Pacific Employers
Management Advisor
Celebrating 45 Years!
September 2009

What's New!

New Dilemma For Employers

The U.S. Supreme Court decision in the New Haven Firman's case "*Ricci v. De Stefano,*" has presented employers with a dilemma.

The court previously held in *Griggs v. Duke Power Co.,* that when a facially neutral employment selection method, such as passing a written test or requiring a high school diploma, is found to have an "adverse impact" on a protected class or classes, use of the method violates Title VII of the Civil Rights Act of 1964, unless the employer can show that the test is job-related and consistent with business necessity.

The 1991 Civil Rights Act codified these principles and added one more: Even if the employer can show that its test is job-related and consistent with business necessity, the adversely affected individuals can still prevail if they can identify an alternative selection practice that would have had less adverse impact, but that the employer refused to adopt.

The *Ricci* case involved written and oral tests for firefighter captain and lieutenant positions in New Haven, Connecticut. No African-Americans scored high enough to be considered for either position and Hispanic applicants were eliminated for the lieutenant positions. New Haven's corporate counsel advised the City Civil Service Board against certifying the results because of significant disparate impact. The Civil Service Board held several days of hearings on the validity of the tests. There was considerable evidence questioning the validity of the tests. Following the hearings, New Haven refused to certify the test results.

One Hispanic and several white firefighters, who had scored well on the tests, challenged New Haven's decision to reject the test results, claiming that New Haven was engaging in intentional race discrimination stemming from a desire to have more minority employees in high-level positions.

Because of the large disparate impact on African-American and Hispanic applicants, together with the questions concerning the validity of the tests, both the District Court and the Court of Appeals held that New Haven was justified in rejecting the test results. The Court of Appeals' opinion was only one paragraph long.

To the surprise of some, the Supreme Court reversed, holding that the white firefighters were victims of intentional race discrimination. The Court rejected New Haven's argument that certifying the test results could have led to disparate-impact liability to the lower-scoring applicants. The Court held that to reject test results, the employer must have a "strong basis in evidence of disparate impact liability." In the Court's view, New Haven's concerns of possible liability did not rise to that level.

The Supreme Court's new standard is amorphous. It is not clear why several days of hearings on the validity of the firefighter exams--as well as evidence that many other cities used other selection methods with less adverse impact--were not sufficient to meet the standard. Additionally, while the Court states in its opinion that the standard is not so high as to require "a probable, actual violation," it is impossible to tell from the opinion what evidence would be deemed sufficient to pass muster.

In light of this lack of clarity, prudent employers should reject the results of a test only when they have very strong evidence that the selection method violates Title VII's disparate-impact provisions. If employers ensure in advance that their selection process is job related and defensible, and if they have investigated alternative selection methods, they should ordinarily not reject the test results, even if they yield a statistical disparity. [PE]

New Federal Minimum Wage Poster Enclosed!

President's Report
~Dave Miller~

Feds Change Poster

The Department of Labor's Wage and Hour Division altered the language in the Federal Government's Minimum Wage notice which is displayed on your All-In-One Poster. This change increases the penalties for child labor violations.

The New language reads, *"Employers may be assessed civil money penalties of up to $1,100 for each willful or repeated violation of the minimum wage or overtime pay provisions of the law and up to $11,000 for each employee who is the subject of a violation of the Act's child labor provisions. In addition, a civil money penalty of up to $50,000 may be assessed for each child labor violation that causes the death or serious injury of any minor employee, and such assessments may be doubled, up to $100,000, when the violations are determined to be willful or repeated. The law also prohibits discriminating against or discharging workers who file a complaint or participate in any proceeding under the Act."*

Enclosed is a copy of the new poster that you can post next to your Pacific Employers' 2009 All-In-One Poster.

In December of this year you will receive the new Pacific Employers' 2010 All-In-One Poster which will have the new DOL Minimum Wage poster as well as all other posters updated for the new year. [PE]

Do not pray for easy lives. Pray to be stronger men. - John F. Kennedy

Recent Developments

I-9 Crackdown Begins

In August, U.S. Immigration and Customs Enforcement ("ICE") issued Notices of Inspection to 652 businesses throughout the United States to audit those businesses' I-9 records. The Notices alert companies that ICE will soon inspect their hiring records to determine whether or not they are in compliance with the employment verification and eligibility laws. The 652 Notices exceeds the total number of similar Notices issued for the entire 2008 fiscal year.

"Krispy Kreme agreed to pay a $40,000 fine. . ."

Under federal law, all employers (regardless of size) are required to use Form I-9 to verify the identity and work eligibility of all new employees (including U.S. citizens) at the time the employees are hired. Completed I-9 forms must be maintained by the employer, in hard-copy or electronic format, for three years after the employee's date of hire, or for a year after the employee's termination date, whichever is later. Completed forms are not submitted to the government, but must be retained by the employer throughout this period.

During an audit, an employer will be required to produce its I-9s for inspection to an ICE or Department of Labor investigator within three (3) days. Given this short time frame, it may not be possible for even small employers to review and correct all I-9 deficiencies.

Fines for having incomplete or missing I-9 forms can be substantial--up to $1100 for each technical "paperwork" violation, and up to $2000 for a first offense of knowingly hiring an unauthorized worker. Indeed, the day after announcing its I-9 crackdown, ICE issued a press release regarding a settlement with Krispy Kreme Doughnut Corporation following an I-9 audit at a Krispy Kreme doughnut factory in Cincinnati. As a direct result of the audit, Krispy Kreme agreed to pay a $40,000 fine and to take measures to revise its immigration compliance program.

Stepped up I-9 enforcement has only just begun. In its press release announcing the issuance of 652 Notices of Inspection, ICE candidly admitted that its actions are part of a "new, comprehensive strategy to reduce the demand for illegal employment and protect employment opportunities for the nation's lawful workforce." Thus, audits-- and settlements like that announced with Krispy Kreme--will soon become far more commonplace than in the recent past.

Employers should be proactive and conduct their own internal audits to ensure that they are complying with their I-9 obligations. Employers should ensure that there is an I-9 on file for all current employees hired after November 6, 1986 (the date the I-9 rules became effective), as well as for any employees terminated in the prior year. The audit should also verify that all I- 9s are complete, signed by both the employee and the employer, and that the necessary documentation has been inspected.

If you need assistance in your audit, ***Pacific Employers*** has staff that can help you become compliant. Conducting an internal audit and correcting any problems with I-9s will put you in the best position to defend your self should ICE ever decide to come knocking at your door. [PE]

New Cal/OSHA Standard

The California Division of Occupational Safety and Health ("Cal/OSHA") has issued an aerosol transmissible disease standard, the nation's first workplace standard designed to protect workers in high-risk environments from aerosol (airborne and droplet) transmitted diseases ("ATD"). New California Code of Regulations, Title 8, section 5199, effective August 5, requires covered employers, such as healthcare and related workplaces, to develop control measures that would reduce the risk of infection for employees, based on the nature of the exposure and the type of work setting.

These measures include:

- designating an administrator to establish, implement and maintain an effective, written ATD Exposure Control Plan which is specific to the workplace(s) or operation(s);
- providing all safeguards, including personal protective equipment, respirators, training, and medical services, at no cost to the employee, at a reasonable time and place for the employee, and during the employee's working hours;
- making specific vaccines available to employees; and
- keeping accurate related records, including confidential employee medical records, employee training records and records of implementation of the ATD plan.

Health care facilities, services and operations that typically treat, diagnose or house individuals who may be ill, including hospitals, nursing homes, clinics, and drug treatment programs, are covered employers. Specific service providers, such as emergency responders, correctional facilities and homeless shelters, which often are the healthcare system's first point of contact with suspected infected persons, also are subject to the regulation. Most dental practices and many specialty medical practices are exempt, as long as they comply with specific conditions.

"Referring employers" who operate a facility in which there is an occupational exposure and who screen persons for infectious diseases then refer them to medical providers, as well as laboratories in which employees have no direct contact with suspected infected persons are subject to a less extensive standard.

Included in new section 5199 is a zoonotic disease standard, addressing employees who work around animals where many infectious diseases originate. Employers are directed to control workplace exposures to infectious diseases in animals such as monkey pox, anthrax, avian influenza and bovine tuberculosis. [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 21st, 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

New Federal Minimum Wage Poster Enclosed!

Human Resources Question with Candice Weaver

The Month's Best Question

Employer Surveillance

Q: ***"What are the new rules regarding employer surveillance?***

A: Recently the California Supreme Court provided guidance to employers about the reasonable scope, purpose, and methods of conducting employee surveillance in the workplace.

In *Hernandez v. Hillsides*, the Court confirmed a sliding scale for employee expectations of privacy in the workplace based on the office environment. But it allowed employers considerable flexibility to monitor employees for legitimate business reasons so long as the surveillance is properly limited in scope and intrusiveness. Finally, the Court suggested that employers should give notice to employees that monitoring might be used.

The Court began by stating the basic principle of workplace privacy; it noted that "while privacy expectations may be significantly diminished in the workplace, they are not lacking altogether." However, the Court suggested that a private employer may have a higher responsibility to avoid invasions of privacy than an individual.

The Court examined the question of whether employees at a particular place of employment had an expectation of privacy. It reviewed the broad spectrum of potential "private" spaces in the workplace. Essentially, the Court held that privacy is heightened in enclosed offices where an employee does not expect to be overheard or observed. The Court set up a spectrum of privacy, with a large cubicle environment on one end providing very low expectations of privacy, and private environments like bathrooms on the other, providing a high expectation of privacy. The particular office under review was somewhere in the middle because the door could be shut and locked, the blinds could be drawn, and the Plaintiffs could have some expectation of conducting personal activities (such as changing into athletic clothes or adjusting clothing) without being observed. The Court noted that in this case, the means of intrusion, surreptitious video tape, was subject to a high standard because it is so invasive.

The Court made a specific point of the fact that the employees had no notice that they might be subject to surveillance. The company had a computer policy that noted that internet activity might be monitored, but it said nothing about surveillance. The Court's reasoning suggests that any employer who wants the ability to monitor and record the activities of its employees through surveillance should explicitly state that possibility in its handbook and policies.

The Court noted that although the company's intent was proper, that was a question of the offensiveness of the conduct, and had no bearing on whether an intrusion occurred. It held that because there was a heightened expectation of privacy, and because the method of intrusion was so invasive, the company had intruded on a zone of privacy.

Moving on to whether the company's conduct in this case met the standards for a claim of invasion of privacy, ultimately answering the question "no." To make out a claim, a plaintiff must show that the intrusion is "highly offensive to a reasonable person" or an "egregious breach of social norms." Courts should consider the place, time, and scope of the intrusion. Given those standards, the Court noted that the surveillance was limited in scope; a camera pointed at the specific computer in question. It was limited in time; surveillance was conducted only after hours when the employees were gone. It was conducted for a legitimate purpose; protecting the children. Safeguards were in place to protect the information; there was limited access to the equipment. Finally, the intrusion itself was limited; while the camera was present, it never actually recorded the employees.

The Court also rejected the argument that the employer had to prove there was no less important means of accomplishing its goals to make out a defense of justification.

The lessons for employers here are simple, if important. First, employers should build the possibility of surveillance into their privacy policies if there is any chance it will be required. Second, employers conducting surveillance should make sure they have a legitimate purpose for the surveillance, and that it is as limited in scope as possible to accomplish the objective. Finally, employers should recognize that any employee environment that can be closed off comes with a higher expectation of privacy. [PE]

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.

2009 Topic Schedule

♦ **Forms & Posters -** as well as Contracts, Signs, Handouts, Fliers - Just what paperwork does an Employer need?

Thursday, Sept. 17th, 2009, 10am - 11:30am

♦ **Vicki Stasch is our Guest Speaker — Speaking on "Change and Conflict during downsizing or restructuring."** Vicki Stasch, M.S. has provided services to businesses since 1982.

She offers the following: *Training, Coaching and Related Services, Leadership Training, One-One Personal and Leadership Coaching, Communication and Team Building, Strategic Planning, Facilitation of Team and Community Meetings, and Conflict Management.*

Thursday, Oct 15th, 2009, 10am - 11:30am

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

Thursday, Nov. 19th, 2009, 10am - 11:30am

There is No Seminar in December

Lemoore Chamber of Commerce

Employer Workshop presented
by Pacific Employers
"Forms & Posters"
Thursday, Sept. 10th 10-11:30 a.m.
Lemoore Depot, 300 E Street, Lemoore
Information & Reservations:
Lynda Lahodny - (559) 924-6401 or
ceo@lemoorechamberofcommerce.com

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!*

New Federal Minimum Wage Poster Enclosed!

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2008 Chamber Visalia of Commerce Small Business of the Year

Want Breaking News by E-Mail?
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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.

California's New Electronic Discovery Law

Governor Schwarzenegger recently signed urgency legislation establishing procedures for people involved in a lawsuit to obtain electronically stored information from the opposing party. California's new law is similar to federal regulations passed in late 2006, and is intended to provide clarity for litigants and the court. It went into effect as an urgency statute on June 29, 2009. [PE]

FTC Announces Delay in Red Flags Rule

The Federal Trade Commission (FTC) announced that it will again delay enforcement of the Red Flags Rule until November 1, 2009 in order to assist small businesses and other entities with compliance issues. The FTC also plans to offer additional guidance "to clarify whether businesses are covered by the Rule." Implementation for the Red Flags Rule had been scheduled for August 1, 2009.

The Red Flags Rule, developed to "detect, and respond to the warning signs, or 'red flags,' that could indicate identity theft," was mandated by the Fair and Accurate Credit Transactions Act of 2003. Enforcement of the Rule was previously postponed twice by the FTC in order "to give creditors and financial institutions more time to develop and implement written identity theft prevention programs." [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

Heat Illness Applies to All Workers

If you have employees that work outside, then your business is covered by the California Heat Illness Prevention Regulations.

Outdoor work is broadly interpreted so don't assume that because your employees work in or near a building they are not covered. For example, an employee who spends a significant amount of his day on a loading dock of a building is likely covered by the Heat Illness Prevention Regulations.

The Heat Illness Prevention Regulations address such topics as shade requirements, drinking water requirements, heat illness training requirements and other related subtopics.

We suggest that the appropriate human resources or safety manager of any business that has outdoor workers in California become familiar with these Regulations. [PE]

Waiting Period for PTO Accrual

An employee claimed her employer failed to pay her accrued, vested vacation compensation, as required by the Labor Code, when her employment ended.

The court acknowledged that state law prohibits a "use it or lose it" policy with respect to vacation pay: if an employer offers vacation benefits, it is required to pay for all vested vacation upon termination of employment. However, an employer is not required to offer vacation benefits from the first day of employment because state law does not dictate the point at which a company providing vacation benefits must begin to provide them.

The employer is free to determine when an employee becomes eligible for vacation benefits so long as eligibility and vesting occur simultaneously. Thus, a "waiting period" for vacation benefits to accrue and vest is permissible. *Owen v. Macy's, Inc.* [PE]