Pacific Employers
Management Advisor
Celebrating 44 Years!
November 2008

Top of the News

ADA Definitions Expanded

President George W. Bush recently signed into law the ADA Amendments Act of 2008 ("ADAAA"), which amends the Americans with Disabilities Act of 1990 ("ADA"). The ADAAA, which passed the House and Senate with overwhelming support, significantly broadens the scope of the ADA, particularly with respect to the definition of a "disability."

> "The ADAAA reverses both of these decisions, . . ."

Over the last decade, various court decisions have limited the reach of the ADA. For example, in *Sutton v. United Air Lines, Inc.*, the Supreme Court held that only a person who remained substantially limited in a major life activity after accounting for mitigating measures could be considered disabled under the ADA. In *Toyota Motor Mfg., Ky, Inc. v. Williams,* the Supreme Court held that only impairments that substantially limit activities of major importance to most people constitute a disability.

The ADAAA reverses both of these decisions, changing the definition of disability and making more employees subject to the protections of the ADA, stating in the ADAAA that "[t]he definition of disability shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act." This new rule of construction will undoubtedly increase the number of individuals deemed disabled.

Toyota Motor Mfg. also held that a "substantially limiting" impairment is one that "prevents or severely restricts an individual from performing major life activities." The ADAAA rejects this narrow reading requires the Equal Employment Opportunity Commission ("EEOC") to revise the definition of "substantially limits" to conform to the new rules.

The ADAAA requires courts to evaluate disability "without regard to the ameliorative effects of mitigating measures." Mitigating measures include both artificial measures and adaptive behavior. Now any individual that is substantially impaired in a major life activity before accounting for medications, physical supports or other mitigating measures will be considered disabled, even if the mitigating measures remove the substantial limitation.

The ADAAA also enlarges the definition of major life activity rejecting the courts' interpretations. Not providing a specific definition of a major life activity, it states that the term "major" need not be interpreted strictly.

Finally, the ADAAA states that an individual has been discriminated against unlawfully on the basis of a disability if the individual is "regarded as having such an impairment," whether "the impairment limits or is perceived to limit a major life activity." Thus, an individual does not have to prove an employer's mistaken belief that the individual suffered from an impairment severe enough to substantially limit a major life activity. An employer that merely believed an employee to be impaired, regards that employee as "disabled" for the purposes of the ADAAA.

The ADAAA is effective January 1, 2009, with more regulations from the EEOC later in the year. The significant broadening of the definition of disability suggests a re-examination and review of disability discrimination and reasonable accommodation policies and practices for compliance with the newly expanded scope of the ADA. [PE]

Attendance Record & Vacation Scheduler Enclosed!

President's Report
~Dave Miller~

Quality Control Audits

The recent increase in layoffs, downsizing and other business closings has spawned a new surge of filings with various government agencies.

"Quality Control Audits"

As a crazy result of the anticipation of loss of employment, we have discovered that employees have been setting their employers up to obtain a bonus at layoff!

In two recent cases we found the foremen at a dairy and the lead person at a fast food restaurant were the ones counselling employees on how to make their timecards serve them as proof of the employer's violations of the Wage Orders.

Working with employers, we have conducted our own "quality control audits" to determine if undesirable practices are taking place. This includes everything from reviewing time cards and pay practices to interviewing employees and supervisors.

"ICE Raids"

The U.S. Immigration and Customs Enforcement is conducting raids on businesses. While they appear to be mostly a publicity stunt to get the public to think the government is doing something responsible about the "problem," they can cause disruptions in business and could even lead to serious prison time.

The great concern for employers and supervisors appears to be the government's need for a scapegoat, and that has been an employer or supervisor who can be viewed as *"harboring a criminal"* by employing someone who the ICE Agents believe the employer recognized to be an undocumented worker.

Simply by having poorly executed I-9 Forms, an employer can find himself in very hot water! Poor record keeping is a fact of life for most harried small business owners, but certain documents must be well maintained for the Feds.

Independent Contractors can also create tax problems if the EDD or IRS reviews your books. Pacific Employers is now providing reviews and guidance in these areas. Give us a call.

> There is no greatness where simplicity, goodness, and truth are absent. — Leo Tolstoy

Attendance Record

Enclosed is our new "2009 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.

Vacation Scheduler

Annually **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 this month's edition of the *Management Advisor* is the 2009 version of the Vacation Calendar Form. If you need additional copies, please contact our office or just stop by!

Recent Developments

"At-Will Employees are Permanent"

The Seventh Circuit Court of Appeals held that an employer did not violate the National Labor Relations Act (NLRA) by refusing to reinstate economic strikers because the employer had replaced the striking employees with permanent replacement workers. The court reasoned that the replacement workers were permanent, even though they had signed forms stating that they could be fired "at-will."

Following failed negotiations for an initial collective bargaining agreement – most of the employees of the company began an economic strike. Shortly thereafter, the company hired replacement workers. Each replacement worker signed a form stating that the individual (1) accepted employment as a permanent replacement worker, (2) could quit or be terminated at any time, with or without cause, and (3) could be terminated as a result of a strike settlement agreement with the union or order of the National Labor Relations Board (NLRB).

The union then made an unconditional offer to return to work on behalf of the striking employees. On the same day, the company sent the union a letter explaining that it had a full complement of employees, including permanent replacements, but that the strikers would be placed on a preferential recall list.

"..THE NLRB HAS NEVER REQUIRED EMPLOYERS TO OFFER A BINDING CONTRACT.."

The union filed an unfair labor charge alleging that the company violated sections 8(a)(1) and (3) of the NLRA when it refused to reinstate economic strikers after the union's unconditional offer to return to work. An economic striker who unconditionally offers to return to work is entitled to immediate reinstatement unless an employer can show a legitimate and substantial business justification for refusing such reinstatement (e.g., hiring permanent replacement workers as a means of continuing business operations).

The dispute focused on the significance of the fact that the replacement workers could be terminated "at-will." The union argued that to be considered permanent, the employer must offer the replacement worker a binding contract of term employment under state law. The NLRB disagreed and ruled in favor of the company. The NLRB reasoned that the "at-will" employment status of the replacement workers did not preclude an employer's otherwise valid showing that it had permanently replaced the striking employees.

On appeal, the Seventh Circuit affirmed the NLRB's decision. The court first observed that the NLRB has never required employers to offer a binding contract of term employment under state law to render a replacement worker permanent. Second, the court determined that the company's offer of permanent "at-will" employment was not illusory because it did not allow the company to keep "all of its options open" in a way that would allow it to illegally manipulate or otherwise violate federal labor law.

The Seventh Circuit's decision is important for employers because it confirms that an employer need not offer a binding contract of term employment under state law to render an employee a permanent replacement worker. To the contrary, a worker can achieve permanent replacement status if the employer's intent in that regard is clearly communicated, even if the worker's employment is "at-will" and can be terminated at any time, or is subject to other conditions, such as a settlement agreement with the union or an order from the NLRB requiring the employer to reinstate strikers. [PE]

Sex Discrimination

A jury in federal court awarded $400,000 to a Londonderry, NH woman on Monday, finding that the drywall installation company where she worked allowed a hostile working environment and discriminated against her as a woman.

"...$400K GIVEN IN SEX DISCRIMINATION CASE."

Nicole L'Etoile, of Londonderry had sued her employer, New England Finish Systems, Inc. of Salem, in 2006, charging the company with gender discrimination in violation of federal law.

L'Etoile worked as a drywall finisher for the company from January 2002 through April 2004, her lawyers, Heather Burns and Beth Deragon, of Concord, announced Monday. Her suit charged that supervisors and co-workers repeatedly belittled her, and made hostile comments about her gender.

After a nine-day trial, a jury in U.S. District Court awarded L'Etoile $200,000 in compensation and another $200,000 in punitive damages, court records show. The jury did not find that the company was discriminating when L'Etoile was laid off, however, and declined to award damages for lost wages, according to court records. [PE]

Attendance Record & Vacation Scheduler Enclosed!

Human Resources Question with Candice Weaver

The Month's Best Question

No Texting While Driving

Q: ***"I understand that California drivers may not "Text" under legislation that takes effect on January 1, 2009. Will that have the effect of making it illegal to dial a phone?"***

A: No, as the law specifically exempts the dialing of numbers or selecting a phone number from a telephone database by using the keyboard to access it.

California drivers will be banned from reading, writing or sending a text message while driving in a vehicle beginning January 1, 2009. As he signed the bill (S.B. 28) into law on September 24, 2008, Governor Arnold Schwarzenegger said, "Banning electronic text messaging while driving will keep drivers' hands on the wheel and their eyes on the road, making our roadways a safer place for all Californians." California joins a handful of states, including New Jersey and Washington, that bans text-messaging while driving.

The new law adds the following provision to the Vehicle Code: "A person shall not drive a motor vehicle while using an electronic wireless communications device to write, send, or read a text-based communication."

It is not considered a violation of the law if one "reads, selects, or enters a telephone number or name in an electronic wireless communications device for the purpose of making or receiving a telephone call." The new law also does not apply to emergency services professionals operating authorized emergency vehicles in the course and scope of their duties.

Violations of the ban are infractions, and violators will be subject to a fine of $20 for the first offense and $50 for each subsequent offense, but no violation point will be assigned to the driver's license.

Drivers in California already are prohibited from using handheld wireless telephones while driving, unless the devices are configured to allow hands-free listening and talking.

The new law does not impose any specific requirements on California employers, but employers should consider a policy on text-messaging while driving company or personal vehicles and conducting company business, particularly where employees are reimbursed for business-related charges. Employers may want to make clear that, if employees receive citations for violating the new law, the fines and penalties are the employees' responsibility. [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.

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

♦ **Discipline & Termination** - The steps to take before termination. Managing a progressive correction, punishment and termination program.
Thursday, November 20th, 2008, 10am - 11:30am

~ No Seminar in December ~

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

"All-in-1" Poster for 2009!

We are working on it now! In your mailbox in December, you will find Pacific Employers' Annual Christmas Card, the year 2009 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 federal EEOC posting in time for the January 1st posting requirement.

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 also recently revised our **"All-in-1" Poster in Spanish.** While we are **not** making a general mailing of it, the poster is available from our office. [PE]

No December Newsletter!

As the **"All-in-1" Poster** takes the place of Pacific Employers' Management Advisor, there will be no December 2008 issue of the printed newsletter. [PE]

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Computer Professionals Now Exempt

California Governor Arnold Scwharzenegger recently signed AB 10 into law, amending California Labor Code section 515.5 as it relates to the overtime exemption for certain computer professionals.

"... PAID A SALARY OF AT LEAST $75,000 ..."

Prior to AB 10's enactment, computer professionals had to be paid at least $36 per hour to qualify for exemption under section 515.5. Furthermore, since the exemption was based on an hourly rate, employers were not relieved of the obligation to track hours worked for these employees in order to ensure that the employees' compensation met the minimum threshold of $36/hour for all hours worked. With the enactment of AB 10, computer professionals who are paid a salary of at least $75,000 for full-time employment qualify for the exemption. The bill relieves affected employers and employees of the obligation of tracking hours worked.

The new law was enacted as urgency legislation and takes effect immediately.

Of note, the minimum hourly rate and salary level applicable to the computer employee exemption will be adjusted annually by California's Division of Labor Statistics and Research. Employers relying on this exemption are also cautioned that it is not applicable to every type of computer occupation. The computer professional exemption under Labor Code section 515.5 is limited to specified types of computer employees whose jobs primarily involve duties such as systems analysis, development, design, and documentation. The exemption generally does not apply to entry-level computer employees or employees engaged in the manufacture, maintenance or repair of computer hardware and related equipment. Additional details regarding the types of computer duties that satisfy and do not satisfy the exemption are provided in the text of section 515.5. Employers must be mindful that applicability of the exemption depends not only on an employee's level of compensation, but also on the nature of the employee's specific job duties. [PE]

IC'S Can be "At-Will"

Independent contractors can be terminable "At-Will" and paid hourly says the California Court of Appeal.

In *Varisco v. Gateway Science and Engineering, Inc.*, the California Court of Appeal rejected an independent contractor's assertion of employee claims.

Although Al Varisco had worked as an independent contractor, his lawsuit asserted that he was an employee because he was terminable at will and paid by the hour instead of by the project.

The Court of Appeal, however, confirmed that independent contractors

(1) can be terminable at will; and,

(2) are now commonly paid by the hour.

While these two factors indicate that an individual may be an employee instead of an independent contractor, the Court of Appeal explained: *"The principal issue is the right to control the 'manner and means' of accomplishing the work, and the facts are that Gateway had no such control, and no right to such control."* [PE]