Pacific Employers
Management Advisor
Celebrating 42 Years!
October 2006

Top of the News

Gov. Signs Minimum Wage Bill

California to raise minimum wage to $8.00!

A bill to raise the California minimum wage passed both houses of the Legislature and was signed by Governor Schwarzenegger. The new law raises the minimum wage for all non-exempt workers in California to $7.50 per hour effective January 1, 2007. An additional increase to $8.00 per hour will be effective January 1, 2008.

The increase also has the potential to affect many of California's exempt executive, administrative and professional employees whose minimum salary requirements are tied to the state minimum wage. For these exempt employees, the minimum salary will increase to $2,600 per month ($31,200 per year) on January 1, 2007 and to $2,773.33 per month ($33,280 per year) effective January 1, 2008.

The change in the Minimum Wage poster will be one of the changes Pacific Employers will be making to the new All-In-One Poster that you will have in time to post for the new wage change in 2007.

Pacific Employers' All-In-One Poster will also sport the new DFEH and USERRA posters that were both updated this year. The first part of December should see the arrival of your poster. [PE]

You've Got Notice!

RadioShack 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]

2007 Vacation Schedule Enclosed!

President's Report

~Dave Miller~

"At-Will" Means What it Says!

The California Supreme Court determined recently that the at-will provisions of employment in California are really at-will. In the case of *Dore vs. Arnold Worldwide Inc.* the court clarified that the provision is enforcable based on its plain meaning.

Defendant Arnold Worldwide, Inc. (AWI), an advertising agency, hired Brook Dore. During the interview process, Dore claimed AWI executives told him they needed someone to handle a new account on a "long-term" basis and that he would "play a critical role" in the agency if hired. Dore learned during the interviews that certain people at AWI had been employed for long periods, and he was told the agency treated its employees "like family." Dore received a verbal offer for the position, which he accepted.

AWI later sent Dore a letter confirming the terms of his employment. The letter stated, among other things, that Dore would have a "90 day assessment" at which time objectives would be set for evaluating his performance at an "annual review." He would then also have the "opportunity to discuss consideration for being named an officer" of AWI. In a separate paragraph, the letter stated, "Brook, please know that as with all of our company employees, your employment with [AWI] is at will. This simply means that [AWI] has the right to terminate your employment at any time . . . ." The letter requested that Dore sign and return it to AWI to signify his acceptance of the terms stated, which he did.

Over two years later, AWI terminated Dore's employment. Dore then sued AWI asserting various claims, including breach of contract and breach of the implied covenant of good faith and fair dealing. Dore alleged that AWI's oral statements, conduct and documents established an "implied-in-fact" contract which prohibited AWI from terminating his employment except for cause.

The Supreme Court's Decision

In a unanimous decision, the California Supreme Court affirmed the dismissal of Dore's claims. The Court confirmed the principle that a clear and unambiguous at will provision in a written employment contract, signed by the employee, cannot be overcome by evidence of a prior "implied-in-fact" contract requiring good cause for termination.

Dore had argued that AWI's letter was ambiguous because the letter defined "at will" only by reference to when his employment could terminate ("at any time"), and was silent on the issue of cause. The Supreme Court responded that the formulation "at any time" in a termination clause is not "per se ambiguous," rather, "[a]s a matter of simple logic, . . . such a formulation ordinarily entails the notion of "with or without cause."

The Supreme Court concluded the language of AWI's letter agreement with Dore was unambiguous. The Court noted that Dore had read, signed and understood the terms in the letter, which plainly stated his employment was "at will." The Court observed that the letter defined that term using language similar to California Labor Code section 2922, which states an "employment, having no specified term , may be terminated at the will of either party on notice to the other." The Court reasoned it would make no sense for the parties to emphasize Dore's employment was "at will" if their true meaning was to require cause for his termination. Finally, the Court rejected Dore's argument that his evidence of AWI's verbal statements and conduct, as described above, rendered the letter ambiguous. [PE]

> Life is ten percent what happens to you and ninety percent how you respond to it.
> — Lou Holtz

Court Decisions

Layoff-Proof on FMLA Leave?

An employee relations manager had a serious heart condition that required repeated lengthy absences, all approved by his employer as qualifying under the Family and Medical Leave Act (FMLA). During his final leave, however, the company was reorganized and his job eliminated. Was the employer obliged to restore him, on his return, to a job that no longer existed?

The employee joined Harrah's in 1994, was transferred to a new operation, and eventually promoted to employee relations manager. By late 2000, however, his heart condition required surgery and other treatment.

In the 2 1/2 years from December 2000 through July 2003, in fact, he requested and got five separate FMLA leaves totaling a surprising 57 weeks of absence. But during his final leave, his job and a number of others were consolidated into fewer positions. He was invited to apply for one of those new jobs, but he declined for health reasons. Then he sued Harrah's, claiming an absolute right to his old job when he returned from leave. A judge in federal district court dismissed his charge, and he appealed.

Appellate judges agreed that the language of the FMLA law is ambiguous regarding limits on an employer's duty to restore an employee to the former or equivalent job. But, they said, following an interpretive regulation from the Department of Labor, circuit courts that have considered the issue have all ruled that an employee on FMLA leave can be discharged if he or she would have been fired or laid off anyway.

The judges were so sure of employers' rights to terminate someone on leave (if they would have done so regardless of the leave) that they said such an absent worker could even be fired for poor performance. [PE]

California Rules On Partial Vacation Days For Exempt Workers

Following an Appellate Court ruling in Conley v. PG&E (2005) 131 Cal.App.4th 260, the state's Division of Labor Standards Enforcement has issued updated content in its Enforcement Policies and Interpretations Manual. The objective is to clarify the conditions under which an employer may provide partial-day time off to an exempt worker without jeopardizing the exempt status.

Having the Labor Commissioner reclassify an exempt to non-exempt can sometimes be an expensive surprise. It can carry with it up to three years of back overtime pay obligations.

Here are two important sections from the updated manual:

51.6.15.3 FEDERAL REGULATIONS. The U.S. Department of Labor has interpreted its regulations to allow an employer with a bona fide sick leave plan to deduct accrued leave to pay the salary obligation for "partial day" absences for illness and injury; however, the federal interpretation does not allow a deduction from the salary for such partial day absences in the event the employee's eligibility for the leave has not yet vested or the employee has exhausted his or her leave.

51.6.15.4 DLSE ENFORCEMENT POSITION. The DLSE adopts the above interpretation by the DOL regarding partial day absences for time off due to sickness taken pursuant to a bona fide sick leave plan UNLESS the accrual which the employer utilizes provides a vested right to wages. If a sick leave plan provides for a vested right to wages, as is the case with vacation and PTO plans, the holding in Conley v. PG&E (2005) 131 Cal.App.4th 260 is applicable and deductions from accrued sick leave may be made only for absences of at least 4 hours in duration. If a sick leave plan does not establish a vested right to wages, deductions from sick leave for increments of less than 4 hours continue to be permissible to the extent that such leave credits exist at the time of the partial day absence. [PE]

Live Scan

Recently, the Department of Justice (DOJ) authorized certain private agencies to perform "live scanning" of finger prints. The following paragraphs will explain what this is all about.

In the past, only law enforcement agencies were allowed to obtain an individual's fingerprints. This was usually done by "inking" the individual's fingers with ink and "rolling" the fingers onto a card which would then be mailed to DOJ. It would take sometimes up to 3 months to have the prints compared to the millions already on file with DOJ to determine if the subject had previously been arrested.

In the past few years technology has been developed to allow the fingerprints to be scanned by a computer scanner and downloaded to the hard drive and then transmitted to DOJ via email. The computers at DOJ will then digitally compare the prints and provide results within as little as 2 hours! This new technique is called "live scanning."

Post 911, the Department of Homeland Security, State and local Agencies have mandated that more and more employees are to be live scanned. This includes volunteers, youth sports coaches and anyone involved in the handling of hazardous materials. The reasons are obvious.

But DOJ has learned that local Police agencies could not handle the increased live scanning so they have allowed the private sector to step in and provide these services.

We recently purchased several of these scanners and computers (at a substantial cost). We also purchased a mobile unit that we can transport to your place of business and perform live scanning of potential hires. We provide these services Monday through Friday, 9:00-4:00. This means no appointments or waiting. It is also possible to set up an account and be billed monthly.

We believe this is a step in the right direction to make this process more convenient for all involved parties! Thanks for reading as always. Hopefully we'll have an interesting read next month.

Rocky Pipkin,
Pipkin Detective Agency — Ca. License # 16269
www.pipkindetectiveagency.com

2007 Vacation Schedule Enclosed!

Human Resources Question with Candice Weaver

The Month's Best Question

JUST BETWEEN FRIENDS

Q: "I understand that in a recent court ruling, an employee was not able to sue over normally objectionable language. What is that all about?"

A: In a recent California Supreme Court ruling, *Lyle v. Warner Bros.*, the Court held that an employee, who was forewarned of the explicit nature of the speech used in a new position, could not claim sexual harassment, as the speech was not aimed at her.

Importance of Forewarning

The California Supreme Court unanimously threw out the workplace sexual harassment lawsuit lodged by former assistant Amaani Lyle. According to the justices, miming sexual gratification, drawing graphic pictures and words, detailing sexual preferences, bragging about exploits did not present a triable issue of harassment. In fact, the court opined that the lewd and crude behavior of the writers was a necessary part of their job.

The Justices agreed with the defense that the plaintiff's suit was without merit for two reasons. First, none of the three writers' offensive conduct was aimed at the plaintiff. Second, due to the nature of the writers' work, the pervasive sexual atmosphere was necessary for the creative process of writing an "adult" themed show. In her job interview she was advised to expect to transcribe sexual content.

The Court required the employee to show she was subjected to sexual advances, conduct or comments that were unwelcome because of sex and the behavior was sufficiently severe or pervasive to alter conditions of employment and create an abusive work environment. She was unable to do so.

What the Court said in *Lyle v. Warner Bros.*, is that acceptance on the part of an employee, of certain risks of the job, should shield the employer from suit.

The Lesson For Employers?

There are many workplaces where employees might be subject to speech, graphics, and other sexual items. Examples include a video store that rents or sells x-rated material, or a fulfilment center that ships calendars and sex aids. Employees hired to work in such positions should be forewarned and in agreement with such contact.

Accordingly, if your business requires exposure to things of a sexual nature, consider pre-warning a job candidate about what to expect. While such warnings could occur in the help wanted solicitation it should occur also during the interview process. Employers should also consider a written notice and agreement for prospective hires to sign indicating their acceptance of a work environment that may contain sexual speech and other material. Let us know if you need help. [PE]

Breaking News by E-Mail?

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

Employment Seminars

Sponsored by the Small Business Development Center (SBDC) and the **Workforce Investment Board** at 10:00 am on the 3rd 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

♦ **Guest Speaker Seminar - Judge Gary L. Paden** will be our presenter in October. He will bring us valuable information on Business Ethics and what an employer should do in order to avoid court action.

Thursday, October 19th, 10am - 11:30am

♦ **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

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 two at the *Vintage Press*. Phone us at 733-4256 or Toll Free 800 331-2592.

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2007 Vacation Schedule Enclosed!

Pacific Employers
Management Advisor
Celebrating 41 Years!

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.

New EEO-1 Report Next Year

The federal government's "Employer Information Report," EEO-1, is required annually and covers 50 million workers nationwide. Due from every company with more than 100 employees, or with more than 50 employees and $50,000 in federal contracts. That is more than 40,000 companies, in nearly a quarter-million locations, employing 50 million workers.

Part of the government's equal employment opportunity effort, EEO-1 asks employers to report the demographic composition of their workforce. Workers are slotted into nine job categories, with their numbers then counted by racial and ethnic identity.

The data charts not only show the upward movement of women and minorities as they climb the job ladder but also the not-so-upward movement in some companies and industries. The latter information becomes the basis for enforcement efforts aimed at bringing equality to every workplace.

Changes for 2007

Officially called the "Employer Information Report," EEO-1 has been around in its current form since 1966. Now changes are being implemented to reflect demographic realities that didn't exist four decades ago. The changes will not affect filings for September 2006. The old format is still to be used. But the new report will be required for September 2007. **These changes will be made in EEO-1:**

- Adding a new category titled "Two or more races, not Hispanic or Latino";
- Deleting the "Asian and Pacific Islanders" category;
- Adding a new category titled "Asians, not Hispanic or Latino";
- Adding a new category titled "Native Hawaiian or Other Pacific Islander, not Hispanic or Latino";
- Extending EEO-1 data collection by race and ethnicity to the State of Hawaii; and
- Strongly endorsing employee self-identification of race and ethnicity, as opposed to visual identification by employers.

That last point means that if you use a form for employees to self-identify, it needs to be revised to match the new categories. Importantly, current workers will not have to be "re-identified," though employers can take this step voluntarily.

Among the most significant changes, the former job categorization scheme classified workers simply as either management or non-management. The new EEO-1 Report:

- Divides "Officials and Managers" into two levels: "Executive/Senior Level Officials and Managers" and "First/Mid-Level Official and Managers."
- Moves nonmanagerial business and financial occupations from the "Officials and Managers" category to the "Professionals" category

These changes were made, says EEOC, because they'll help identify groups "stuck" in middle-management and seemingly unable to reach the highest levels of their organizations.

Additionally, the data shows women have a greater chance of being managers in some industries, such as legal services and air transport. But their chances seem limited in others, including full-service restaurants and nursing care facilities. [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.**