

WHAT'S NEW! BACK DOOR CARD CHECK

As Big Labor has realized it won't get "card check" legislation through Congress, it is turning to its secret weapon inside the Obama Administration—labor lawyer Craig Becker. And as many Senators feared when he was nominated, Mr. Becker is using his position on the National Labor Relations Board to bypass the will of Congress.

President Obama gave Mr. Becker a recess appointment in March after Senate Democrats refused to confirm him to the NLRB, the agency charged with fairly overseeing union elections. As a top lawyer for the Service Employees International Union, Mr. Becker had suggested that the NLRB has the legal authority to impose card check—which eliminates secret ballots in union elections—without the approval of Congress. At the end of August the NLRB dropped the bombshell, when, in a 3-2 decision, it decided to revisit its important 2007 *Dana Corp.* ruling.

This *Dana* reversal also raises more questions about Mr. Becker's ethical standards. The labor lawyer has already refused to recuse himself from cases involving the SEIU, his former employer. Now it turns out he had filed a brief for the AFL-CIO in the original *Dana* case, arguing that there is no essential difference between card check and secret ballots and calling *Dana*-style protections "bad labor-relations policy." Mr. Becker is clearly biased against *Dana* and by any reasonable standard should not be able to rule on it. [PE]

AFTER HEAT-RELATED DEATHS, NEW SAFEGUARDS ADOPTED

Job safety authorities in California have approved new rules to protect outdoor workers from the potentially deadly effects of heat.

The new regulation strengthens existing protections for farmworkers and extends safeguards to other laborers, including those who transport heavy materials and work in landscaping, construction and oil and gas fields. Shade must be available when the temperature hits 85 degrees, and employers must remind workers to drink water and closely supervise new employees when temps reach 95, under the rules adopted by the California Occupational Safety and Health Standards Board.

In 2005, California adopted landmark heat-illness protections for farmworkers. The rules aimed to protect seasonal workers who picked fruit during the hot summer months.

But in recent years, hundreds of farm workers have been found with inadequate shade and no water, prompting calls for updated safety standards. In the last five years, 28 workers have died from heat-related health problems, 12 of whom worked in agriculture, the Associated Press reports.

The new rules are set to take effect this fall. [PE]

Workplace Security Flyer, 2011 Vacation Calendar & new WC Poster Enclosed!

President's Report ~Dave Miller~

Workplace Security Seminar

On October 21st we will be holding our annual Guest Speaker Seminar. This will be a very special Guest Speaker Seminar having to do with Workplace Security.

Under CA law, every employer must maintain a written safety program addressing the potential for violence in the workplace and must train employees in the hazards specific to their jobs. Most employers recognize the additional need to maintain the security of their assets, including money, vehicles and work sites.

This seminar will cover several aspects of resource, equipment and employee security such as the use of company gas cards, cell phones, GPS equipment, video and audio taping as well as internet transparency. [PE]



New Workers' Comp Info Poster

The Division of Workers' Compensation has posted information as relates to Workers' Compensation Requirements. We are including the poster as an inset as well as the following information so that you can get a jump start on compliance requirements that will be met with our up-coming 2011 All-In-One Poster that will be sent to you this December.

New state regulations will require employers to update their new-hire pamphlets, workers' compensation notices and posters by Oct. 8, 2010. See the attached Division of Workers Compensation (DWC) notice for specific information. Fines and penalties may apply for noncompliance. Listed below are links to the new documents available through the DWC website at no cost.

Poster: http://www.dir.ca.gov/dwc/forms/DWCForm7_2010.pdf

Claim form: <http://www.dir.ca.gov/dwc/forms/ClaimForm2010.pdf>

Facts for Injured Workers: http://www.dir.ca.gov/dwc/FactSheets/Employee_FactSheet.pdf

MPN Notices: http://www.dir.ca.gov/dwc/MPN/MPN_SampleInitialWrittenEmployeeNotificationLetter.doc

You may wish to contact your Workers' Compensation carrier for document availability or purchase from the California Workers' Compensation Institute store at www.cwci.org. [PE]

Nobody made a greater mistake
than he who did nothing because
he could do only a little.

- Edmund Burke, statesman and writer (1729-1797)

Recent Developments

Ninth Circuit Finds Female Employee's Unwelcome Advances On Male Colleague Potentially Actionable

The Ninth Circuit confirmed that men are equally entitled to protection under Title VII from a sexually abusive work environment. *Equal Employment Opportunity Comm'n v. Prospect Airport Servs., Inc.* The court held that a female co-worker's repeated sexual advances to a male colleague can form a prima facie case of sexual harassment where the man informed her the conduct was unwelcome and repeatedly complained to various supervisors, who did not take steps to stop her behavior. The Circuit panel reversed the district court's grant of summary judgment for the employer.

Over a six-month period, Sylvia Munoz, who was married, sent notes of an explicit sexual nature to her male colleague at Prospect Airport Services, Rudolpho Lamas. The notes became more frequent as he continued to deny any interest in her. Munoz began to involve co-workers, asking them to deliver her notes to Lamas and to tell him of her attraction to him. As Lamas continued to reject Munoz, saying that as a Christian a recent widower, and did not want to be involved with a married woman, rumors spread at the workplace that he was homosexual, which increased his discomfort. He began seeing a psychologist and alleges that his work performance suffered.

While Lamas had once been chosen to be the key employee in charge of saving an important contract with Southwest Airlines, he was later demoted and fired due to his poor performance and negative attitude. Lamas testified that the stress caused by the six months of Munoz's harassment caused the decline in his performance.

... "WALK AROUND SINGING TO YOURSELF . . . I'M TOO SEXY FOR MY SHIRT."

Although he had repeatedly complained to at least three separate supervisors, asking them to make Munoz stop sending him notes and messages, his complaints resulted in just one warning to Munoz that she should stop pursuing Lamas.

After that warning, Munoz's advances continued, as did Lamas's complaints to management. But the employer's assistant general manager advised Lamas that the harassment "was a joke" and that Lamas should "walk around singing to yourself . . . I'm too sexy for my shirt." The supervisors' failure to take action contravened both Prospect's written sexual harassment policy, which required prompt investigation and discipline where warranted, as well as Prospect's history of having disciplined men for sexual harassment of women, including two past firings.

The Ninth Circuit held that it "cannot be assumed that because a man receives sexual advances from a woman that those advances are welcome" and noted that "even if Munoz looks like Marilyn Monroe, Lamas might not want to have sex with her, for all sorts of possible reasons." Significantly, welcomeness cannot be measured objectively, but depends on an individual employee's circumstances and feelings. So long

as he communicates that the behavior is unwelcome, the employer may be liable for not stopping it.

Although the behavior here was not severe in the sense that there was almost no physical contact, a work environment may still be actionably hostile even where the conduct consists only of pervasive remarks over an extended period of time (citing *Draper v. Coeur Rochester, Inc.*). Moreover, Munoz's behavior was extremely pervasive, and "the required level of severity of seriousness varies inversely with the pervasiveness or frequency of the conduct."

This decision reminds employers that complaints of sexual comments or behavior should be addressed promptly and with sufficient deterrence to end the behavior. The relative genders of the involved parties may not diminish that urgency. " [PE]

ICE Targets 500+ Businesses for I-9 Audits

U.S. Immigration and Customs Enforcement (ICE) began serving Notices of Inspection (NOIs) to over 500 businesses nationwide on September 15, 2010. The NOIs require in-person inspection of I-9 employment verification forms and payroll documentation. Targeted employers are given three business days to prepare for a meeting with federal officials for review of the requested documentation.

... HIGHER FINES APPLY FOR KNOWING EMPLOYMENT OF UNAUTHORIZED WORKERS."

According to ICE, the 500-plus businesses targeted in this round of ICE I-9 audits were selected as a result of specific leads and information regarding allegations of hiring unauthorized workers, exploiting workers and paying unfair wages. Fines for uncorrected technical and substantive errors on the forms range from \$110 to \$1100 per form. Higher fines apply for knowing employment of unauthorized workers. Even if you do not receive a NOI in this round, we recommend that you take this opportunity to conduct an audit of your I-9 compliance.

If you wish to have a member of the Pacific Employers' staff review your I-9's and provide instructions on your hiring documents, contact our office for a visit. [PE]

Skateboard Injury Led To \$15K WC Fraud

Investigators say a 26-year-old Southern California skateboarder fell and broke his elbow, then claimed more than \$15,000 in workers' compensation by saying he stumbled at work.

Rudy Matthew Ursua is charged with nine felony counts, including making fraudulent statements and lying about his injuries in violation of Insurance Code and grand theft.

... WHILE SKATEBOARDING AT HIS GIRLFRIEND'S HOUSE. "

The Victorville Daily Press says Ursua filed for workers' comp benefits in 2008 while working for RCR Plumbing & Mechanical. Ursua claimed he was injured at work when he stepped on plumbing fittings on the warehouse floor.

But San Bernardino County district attorney's office investigator Hank June says it was later determined Ursua fell and fractured his left elbow while skateboarding at his girlfriend's house. [PE]

Workplace Security Flyer, 2011 Vacation Calendar & new WC Poster Enclosed!



Human Resources Question with Candice Weaver

THE MONTH'S BEST QUESTION

Fitness For Duty Exam

Q: "We have an employee returning from FMLA leave due to his own serious health condition. Although the employee has provided a doctor's note stating that he is released to work "full duty," we have serious concerns about his ability to do his job without risk of injury to himself or others. Can we require him to see a doctor selected by the company?"

A: Yes, if the medical examination is "job-related and consistent with business necessity."

Under the FMLA regulations, an employer can have a "uniformly-applied policy or practice that requires all similarly-situated employees (i.e., same occupation, same serious health condition) who take leave for such conditions to obtain and present certification from the employee's health care provider that the employee is able to resume work."

When such a policy or practice exists, the employer can delay restoration to employment following FMLA leave until an employee provides a fitness for duty certification, provided that the employee has been properly notified of the requirement in the designation notice.

An employee who fails to provide a properly requested fitness for duty certification is not entitled to reinstatement under the FMLA. Conversely, once an employee provides a fitness for duty certification, he or she must generally be reinstated.

But what if an employer has a genuine concern about an employee's ability to effectively perform the functions of his or her position notwithstanding a cursory note from the employee's doctor?

ADA PROVIDES FOR EXAM

While the FMLA procedures do not create a separate mechanism to require a medical exam, they do provide that "requirements under the Americans with Disabilities Act (ADA), as amended, apply."

Under the ADA, once an employee returns from FMLA leave, an employer may require a medical exam by its own health care provider and at its own expense if the exam is "job-related and consistent with business necessity."

Thus, the FMLA rules state, "an employer may require a warehouse laborer, whose back impairment affects the ability to lift, to be examined by an orthopedist, but may not require this employee to submit to an HIV test where the test is not related to either the essential functions of his or her job or to his/her impairment." Likewise, "an accountant could not be required to submit to a medical examination or inquiry just because her leg had been amputated." The accountant might be required to see the employer's doctor, however, if he or she had a condition that seriously impaired judgment or critical thinking.

Further, if an employee seeks an accommodation under the ADA, the employer may follow the procedures for requesting relevant information under the ADA. [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.

NO-COST EMPLOYMENT SEMINARS

The Tulare-Kings Builders Exchange, along with 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.

2010 Topic Schedule

◆ **WORKPLACE SECURITY** will be the topic for our Guest Speaker Seminar - Our guest experts will look at the protection of employees, clients and the workplace as well as equipment and money.

Thursday, October 21st, 2010, 10 - 11:30am

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

Thursday, November 18th, 2010, 10 - 11:30am

There is No Seminar in December

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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.

“Vacation Calendar Enclosed”

Vacation Calendar -- Enclosed in this edition of the Management Advisor is a 2011 Vacation Schedule Planner that provides the opportunity to visually and graphically display their employees’ vacation choices. If you need additional copies, please contact our office or just stop by!

Attendance Record -- Next month Pacific Employers will supply you with a new “2011 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. [PE]

ABM to settle sexual harassment suit, pay \$5.8M

One of the nation’s largest janitorial companies, ABM Industries Inc., has agreed to pay \$5.8 million to 21 female former employees to settle a sexual harassment lawsuit brought by the federal government.

The suit, filed in 2007, alleged that in one instance an employee was raped by a supervisor. Other charges included indecent exposure, groping, asking for sex and trading sex for promotions, according to court documents.

The U.S. Equal Employment Opportunity Commission is set to announce the settlement, in which ABM will admit no wrongdoing, Thursday morning with concurrent press conferences in Los Angeles and Fresno. The infractions allegedly took place in Bakersfield, Fresno and Visalia, Calif. [PE]

Deaths Decreased In U.S. Workplaces In 2009

Preliminary data show that on the whole, fewer people died on the job in 2009. Total workplace deaths in 2009 numbered 4,340, according to the Bureau of Labor Statistics, which recently released preliminary results from the 2009 Census of Fatal Occupational Injuries (CFOI).

The figure represents a nearly 17 percent decrease from 5,214 in 2008 and is also the lowest yearly estimate since the CFOI was introduced in 1992. [PE]

OSHA says injuries weren’t recorded

Federal regulators are seeking \$1.2 million in fines from a Houston heating and cooling products manufacturer that the government claims deliberately failed to record work-related injuries and illnesses as required.

The Occupational Safety and Health Administration said in a statement Wednesday that Goodman Manufacturing Co. failed to report, or to adequately log, 72 percent of workplace injuries that occurred from January 2008 to mid-March 2010. [PE]

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 Oct 27th, 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