Pacific Employers
Management Advisor
48 Years of Excellence!
September 2012

What's News!

NLRB Off-Duty Policy Violates Rights

In *Sodexo America LLC*, the National Labor Relations Board (NLRB) recently ruled that USC Hospital's off-duty access policy violated employees' Section 7 rights under the National Labor Relations Act (NLRA). The policy prohibited off-duty employees from entering the hospital unless they were visiting a patient, receiving medical treatment, or conducting "hospital-related business," which the hospital's handbook defined as "the pursuit of the employee's normal duties or duties as specifically directed by management."

The NLRB took issue with the "specifically directed by management" language of the policy, finding that it provided the Hospital with "unlimited discretion to decide when and why employees may access the facility." The NLRB read the rule on its face as prohibiting employee access for purposes of engaging in protected concerted activity, while permitting access for other reasons as specified by management. It further reasoned that such a policy lacked uniformity in the sense that it did not prohibit off-duty access entirely; rather, it prohibited access only when not "specifically directed by management."

Construing any ambiguities in the policy against the Hospital, the NLRB found that it gave the Hospital "free rein to set the terms of off-duty employee access," which constituted a violation of Section 8(a)(1) of the NLRA. Dissenting NLRB Member Brian Hayes found the majority's holding too restrictive, specifically noting that it will limit the Hospital's right to allow off-duty employee access for "innocuous activities" like collecting paychecks, completing paperwork, and filling out patient information.

This ruling is just the latest example of what is becoming an endless stream of NLRB activity on general employment policies. The NLRB is expanding its territorial reach well beyond labor disputes, looking for violations of employees' Section 7 rights wherever they may be lurking. The *Sodexo* decision is also significant for the NLRB's decision to broadly construe the access policy against the employer, and completely ignore any evidence of purpose or intent behind the rule.

In light of *Sodexo*, and other recent NLRB decisions involving employment policies like social media and at-will employment, both union and non-union employers should continue to review and update their policies to ensure that they are specific and narrowly tailored to their business needs. As these decisions make clear, employers must comply not only with all applicable employment statutes, but the NLRA as well. [PE]

Sexual Harassment Prevention Flyer Enclosed!

President's Report
~Dave Miller~

ADA Excesses Discussed

Let's say that you determine that your business' parking lot needs resealing and the restroom needs redecorating. You are proud of your updates until you are notified that you are being sued for $25,000 because the paint stripes are too wide on the handicapped parking space and the assist bars are too low in the restroom! What is this all about? All you did is repaint and decorate.

It's the ADA Vigilantes at work again. It is also the topic of our Guest Speaker Seminar. For years we have turned over the lectern of our October Monthly Seminar to a special guest who has a message that all employers should hear. This year we will be featuring a local businessman who has a well known business with a number of locations in Tulare County. He has been the victim of the ADA Vigilantes in his business.

In order to get our program we had to move the date of the seminar up one week. **SOOO... The date for the ADA Seminar will be October 11th.** We will give you more info in next months newsletter. [PE]

EEOC's "Frivolous" Lawsuit Rejected

Tenth Circuit rejects another EEOC lawsuit and affirms $140,571.62 in attorneys' fees. The court affirmed another fee sanction against the EEOC, and struck down the EEOC's attempt to litigate questionable (at best) issues under the Americans With Disabilities Act in *EEOC v. TriCore Reference Laboratories.*

The case involved an employee who had surgery on her foot and ankle and took leave under the FMLA to recover. When she exhausted her leave, TriCore granted her additional time off to comply with her doctor's orders. Her doctor indicated that once the employee returned to work, she would have certain restrictions – including keeping her foot elevated. Upon her return to work, she could not perform the essential functions of her job.

Although not required by under the ADA, TriCore assigned her a new set of duties – essentially creating a job for her. During her thirty-day trial period, she made "many errors that threatened patient safety," was coached about the errors and did not improve, failed to apply for other internal positions with the company and the company let her go. [PE]

To believe all men honest would be folly. To believe none so is something worse. - John Quincy Adams

Recent Developments

Handbook Arbitration Policy Not Enforceable

A recent California state court decision that arbitration policies set forth in employee handbooks generally do not amount to an enforceable agreement to arbitrate claims.

In *Sparks v. Vista Del Mar Child & Family Services,* the employer had an employee handbook containing, among many other policies, a policy requiring arbitration of employment disputes. The handbook elsewhere included language making clear that the handbook was not an express or implied contract.

"... PROVISION WAS BURIED IN A LENGTHY EMPLOYEE HANDBOOK ..."

Employees were required to sign a form acknowledgement indicating they had received the handbook. However, the acknowledgement did not specifically allude to the arbitration policy or separately include any agreement to arbitrate. A former employee filed an employment-related claim against the employer, and the employer moved to compel arbitration, arguing that the employee had agreed to arbitrate the dispute by virtue of his signed acknowledgement of receipt of the employee handbook.

The court refused to compel arbitration, holding that there was no evidence that the employee had agreed to arbitrate. The court reasoned that the arbitration provision was buried in a lengthy employee handbook, the handbook itself stated that it was not intended to create a contract, the acknowledgement form made no specific mention of arbitration, and the handbook also stated that the employer could modify the policies therein at any time, making any agreement to arbitrate illusory. The court also noted that even if there was a valid agreement to arbitrate, it would still be unenforceable due to unconscionability because the arbitration policy did not provide for adequate discovery and incorporated AAA arbitration rules that were not included nor provided to the employees.

Sparks reinforces the admonition that to be enforceable, employment arbitration agreements ideally should be free-standing agreements signed by employees. They may be included on acknowledgement forms or in broader agreements, but the arbitration provision should be a prominent provision, making the employee's knowledge of the provision and agreement thereto unmistakable. [PE]

Personal Attendant Exemption Upheld

In a major decision on the personal attendant overtime exemption, the California Court of Appeal has held that the exemption applies even if the employee performs health care-related tasks for the person in his or her care. The opinion in *Cash v. Winn* refused to recognize a further exception to the exemption when an employee performs any health care-related function.

The decision comes as federal and state efforts continue to seek elimination of the exemption altogether.

California's Personal Attendant Exemption

Since 2001, California has required that personal attendants be paid at least the state minimum wage. However, they have remained exempt from overtime. Industrial Welfare Commission Wage Order No. 15 (Household Occupations) defines a "personal attendant" as "any person employed by a private householder or by any third-party employer recognized in the health care industry to work in a private household, to supervise, feed, or dress a child or person who by reason of advanced age, physical disability, or mental deficiency needs supervision."

According to the court, the exemption applies "if the work is directed primarily at supervising, feeding, or dressing the client." Supervising—the main duty—"generally refers to assisting the person with daily tasks to allow the individual to remain living at home."

The personal attendant exemption applies "when no significant amount of work other than the foregoing is required." The wage order does not quantify the "significant amount of work" that would remove an employee from the exemption. However, it is generally understood to mean no more than 20 percent of the employee's time, based on interpretations by the Labor Commissioner, one prior case, and a similar federal overtime exemption.

"20 PERCENT RULE APPEARS TO BE A REASONABLE INTERPRETATION ..."

In *Cash*, the court said that the "20 percent rule appears to be a reasonable interpretation of the wage order" and "we assume for purposes of this decision that it reflects a correct interpretation." An exception to the exemption exists for most registered nurses engaged in the practice of nursing in the home.

Exemption allows health care-related tasks

The issue in *Cash* was whether another exception applies to any employee who performs any form of health care-related task for a client, regardless of the amount of time spent. In the case, the jury found that the employee was employed to supervise, feed, and dress a client and did not spent more than 20 percent of her time on other work duties. Nonetheless, the jury awarded over $33,000 in overtime because it found that the employee's work involved "the regular administration of health care services," such as checking the client's blood sugar and vital signs.

On appeal, the court concluded that the trial court incorrectly interpreted the personal attendant exemption as excluding anyone who performs any sort of health care-related function. The court held that such an interpretation was not supported by the wage order's language, which "cannot be reasonably interpreted to mean that the employee falls outside the definition if the employee regularly engages in a single 'health care' related task (including 'taking temperatures or pulse or respiratory rate'), regardless of whether these services are an incidental or minor part of the caretaker's work." [PE]

Onion Grower Owes $2.3M Back Wages

Onion grower Peri & Sons of Yerington, Nev., has agreed to pay a record total of $2,338,700 in back wages to 1,365 workers, along with a civil money penalty of $500,000, for violations under the H-2A program, the U.S. Department of Labor says.

"... ALL OF THE WORKERS CAME TO THE U.S. FROM MEXICO. ..."

An investigation by the department's Wage and Hour Division determined that workers employed by Peri & Sons involved in irrigation, as well as harvesting, packing and shipping onions sold in grocery stores nationwide, were not paid properly for work performed, the Labor Department says.

All of the workers came to the U.S. from Mexico under the H-2A temporary agricultural worker visa program. In most cases, their earnings fell below the hourly wage required by the program, as well as below the federal minimum wage for a brief period of time.

Investigators also found that workers were not paid for time spent in mandatory pesticide training or reimbursed for subsistence expenses while traveling to and from the U.S. Additionally, their return transportation costs at the end of the contract period were not paid, as was required, the government says.

The H-2A temporary agricultural worker program establishes a means for employers who anticipate a shortage of domestic workers to bring nonimmigrant foreign workers to the United States to perform temporary or seasonal agricultural work. The employer must file an application stating that a sufficient number of domestic workers are not available and the employment of these workers will not adversely affect the wages and working conditions of similarly employed workers in the U.S.

Employers using the H-2A program must meet a number of specific conditions relating to recruitment, wages, housing, meals and transportation. [PE]

Human Resources Question with Candice Weaver

The Month's Best Question

Commission Agreements

Q: ***"We have heard that a commission agreement in writing for all commission paid employees will be required next year. In that agreement, can we include a charge back on commissions when certain conditions are not met?"***

A: Yes, if the conditions are not unconscionable. Both a 2005 case and a more recent one describe permissible "clawbacks."

These two cases, *Deleon II* and *Steinhebel v. Los Angeles Times Communications*, address the lawfulness of agreements in which employers advance commissions to sales employees when a sale occurs, but the commission is subject to being "charged back" (recouped) if the customer cancels the sale within a certain period of time.

As explained below, the newer case, *Deleon II* clarifies earlier precedent and effectively expands the universe of proper chargeback agreements. Both *DeLeon II* and *Steinhebel* hold that an agreement that an employee will receive advances that are subject to chargeback if future conditions are not met is enforceable as written and does not violate Labor Code Sections 221-223, which are the sections of the Labor Code that render unlawful certain kickback schemes. In both cases, the key to having an advance vest as an irretrievable "commission" was that the customer not cancel the purchase on which the advance was paid for a certain period of time after the sale was closed.

The two cases have similar holdings, namely that (1) advances are not treated as vested wages; (2) it is permissible to reconcile an advance that is charged back by reducing future advances accordingly; (3) it doesn't matter that the employee who made the initial sale did nothing to put him/her "at fault" for the customer canceling the subscription; and (4) the mere fact that it could be characterized as holding employees accountable for "business losses" is insufficient to render the arrangement unconscionable.

Even where the employee does not sign the compensation plan, the chargebacks are still permissible so long as the employer gives notice that continuing employment is agreement to the compensation plan. While the employer cannot invoke Labor Code Section 224's savings clause without a signed writing, a general agreement that commissions will be advances, subject to chargeback, does not violate Section 221-223, so there is no need to invoke Labor Code Section 224 and no need for a signature.

This case continues the trend, which has included such cases as *Steinhebel, Koehl v. Verio,* and *Prachasaisoradej v. Ralphs,* holding that an employer and employee can contract when certain payments are "earned," and this can include putting conditions on the earnings of wages that make payments made contingent and subject to reduction for items that are not strictly within the control of the employees.

Getting your commission agreements into effect by January 1, 2013 will comply with AB 1396 which requires all California employers to use written commission agreements that set forth the method by which commissions are computed and paid. [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.

2012 Topic Schedule

♦ **Forms & Posters - Thursday, September 20th, 2012, 10 - 11:30am --** As well as Contracts, Signs, Handouts, Fliers - Just what paperwork does an Employer need?

Guest Seminar
DATE CHANGED TO Oct 11th

♦ **Protect Yourself From ADA Predators - Guest Speaker Seminar - Thursday, October 11th, 2012, 10 - 11:30am --** Employers need to be aware of the access rules for employees and the public as they build, remodel, update and hire. Our speaker has been through it all.

♦ **Discipline & Termination - Thursday, November 15th, 2012, 10 - 11:30am --** The steps to take before termination. Managing a progressive correction, punishment and termination program.

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.

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 24th, 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 $45
Certificate – Forms – Guides – Full Breakfast
Future Training on 1-23-13, 4-23-13, 7-24-13, 10-23-13

Sexual Harassment Prevention Flyer Enclosed!

Pacific Employers
306 North Willis Street
Visalia , CA 93291
559 733-4256
(800) 331-2592
www.pacificemployers.com
email - peinfo@pacificemployers.com

VISALIA CA 93277

PRESORTED
STANDARD
U.S. POSTAGE
PAID
PERMIT NO. 520

Return Service Requested

Pacific Employers
Management Advisor
47 Years of Excellence!

2008 Chamber Visalia of Commerce Small Business of the Year

Want Breaking News by E-Mail?
Just send a note to
peinfo@pacificemployers.com
Tell us you want the News by E-Mail!

DREAM Alert

President Barack Obama announced he will implement part of the DREAM Act. The administration will use its prosecutorial discretion to not prosecute those who might be eligible to remain in the United States under the Act. Instead, USCIS will focus on the removal of foreign nationals ("illegal immigrants") that pose a greater threat (e.g., those with a criminal background).

Qualifying individuals may be granted deferred action (i.e., will not be removed) by ICE or USCIS and could become eligible for work authorization. Although, this is not technically the same as "legal status" or a path to legal status or permanent residency, once rules are implemented, the pool of available younger workers may expand. Businesses in the hospitality, restaurant, retail and agricultural industries might see increases in the number of eligible workers. [PE]

"At-Will" Now Violates NLRA

Broad "At-Will Employment" Disclaimers Can Violate The National Labor Relations Act

At-will disclaimers in employee handbooks typically clarify that the employment may be terminated at any time, for any reason, and by either party, and ordinarily do not allow the at-will status to be modified unless it is reduced to writing and agreed to by the employer.

Employers rely on these provisions to protect themselves from claims that an employee has an enforceable employment contract with the employer based on the handbook's employment provisions.

Recently however, the National Labor Relations Board ("NLRB" or the "Board") has closely scrutinized and disapproved of broadly-worded at-will disclaimers that can have a "chilling effect" on the employee's right to engage in concerted activity under the National Labor Relations Act ("NLRA" or the "Act"), to the extent that they potentially imply that union representation and collective bargaining will not alter the at-will employment status.

In two recent complaints, the NLRB's Acting General Counsel has taken issue with seemingly common at-will provisions, indicating that there may be a new enforcement target that all employers should be aware of when drafting at-will provisions. [PE]

Court Reverses Supreme Court

After a reversal by California Supreme Court, the Court of Appeal reissues unfavorable ruling in the "Administrative Exemption" case.

Employers breathed a sigh of relief when the California Supreme Court issued its December 29, 2011 ruling reversing the Court of Appeal's decision in *Harris v. Superior Court ("Harris I")*. But in a disturbing development recently, the Court of Appeal on remand stuck to its prior holding and issued a decision on the administrative exemption that appears largely to ignore the guidance the California Supreme Court provided. The resulting decision is unpersuasive and a good candidate for a second review (if not a summary reversal and remand).

Fortunately, unlike when *Harris I* initially came down in 2007, there is now a sizeable body of established law on the administrative exemption that is simply inconsistent with the narrow standard the two-justice majority announced. [PE]

Arbitrate! -- Court Rules, Rebuffing NLRB

Where the parties' arbitration agreement was neither unconscionable nor in violation of public policy, the employee must arbitrate her individual wage and hour claims against her employer, the CA Court of Appeal has ruled, affirming an order compelling arbitration in a class action for Labor Code violations and rejecting the employee's reliance on the NLRB's *D.R. Horton, Inc.* where they ruled that class action waivers in employment arbitration agreements violated the Act.

The Court noted there was no indication in the case before it that the plaintiff was covered by the NLRA. In any event, the Court was not inclined to follow the NLRB decision, declaring it not binding and that it went beyond the scope of the NLRB's expertise. *Nelsen v. Legacy Partners Residential, Inc.* [PE]