Pacific Employers
MANAGEMENT ADVISOR
Celebrating 43 Years!
October 2007

TOP OF THE NEWS

Arbitration Agreements Bypassed

The California Supreme Court handed workers a major victory by allowing them to bring class-action lawsuits alleging labor code violations even if they had signed agreements with their employers requiring them to arbitrate such disputes.

By letting workers bypass these now-ubiquitous arbitration clauses, the ruling probably will add to the high volume of back-pay and overtime class-action cases already on court dockets, experts say, and will probably set a standard for courts in other states to follow.

Class-action lawsuits are a type of lawsuits that groups of employees can bring against their employer because attorneys are reluctant to take on individual suits in which the potential awards are small.

"... UNWAIVABLE STATUTORY RIGHTS ..."

Potential beneficiaries of the ruling would be the white-collar workers in industries such as retail, food service, insurance, technology and banking who are classified as managers or assistant managers but who spend much of their day ringing up sales, stocking shelves or sweeping the floor alongside the workers they supervise.

Class-action lawsuits by such employees seeking back pay for overtime and missed breaks have risen dramatically over the last decade. Most eventually settle, with employers typically paying millions of dollars to avoid the prospect of bigger losses at trial. In response to these suits, thousands of employers have asked their workers to sign agreements promising to resolve their disputes through arbitration instead of going to court.

The Court's decision centered on the agreement that Circuit City asked its 46,000 employees to sign, waiving their right to file a class-action lawsuit and limiting damages, the statute of limitations to bring their claims and the attorney fees they could recover. In a 4-3 ruling, the high court said that some of those agreements undermined employees' "unwaivable statutory rights" and "pose a serious obstacle to the enforcement of the state's overtime laws."

The Circuit City case was filed by former customer service manager Robert Gentry in 2002, claiming that the retailer had illegally denied him overtime pay. The Los Angeles resident signed an arbitration agreement when he began working for the company in 1995 but later claimed that the agreement violated state labor laws and was unconscionable because employees were coerced into signing and feared retaliation if they didn't.

The Court did not issue a blanket ban on provisions such as the one Gentry signed but remanded his case to the trial court, instructing it to void such agreements if employees can more effectively pursue their rights through class actions. [PE]

2008 Vacation Schedule Enclosed!

President's Report

~Dave Miller~

Responding To A Cal/OSHA Inspection!

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. This year our emphasis will be on safety as we bring to you the experts in the field. Sierra Safety Services will present a program that provides you with the information you will need when Cal/OSHA comes to visit.

An accident, disgruntled employee or just a random act by the agent in the neighborhood, can trigger an inspection. Because Cal/OSHA inspectors won't give you a warning, the best way to prepare for an inspection is to be in compliance. In the event that an inspector does come knocking, it helps to have a plan in place for how to manage the visit. Our October speaker will give you the information you need to be ready for any eventuality. [PE]

Progress might have been all right once, but it's gone on too long - Ogden Nash

Judge Stops Immigration Crackdown

The Social Security Administration cannot start sending out letters to employers next week containing notification of more serious penalties for knowingly hiring illegal immigrants, a federal judge has ruled.

Based on a lawsuit filed by the AFL-CIO, a U.S. District Judge granted a temporary restraining order prohibiting the so-called "no-match" letters from going out as planned, with a hearing on the matter set for Oct. 1.

The lawsuit claims that new Department of Homeland Security rules outlined in accompanying letters threaten to violate workers' rights and unfairly burden employers.

At the heart of the new rules announced last week is toughened Homeland Security enforcement of so-called "no match" letters — which SSA sends to companies when employees have questionable identification numbers.

Homeland Security officials acknowledged that because of a privacy provision in the IRS code, immigration officials will actually have no way of knowing which employers have received "no-match" letters, which have complied and which have not. [PE]

Labor News

California Supreme Court Employers Win Big in Two New Rulings

Employers Not Required To Prove The Negative

In *Green v. State* of California, the high court ruled that in a disability discrimination case filed under California's Fair Employment and Housing Act (FEHA), the employee bears the burden of proving that he or she is capable of performing the essential duties of the job.

"... THE EMPLOYEE BEARS THE BURDEN .."

Although this is the standard that already applies under the federal Americans with Disabilities Act, the language of the FEHA created some doubt as to the correct standard under state law. The employee in this case unsuccessfully argued that the employer had the burden of proving that the employee was not capable of performing his duties. [PE]

Ralph's Rewards Employees

Employers May Consider Their Costs

In the other decision, *Prachasaisoradej v. Ralphs* Grocery Company, Inc., the Supreme Court held that California wage and hour law didn't bar Ralphs Grocery from maintaining an employee bonus plan that calculated store employee bonuses based on store profitability.

The plan's formula took into account expenses and losses due to cash shortages, merchandise shortages and shrinkage, workers' compensation costs, tort claims by nonemployees, and other losses. The employees contended that this formula violated Labor Code provisions prohibiting employers from taking back any part of an employee's wages and from requiring employees to contribute to workers' comp costs (whether directly or indirectly). The employees also argued that the plan violated Wage Order terms stating that employers may not make wage deductions or require reimbursement from employees for cash shortages, breakage, or loss of equipment, unless the shortage, breakage, or loss is caused by the employee's dishonesty, willful act, or gross negligence.

"... DESIGNED TO REWARD EMPLOYEES .."

According to the high court, nothing in the law "suggests that an employer violates California wage-protection laws by providing, as Ralphs did, supplementary compensation designed to reward employees, over and above their regular wages, if and when their collective efforts produced a positive financial result for the store where they worked." [PE]

Man Found Guilty Of Fraud

A Pomona man has been found guilty of workers' compensation insurance fraud. Manuel Carreon, 45, was convicted Aug. 14 of the felony. He was sentenced to two years in state prison. Carreon attempted to embezzle Hartford Casualty Insurance Company out of more than $100,000. In 2003, Carreon reported he hurt his back as a nursing assistant, and in 2004 he was hired as a carpenter for Howard Roberts Development while he received total disability, according to the news release.

After Carreon was hired, he told his physician - falsely, the release said - he was still injured. The Riverside County District Attorney's Office prosecuted the case. [PE]

Technician Goes to Prison

An electronics technician formerly with the Federal Aviation Administration was sentenced to one year in federal prison for his fraudulent receipt of $100,000 in federal workers' compensation benefits while running an aviation-related business on the side and failing to report income while receiving the federal assistance.

U.S. District Judge Robert B. Kugler also ordered Jeffrey L. Bell, Sr., 56, of Vineland to make $10,000 in restitution. He was ordered into custody immediately to begin serving his prison sentence. The government will now also move to have Bell forfeit all $100,000 in workers' compensation benefits.

A jury in federal court convicted Bell on all six counts of an Indictment. Counts One through Five charged Bell with completing and submitting forms to the U.S. Department of Labor to obtain workers' compensation benefits in which Bell falsely stated that he was not employed, self-employed, and had no income from such employment or self-employment. Count Six charged Bell with lying to federal agents during an interview on June 7, 2006.

In about October 2001, Bell reported that he injured his neck when he fell out of a chair at his workplace. Over the course of approximately 15 months over two periods - March 2005 through September 2005 and from November 2005 through August 2006 - Bell received compensation benefits of more than $100,000.

Bell was the president and sole owner of U.S. Aircraft Instruments, Inc., at a New Jersey airport. His company repairs, installs, services, and inspects navigational devices in aircraft. Through this period, Bell operated and managed the company, performed repairs, inspections and services for a fee and earned income, none of which were disclosed on the forms to obtain federal workers' disability compensation.

At trial, the evidence established that Bell, through his company, had made in excess of $130,000 in gross receipts through the period, some of which he deposited into his personal bank account and his wife's personal bank account. [PE]

2008 Vacation Schedule Enclosed!

Human Resources Question with Candice Weaver

The Month's Best Question

When to Investigate

Q: ***"An employee says she is 'outraged' by another employee's conduct and demands that we begin an investigation. Should we?"***

A: Move cautiously! Most companies have situations where they must conduct internal investigations of employee behavior. You may launch an investigation when you determine a legitimate business purpose. An investigation can itself become a source of liability, however, if initiated for an improper motive or if the investigative procedures or results are mishandled.

Employee conduct usually merits investigation when it is against company policy and subject to discipline as defined in employers' codes of conduct, but it may also be defined in collective bargaining agreements. It may be undefined as well and left to the employer's discretion at the time the conduct occurs. Obvious types of conduct that might warrant investigation include financial misdeeds or other misuse of company assets; abusive behavior toward supervisors, coworkers, or business contacts; or current drug or alcohol abuse.

While some types of internal investigations are prohibited by law, others are mandated. For example, harassment charges must be investigated. When an employee alleges harassment based on a characteristic protected by antidiscrimination laws, the employer's defense may depend on its ability to prove to the court that it did not condone such harassment, that it had a policy against it, and that it took action to prevent or correct the harassment. The company must investigate claims to later prove it took action to prevent or correct the problem.

Investigations of employee conduct must be conducted properly to respect the interests of complainants, witnesses, and the accused, as well as to avoid potential liability. When a company is conducting an investigation based on employee harassment complaints, management must recognize the risk that the complaining person, and those interviewed as witnesses, will later assert claims of retaliation for their involvement.

Contact Pacific Employers when you need help to determine if your reasons are sufficient to take the steps that will certainly involve employee privacy and will probably bring about a negative reaction from the employee who is being investigated. [PE]

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

Employment Seminars

The Small Business Development Center and Pacific Employers will host the 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.

Sexual Harassment Prevention Training

California Assembly Bill 1825 (AB 1825) requires employers with 50 or more employees to provide all personnel who have "Supervisory Authority" a minimum of two hours of Sexual Harassment Prevention Training every two years. Training must include strategies for prevention and discuss remedies for victims of unlawful harassment.

On Wednesday, October 17th, 7:30am registration & breakfast with program 8:00am thru 10:00am, at the Lamp Liter Inn in Visalia, the Visalia Chamber of Commerce, in cooperation with Pacific Employers, will present the state mandated Supervisors, Sexual Harassment Prevention Training Seminar & Workshop with full breakfast.

Call the Chamber at 734-5876 for reservations
$25 for Pacific Employers and Chamber members.

2007 Topic Schedule

♦ **Guest Speaker Seminar -** Sierra Safety Services will present a program that provides you with the information you will need when Cal/OSHA comes to visit.

Thursday, October 18th, 2007, 10am - 11:30am

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

Thursday, November 15th, 2007, 10am - 11:30am

There is No Seminar in December

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.

2008 Vacation Schedule Enclosed!

Pacific Employers
306 North Willis Street
Visalia , CA 93291
559 733-4256
(800) 331-2592
www.pacificemployers.com
email - peinfo@pacificemployers.com

Return Service Requested

PRSRT STD
U.S. Postage
PAID
VISALIA, CA
Permit # 441

Pacific Employers
Management Advisor
Celebrating 43 Years!

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

Seven Figure USERRA Verdict Hits Target!

Proving once again that employers can pay a steep price for disregarding the rights of returning Veterans, a jury recently awarded just under $1,000,000 to an Oregon National Guardsman who was discharged after seeking outside assistance to get his job back. Apparently in a sense of outrage, a jury in the U.S. District Court for the District of Oregon awarded an employee $85,000 in economic and compensatory damages and a whopping $900,000 in punitive damages, based largely upon the timing of the employer's discharge decision. Patton v. Target Corp.

The action was brought under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), which was enacted to protect the jobs of reservists, National Guard members and other members of the uniformed services. [PE]

FREE & UNLIMITED CONSULTATION?

Yes FREE! A benefit of Pacific Employers' Membership is Free, 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.

Widow to Receive $19 Million

The widow of a railroad-car repairman killed on the job, has been awarded $19.1 million for her pain and suffering and her husband's wrongful death.

Defendants in the case were New Jersey Transit (the worker's last employer), Central Railroad of New Jersey, and Consolidated Rail Inc.

According to lawyers for the plaintiff, the employee was engaged, while working for the railroads, in welding, sanding, painting, and repairing brakes, using asbestos and silica products. Exposure to these substances and other dusts and fumes caused his diagnosis of pulmonary fibrosis in June 2000. He died from the disease in 2002.

The award followed a 5-week trial and 7 1/2 hours of deliberations in Middlesex County Superior Court. [PE]

Zoo Cited in Mauling Of Worker by Jaguar

OSHA has cited the Denver Zoological Foundation Inc. for alleged unsafe working conditions following a fatal accident in which a 28-year-old employee was mauled by a jaguar.

A citation issued to the organization by OSHA's Denver area office alleges one serious violation of the Occupational Safety and Health Act for failure to provide appropriate protocols for preventing inadvertent contact with dangerous animals. The citation carries a proposed penalty of $3,500.

The zoo claims that the employee violated safety procedures, including:

* Failure to verify the location of the animal before opening the door, and

* Failure to maintain two locked doors between the keeper and the animal.

The employee had undergone extensive safety training, according to the zoo. [PE]