Pacific Employers
Management Advisor
47 Years of Excellence!
November 2011

What's News!

Brinker Oral Argument in November

The California Supreme Court has finally scheduled oral argument in Brinker v. Hohnbaum for November 8, 2011. Employers can reasonably expect a decision in the case sometime between December 2011 and February 2012, as the Court generally has 90 days following oral argument to issue its decision.

The long-awaited decision is expected to provide much needed clarity on an issue that has fueled countless lawsuits and caused operational headaches for employers as well as inconvenience for employees. Specifically, the Court will decide whether California meal period laws require employers to ensure that employees take at least a 30 minute, uninterrupted meal break at or before completing five hours of work, or whether employers are simply required to provide their employees the opportunity to take such a break, which the employee may voluntarily decide to skip with no adverse consequence to either the employer or the employee.

Most courts that have decided this issue have held that the law simply requires the employer to provide the opportunity for a meal break, but a few courts (along with the DLSE for a period of time) have held that employers must ensure such breaks are taken, regardless of whether an employee wants to take them. As a result, employers have had no clear direction on the proper interpretation of the law and most have taken the conservative approach and forced employees to take breaks, even disciplining them for failing to do so, much to the displeasure of many employees.

"... BUT THE LEGISLATURE HAS REFUSED TO PASS ALMOST ANY BILL ..."

Employer friendly groups have caused numerous bills to be introduced before the California legislature in the last two or three sessions to try to clarify this issue in a way that is operationally manageable and beneficial to employers and employees alike, but the legislature has refused to pass almost any bill that would provide the greatly needed relief--much to the appreciation of the California plaintiffs' bar which has profited wildly from the cottage industry of meal break litigation. [PE]

Vacation & Attendance Forms Enclosed!

President's Report
~Dave Miller~

Pregnancy Insurance

Governor Edmund G. Brown Jr. has signed four bills to provide benefits to pregnant women and new mothers. The four bills include one that requires that employers maintain and pay for group health insurance during pregnancy disability leave.

The following bills were signed by Governor Brown:

- **SB 222** by Senator Noreen Evans (D-Santa Rosa) and,
- **AB 210** by Assemblymember Roger Hernandez (D-Baldwin Park) – With SB222, these bills require that every individual and group health insurance policy must provide coverage for maternity services.
- **SB 299** by Senator Noreen Evans (D-Santa Rosa) – This bill prohibits **employers from refusing to maintain and pay for coverage under group health plans for women who take maternity leave.**
- **SB 502** by Senator Fran Pavley (D-Agoura Hills), the Hospital Infant Feeding Act. This bill will help hospitals promote breast feeding. [PE]

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 2012 version of the Vacation Calendar Form. If you need additional copies, please contact our office or just stop by!

Attendance Record

Attendance Record -- This month Pacific Employers supplies you with the new "2012 Attendance Record." Its purpose is to provide a way to keep track of an employee's annual attendance on a single sheet. A shorthand guide 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.

2012 All-In-One Poster

Next month, instead of our monthly "*Management Advisor*" you will receive the 2012 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 National Labor Relations Board posting now required for all covered employers. [PE]

We are what we repeatedly do. Excellence, therefore, is not an act but a habit. - Aristotle

Recent Developments

Superior Court Opines that Meal Breaks Must Be 'Available' Not 'Ensured'

In a Santa Clara County Superior Court Statement of Decision that employers can hope will be echoed by an appellate court, the Honorable James P. Kleinberg ruled following a bench trial that an employer complies with California's meal break requirement if it makes a 30-minute break "available" rather than "ensure" that the break is taken.

The case is Driscoll v. Graniterock. The Graniterock plaintiffs were concrete ready-mix drivers. The drivers do not have a regular schedule and until they arrive at work to get the concrete trucks, they do not know how long the day will last or whether they will have to work through lunch. The on-duty nature of the work is dictated by the physical properties of concrete, a perishable product that, once pouring has commenced, must be poured continuously until complete. Drivers could, however, tell the dispatcher that they wanted a meal break. Drivers were paid a premium for taking an on-duty meal break, and not surprisingly, expressed a strong preference for eating on the job, earning additional pay, and leaving early.

Graniterock drivers signed a revocable on-duty meal period agreement that included the caveat that the written revocation provide a one day advance notice of the decision to revoke. Judge Kleinberg rejected Plaintiffs' argument that the one day notice was facially invalid, finding it significant that the one day notice requirement did not deter a driver from revoking the agreement – indeed three drivers did revoke. The more common scenario showed that dispatchers made every effort to accommodate a driver's desire for a break, even when the driver did not revoke the agreement but simply called to say he wanted lunch.

"... WHETHER AN EMPLOYER MUST "ENSURE" OR MERELY "MAKE MEAL BREAKS AVAILABLE ..."

Most importantly, while noting that the issue of whether an employer must "ensure" or merely "make meal breaks available" remains to be decided by the California Supreme Court, the court sided with the majority of appellate cases currently pending resolution of Brinker, and concluded that the Wage Order's use of "provide" means "to make available." Graniterock argued, apparently quite persuasively that since its drivers knew that the meal break waivers were neither required nor irrevocable, and that they could simply request and receive a meal break, it was the drivers themselves who chose to waive their right to an off-duty meal break.

While employers can applaud the trial court's ruling, a note of caution sounds in the decision's procedural background: this bench trial was tried for more than two weeks and required 55 witnesses and 285 exhibits, an expensive undertaking for the company, albeit one with the comfort of an excellent outcome. [PE]

CA Supreme Court Hears Overtime Exemption Case

Almost four years ago, the California Supreme Court granted review of *Harris v. Superior Court, 154 Cal.App.4th 164 (2007),* an important case involving application of the administrative exemption under California law. The Court heard oral argument on the case in October.

"... CASE IS LIKELY TO OFFER SOME IMPORTANT GUIDELINES ..."

The issue under review in *Harris* is whether certain insurance claims adjusters were properly classified by their employer as exempt under the administrative exemption. Specifically, the Court will analyze whether the claims adjusters were engaged in work that was "directly related to management policies or general business operations," commonly referred to as the administrative/production dichotomy, and whether this analysis is dispositive of the issue regarding whether an employee is properly classified under the administrative exemption.

This decision in this case is likely to offer some important guidelines in determining how to properly analyze whether employees qualify for the administrative exemption under California law. Expect a decision in December or January 2012. [PE]

State Prohibits The "Willful Misclassification" Of Independent Contractors

California's new law to deal with workers misclassified as independent contractors, SB 459 is probably the most significant of the bills signed by Governor Brown this Term. It specifically prohibits the "willful misclassification" of independent contractors and authorizes the Labor and Workforce Development Agency (LWDA) to assess severe civil penalties against employers who do so.

Monetary penalties can range from $5,000 to $25,000 for each violation, depending on whether the LWDA finds that the company engaged in a pattern or practice of misclassification. The law also will impose an embarrassing posting penalty on employers found to have engaged in such willful misclassification. For one year following the final decision, the employer must post on its website (or in an area available to employees and customers) a notice stating the following: (1) that the LWDA has found that the employer committed a violation of the law by engaging in the willful misclassification of employees; (2) that the company has changed its practice to avoid committing further violations; (3) that any employee who believes that he or she is misclassified may contact the LWDA (along with the LWDA's contact information); (4) that the notice is being made pursuant to state order; and, finally, (5) the signature of an officer or owner of the company.

These same penalties will apply if the employer charges fees to a misclassified independent contractor where those fees would have been unlawful had the individual been properly classified. Those fees could include such things as space rental, material costs, license fees, and equipment rental. Lastly, the new law imposes joint and several liability on consultants who advise an employer to classify an employee incorrectly, although this does not apply to in house advisors or attorneys. [PE]

IRS Introduces Partial Amnesty Program for Independent Contractor Misclassification

The Internal Revenue Service introduced the Voluntary Worker Classification Settlement Program that offers employers the opportunity to gain certainty regarding potential past federal tax liability associated with misclassifying workers as independent contractors.

The Program allows employers to voluntarily reclassify workers that were improperly classified as independent contractors into employees and pay a minimal payment (federal payroll taxes, interest and penalties) to cover past federal payroll tax obligations for the contractor-turned-employee.

To be eligible for the Program, an employer must:

(1) Consistently have treated the workers in the past as nonemployees,

(2) Have filed all required Forms 1099 for the workers for the previous three years, and

(3) Not currently be under audit by the IRS, the Department of Labor or a state agency concerning the classification of these workers.

With the federal and state authorities increasing their enforcement in this area, the primary benefit of this Program is that it allows employers that believe they may have missclassified workers as independent contractors to be assured, by paying the minimal amount to the IRS (10% of the back payroll taxes owed), that they will not have any further past federal tax liability.

There are, however, significant risks with using this Program as it is not a complete amnesty program. [PE]

Human Resources Question with Candice Weaver

The Month's Best Question

Wage Theft Prevention?

Q: ***"I have heard there is a new requirement to provide additional paperwork to employees at the time of hire?"***

A: Yes, and not only at the time of hire! Along with a multitude of other bills, the Governor has recently signed into law the new Wage Theft Prevention Act of 2011 (AB 469).

AB 469 includes a number of revisions to various Labor Code sections such as classifying certain "willful" actions by employers as misdemeanors and extending time limitations for enforcement of some violations. The one provision that will impact all employers, however, is new Labor Code section 2810.5. This section requires all private employers to provide a list of specific written information to all new non-exempt employees who are not covered by the terms of a valid collective bargaining agreement.

Beginning January 1, 2012 the following information must be provided to employees at the time of hire in a format to be determined by the Labor Commissioner:

- The rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission or otherwise, including any rates for overtime, as applicable;
- Allowances, if any, claimed as part of the minimum wage, including meal or lodging allowances;
- The regular payday designated by the employer in accordance with the requirements of this code;
- The name of the employer, including any "doing business as" names used by the employer;
- The physical address of the employer's main office or principal place of business, and a mailing address, if different;
- The telephone number of the employer;
- The name, address and telephone number of the employer's workers' compensation insurance carrier; and
- Any other information the Labor Commissioner deems material and necessary.

Employers also must provide notification of any changes in the above information within seven days either by information on the employees' next pay statements or in a separate written form.

While there has been no indication how the State Labor Commissioner intends to enforce these new requirements, there can be no question that non-compliance with any of the technical provisions will result in some form of enforcement action, including possible civil penalty assessments. [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.

2011 Topic Schedule

♦ **Discipline & Termination -** The steps to take before termination. Managing a progressive correction, punishment and termination program.
Thursday, November 17th, 2011, 10 - 11:30am

There is No Seminar in December

"All-in-1" Poster for 2012"

We are working on it now! In your mailbox in December, you will find Pacific Employers' Annual Christmas Card, the year 2012 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 National Labor Relations Board posting in time for the January 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.*

No December Newsletter!

The **"All-in-1" Poster** takes the place of Pacific Employers' Management Advisor. There will be no December 2011 issue of the printed newsletter. [PE]

Dinner for 2 at the *Vintage Press!*
That's right! When a business that you recommend joins Pacific Employers, we treat you to dinner for two at the *Vintage Press.*
Call 733-4256 or 1-800-331-2592.

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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.

Even LEGAL immigrants are fleeing Alabama

Tough new Alabama immigration laws are forcing even legal migrant workers to flee the southern state over fears they will be deported.

Regulations introduced last week seen as the toughest in America have caused a mass exodus in the state, which experts say could cripple Alabama's economy.

A staggering one quarter of commercial building workers are thought to have left the state since tight regulations were introduced.

Masses of legal Hispanic workers are leaving Alabama because family members and friends don't have the correct paperwork and they fear they could be jailed.

Many are fleeing to Tennessee or Washington, while those who are staying are 'trying not to go out as much'.

Under strict rules brought in last week, schools have to check the immigration status of newly enrolled children.

Immigration laws in Alabama also allow police to ask for papers showing citizenship or immigration status during traffic stops if they have a 'reasonable suspicion' that the person may be in the country illegally.

As a result, over 800 Hispanic pupils have either withdrawn or not returned to state schools, while an estimated one quarter of the commercial building work force has left since last week.

Elsewhere, one fruit farmer told how just eight of a near 50-strong workforce returned to work last week.

Rick Pate, the owner of a commercial landscaping company in Montgomery, lost two of his most experienced workers, who were in the country legally.

The law targets employers by forbidding drivers from stopping along a road to hire temporary workers. It also bars businesses from taking tax deductions for wages paid to illegal workers and makes it a crime for an illegal immigrant to solicit work. [PE]

NLRB Postpones New Poster Start Date

The NLRB announced today that it is postponing the implementation date for its recently issued employee-rights notice. The new effective date is January 31, 2012. The NLRB's stated reason for the postponement is to "allow for further education and outreach" in light of "queries from businesses and trade organizations . . . about which businesses fall under the Board's jurisdiction."

Coincidentally, however, the NLRB's newly required poster currently is under both legislative and legal attack. As reported in our prior post, legislation has been introduced to block implementation of the new poster, and lawsuits have been filed by various groups seeking to enjoin implementation. [PE]

DFEH Awards $846,300 for Firing

On September 12, 2011, the California Department of Fair Employment and Housing ("DFEH") announced its largest-ever administrative award of $846,300 (and no, that's not a typo) against electrical supplier Acme Electric Corporation ("Acme") for firing an employee, Mr. Charles Wideman, because he had cancer.

The DFEH rejected Acme's argument that his poor performance and travel restrictions led to his dismissal. Instead, the DFEH found Acme violated the California Fair Employment and Housing Act ("FEHA") by failing to accommodate Mr. Wideman's known travel limitation due to his cancers, failing to engage in a good faith interactive process, discriminating against him because of his disability, and failing to take all reasonable steps necessary to prevent discrimination from occurring. The DFEH awarded Mr. Wideman $748,571 for lost wages, $22,729 for out-of-pocket expenses and $50,000 for emotional distress. And for good measure, it ordered Acme to pay $25,000 to the State's General Fund as an administrative fine. [PE]