Pacific Employers
Management Advisor
47 Years of Excellence!
September 2011

What's News!

False SS Number = Unclean Hands = No Case

Vicente Salas worked for Sierra Chemical Company. He was seasonal, and was repeatedly laid off and re-hired. Along the way, he injured himself. The company allegedly denied him re-hire after he did not produce a release from his doctor. Salas claimed he was told he had to be 100% healed, which is one of those ADA no-nos. He sued for a variety of employment based claims, including disability discrimination, failure to provide reasonable accommodation, etc.

But Sierra found out that Salas used a false social security number and obtained summary judgment because of the *"unclean hands / after acquired evidence"* defenses. (The trial court actually denied the motion, but the court of appeal issued an order to show cause in response to a petition for a writ, resulting in the trial court's changing its mind.)

Salas's use of another person's Social Security number to obtain employment with Sierra Chemical went to the heart of the employment relationship and related directly to his claims that Sierra Chemical wrongfully failed to hire him following his seasonal lay off and discriminated against him by failing to provide a reasonable accommodation for his back injury. Because Salas was not lawfully qualified for the job, he cannot be heard to complain that he was not hired. This is so even though he alleges that one reason for the failure to hire was Sierra Chemical's unwillingness to accommodate his disability.

In light of the nature of the misrepresentation, the fact that it exposed Sierra Chemical to penalties for submitting false statements to several federal agencies, and the fact that Salas was disqualified from employment by means of governmental requirements, we conclude that Salas' claims are also barred by the doctrine of unclean hands.

The court also rejected Salas' claim that the Legislature foreclosed the unclean hands/ after acquired evidence defense by passing SB 1818, which provides in pertinent part:

"The Legislature finds and declares the following: (a) All protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status who have applied for employment, or who are or who have been employed, in this state. (b) For purposes of enforcing state labor, employment, civil rights and employee housing laws, a persons immigration status is irrelevant to the issue of liability..."

The court noted that SB 1818 was intended to be "declarative of existing law," and so it did not abrogate existing defenses to employment law actions.

The upshot is that this case denies relief to employees who falsify their employment credentials, resulting in a violation of law if the employer continues to employ the employee. The employer will have to show as well that the employer's settled policy is to discharge / refuse to hire employees who commit the type of violation at issue. [PE]

Record Retention Flyer Enclosed!

President's Report
~Dave Miller~

Donor Leave Clarified

California implemented a new employee leave entitlement last year requiring employers to provide employees with time off for purposes of donating an organ (30 days in a one-year period) or bone marrow (5 days in a one-year period).

Last week, Governor Brown signed new legislation clarifying some issues surrounding this new leave. Specifically, the new legislation clarifies that the one-year period is a rolling 12-month period measured forward from the date an employee uses the leave. The legislation also clarifies that the leave entitlement is measured in business days, not calendar days, and that leave taken pursuant to these leave provisions is not considered a break in service for purposes of benefit accruals and seniority. Finally, the legislation clarifies that an employer may require an employee taking bone marrow leave to use up to five days of accrued paid time off, and an employee taking organ donation leave to use up to two weeks of accrued paid time off. [PE]

Unemployment Fund Insolvent

California's unemployment insurance trust fund is $8.5 billion in the red. State officials are calling for changes to the system.

The state is able to continue to pay benefits thanks to a federal loan. But now in September, California must begin paying hundreds of millions of dollars in interest on that loan.

Loree Levy is with the Employment Development Department. She said the fund is chronically imbalanced and the deficit keeps growing. "11.1 billion by the end of 2011. We forecast a deficit of 12.7 billion by the end of 2012 if we still have no solution. So it's a situation that can no longer recover on its own, no matter how strong the economy rebounds."

The first interest payment will be about $320 million.

She also said there have been unsuccessful proposals recently to both increase the amount of money that employers put into the system and decrease benefits. [PE]

"The ability to combine wisdom and power has only rarely been successful and then only for a short while." - Albert Einstein

Recent Developments

Overnight Shifts Not a Split Shift

The California Court of Appeal has held that employees who work overnight shifts that begin on one day and conclude on the next, but which are not interrupted by unpaid, non-working periods, do not work "split shifts," as defined in the applicable Industrial Welfare Commission Wage Order. *Securitas Security Services USA, Inc. v. Superior Court (Holland)*

Under California law, employers must pay an additional hour's pay for workdays where employees work a split shift. Wage Order No. 4 defines a "split shift" as "a work schedule, which is interrupted by non-paid non-working periods established by the employer, other than bona fide rest or meal breaks." A "shift" is defined as "designated hours of work by an employee, with a designated beginning time and quitting time." However, "work schedule" is not defined in either the Wage Order or the California Labor Code. Notwithstanding the lack of a definition, the appeals court concluded that a "work schedule" "simply means an employee's designated working hours or periods of work," regardless of the "workday" established by an employer.

"... NOT ENTITLED TO SPLIT-SHIFT PAY UNDER THE WAGE ORDER."

Based on the Court's interpretation of "work schedule" and the Wage Order's plain language, the Court concluded that a split shift only occurs when an employee's designated working hours are interrupted by one or more unpaid, nonworking periods that are not bona fide rest or meal periods. Therefore, it found the fact that a single continuous shift begun on one workday and ending on the following workday did not transform the shift into a "split shift." Correspondingly, the Court held that "employees working uninterrupted overnight shifts on consecutive days do not work a split shift and are not entitled to split-shift pay under the wage order."

However, because fact issues existed regarding whether the company worked split shifts in other circumstances, Securitas was not entitled to summary adjudication, and the Court remanded the case for further proceedings.

The California Court of Appeal recognized that split shifts were meant to compensate employees for working two non-consecutive shifts in the same day, rather than to provide a premium payment for working overnight.

Employers with 24-hour workforces will find this decision welcome news as negative cases tend to spiral into major class action lawsuits. [PE]

Meal & Rest Break Rulings Demand Caution

Almost five years ago, in April 2006, nearly 59,000 employees obtained class certification in a lawsuit claiming that Brinker Restaurant Group violated California labor laws by failing to ensure that its non-exempt employees took meal and rest breaks. In July of 2008, the appeals court vacated the class certification based upon a finding that employers need not ensure that meal and rest breaks are taken.

The California Supreme Court then vacated the decision and granted review on October 22, 2008. Much to the chagrin of California employers and employees seeking clarity on the issue, the Supreme Court has yet to issue its ruling in *Brinker Restaurant Group v. Superior Court.*

The Supreme Court's over two year delay in issuing a ruling in Brinker has allowed the Second Appellate District to weigh in as to whether California employers must simply provide non-exempt employees with their statutory meal and rest breaks or if they must take the added step of ensuring that the employees take them. Although uncertainty will remain until the Supreme Court rules in *Brinker*, the Second Appellate District's ruling in *Hernandez v Chipotle* Mexican Grill provides hope that the Supreme Court will side with employers in finding that meal and rest breaks need only be provided to employees.

"... THE TRIAL AND APPELLATE COURTS DENIED THE CLASS CERTIFICATION ..."

In *Chipotle*, the appellate court upheld the trial court's denial of class certification to employees who claimed they had not received their breaks. Both the trial and appellate courts denied the class certification and in so doing utilized the less onerous provide meal and rest breaks standard. The courts reasoned that if employers must merely provide breaks then an inquiry as to why certain employees did not take them must be taken. The courts found that having to inquire why certain employees did not take advantage of the breaks provided was too individualized for class treatment.

With the rising number of Meal Period violations claimed in the State of California, waiting for a ruling on *Brinker* to clarify the meal and rest break issue may, as the adage says, be the "hardest part." However, ignoring favorable rulings such as *Chipotle* and continuing to prepare for the worst will be a more logical approach to an already illogical subject. Check in periodically with Pacific Employers for updates regarding the status of the *Brinker* case." [PE]

California Non-Competes: Are They Legal?

In an eye opening decision, the United States District Court for the Northern District of California recently granted a temporary restraining order partially enforcing a non-compete agreement. In *Richmond Technologies v. Aumtech Business Solutions*, the Company provides software for financial services firms.

The company entered into a "Teaming Agreement" with the employee, pursuant to which the Employee developed software for the company. In the agreement, the Employee promised not to (1) use or disclose the company's confidential information; (2) initiate contact with or solicit the company's clients; and (3) compete with the company by using its technology. Requesting a temporary restraining order, the company alleged a breach of each of these three provisions.

The District Court began its legal analysis by observing that the "California Supreme Court *'generally condemns noncompetition agreements.'*" The Court explained that this condemnation is rooted in California Business and Professions Code § 16600. Despite California's antipathy toward restrictive covenants, the Court also noted that "[a]n equally lengthy line of cases" have protected parties against the misuse of trade secrets to unfairly compete. The Court noted that these cases fall into two camps. Namely, some cases observe a "trade secret exception" to § 16600 and enforce restrictive covenants that are necessary to protect trade secrets, while others cases simply view the use of trade secrets as an independent wrong. The Court then proceeded to follow the former group of cases, and found that the various covenants at issue in this case were likely enforceable to varying extents.

For example, in analyzing the non-compete provision, the Court stated "if the clause is construed to bar only the use of confidential source code, software, or techniques developed for [the Company], it is likely enforceable as necessary to protect [the Company's] trade secrets." "Similarly, the clause prohibiting use of confidential information is likely enforceable to the extent that the claimed confidential information is protectable as a trade secret." Against this logical underpinning, the Court determined that the key was to ensure that any injunction "imposed by the Court would be narrowly tailored to prohibit only the misuse of trade secrets and would permit Employees to compete, in a lawful manner, with Company." The way in which the Court struck this balance was eye opening. Namely, the Court enjoined the Employees from, among other things:

• Initiating contact with the Company's clients regarding competitive software unless none of the Employees had knowledge of or contact with those clients during the term of their employment with the Company.

• Using the Company's information about its clients' technical and business requirements, or other confidential client information, to solicit or obtain agreements with those clients. "However, Employees may enter into agreements with [the Company's] customers if the customer initiates the contact and none of [the Company's] confidential information will be used in negotiating, executing, or performing the agreement."

Surprisingly the Northern District of California just enforced a non-compete agreement. [PE]

Record Retention Flyer Enclosed!

Human Resources Question with Candice Weaver

The Month's Best Question

Guidance on Social Websites

Q: ***"In the workplace, the ubiquitous Facebook has become the modern equivalent to a water cooler as a conversation site. What rules can we have regarding employee use?"***

A: This summer, the National Labor Relations Board (NLRB) issued three advice memoranda that clarified its position on acceptable workplace social media policies.

In these three new advice memoranda the Board illustrates their position that social media policies violate the National Labor Relations Act only when the policies or practices specifically target concerted activity *(union organizing)*. In the three matters decided, the NLRB held that the complaints posed by employees on Facebook were not concerted activity, but were instead unprotected general personal complaints.

- In JT's Porch Saloon, Case No. 13-CA-46689 (July 7, 2011), a bartender who, along with other co-workers, was upset about the employer's tipping policy, posted his complaints on Facebook in response to an inquiry by a family member. The employee also referred to the employer's customers as "rednecks" and posted that he "hoped they choked on glass[.]" The NLRB held that complaints were not concerted activities and therefore not protected by Section 7.
- In Wal-Mart, Case No. 17-CA-25030 (July 19, 2011), the NLRB held that an employee's Facebook postings criticizing his manager was not concerted action, where the posting included vulgar terms for the manager and subsequent messages of support from fellow employees. The NLRB held that mere supportive comments by fellow employees were not enough to garner protection under Sections 7 and 8(a). Rather, to be covered, the NLRB concluded that such "[c]omments should look toward group action."
- Lastly, in Martin House, Case No. 34-CA-12950 (July 19, 2011), the NLRB held that an employee's Facebook posting criticizing the employer's homeless facility residents was not concerted action protected by Sections 7 and 8(a), such that her termination for such postings did not violate the NLRA.

The NLRB's July 2011 advice memoranda clearly indicate that an employer's social media policy or practice only violates the NLRA when the policy or practice is used to stop or specifically target concerted activity. While employers may not prevent employees from using Facebook to organize, depending on the circumstances, employers do not have to tolerate disparaging remarks about their company, managers, other employees or customers simply because an employee makes that remark on Facebook or another social media site.

For further information regarding the current NLRB position on social media restrictions placed on employees or assistance implementing compliant social media policies, please contact the staff at Pacific Employers. [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.

2011 Topic Schedule

There is No Seminar in August

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

Thursday, September 15th, 2011, 10 - 11:30am

♦ **Guest Speaker Seminar - Attorney Anthony P. Raimondo of McCormick, Barstow, Sheppard, Wayte & Carruth will be our Guest Speaker who** will bring you a timely discussion of current labor relations issues of interest to all employers.

Thursday, October 20th, 2011, 10 - 11:30am

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

Thursday, November 17th, 2011, 10 - 11:30am

There is 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 dinner for two at the *Vintage Press.*

Call 733-4256 or 1-800-331-2592.

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OSHA Warns Employers Of More Aggressive Enforcement

Supporting OSHA's aggressive semi-annual regulatory agenda, Deputy Assistant Secretary of Labor for OSHA, Jordan Barab, recently warned a research symposium that, "despite what goes on in Congress, [OSHA] [has] absolutely no intention of pulling back or retreating." Barab alerted attendees that OSHA's regulatory agenda aims to extend enforcement beyond traditional manufacturing and construction sectors.

Consistent with recent enforcement trends, Barab also defended OSHA's increased use of willful citations, General Duty Clause citations, and negative press releases when it issues citations. Specifically, Barab indicated that OSHA is issuing more willful citations, which carry maximum fines of $70,000 per penalty, to achieve a greater deterrent effect. Barab further commented that OSHA is justified in its increased use of General Duty Clause citations and will continue to use this statutory "catch all" to combat a host of workplace hazards, including those affecting employees due to summer heat. [PE]

OSHA Announces Phase-In For Fall Protection

On June 9, 2011, the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) announced a three-month phase-in period to allow residential construction employers to come into compliance with the Agency's new directive to provide residential construction workers with fall protection. [PE]

Worker Retention Ordinances

The City of Los Angeles Grocery Worker Retention Ordinance regulates the ability of grocery store employers to summarily replace the workforce upon acquiring a new store. On July 18, 2011, the California Supreme Court held the Ordinance is not preempted by state or federal law, and does not violate the Equal Protection Clause. [PE]

San Francisco's Rates Increase for 2012

San Francisco's Health Care Security Ordinance (SFHCSO) requires medium and large-sized employers to spend a minimum amount of money on health care for their workers who work in San Francisco. If you are subject to the SFHCSO, you may elect to satisfy this obligation by purchasing health insurance coverage, making payments to San Francisco for the benefit of your covered employees, reimbursing your employees for their health care expenditures, or providing a medical spending account for your employees that meets certain requirements. As you begin your planning for the upcoming 2012 year, you should note the following changes to the minimum amount you must spend to satisfy the SFHCSO during 2012:

- Employers with more than 100 employees must spend at least $2.20 per hour on health care for their employees (an increase from the $2.06 per hour in 2011).
- Employers with 20 to 99 evmployees must spend $1.46 per hour on health care for their employees (an increase from the $1.37 per hour in 2011).
- Small employers with less than 20 employees and non-profit organizations with less than 50 employees remain exempt.

You must count all employees, regardless of where they live, where they work, or how they are classified (i.e., part-time, seasonal, permanent, etc.), for purposes of determining your employer size and expenditure rates. [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 Wednesday, *October 27th*, registration at 7:30 am. Seminar 8:00 to 10:00 am, at the Lamp Liter, Visalia.

RSVP Visalia Chamber - 734-5876 – $25
Certificate – Forms – Guides – Full Breakfast