

### WHAT'S NEW!

#### INFLEXIBLE LEAVE OF ABSENCE POLICIES

**Sears, Roebuck and Company agreed to pay \$6.2 million** as part of a consent decree to resolve a class action lawsuit filed by the U.S. Equal Employment Opportunity Commission (EEOC) in federal court in Chicago.

The EEOC alleged that Sears violated the Americans With Disabilities Act (ADA) by maintaining an "inflexible" workers' compensation leave exhaustion policy, whereby Sears automatically terminated employees after 12 months of leave instead of making a case-by-case determination whether a reasonable accommodation might have allowed employees to return to work.

In addition to providing monetary relief, the three-year consent decree includes an injunction against violating the ADA and retaliation. It also requires that Sears amend its workers' compensation policy by: (1) notifying affected employees of their right to request a reasonable

accommodation at least 45 days before their leave expires; and (2) giving employees examples of reasonable accommodations, including part-time work, reassignment and additional leave. The consent decree further requires that Sears provide written reports to the EEOC explaining how its workers' compensation practices comply with the ADA, train its employees regarding the ADA, and post a notice of the consent decree at all Sears locations.

Sears did not admit wrongdoing or liability, and the consent decree did not address the legality of Sears' policy. However, the EEOC's Chicago District Office recently filed at least two other federal lawsuits asserting claims under the ADA against employers with similar inflexible 12-month leave policies. EEOC v. United Parcel Service, Inc. (No. 09-C-5291) was filed on Aug. 27, 2009, and EEOC v. SuperValu, Inc. and Jewel-Osco (No. 09-CV-5637) was filed on Sept. 11, 2009.

These cases suggest that employers should re-evaluate their leave of absence policies to ensure that company leave, attendance and other practices are flexible and provide employees an opportunity to request a reasonable accommodation. [PE]

### Attendance Form Enclosed!

## President's Report

~Dave Miller~

### Big Business Blitz

**The U.S. Chamber of Commerce, in an effort sure to rankle Democrats,** is launching a multi-million dollar media blitz to promote job growth and raise alarm bells at what it sees as dangerous economic policies.

The "Campaign for Free Enterprise" will aim to get lawmakers, companies and voters to support policies the Chamber says will create 20 million new jobs over the next 10 years.

The Chamber, one of the most powerful business lobbies in Washington, is calling the effort its biggest campaign yet. TV ads have started to run on cable networks.

The new campaign will also involve town hall type forums at universities and other locations, as well as outreach with state and local chambers of commerce.

The group says the effort is not partisan, but the campaign could take aim at a lot of Obama administration efforts.

Over the past several months, the chamber has declared several top Obama proposals, including a new consumer agency and a cap on greenhouse gas emissions, a threat to free enterprise.



The focus on job creation is a particular sore spot with the Obama administration, which has been bombarded with Republican criticism that billions in stimulus spending isn't working. With the unemployment rate expected to remain high through next year, job growth is expected to be a major issue in the 2010 congressional campaign cycle.

Tens of millions will be spent on the campaign and last through 2012 and it would aim to spend \$25 million a year on the campaign for several years.

The new campaign won't fund or oppose congressional candidates in the 2010 election. Yet, it will play a role in future elections.

The Chamber, which represents more than 3 million businesses, made headlines in recent weeks for some high-profile membership defections. Apple (AAPL, Fortune 500) and Pacific Gas & Electric Co. (PCG, Fortune 500) have dropped their membership because they were at odds with the Chamber's opposition to legislation capping greenhouse gas emissions.

The Chamber has tapped Bush administration officials to lead and work with the campaign, including Brian Gunderson, former chief of staff to Secretary of State Condoleezza Rice, and former Secretary of Education Margaret Spellings. [PE]

Apparently there is nothing that cannot happen today. — Mark Twain

## Recent Developments

### Department of Homeland Security

#### Rescinds No-Match Rule

**Plagued by controversy and legal battles, the Department of Homeland Security (DHS)** is rescinding the 2007 No-Match Rule in a regulation published in the October 7 Federal Register.

The No-Match rule was intended to establish safe-harbor procedures for employers to follow if they received Social Security Administration (SSA) No-Match letters or DHS notices that questioned work eligibility information provided by employees. SSA no-match notices are sent to employers when an employee's name and Social Security Number provided for a W-2 earnings report do not match SSA records.

*"...BLOCKED... AND WAS NEVER IMPLEMENTED."*

Issued under the Bush administration in 2007, the No-Match Rule was blocked by the U.S. District Court for the Northern District of California shortly after issuance and was never implemented.

DHS announced in July 2009 its intention to rescind the rule and instead focus its enforcement attention on the use of the E-Verify database system as the mechanism for preventing the employment of aliens not authorized to work in the U.S.

E-Verify is an Internet-based system operated by the DHS in partnership with the SSA that allows participating employers to electronically verify the employment eligibility of their newly hired employees. E-Verify is being required by a growing number of states and, as of September 8, 2009, is required for certain federal contractors and subcontractors. [PE]

## Overtime Refusal Needs Notice

**The National Labor Relations Board properly decided** that United Healthcare Workers West, which is affiliated with the Service Employees International Union, violated federal labor law by calling for housekeepers and linen aides at a San Francisco hospital to refuse to perform overtime work without giving the hospital 10 days of prior notice, the U.S. Court of Appeals for the Ninth Circuit ruled Aug. 3 (SEIU, United Healthcare Workers-West v. NLRB, 9th Cir., No. 07-73028, 8/3/09).

Section 8(g) of the National Labor Relations Act requires unions to give 10 days of written notice to a health care institution of any strike, picketing, or "other concerted refusal to work" and to state the date and time such action will begin. California Pacific Medical Center received only four days of notice that union members would refuse overtime to protest proposed subcontracting, but UHW argued that no notice was required because the bargaining contract does not allow the hospital to impose mandatory overtime except in an emergency.

"We agree with the Union that there would not necessarily be a concerted refusal to work in the event all employees, acting independently, were unwilling to volunteer for overtime," Judge Mary M. Schroeder wrote for the appeals court. However, she found that in this case the union members' action was "orchestrated by the Union."

*"HOSPITAL ROUTINELY RELIED ON OVERTIME VOLUNTEERS."*

UHW represents housekeepers and linen aides working at California Pacific's facilities referred to as the Davies and the Pacific campuses. A series of bargaining contracts has provided that the hospital cannot assign mandatory overtime unless there is an emergency. To get all the work done,

the hospital routinely relied on housekeepers and linen aides volunteering to perform overtime.

In May 2006, the hospital proposed a change in linen processing that the union alleged would violate the bargaining contract's prohibition on subcontracting unit work. More than 100 union members, more than a majority of the unit, signed a petition protesting the proposal and authorizing shop stewards to call rolling one-week periods in which the workers would refuse to work overtime or extra shifts. The petition was submitted to the manager at the Davies campus June 1, 2006, and to the manager of the Pacific campus the following day.

For seven days starting Monday, June 5, every worker who was asked to volunteer to perform overtime declined to do so. A union newsletter published that week stated that the workers' action was intended to protest the proposed subcontracting and to "expose the short staffing that management has created" in the department. The union called on the hospital to hire more workers, not eliminate jobs.

The hospital filed an unfair labor practice charge against the union. An administrative law judge found in December 2006 that the union violated Section 8(g) by failing to provide timely notice of a concerted refusal to work. In a 2-1 decision in July 2007, the board agreed that the union violated Section 8(g) because the union orchestrated the refusals to work overtime as a collective means to accomplish the common goal of pressuring the hospital to withdraw its proposal (350 N.L.R.B. 284, 182 LRRM 1374 (2007)). The board ordered the union to cease and desist from engaging in any concerted refusal to work at California Pacific "or any other health care institution" without providing at least 10 days of notice. [PE]

## Right to Set Initial Terms

**Under the National Labor Relations Act ("NLRA"), when an employer purchases the assets of a unionized company,** the purchaser will be deemed to be a successor employer, and have an obligation to recognize and bargain with the union representing the seller's employees if there is substantial continuity in operations and a majority of the new employer's workforce is hired from the employees of the seller. As a general rule, a successor employer normally retains the right to set the initial terms and conditions of employment under which the employees of the predecessor will be hired.

In other words, a successor employer may have to recognize and bargain with the union representing the predecessor's employees, but ordinarily it will not be bound by the terms of the collective bargaining agreement between the predecessor and the union.

There is an exception to this general rule in circumstances where "it is perfectly clear that the new employer plans to retain all of the employees" in the existing bargaining unit. Burns, 406 U.S. at 294-95. A Burns "perfectly clear" successor is not permitted to set initial terms and conditions of employment unilaterally, but must bargain with the union before making any changes to the existing contract conditions.

The D.C. Circuit's decision reigns in the NLRB's recent tendency to apply an overreaching interpretation of the Burns "perfectly clear" rule, and offers protection to employers in asset purchase transactions. Nonetheless, the best advice for any employer contemplating an asset purchase involving a unionized facility remains to make clear its intent to set the initial terms and conditions of employment for all employees to be hired to staff that facility. [PE]



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## Attendance Form Enclosed!



## Human Resources Question with Candice Weaver

### THE MONTH'S BEST QUESTION

#### WC & FMLA Leave

**Q:** "We have an employee out of work due to a workers' compensation injury. Does the employee's time off count against his FMLA leave?"

**A:** If the employee's on-the-job injury or illness qualifies as a serious health condition under the FMLA, the workers' compensation absence and FMLA leave can run concurrently, assuming that your company has provided the injured worker with the proper notice and designation.

Be aware that at some point the employee's health care provider may certify that the employee is able to return to work in a light-duty position. If your company offers the employee light-duty work, the employee does not have to accept the position if he is also eligible for FMLA leave. If the employee declines the light-duty position, the time off from work would represent FMLA leave, and the employee would likely not qualify for workers' compensation benefit payments during this period.

He will, however, still be entitled to continue unpaid FMLA leave until he is able to return to the same or equivalent position or has exhausted the 12 weeks of FMLA leave.

Finally, keep in mind that the injured employee may also be a qualified individual with a disability and have rights under the ADA. [PE]

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#### 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 January 27<sup>th</sup>, 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

#### 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.

#### Last 2009 Seminar

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

Thursday, November 19<sup>th</sup>, 2009, 10- 11:30am

#### 2010 Topic Schedule

♦ **Labor Law Update** - The courts and legislature are constantly "Changing the Rules" - Learn about the recent changes to both the California and U.S. laws that affect employers of all types and sizes.

Thursday, January 21<sup>st</sup>, 2010, 10 - 11:30am

♦ **Employee Policies** - Every employer needs guidelines and rules. We examine planning considerations, what rules to establish and what to omit.

Thursday, February 18<sup>th</sup>, 2010, 10 - 11:30am

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

Thursday, March 18<sup>th</sup>, 2010, 10 - 11:30am

♦ **Safety Programs** - Understanding Cal/OSHA's Written Safety Program. Reviewing the IIPP or SB 198 requirements for your business.

Thursday, April 15<sup>th</sup>, 2010, 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 20<sup>th</sup>, 2010, 10 - 11:30am

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

Thursday, June 17<sup>th</sup>, 2010, 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 15<sup>th</sup>, 2010, 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 16<sup>th</sup>, 2010, 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 21<sup>st</sup>, 2010, 10 - 11:30am

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

Thursday, November 18<sup>th</sup>, 2010, 10 - 11:30am

#### There is No Seminar in December

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### San Jose Mulls \$200K To Firefighter Over Porn

**T**he San Jose City Council is set to vote on a \$200,000 settlement offer to a female firefighter who said she was harassed after complaining about hard-core pornography at her firehouse.

Julie LaBlanc sued the city in 2008 after she found a pornographic magazine under her 9-year-old son's pillow that he said he found at the firehouse.

LaBlanc alleged she found more than 60 other such magazines at work the next day. She said she was taunted and shunned by fellow firefighters while the city investigated her complaints.

San Jose has a policy prohibiting sexually explicit material in the workplace.

LaBlanc's attorney would not comment on the pending settlement." [PE]

### Wages Tumble Toward 18-Year Low

A bad economy and low inflation are starting to drag down wages for millions of everyday workers and freeze benefits for millions of retirees.

Average weekly wages have fallen 1.4% this year for private-sector workers through September, after adjusting for inflation, to \$616.11, a USA TODAY analysis of Bureau of Labor Statistics data found. If that trend holds, it will mark the biggest annual decline in real wages since 1991.

The bureau's data cover 82% of private-sector workers but exclude managers and some higher-paid professionals.

"Wages are usually the last thing to deteriorate in a recession," says economist Heidi Shierholz of the liberal Economic Policy Institute. "But it's happening now, and wages are probably going to be held down for a long time." [PE]

### Job Program Found To Miss Many States

**B**usinesses with federal stimulus contracts have created few jobs in states with the worst unemployment rates, according to data released Thursday by the federal government.

The new jobs come from a small slice of a sliver of the \$787 billion stimulus program: the roughly \$16 billion worth of stimulus contracts that were awarded directly by federal agencies, of which about \$2.2 billion has been spent so far. But the preliminary data represented the first time that the federal government has reported actual job figures, and not just job estimates, and they provided the most complete snapshot yet of how one component of the sprawling program — direct federal contracts — was shaping up.

One thing was clear: while the federal contracts have created or saved 30,383 jobs, they were not directed to states with the highest jobless rates. Businesses in Michigan, whose 15.2 percent unemployment rate in August was the highest in the nation, reported creating or saving about 400 jobs. Businesses in Nevada, which had the next highest unemployment rate, reported 159. And businesses in Rhode Island, which had the third-highest unemployment rate, 12.8 percent, reported the fewest jobs: just six. [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*