down from campaign pledges to curb work-site enforcement efforts. Those concerns were ratcheted up dramatically when ICE agents swept into a manufacturing plant in Bellingham, Wash., in February and arrested dozens of people on suspicion that they were in the country illegally.

Napolitano stated, "In my view, we have to do workplace enforcement. It needs to be focused on employers who intentionally and knowingly exploit the illegal labor market." [PE]

The multitude of books is making us ignorant. - Voltaire (1694 - 1778)

Recent Developments

Employees to Get Stimulus Bonuses

As part of the new stimulus package, many workers will be seeing a little extra cash in their paychecks following the signing of the Stimulus Package — in the form of a reduced federal income tax withholding called the Making Work Pay Tax Credit. For employers, this means that payroll calculations need to be adjusted to ensure that the lowered withholding rate is applied to employees' paychecks.

"... an additional $10 to $15 per week in their paychecks ..."

Employees are eligible to receive the 6.2% tax credit if they earn less than $75,000 for individuals or $150,000 for married couples. Low wage workers who earn too little to have federal income taxes withheld will not see an increase in their pay now, but will be able to claim the tax credit with their 2009 federal income tax returns. Of course, the exact amount credited to individual employees will vary depending on the number and type of deductions claimed. The Internal Revenue Service estimates, however, that employees will see an additional $10 to $15 per week in their paychecks. [PE]

California Bill Would Ease Farm Union Sign-Ups

California's farmworker unions have for years sought new rules making it easier for workers to organize. But the unions are stuck on the sidelines as corporations and organized labor duel over a union-backed bill recently introduced in Congress.

"Democrats have made the legislation a top priority'..."

The legislation, dubbed the Employee Free Choice Act, would amend federal law to give workers the option of joining unions by signing cards, rather than casting secret ballots.

California farmworkers are covered by state law, however, meaning the change would not affect them.

So the United Farm Workers union and other farm unions are once again looking to Sacramento, where Senate President Pro Tem Darrell Steinberg has introduced a state version of the federal bill aimed at agricultural unions.

Senate Bill 789 would give workers the option of bypassing the secret-ballot elections. Instead, they could sign representation cards. If a majority signed up, the state would certify the new bargaining unit.

Gov. Arnold Schwarzenegger has vetoed similar "card check" bills the last two years, pleasing farm leaders who fiercely lobbied against the proposals.

Steinberg, D-Sacramento, hopes the federal debate will bring new momentum to the state effort.

The bill is "a priority for me," he said. "I believe that the farmworkers of California should have the right to organize without so many roadblocks in the way."

Labor's argument for the state and federal bills is the same – that the elections process allows time for company officials to intimidate workers against joining unions.

In farmworker elections, the state Agricultural Labor Relations Board must hold a secret-ballot election within seven days after a majority of workers sign a petition. The UFW alleges that in the interim, company officials threaten retaliation for those who vote yes, including firing or blacklisting pro-union workers.

Business leaders say the secret-ballot process works just fine and allows employees to file complaints alleging intimidation.

"We're not going to deny that intimidation could occur," said Barry Bedwell, president of the Fresno-based Grape and Tree Fruit League. "There are laws, though, to address that – and that's what we should be looking at."

The federal bill does not include farmworkers because they were left out of the 1935 National Labor Relations Act. Decades later, California farmworkers gained protections with the passage of the state Agricultural Labor Relations Act in 1975, a crowning achievement of legendary organizer Cesar Chavez.

In the wake of the law, farm unions had great success securing union contracts. But organizers have been stung by losses in recent years. Now, the UFW is watching with envy as the federal "card-check" bill gains momentum.

"It was a grave injustice that farmworkers were excluded from the National Labor Relations Act back in the 1930s," said UFW President Arturo Rodríguez. "But we are committed to do everything possible to get farmworkers covered under employee free choice-type legislation here in California."

Others in the food industry – including workers at most packing houses – are covered under the federal law.

The Valley, home to thousands of hourly food industry workers, has a stake in both the national and state debate – and the lobbying on both sides of the issue is fierce.

Democrats have made the legislation a top priority, and President Barack Obama has endorsed it. Co-authors include Rep. George Miller from Martinez.

The Greater Fresno Area Chamber of Commerce on Friday presented more than 100 cards to Valley lawmakers from chamber members who oppose the federal bill.

The Grape and Tree Fruit League helped form a national coalition of farm industry groups called Agriculture for a Democratic Workplace. The group's aim is to lobby undecided members of Congress against the bill.

Farm leaders fear that the proposal would lead to more union workers at processing plants. In turn, workers would demand higher pay. And if the higher labor costs can't be passed along to consumers, the food makers might pay less for crops, farm leaders said.

"It goes back to the farmer, and the farmer is a price-taker, not a price-setter – and that's a problem," Bedwell said.

The U.S. Chamber of Commerce cites a study by economist Anne Layne-Farrar predicting 600,000 job losses across all industries if the card-check bill passes.

Business leaders scored a victory when Pennsylvania Sen. Arlen Specter said Tuesday that he will oppose a bill. The moderate Republican was considered a key swing vote.

But labor groups continue to make appeals to other lawmakers. [PE]

Reminder: New I-9 Forms Now in Effect

As of April 3rd, all employers must begin using the new U.S. Customs and Immigration Service (USCIS) I-9 forms to verify employee eligibility. The form issue date is 02/02/09 and has an expiration date of 06/30/09. [PE]

COBRA General Notice Enclosed!

Human Resources Question with Candice Weaver

The Month's Best Question

Arbitration Agreements

Q: ***"Can an employer rely on Arbitration Agreements signed as part of the hiring process?"***

A: Recent court decisions say yes.

In Roman v. Superior Court, Gabriela Roman, a former employee in Flo-Kem's accounts receivable department, brought suit against Flo-Kem for alleged violations of the Fair Employment and Housing Act, including disability discrimination, as well as a claim for wrongful termination in violation of public policy. Before beginning her employment, Roman had signed a short arbitration agreement that was attached to the last page of her employment application.

This arbitration agreement was a single paragraph clause which stated in pertinent part that "I agree, in the event I am hired by the company, that all disputes and claims that might arise out of my employment with the company will be submitted to binding arbitration." The clause also incorporated the rules of the American Arbitration Association ("AAA") in effect at the time.

Further, the arbitration clause was the last paragraph of the seven-page employment application and clearly marked with a separate heading. Roman had initialed next to the clause, signifying that she had read it, in addition to signing the application.

Roman argued that the arbitration clause was unenforceable. She claimed that the arbitration clause was part of the "take it or leave it" conditions of the employment application. While the Court acknowledged that many employees are without other employment options, it noted that the arbitration clause had been clearly marked and was not hidden in any way.

The Court also found that the "I agree" language of the arbitration clause did not mean that the agreement only applied to Roman. In stating that "all disputes and claims" were covered, the arbitration clause applied to both parties. Reading the arbitration clause as a whole indicated its intent to be binding on Roman and Flo-Kem.

The court ruled that the company was entitled to go to arbitration as the parties had agreed. [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 July 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

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.

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

♦ **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 or December

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

♦ **Discipline & Termination -** The steps to take before termination. Managing a progressive correction, punishment and termination program.
Thursday, Nov. 19th, 2009, 10am - 11:30am

Lemoore Chamber of Commerce

Employer Workshop presented
by Pacific Employers
"Employer Policies - Hiring "At-Will"
Thursday, May 14th 10-11:30 a.m.
Lemoore Depot, 300 E Street, Lemoore
Information & Reservations:
Lynda Lahodny - (559) 924-6401 or
ceo@lemoorechamberofcommerce.com

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Small Business of the Year

New COBRA Form Enclosed

The American Recovery and Reinvestment Act of 2009 (ARRA) provides for premium reductions and additional election opportunities for health benefits under the Consolidated Omnibus Budget Reconciliation Act of 1985, commonly called COBRA. We have provide the abreviated version, in this Newletter. However, you can find all the new model notices here:

http://www.dol.gov/ebsa/COBRAmodelnotice.html [PE]

E-Verify Rule Delayed Again

The federal government has announced a third delay in the implementation of the Federal Contractor E-Verify Rule. The new date for implementation of the rule is now June 30, 2009.

The rule, which requires use of E-Verify for all newly hired employees and current employees working on the contract, was originally due to take effect on January 15, 2009. It applies to all federal contractors for services and construction with contracts over $100,000 and a performance period over 120 days. [PE] [PE]

NLRB Ruling Expands 10-Day Notice Rule

The National Labor Relations Act's section 8(g) requires all labor organizations to give health care employers a minimum of 10 days' notice before they can engage in a "concerted refusal to work."

The National Labor Relations Board has held that the act of unit members refusing to work voluntary overtime is considered a "concerted refusal to work" and requires a 10-day notice under the NLRA. [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

"No-Hire" Provision Is Unenforceable

In VL Systems, Inc. v. Unisen, Inc., a California Court of Appeal held that a broad "no-hire" provision in a consulting contract was unenforceable as an impermissible restraint on trade.

"No-hire" clauses are common in the consulting industry (and other similar industries such as the temporary services industry) in which the consulting companies provide specialized labor to their clients. The reason for the "no-hire" provisions is that the consulting companies fear that the clients will hire their employees directly as employees and thereby eliminate the need for the consulting company.

VL Systems, a computer consulting company, had entered into a short term consulting contract with Star Trac. VL Systems included a provision that restricted Star Trac from hiring away VL Systems' consultants. The "no-hire" provision required Star Trac to pay liquidated damages to VL Systems if it hired any VL Systems' employee within one year of the consulting contract.

The "no-hire" provision was extremely broad and applied to all VL Systems' employees regardless of whether they worked on the Star Trac contract or even if they worked at VL Systems at the time of the Star Trac contract.

The Court found that the "no-hire" clause was unenforceable because it impermissibly restrained any VL Systems' employee. The Court rejected the argument that the "no hire" clause did not prevent them from seeking employment with Star Trac, it merely required Star Trac to pay liquidated damages. The Court took the practical view that companies would be unwilling to hire Mr. Rohnow if they had to pay liquidated damages to VL Systems in addition to his salary. Consequently, the "no-hire" clause restricted his ability to seek employment.

Companies in the consulting, temporary services, or other industries that wish to utilize "no-hire" clauses should consider this decision when drafting "no hire" provisions. [PE]