Pacific Employers
Management Advisor
Celebrating 44 Years!
October 2008

Top of the News

Misclassifications

When the IRS recently hit FedEx with hundreds of millions in penalties and back taxes for classifying its drivers as independent contractors, it was apparent that the days of government agencies and regulatory authorities blindly accepting a business classification of individuals as "independent contractor" were over. This increased scrutiny makes it critical for employers to determine whether their workers are employees or independent contractors.

"... EMPLOYERS SHOULD CONDUCT INTERNAL AUDITS ..."

Several states have implemented initiatives to ensure that companies are not avoiding overtime pay, unemployment compensation, payroll taxes and employment-related rights and benefits through the use of the independent contractor classification. California has recently sent "employment relationship" questionnaires to "independent contractors" to ensure that those individuals are not more rightfully classified as employees.

The federal government also appears poised to join the attack. In late May 2008, the U.S. House of Representatives introduced the Employee Misclassification Prevention Act (H.R. 6111). As its name suggests, this legislation targets employers who misclassify their employees as "independent contractors." If passed, this legislation would make the misclassification of employees a prohibited act under the Fair Labor Standards Act and increase penalties under the FLSA. The legislation would also require employers to keep records regarding their classification of workers, notify workers of their classification, and allow them to challenge that classification. In addition, the proposed legislation would require state unemployment insurance agencies to conduct audits to ascertain which employers are misclassifying their employees, it would authorize the Department of Labor (DOL) and the Internal Revenue Service to share information on instances of misclassification, and mandates that the DOL perform audits focusing on industries that frequently misclassify employees.

In light of the increased scrutiny on independent contractor relationships, employers should conduct internal audits to ensure they have properly classified their independent contractors and to effectively address any misclassifications.

If you are using independent contractors who might be considered employees by the state or federal agencies, you may want someone to review your current situation. Contact the staff at Pacific Employers at 559 733-4256. Drop by our office at 306 N. Willis Street, Visalia, for assistance. We look forward to seeing you. [PE]

Concerned about ICE? See Seminars on Page 3

ICE Seminar Flyer Enclosed!

President's Report
~Dave Miller~

Deductions Can Be Costly

Employee handbooks can provide useful policies for handling various work-related issues. However, some handbooks contain policies that create unnecessary liability.

In a recent federal court case, employees demonstrated that their employer had a policy of docking exempt workers for partial day absences and disciplinary reasons. (*Ergo v. International Merchant Services)* The Fair Labor Standards Act ("FLSA") prohibits docking exempt employees except in very limited circumstances.

In *Ergo*, the court found that an impermissible docking policy and practice prevented employees from being classified as exempt under the FLSA's salary basis test. Under this test, an exempt employee must receive the same predetermined amount of money for each week worked. An employee whose pay is subject to reduction because he or she is late or leaves early, for example, will not be considered "salaried" because such an employee's pay varies according to hours worked.

The employer argued that any deduction based on its policy occurred only in "unusual circumstances." The court found that 12 such instances under the policy to establish FLSA violations. The court emphasized that even if the employees had not actually been subjected to any improper deductions, the mere existence of a policy permitting such deductions showed that the salary basis test was not satisfied and the employees could not be properly classified as exempt.

"... EXEMPT EMPLOYEE MUST RECEIVE THE SAME ... EACH WEEK WORKED ..."

The *Ergo* decision teaches that employers should review their employee handbooks and other personnel policies to ensure that they comply with the salary basis test and that exempt employees' salary is not subject to impermissible "docking."

It is also important for employers to have a safe harbor policy to help protect them from liability. A "safe harbor" provision may minimize the impact of inadvertent improper deductions from an exempt employee's salary. The "safe harbor" is a brief period of time in which employers have the opportunity to correct inadvertent improper deductions that may have been made from an exempt employee's salary.

If you need your policy reviewed, please contact the staff at Pacific Employers at 559 733-4256. [PE]

No man's life, liberty, or property is safe while the legislature is in session. — Mark Twain

Recent Developments

Shopping Malls Cannot Prohibit Union Protesters

The California Supreme Court recently ruled in a 4-3 decision that a privately owned shopping mall could not restrict union members from peacefully handbilling on its property in connection with a labor dispute, even though the handbilling was designed to cause a consumer boycott of one of the mall's tenants. *Fashion Valley Mall, LLC v. NLRB*

"... Fashion Valley has potentially wide-range implications ..."

Justice Carlos R. Moreno said that under the California Constitution, a large shopping mall is a "public forum," and that mall managers cannot prohibit speech based on its content. The Court said that as long as the protesters do not disrupt a business or physically interfere with shoppers, the right of free speech outweighs the mall's right to protect its tenants' profits. The ruling follows a 1979 California Supreme Court decision that found that large shopping malls are public forums in which people's free speech rights are protected by the California Constitution. *Robins v. Pruneyard Shopping Center*.

The decision in Fashion Valley has potentially wide-range implications for California employers and owners of private property who encourage, invite, or permit members of the general public to come upon their property. Indeed, owners of private property that may be deemed to be a "public forum," such as a large shopping mall, who attempt to restrict or regulate speech on their property based on content, may be in violation of the California Constitution as decided by the California Supreme Court in *Fashion Valley*.

Lessees should be certain that their property interest is clearly defined in the governing lease. Lessees should bargain for and obtain the right to exclude persons from the leased premises and adjacent sidewalks and common areas, rather than agree to nonexclusive use of those areas. Only those who possess a sufficient interest in property, an exclusory interest, may properly seek to exclude union agents or other third parties. *Bristol Farms, 311 NLRB 437*

For nonpublic-forum land owners or occupants, such as freestanding retail stores and other similar land owners, or entities that have a clearly definable "property interest" (e.g., lease holders), the principles of Fashion Valley and Pruneyard would not appear to be applicable because the property in question does not possess the characteristics of a "public forum" due to the small size of any common or "public" areas and the relatively small number of square footage of shopping or selling space. Nevertheless, such entities might wish to consider designating a relatively small space on their property as a "free speech zone" where outside groups could stand and offer any leaflet or handbill to members of the general public who enter the property in question. This approach may avoid litigation in California courts regarding trespass issues and also avoid litigation under the National Labor Relations Act.

Employers with limited and special missions that involve entry of the public onto their private property, such as health care providers, may be able to successfully prohibit any entry onto their private property by protesters. The argument to support this approach is that the special mission of the property owner, such as rendering health care services to the public, should not be interfered with by outside organizations. [PE]

ICE Raids

Immigration Alert: Worksite Enforcement Actions are Evidence of Continued Focus on Employers' Role in Illegal Immigration

On August 25, 2008, U.S. Immigration and Customs Enforcement (ICE), an arm of the Department of Homeland Security (DHS), conducted the largest single-workplace immigration raid in U.S. history at Howard Industries, Inc., an electric transformer manufacturing facility, located in Laurel, Mississippi. Approximately 595 illegal aliens were arrested and 8 will be prosecuted for criminal charges of aggravated identity theft. The agents executed a federal criminal search warrant for evidence relating to aggravated identity theft, fraudulent use of Social Security numbers and other crimes, as well as a civil search warrant for individuals illegally in the United States.

"... and faces up to 10 years in prison and a $500,000 fine."

According to the ICE Special Agent in Charge of the Office of Investigations in New Orleans, Michael A. Holt, this enforcement action is "part of ICE's ongoing nationwide effort to shut down the employment magnet fueling illegal immigration." Although no company executives have been detained, the investigation is ongoing with the execution of search warrants only the first part in the enforcement action.

In Iowa, on May 12, 2008, ICE special agents detained nearly 400 workers at Agriprocessors, the nation's largest kosher meatpacking plant and seized dozens of fraudulent permanent resident alien cards from the plant's human resources department. At least one supervisor has since pleaded guilty to conspiring to hire illegal immigrants and aiding and abetting their hiring and faces up to 10 years in prison and a $500,000 fine.

These recent events highlight ICE's strategy of sending a strong deterrent message to employers by conducting large-scale enforcement actions which immediately impact a company's bottom line. In addition to the lost profits incurred by companies during an enforcement action (which may include shutting down a plant for a period of time because of lack of workers), ICE is focused on pursuing criminal enforcement actions against a company's supervisors and potentially the company itself. ICE's current strategy differs dramatically from the approach of the former Immigration and Naturalization Service (INS) which focused on imposing civil fines on employers who hired illegal aliens. Today, ICE relies on large-scale enforcement actions, criminal prosecutions and the seizure of company assets to gain compliance from businesses.

In 2002, ICE made 25 criminal arrests and 485 administrative arrests. In 2007, ICE made 863 criminal arrests and 4077 administrative arrests. ICE is on track to far surpass those numbers in 2008. As of August 12, 2008 (prior to the recent enforcement action at Howard Industries), ICE had made 1022 criminal arrests and 3900 administrative arrests.

These enforcement actions highlight the need for companies to have comprehensive human resources policies regarding the hiring and employment of their workers to ensure that all workers are, and continue to be, authorized to work in the United States. In addition, companies need to regularly monitor these policies to ensure that their managers are not turning a blind eye to evidence that a worker may be unauthorized, while at the same time, complying with all relevant anti-discrimination laws. [PE]

ICE Seminar Flyer Enclosed!

Human Resources Question with Candice Weaver

The Month's Best Question

Disability?

Q: ***"We had an applicant for employment make reference in an interview to her disability, without explaining what she meant. We chose not to ask for an explanation and did not hire, was that smart?"***

A: When you are made aware of an employee's "protected status" you may be at risk of discrimination under the ADA, the FEHA and a host of other laws without even trying.

Two recent cases examining whether an employee is "disabled" and therefore, entitled to protection from discrimination under the Americans with Disabilities Act of 1990 ("ADA"), concluded that stress disorders and obesity are disabilities.

In some instances, employees who claim disabilities are referring to the protected status they hold by some need, such as the need to take time off for kidney dialysis.

A recent court case held that a worker who was trying to become pregnant through a fertility clinic was entitled to consideration under the pregnancy disability laws.

Another recent case found an employer guilty of discrimination against an employee who requested no accommodation, and stated on his application for employment that he *"had the ability to perform the essential functions of the position either with or without a reasonable accommodation."* The applicant performed poorly when doing the job he was hired to do and was transferred to two other positions to find something he could do well.

The employee claimed *"He was discriminated against because of his disability, and that the company failed to provide him with required reasonable accommodation for his disability."* The Court found evidence that the worker exhibited *"noticeably slower walking, walking with a shuffle and limp, recognizably slower and quieter speech, not looking directly at people when talking to them, weaker vision, and a poor sense of direction."*

The Court ruled that the company should have perceived the disability and made accommodation. It should be clear that refusing to hire someone with a disability is illegal, but even hiring someone who requests no accommodation can lead to trouble when you fail to consider their needs. [PE]

Supervisors' 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 October 22nd, 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

Want Breaking News by E-Mail?
Just send a note to
peinfo@pacificemployers.com
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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

Guest Speaker Seminar
ICE Raids

NEWS: For the last several months, agents of Immigration and Customs Enforcement (ICE) have carried out well-publicized immigration raids in factories, meatpacking plants, janitorial services, and other workplaces employing immigrants.

IRCA, Immigration Reform and Control Act prohibits the employment of illegal aliens and imposes criminal and civil penalties (fines between $250 and $10,000, and six months imprisonment) against persons who knowingly hire unauthorized aliens.

♦ **ICE Raids - What to expect from the U.S. Immigration and Customs Enforcement agents when they target your employees. Guest Speaker - from the Law Office Of Lazaro Salazar.**
What are your liabilities, penalties, etc. for knowingly hiring undocumented workers?
Thursday, October 16th, 2008, 10am - 11:30am

♦ **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 ~

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.

ICE Seminar Flyer Enclosed!

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Chamber Visalia Community • Advocacy • Education • Networking of Commerce
Small Business of the Year

Ex-car salesmen win $19 million

A **federal jury in Portland awarded $19 million** to four African American former employees of Thomason Toyota in Gladstone for enduring a hostile, racially charged work environment.

"All I do is take Viagra and redneck pills every morning."

Salesmen Carlos Barfield, Marcus Arnold, Jahaeel Hardy and Kent Paul sued in 2006 after they said managers and other workers at the dealership created an atmosphere of racist remarks that management failed to stop.

The verdict was against the dealership's former owner, the New York-based Asbury Automotive Group, which bought a majority stake in Thomason and its nine new-car dealerships in 1998.

Several witnesses claimed that a supervisor repeatedly described himself as a "redneck" and threatened to put a bullet in the head of anyone who complained. "Am I the only redneck here?" one Thomason employee reportedly said. "All I do is take Viagra and redneck pills every morning."

Another employee "talked about how his parents are rednecks and they don't like blacks and they used to burn crosses," according to witness statements. [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

New Time Card Crime

Governor Schwarzenneger has signed into law AB 2075, which amends California Labor Code section 206.5 and makes it a misdemeanor for an employer to require an employee, as a condition of payment of wages, to sign a statement of hours worked that the employer knows is false.

". . . employers who require employees to certify their timesheets . . ."

Prior to amendment, Labor Code section 206.5 prohibited employers from requiring an employee to execute a release of wage claims, unless payment of the wages has been made. The amendment extends this protection by defining "execution of a release" to expressly include requiring an employee to execute a statement of hours worked during a pay period which the employer knows to be false. Proponents of the legislation argued that the new law was needed because some employers are attempting to guard against wage and hour litigation by requiring their employees to certify records of hours worked that are false and do not accurately reflect overtime and other hours worked. The new law goes into effect January 1, 2009.

California employers who require their employees to certify their timesheets each pay period in order to be paid should evaluate their practices. Employers who knowingly permit employees to record "default" hours as opposed to actual hours worked, and/or who know employees are recording inaccurate hours, may be subject to new risk and liability under California law. [PE]