

### TOP OF THE NEWS

#### Non-Compete Employment Contracts are Impermissible!

The Second District Court of Appeal in Los Angeles recently issued a significant opinion, finding that noncompete agreements in California employment contracts are impermissible. The decision makes clear that such agreements are generally invalid and employees cannot be compelled to sign them as a condition of employment (*Edwards v. Arthur Andersen LLP*).

In so holding, the three-judge panel stated that such agreements violate California's public policy in favor of protecting employee mobility. The court went on to state that "noncompetition agreements burden a terminated employee with the task of guessing, at his or her peril, whether a court might find particular restrictions sufficiently narrow or overly broad." [PE]

#### You've Got Notice!

**R**adioShack Corp. notified about 400 workers by e-mail that they were being dismissed immediately as part of planned job cuts.

Employees at the Fort Worth headquarters got messages Tuesday morning saying: "The work force reduction notification is currently in progress. Unfortunately your position is one that has been eliminated."

Company officials had told employees in a series of meetings that layoff notices would be delivered electronically, spokeswoman Kay Jackson said. She said employees were invited to ask questions before Tuesday's notification on a company intranet site. [PE]

Wal-Mart created 70% of jobs from 1997 to 2004! From 1997 to 2004, the U.S. population grew 7.7 percent. If jobs in retailing had grown at the rate of the population, the country would have added 1.1 million retailing jobs during those seven years. The country however added just over that number - 670,000 new retail jobs. Out of those 670,000 jobs, Wal-Mart created 70 percent of them. The remaining new retail jobs - 190,000 in the nation over seven years amount to just 540 new retail jobs in each state, each year. While the number of Wal-Mart jobs grew 67 percent, the number of jobs in the rest of U.S. retail grew 1.3 percent. (Source: The Wal-Mart Effect)

## 2007 Attendance Form Enclosed!

### President's Report

~Dave Miller~

### 2007 Forms & Posters

#### Attendance Record



Enclosed in this edition of the *Management Advisor* is our new "2007 Attendance Record." Its purpose is to provide a way to keep track of an employee's annual attendance on a single sheet. A shorthand method for keeping track of absences, injuries, leaves of

absence, sick days, vacations, etc., will be included on the form. If you need additional copies, please contact our office.

#### "ALL-IN-1" POSTER FOR 2007!

**We are working on it now!** In your mailbox in December, you will find Pacific Employers' Annual Christmas Card, the year 2007 version of the Pacific Employers' "All-in-1" Poster which includes the required federal and state postings for most businesses. It will include the new state "Minimum Wage" posting in time for its January 1<sup>st</sup> increase to \$7.50 per hour!

Clients who have multiple locations will want to obtain additional copies of the "All-in-1" Poster for each site. Stop by or just give us a call at the office to obtain extra copies of the poster.

**Note:** You're not done when you get the "All-in-1" Poster

up. You still need to make sure you have the Industrial Welfare Commission's (IWC) order for your business posted. Contact our office or go to our Web site for information on the IWC orders for your business.

#### SPANISH "ALL-IN-1" POSTER!

Pacific Employers will soon have a revised "All-in-1" Poster in Spanish. While we are **not** making a general mailing of it, the poster will soon be available from our office.

#### Vacation Calendar

**A**NNUALLY PACIFIC EMPLOYERS prepares for its clients a Vacation Schedule Planner that provides them with the opportunity to visually and graphically display their employees' vacation choices. Enclosed in last month's edition of the *Management Advisor* was the 2007 version of the Vacation Calendar Form. If you need additional copies, please contact our office or just stop by!

**NOTE:** As is our practice, there will be no December 2006 edition of the *Management Advisor*. [PE]

All bad precedents begin as justifiable measures.

— Julius Caesar

## Your Tax \$\$\$'s At Work!

*This recent article from visaliatimesdelta.com outlines how a local dairyman was coerced into settling a lawsuit for nearly a quarter of a million dollars for what most of us would consider bookkeeping or minor payroll errors.*

TULARE — A Tulare dairyman has agreed to pay \$230,000 to settle a lawsuit alleging violations of labor, health and safety laws.

Joaquin Toledo Jr. paid the amount to settle the lawsuit brought on behalf of about 70 current and former employees who worked at the dairy since June 2001, said the California Rural Legal Assistance Inc. in Fresno, which represented the employees.

Plaintiffs in the suit, filed in Tulare County Superior Court in June, were former Toledo employees Alfredo Medrano, Ivan Gonzalez and Hector Alonso Lopez.

They claimed the dairy owed employees overtime wages, compensation for rest and meal periods not received, penalties for inadequate wage statements and reimbursement for protective equipment purchased by employees.

"I am glad that myself and other people who work at Toledo Dairy will get some of the money owed to us for our hard work," Medrano said. "It was very difficult working over 12 hours per day, eight days in a row without being allowed to take any breaks during the workday and without being paid any overtime."

In a statement, Toledo denied the allegations but acknowledged an agreement was reached "in an effort to avoid any further litigation or harm to either party."

According to a settlement agreement dated Aug. 22, the three plaintiffs will receive a total of \$86,860 — Medrano \$37,802, Gonzalez \$35,179 and Lopez \$13,179. The rest of the money will be for other dairy employees and attorneys' fees.

A claim process has been started for the rest of the employees.

Toledo's attorney, Joseph Soares, said having to pay the settlement has an effect on Toledo.

"It has a profound effect on the operation of his business," he said. "It also affects him emotionally."

Soares said Toledo had operated his 1,100-head dairy for more than 40 years.

"Mr. Toledo is an elderly gentleman who has always treated his employees with dignity and has paid fair and reasonable compensation to all of the employees," Soares said in a statement. "In addition, Mr. Toledo has always tried to express his appreciation for all their hard work."

According to court documents, Toledo:

Provided Medrano with inadequate and incomplete wage statements that do not show the total hours worked or the hourly rate of pay

Provided Gonzalez with incomplete wage statements that do not show the number of hours worked or any deductions other than \$2 per wage statement for federal withholdings of taxes.

The documents said Medrano and Gonzalez worked eight days a week followed by two days of rest, with each daily shift lasting 9 to 10 hours, with no meal or rest periods.

"Before we looked for legal help, we tried to talk to our supervisors about the problems at the dairy, but they wouldn't change anything and instead told us to go to work for the government if we wanted to have rights," Medrano said. "This lawsuit was the only way they would listen."

In denying the allegation, Soares said Toledo was "always" following labor laws.

As part of the settlement, Toledo was also ordered to follow labor laws.

Soares said his client is already doing that.

California Rural Legal Assistance attorney Alegria De La Cruz said she's hopeful the settlement will improve the way dairy employers keep labor records.

"I hope one result of this settlement is that other dairy employers will realize the importance of making sure they're following basic labor laws," she said. [PE]

## Court Decisions

### Courier Drivers not Independent Contractors

**T**he Sixth District Court of Appeal of California recently ruled that a courier business cannot classify its drivers as independent contractors. In *JKH Enterprises Inc. v. Department of Industrial Relations*, the employer challenged a trial court's denial of its petition for a writ of administrative mandamus to overturn a DIR stop work order and penalty assessment for misclassification of 15 drivers as independent contractors and failure to maintain workers' compensation insurance for them. The Court of Appeal upheld the decisions of the DIR and the trial court, finding that the workers were bona fide employees.

While some of the facts support JKH's position that the drivers are independent contractors:

- the drivers all used their own vehicles, paid for their own gas, maintenance and insurance;
- they communicated with dispatch via their own cell phones;
- they wore no uniforms and had no company logos on their cars;
- some even did courier work for other firms and two had separate business licenses;
- they set their own schedules and chose their own driving routes;
- they are not required to report to work at JKH's office, and the manager hadn't even met them all;
- they can take time off when they choose; and,
- they are paid twice a month, and draw annual 1099s.

However, the court noted that none of that matters. Under the "economic realities" test in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* they were found by the DIR to be employees, not independent contractors.

**"Although some of the factors in this case can be indicative of the workers being independent contractors, the overriding factor is that the persons performing the work are not engaged in occupations or businesses distinct from that of [JKH]. Rather, their work is the basis for [JKH's] business. [JKH] obtains the clients who are in need of delivery services and provides the workers who conduct the service on behalf of [JKH]. In addition, even though there is an absence of control over the details, an employee-employer relationship will be found if the [principal] retains pervasive control over the operation as a whole, the worker's duties are an integral part of the operation, and the nature of the work makes detailed control unnecessary. (Yellow Cab Cooperative v. Workers Compensation Appeals Board (1991) 226 Cal.App.3d 1288). Therefore, the finding is that these workers are in fact employees of [JKH]."**

The Court of Appeal upheld the finding, holding that it was supported by substantial evidence, "in light of the whole record to support the Department's determination that 15 of 16 of JKH's drivers were functioning as its employees rather than as true independent contractors.... [where] our review is limited to examining the whole administrative record to determine if the Department's findings and order are supported by substantial evidence, it is not our function to reweigh the evidence or the particular factors cited by the Department in support of its decision, to which we afford considerable deference. Once we conclude, as we have here, that the Department's findings are indeed supported by substantial evidence, and that those findings in turn support the Department's legal conclusion or ultimate determination, our analysis is at an end."

Very few businesses can rely upon an army of independent contractors to do their work, and the standard of review makes it very difficult to challenge the DIR's findings when they characterize your workers as bona fide employees. The language of this now-published opinion is going to prove extremely useful to employees. [PE]

## *2007 Attendance Form Enclosed!*



## Human Resources Question with Candice Weaver

### THE MONTH'S BEST QUESTION

#### ARBITRATION AGREEMENTS

**Q:** "I understand that in a recent National Labor Relations Board (the Board) ruling, it was interpreted by the Board that an employer's arbitration agreement did not allow the employee to pursue a claim under the National Labor Relations Act (NLRA) and was therefore ruled illegal. How can I make sure my arbitration agreement is valid?"

**A:** In U-Haul Company of California and Machinist District Lodge 190 the NLRB ruled that arbitration language that attempted to preclude filing of actions under federal law could reasonably be interpreted by the employee as disallowing a filing before the NLRB and therefore in violation of the National Labor Relations Act.

#### Exclusions Required

In examining the employer agreement in the U-Haul Case, the NLRB stated that "Employer attempts to limit or bar the exercise of statutory rights, particularly those of individual employees as distinguished from those of their agents, have been held unlawful."

They went on to say that they have regularly held that an employer violates the NLRA when it insists that employees waive their statutory right to file charges with the Board or to invoke their contractual grievance-arbitration procedure.

In U-Haul they decide that the employer's mandatory arbitration provision covered all disputes relating to or arising out of an employee's employment with Respondent. Claims covered include wrongful termination, employment discrimination and claims recognized by Federal laws or regulations. They find that this policy reasonably tends to inhibit employees from filing charges with the Board, and, therefore, restrains the employees' rights under Section 7 or the NLRA to engage in concerted activities for collective bargaining or other mutual aid or protection.

While there are many employers who have language like that included in the U-Haul agreement, most persons who craft employment documents like those mentioned above recognize that you cannot violate or restrain an employee in the exercise of their rights under state or federal law.

If your arbitration agreement was provided by Pacific Employers, you can be assured that it complies with current state and federal rulings in this matter. The language should exclude certain actions such as Workers' Comp, Labor Commissioner and NLRB related matters.

Our staff can review your agreement's language to assure its legality.  
[DE]

#### Breaking News by E-Mail?

Just send a note to  
[peinfo@pacificemployers.com](mailto:peinfo@pacificemployers.com)  
Tell us you want the  
News by E-Mail!

#### EMPLOYMENT SEMINARS

**S** PONSORED BY THE SMALL BUSINESS DEVELOPMENT  
CENTER (SBDC) and the Workforce Investment

Board at 10:00 am on the 3<sup>rd</sup> Thursday monthly at 4025  
West Noble Avenue, Suite A, Visalia. We ask that you  
RSVP to the Small Business Development Center at  
- 559 625-3051 or Fax - 559 625-3053.

#### 2006 Seminar Schedule

##### ◆ Progressive Discipline & Effective Termination

- In the last seminar of the year we discuss the  
steps to take before discharging an employee  
to avert a lawsuit! We examine how to set up a  
progressive instruction, correction, punishment  
and termination program.

*Thursday, November 16th, 10am - 11:30am*

#### No December Seminar

#### 2007 Schedule Enclosed

These morning seminars are free of charge and  
include refreshments and handouts.



#### 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  
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2007 Attendance Form Enclosed!

**Return Service Requested**

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.

### Women's Harassment Suit Settled

**A** Sunnyvale KFC/Taco Bell will pay a total of \$319,800 to three former employees who claimed a supervisor made daily unwanted sexual advances and degrading comments to them, under a settlement announced Thursday.

Attorney Virginia Villegas said the women claimed their employer responded to their complaints by doing nothing and that they were punished for speaking out.

Under the agreement, the women will not speak publicly about the case, Villegas said.

The women, who were 25, 22 and 20 at the time the alleged harassment started in 2000, came forward in 2002 after the supervisor touched one of them, Villegas said.

That was after years of daily comments about their breasts and buttocks, she said.

It took so long for the women to come forward because they depended on the income from their jobs at the Hollenbeck Avenue franchise. The suit was filed in 2005. [PE]

### Governor Vetoes WC Disability Award Increase

**G**overnor Schwarzenegger has vetoed SB815, the bill that would have doubled workers compensation permanent disability payments in California over the next three years. Rightly noting that changing workers compensation benefits now would alter the comp reform landscape, Schwarzenegger committed to monitoring the disability payment schedule and assessing its impact on injured workers. [PE]

### Tyson Foods Inc. to Pay \$1.5 M for Hiring Discrimination

**T**yson Foods Inc. has agreed to pay \$1.5 million to settle allegations that the company discriminated against women and minorities in hiring, the Labor Department announced Wednesday. The allegations of hiring discrimination involved six facilities in Arkansas and Oklahoma. The allegations emerged during government compliance evaluations conducted from 2002 through 2004.

Tyson has also agreed to correct discriminatory practices and to conduct extensive monitoring measures for two years to make sure that all hiring practices fully comply with the law, according to the DOL.

The suit followed OFCCP previous findings that Tyson discriminated against 1354 rejected female applicants for entry-level laborer positions at three Tyson chicken processing plants in Van Buren, Clarksville and Berryville, Arkansas. The agency also found that Tyson discriminated against 998 rejected minority applicants for entry-level laborer positions at chicken processing plants in Grannis, Ark. and Broken Bow, Okla., and discriminated against 225 rejected minority applicants for long haul driver positions at Tyson's long haul terminal in Springdale, Ark. [PE]

### FREE & UNLIMITED CONSULTATION?

*Yes FREE! A benefit of Pacific Employers' Membership is Free, Unlimited, direct, phone consultation on labor, safety or personnel question on the Pacific Employers' Helpline at: (559) 733-4256 or Toll Free (800) 331-2592.*