Pacific Employers
MANAGEMENT ADVISOR
49 Years of Excellence!
October 2013

STRATEGIC PARTNER'S GUEST SEMINAR

Our October Guest Speaker Seminar will introduce our members to one of Pacific Employers' most accomplished and talented Strategic Partner organizations. It will also provide an opportunity for you to meet **Kim Parker, Executive Vice President,** and **Craig Strong, Regional Director**, from ***California Employers Association.***

Kim Parker is an experienced HR Generalist, a dynamic speaker and a successful leader. She is proud to be leading the way for California Employers Association (CEA). Kim has been thoroughly immersed in human resources and operational management for over 20 years. She exhibits her comprehensive bank of knowledge and crystal clear strategic guidance with CEA members and staff every day. Kim earned her BA degree in Business Administration, with a minor in Human Resources, at the University of Puget Sound. Kim is a founding member of the Employers Association of America, a National Network of local workforce solutions.

- Board Chair for the Sacramento Workforce Investment Board since 2009.
- Board Chair for the Sacramento WIB Employer Outreach Committee from 2007-2009.
- Appointed in 2013, by Governor Jerry Brown, to the California State Workforce Investment Board.

Craig Strong has over 24 years of extensive experience in human resources. His areas of expertise include recruiting, interviewing, record keeping, regulatory compliance, conflict resolution, union relations, employment law, training and team building. Craig began his human resource career right out of high school, when he joined the Navy. Working in personnel administration with both military personnel and civilians, Craig gained knowledge in all aspects of human resources and specialized in criminal investigations. He also played a key role in developing and implementing the Sexual Harassment Awareness program for the Navy after the *Tailhook* scandal.

With a Bachelor of Arts in Human Resource Management, Craig retired from the military. He continued to round out his career by working for a large banking institution, later a small private employer, and most recently was employed by a large manufacturer in Fresno. [PE]

2014 Vacation Scheduler Enclosed!

President's Report
~Dave Miller~

The 2014 Vacation Scheduler!

Enclosed in this edition of the *Management Advisor* **is our 2014 Vacation Scheduler** that provides the opportunity to visually and graphically display the 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 "2014 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, you may download a ***PDF*** copy from our website ***Forms*** page or you may contact our office.

UPCOMING FORMS AND INFORMATION

December 2013 - Instead of our monthly "*Management Advisor"* you will receive the updated, 2014 version of the ***Pacific Employers' "All-in-1" Poster*** which includes the required federal and state postings for most businesses.

January 2014 - Our Labor Law Update Seminar will be held on Thursday, January 16th, 2014, 10 - 11:30am. Learn about the recent changes to both the California and Federal laws that affect your business and employees.

EMAIL NEWSLETTER

When circumstances move us, Pacific Employers sends out email newsletters that have information on breaking news, events and a few good jokes. Send a note to us at peinfo@pacificemployers.com and tell us you want "Breaking News by E-Mail."

NOTE: **The current Spanish Language All-In-One Poster is now available at our office.** [PE]

Useless laws weaken the necessary laws. -Charles de Montesquieu, philosopher and writer (1689-1755)

Recent Developments

District Court Rejects NLRB Top Lawyer

Court Rules NLRB's Top Lawyer Improperly Appointed

The National Labor Relations Board's (NLRB) top lawyer, Lafe Solomon, was improperly appointed, a U.S. District Court judge held in a recent decision. In the ruling, U.S. District Judge Benjamin Settle said President Barack Obama's appointment of Mr. Solomon in June 2010 was "improper" because the Federal Vacancies Reform Act, under which he was installed, only permits such an appointment if the appointee has served as a personal assistant to the departing general counsel within the prior 365 days.

Judge Settle said it was an "undisputed" fact that Mr. Solomon never served as such an assistant. It's not certain if the NLRB will appeal the ruling, which was issued by the U.S. District Court for the Western District of Washington at Tacoma. [PE]

"Bag Search" Wage Claim

Two Former Apple Employees File Suit Seeking Unpaid Wages for Time Spent Undergoing "Bag Searches"

Two former Apple Inc employees, who were hourly store workers, have filed a lawsuit against the company alleging that they were subjected to daily searches while off-the-clock, and that they should have been compensated for that time.

According to the lawsuit, the "screenings" or bag searches, designed to discourage theft, are conducted every time sales representatives leave the store, including for meal breaks. The employees are seeking unpaid wages, overtime compensation and other penalties. They are also seeking class-action status on behalf of every current and former Apple hourly employee. Their complaint alleges that they often waited in line for roughly 5 to 10 minutes or more (while off-the-clock) before undergoing each check. The company has more than 400 stores around the world. [PE]

Trustees Pay Millions for Violations

Trustees of a theatrical stage employees' union pension plan have been required to repay $2.3 Million for Alleged ERISA Violations.

The trustees of the pension plan, annuity fund and vacation fund of Exhibition Employees Local 829 of the International Association of Theatrical Stage Employees in New York have repaid a total of $2,256,817, with an additional $50,000 scheduled to be paid, to the funds following a consent judgment, which resulted from a U.S. Department of Labor (DOL) investigation which revealed alleged violations of the Employee Retirement Income Security Act (ERISA).

The trustees have also agreed to make additional payments and forfeitures of their own annuity plan accounts, resign and take other corrective action. The violations included alleged improper transfer of assets from the Local 829 pension plan to the union's annuity, vacation, hiring hall and general funds as well as the improper transfer of at least $240,000 from the pension plan and annuity fund to service providers. [PE]

Psychiatric Manual Poses New Challenges

Suppose a shy and awkward employee who just performed badly in a customer presentation brings a note from his doctor diagnosing "Social (Pragmatic) Communication Disorder" and asks not to have to meet with customers again as a reasonable accommodation.

Or an older employee who is about to be given a final warning for making critical mistakes in her work brings a note from her doctor stating that she has "Mild Neurocognitive Disorder" and requesting that her job be restructured to help her deal with her short-term memory loss.

Or an employee fails to return to work after taking the company's standard bereavement leave for the death of a close relative. Eventually his doctor faxes a note stating that the employee has major depression and needs leave until further notice to deal with his loss.

Each of these scenarios is made possible by the American Psychiatric Association's release in May of a new edition of its Diagnostic and Statistical Manual of Mental Disorders, known as "DSM-5." This manual is primarily used by psychiatrists and other mental health professionals in diagnosing patients, but its addition of new diagnoses and expansion of others is likely to impact employers as well.

The new and expanded diagnoses in DSM-5 are likely to increase the number of conditions covered by the Americans with Disabilities Act. Although DSM-5 cautions that the assignment of a diagnosis does not imply a specific level of impairment or disability, this distinction has little practical meaning given the enactment of the ADA Amendments Act in 2008 in which Congress decreed that the definition of "disability" for purposes of the ADA is to be construed broadly in favor of coverage.

"... CERTAIN PSYCHIATRIC DISORDERS .. WILL ALMOST ALWAYS QUALIFY AS DISABILITIES.."

The EEOC's regulations issued under the ADA even decreed that certain psychiatric disorders, including Posttraumatic Stress Disorder, Major Depressive Disorder, and Bipolar Disorder, will almost always qualify as disabilities.

But the mere inclusion of new diagnoses in DSM-5 does not necessarily mean that employees with those diagnoses are entitled to accommodations. If a diagnosis does not restrict the employee's ability to work in some way, it is not likely to require an accommodation. Moreover, there are limits to what must be done as an accommodation.

First, an essential function of a job need never be eliminated as an accommodation. If a job's essential elements include meeting with customers or performing calculations accurately, an employer need not eliminate these functions for employees who cannot perform them on account of a mental disorder.

Second, employers are not required to provide indefinite leaves of absence, nor must they tolerate erratic attendance as a reasonable accommodation.

Third, accommodations are only required to the extent that they will enable the employee to perform the job. Accommodations such as job restructuring, working at home and the like, need not be provided merely to make work more convenient or agreeable.

Fourth, disruptive or dangerous employee misconduct typically need not be accommodated. Even in the U.S. Courts of Appeals for the 9th and 10th Circuits, *(the 9th Circuit covers CA)* which require employers to accommodate misconduct in some instances, violent or threatening conduct is never protected. [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 October 23rd, registration at 7:30am Seminar 8:00 to 10:00am, at the Lamp Liter, Visalia.

RSVP Visalia Chamber - 734-5876
PE & Chamber Members $35 - Non-members $50
Certificate – Forms – Guides – Full Breakfast

Human Resources Question with Candice Weaver

The Month's Best Question

ObamaCare BreastFeeding Rules?

Q: "I understand that the Patient Protection and Affordable Care Act (PPACA) has expressing and breastfeeding rules. This is part of healthcare?

A: Yes, a little-known section of the Patient Protection and Affordable Care Act requires employers covered by the federal Fair Labor Standards Act (FLSA) to allow a worker to take unpaid break time to express breastmilk for her nursing child. The requirement extends for a year after the child is born. Under the law you must:

- make available a suitable location (other than a bathroom) that is shielded from view and is free from intrusion by coworkers or the public;
- permit a "reasonable" break time under the circumstances; and
- let the worker take such a break each time she "has need" to express milk.

Sounds Simple, But It's Not

This all seems straightforward until one begins to ponder such things as how many daily breaks are required, how much time is "reasonable," and so on. Many of the answers necessitate individualized evaluations based upon a particular employee's (and child's) circumstances.

For example, the number and frequency of breaks can depend upon a variety of things, such as the number of feedings in a baby's normal daily schedule, the impact of a baby's age upon feeding needs, and whether the baby is eating solid food. The U.S. Labor Department suggests that the number of breaks called for in an eight-hour shift would "typically" be two or three. However, more might be required during longer shifts.

The duration of a "reasonable" break is also subject to situation-specific factors. Relevant considerations would include, for instance, how long it takes the worker to walk to and from the break location, how much time she must spend expressing the milk (the Labor Department thinks that this would normally be around 15 to 20 minutes), and the amount of time she must devote to setting-up for, cleaning-up after, and adequately storing the milk produced.

There are also many other areas of uncertainty. As illustrations, what must an employer do with respect to employees who do not work at any fixed location, or as to those who work at a client's or a customer's premises? The DOL has asked for public comment on these questions, but to date it has offered little guidance.

Although the law plainly says that "[a]n employer shall not be required to compensate an employee" for the reasonable break time taken, even here matters are less than clear. The DOL has said that the break could nevertheless count as compensable worktime in some situations, including when the employee has not been "completely relieved from duty" during the break. Labor Department interpretations also take the view that an employer must pay the employee the same way it does others if she takes paid break time to express breastmilk.

The requirement does not apply to employees who are excluded from the FLSA's overtime provision, including those who fall within that law's executive, administrative, professional, or "outside salesman" exemption. There is also an exception for an employer of fewer than a total of 50 workers if "undue hardship" will result from providing the breaks, but this is a high standard that will likely be difficult to prove.

Employers should develop a policy for dealing with the break obligation before a worker comes forward with her request. Planning points will include, among others, who will take the lead in evaluating each worker's request, what location(s) will be provided, how management will go about arriving at the appropriate length and number of breaks, and whether there are any unusual or atypical factors to be evaluated ahead of time. [PE]

No-Cost Employment Seminars

The Tulare-Kings Builders Exchange and Pacific Employers host this Seminar Series at the Builders Exchange at 1223 S. Lover's Lane at Tulare Avenue, Visalia, CA. RSVP to Pacific Employers at 733-4256.

These mid-morning seminars include refreshments and handouts.

2013 Topic Schedule

♦ **Guest Speaker Seminar - We have established a strategic partnership with California Employers Association (CEA).** Our Guest Speakers are **Kim Parker, CEA Executive Vice President, Sacramento office, and Craig Strong, CEA Regional Director of the Madera office**.

Thursday, October 17th, 2013, 10 - 11:30am

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

Thursday, November 21st, 2013, 10 - 11:30am

There is No Seminar in December

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Dinner for 2 at the *Vintage Press!*

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2014 Vacation Scheduler Enclosed!

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Sexual Desire Not Required!

Governor Brown Signs SB 292 "Sexual Desire Not Required for Sexual Harassment Claim." The Senate Bill is aimed at protecting the rights of individuals who are sexually harassed.

Authored by Senate Majority Leader Ellen M. Corbett (D-East Bay), this bill addresses the decision in *Kelley v. Conco Companies*, and clarifies that sexually harassing conduct under the Fair Employment and Housing Act (FEHA) does not need to be motivated by sexual desire in order to be classified as 'sexual harassment.'

In 2011, the First District California Court of Appeal held in Kelley that the plaintiff in that same-sex harassment case had not proven that the harasser had a sexual desire for the plaintiff, which remained one avenue necessary in order for the case to proceed.

The result of Kelley has confused sexual harassment law and seemingly weakened the protections against sexual conduct that leads to a hostile work environment. [PE]

"Nanny Break Bill"

The "Nanny Break Bill" Goes to Senate Appropriations Committee for review. A California Chamber of Commerce-opposed bill that expands liability for individual homeowners who employ "domestic work employees" was sent to the Senate Appropriations Committee suspense file, pending a review of the bill's fiscal impacts.

The bill requires individual homeowners as well as the third-party employer of domestic work employees, including nannies and/or caregivers, to ensure that such employees are provided with a duty-free, 30-minute meal period; given the opportunity to take a 10-minute, uninterrupted rest period; and provided with daily/weekly overtime. Failure to comply invokes statutory penalties and attorneys' fees. [PE]

Settlement Over Reasonable Accommodation Dispute

Employer Reaches Settlement With EEOC Over Reasonable Accommodation Dispute. The U.S. Equal Employment Commission (EEOC) announced that Cooper University Health Care has implemented policy changes that strengthen its processes for addressing reasonable accommodations for employees who must be absent from work due to serious medical conditions.

Cooper has also agreed to pay $500,000 to former employees to resolve disputes over the extent of reasonable accommodations previously granted. EEOC Regional Attorney Debra Lawrence stated, "We commend Cooper for engaging in a constructive and successful conciliation process and for recognizing that some of its employees were entitled to additional accommodations under the ADA, and stepping up to do the right thing. Its actions should be emulated by employers nationwide." [PE]

Employees Fired for Union Activity

The Eighth Circuit Court of Appeals has upheld two decisions issued by the National Labor Relations Board (NLRB) against Relco, Locomotives, Inc (Relco).

The Court agreed that Relco illegally terminated employees in violation of the National Labor Relations Act (NLRA). Relco repairs and rebuilds locomotives. In 2009, employees in the company's Albia facility sought union representation. Relco suddenly discharged the leading employee Union adherents.

In addition, in 2010, Relco terminated two other employees involved in protests that Relco was overcharging employees to clean their uniforms. After an investigation, the NLRB issued a complaint alleging the terminations violated the NLRA. In enforcing the orders, the court stated the NLRA "provides protections to workers who seek to form a union or otherwise engage in concerted labor activities." [PE]