Pacific Employers
Management Advisor
Celebrating 44 Years!
September 2008

Top of the News

Take It Or Leave It

In a ruling that has taken all too long for many employers, the California Court of Appeal has ruled that the Labor Commissioner has been mis-applying the Meal and Rest Period Requirements for California employees.

In the year 2000, the Labor Commissioner's deputies were armed by the passage of the Knox Bill, with penalties to assess employers who failed to force their employees to take their full meal periods and break periods. Answering a question of another employee during a break or taking a business phone call during lunch would prompt a violation.

"...EMPLOYERS NEED NOT ENSURE MEAL PERIODS ARE ACTUALLY TAKEN, ..."

When charges are issued by the Labor Commissioner, the employer is considered guilty and must prove himself innocent, establishing that his employees had taken their breaks and meal periods, without any interruptions. Otherwise the penalty of one hour's pay for meals and one hour's pay for breaks would be assessed. When calculated as overtime wages with a three year statute of limitations, that's $18,720 per employee at the current minimum wage!

The Court has now come down with a common sense reading of Labor Code Section 512 that simply requires employers to provide meal and break periods, not force employees against their will to take them at a pre-set time or for a specific duration. The Court held that Labor Code Section 512 and the meal period requirements set forth in the Wage Orders mean that employers must provide meal periods by making them available, but need not ensure that they are taken. Employers, however, cannot impede, discourage or dissuade employees from taking meal periods.

Unlike prior findings, this ruling also allows employees to take their meal periods early and not be required to be off duty for a full 30 minutes within 5 hours of the first meal period. The Labor Commissioner had required a meal period for every 5 consecutive hours worked, even if the employee had less than one hour to finish the day.

The court found persuasive the reasoning in the federal district court decisions in White v. Starbucks and Brown v. Federal Express Corp. and concluded that employers need not ensure meal periods are actually taken, just make them available.

Rest periods were similarly reinterpreted by the Court which held that employers need only authorize and permit rest periods every three and one half to four hours of work but are not required to be in the middle of each work period.

Accordingly, the court concluded, as long as employers make rest periods available to employees, and strive, where practicable, to schedule them in the middle of the first four-hour work period, employers are in compliance with that portion of the applicable wage order.

If you need a meal and break policy or want someone to review your current policy, you may contact the staff at Pacific Employers at 559 733-4256. Or you may 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

Meals & Breaks Decision Enclosed!

President's Report
~Dave Miller~

Review & Revision Required

Along with the requirements that employers embrace new rules on a regular basis, the administrative agencies that interpret and enforce the employment law have increasingly required employers to adopt new policies and programs and then on an irregular basis, to revise and reapply them.

For example, in current employment news:

- new posters are now required;
- new policies developed by the DOT are posted and the headlines scream *"Transportation Workplace Drug And Alcohol Testing Programs Must Be Updated By August 25"* to alert employers to the new rules for drug and alcohol testing;
- new documents have been noted for I-9 acceptance or rejection; so employers must change their procedures to accommodate:
- EEOC creates a list of best practices for employers to adopt to prevent religious discrimination; and,
- appeals court rules that trying to become pregnant is now classified under pregnancy disability laws.

The major effect of this exercise of jurisdiction over employers is to put them under a constant preoccupation with trying to stay up with changes in the regulatory process. Never perfecting, but always chasing the elusive "full compliance" program.

"... TRYING TO BECOME PREGNANT IS NOW CLASSIFIED UNDER PREGNANCY DISABILITY"

Trying to stay ahead of all these rulings is one of the areas of our practice that we constantly strive to maintain. As you become aware that changes in the laws and regulations may affect your business, be assured that Pacific Employers has prepared a solution. One of our recent moves has been to provide the means to review your hiring, I-9 and payroll documentation to establish compliance. We also have the capability to do training and investigations in Spanish. [PE]

A person who is not willing to follow is not prepared to lead.

Recent Developments

U.S. Passport Cards Now Acceptable as I-9 Document

U.S. Citizenship and Immigration Services (USCIS) has announced that the new U.S. passport card may be used as a valid "List A" document to complete Form I-9 during the employment eligibility verification process to prove both identity and work authorization, including for E-Verify participants.

"... already received more than 350,000 applications."

The U.S. Department of State began producing passport cards on July 14, 2008, and has already received more than 350,000 applications. The passport card carries the same rights and privileges of the U.S. passport book and legally attests to the U.S. citizenship and identity of the holder. The passport card is a significantly cheaper, faster and more portable alternative to the traditional passport book. It can be used to enter the U.S. at all land and sea ports when arriving from Canada, Mexico, the Caribbean and Bermuda. The card may not be used to travel by air. First-time applicants can apply for a passport card at any of the 9,300 Passport Application Acceptance Facilities throughout the country. The cost is $45 for adults and $35 for children under 16. Adults with fully valid passport books issued within the last 15 years can apply for the card by mail using Form DS-82, at a cost of only $20. [PE]

California Employers Must Properly Classify Health-Related Absences

In Avila v. Continental Airlines, Inc., the California Court of Appeals addressed employee notice obligations under the California Family Rights Act ("CFRA"). Upon proper notification from an employee (which varies depending on the circumstances), the CFRA requires covered employers to provide eligible employees up to 12 weeks unpaid leave to care for the employee's own "serious health condition." Avila addressed whether an employee who never specifically requested CFRA leave nevertheless provided sufficient notice for such a leave.

"... NOTICE OBLIGATIONS ... ARE FAR MORE EXACTING ..."

In this case, Mr. Avila, a CFRA eligible employee of Continental Airlines, called in sick during his hospitalization but never specifically requested such absences be considered CFRA leave. Upon return to work, he provided Continental with documentation verifying his hospitalization. A month later, Mr. Avila was again absent from work, this time without any confirmed medical justification, and was thereafter terminated for excessive absenteeism. Continental considered the hospitalization related absences in its termination decision. Avila sued, contending such absences were CFRA protected and thus should not have been considered. Continental sought to dismiss the case, claiming Avila did not properly request CFRA leave, and thus the hospitalization stay could not be considered CFRA leave. The Court disagreed, reasoning that Mr. Avila's calling in sick, coupled with his providing documentation of his hospitalization, was sufficient to establish notice of a CFRA protected "serious health condition", entitling Mr. Avila to protected leave.

California employers should remain mindful that their written notice obligations under the CFRA (and FMLA as well) are far more exacting than what is required of employees. Accordingly, whenever a CFRA/FMLA eligible employee is absent from work for a reason which potentially might be CFRA/FMLA protected, California employers are well advised to determine whether such leave is indeed protected before classifying any absence as unexcused. [PE]

Transportation Workers Face Tougher Drug Testing Procedures

The eight million regulated workers in the transportation and pipeline industries now face more stringent drug testing collection procedures since the new federal transportation regulations went into effect last month. The new rules address "specimen validity" and seek to deal with what appear to be widespread efforts by workers to "beat" drug tests.

The new rules include various mandatory laboratory-based tests intended to improve the detection of samples that have been adulterated by masking agents or diluted by water.

Concern about the proliferation of mechanical devices designed to be worn by an individual to simulate the act of urination while delivering a "clean" urine sample has also triggered new, broader requirements for observed collections. Commencing with the rule's effective date, all return-to-work and follow-up urine collections must be observed collections.

"OBSERVED COLLECTIONS DESIGNED TO THWART ABUSES"

At present, observed collections are required only in a handful of situations, such as when the collector believes that the specimen donor has attempted to tamper with or adulterate his test specimen. The new rules will require any employee who is taking either a return-to-work drug test (after a prior positive result) or who is subject to follow-up testing (after having violated the regulations and completing an evaluation and prescribed treatment) to submit to observed collections.

Affected workers will be required "to raise their shirts, blouses, or dresses/skirts above the waist, and lower their pants and underpants, to show the observer, by turning around, that they do not have a prosthetic device on their person. After this is done, they may return their clothing to its proper position," and produce a specimen "in such a manner that the observer can see the urine exiting directly from the individual into the collection container." Observed collections will continue to be monitored by same-gender collection site personnel.

Employers with regulated workers should review and consider amending their DOT drug and alcohol testing programs, particularly for those workers where regulatory oversight rules require that they be presented with detailed information on the testing process, so as to ensure that workers understand the circumstances in which observed collections may occur. More important, perhaps, employers should consider auditing their collection processes to ensure compliance with the rules and should make sure that those charged with implementing the policy, from management to outside collection personnel, are aware of the new regulatory requirements.

Businesses using DOT procedures but which are not actually subject to DOT requirements, should also consider updating their policies and procedures. However, observed collections, soon to become common within the DOT regulatory framework, are clearly prohibited by statute in a number of states and are not advised for non-regulated workers in jurisdictions with strong privacy protections. Although the DOT regulations do preempt contrary state law as to regulated transportation workers, state law will take precedence for those not actually subject to DOT regulation. [PE]

Meals & Breaks Decision Enclosed!

Human Resources Question with Candice Weaver

The Month's Best Question

Non-Competition Agreements

Q: ***"We have read that the California Supreme Court has confirmed that non-competition agreements are unenforceable here in California. It doesn't seem fair that an employee can come to work for you for a short while, learn all your business secrets and then go into competition with you. What is an employer to do?"***

A: Non-competition agreements are unenforceable in California says the California Supreme Court.

Any agreements that restrict an employee's ability to pursue similar employment after leaving a job are prohibited, even if narrowly written and leave a substantial portion of the available employment market open to the employee.

Unless a non-competition agreement clearly falls under one of the following exceptions, it will be unenforceable in California:

- Trade secrets protections, which can legally restrict an employee's ability to use confidential information or company-defined trade secrets.
- Sale of a business, which can legally restrict a seller's ability to compete with the buyer in the geographic location where the seller had carried on his or her business.
- Dissolution of a partnership, which can legally define a geographic area within which one of the partners cannot conduct a similar business.

The Court stated that non-competition agreements are against public policy because they restrict an individual's ability to earn a living.

They also found that requiring a former employee to get a release of an invalid agreement constitutes unlawful interference with the employee's rights. In addition, a waiver of "any and all" claims is not an illegal waiver of employee indemnification rights unless the waiver specifies that indemnification is being waived. *Edwards v. Arthur Andersen LLP* [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
Tell us you want the News by E-Mail!

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

♦ **Record Keeping -** Forms, Posters, Signs, Handouts, Fliers - Just what paperwork, posters, flyers and handouts does an Employer need?
Thursday, September 18th, 2008, 10am - 11:30am

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.

Meals & Breaks Decision Enclosed!

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Workers' Comp Time Limits

A **California appeals court** awarded David Carls, a sign painter for the Claremont Colleges in Southern California, workers' compensation benefits for a back injury even though he waited a long time — almost seven years — before filing a worker's compensation claim.

"... WAITED TOO LONG — ALMOST SEVEN YEARS ..."

The court explained that the statute of limitations stopped running because the employer never gave Carls a workers' comp claim form even though it knew about the injury.

This "tolling" of the statute of limitations doesn't occur when an employee is aware of the right to file a claim, despite not receiving a claim form, but the court found here that the evidence wasn't strong enough to establish that Carls knew about his workers' comp rights, even though he had filed previous comp claims.

The message is clear. Employers should always provide an employee with the opportunity to file a workers' comp claim, even if the employee is not interested in doing so, and have evidence that he chose not to file. [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

Contractor Record Retention

A confusing part of federal regulations for federal contractors revolves around record retention.

The Office of Federal Contract Compliance Programs (OFCCP) is holding contractors accountable for retaining every individual expression of interest in employment. That is not to say, every expression of interest equates to a qualified applicant. Yet, the first contact must be retained, be it a resume, a telephone log, emails, a job application form, or some other contact record.

... "EXPRESSIONS OF INTEREST" MUST BE RETAINED BY CONTRACTORS

Once the stack of "expressions of interest" has been assembled, the employer should use a list of job qualification requirements to screen each individual. The result of that screening will be a group that meets basic job qualification requirements. That group represents "job applicants."

Job applicants must be given an invitation to self-identify their race/ethnicity and sex. That information must be retained and linked to the specific job opening for which the applicant is considered.

All of these records must be retained for either one or two years depending on the size of the employer and the value of the federal contract. If the contractor has 149 workers or less and the value of the contract is under $150,000 then records must only be kept for one year. All other contractors must keep their records for two years. *(41 CFR 60-1.12)* [PE]