

### WHAT'S NEWS!

#### GOOD NEWS!

**T**hrough a partnership with the California Employers Association (CEA), Pacific Employers' clients are now able to purchase CEA hosted programs, within three new categories:

- Monthly Educational Webinars
- 24/7 On-Line Learning Programs
- Quarterly Employer Forums in Fresno (and throughout the state)

Pacific Employer clients can participate in all training programs at a discounted rate of \$45/training. (Regularly \$65 per training).

All trainings can be ordered directly on the CEA Store: <http://www.employers.org/store-home> or call 800 399-5331. Type in the Pacific Employers discount code: **pacemp** when registering for a program.

#### EDUCATIONAL WEBINARS

Training has never been more exciting when you can tune into business discussions. You can hear and discuss today's essential business topics live. CEA webinars are a one (1) hour escape, designed to re-tool and improve your business operations. Train from the convenience of your office or home computer. And, if you miss a "live" event, you may purchase a download of the webinar. All notes or hand outs are also included.

#### ONLINE TRAINING

CEA's interactive online trainings are individualized and require attendees to show what they learn by peppering courses with quizzes that challenge their comprehension. Courses are available from any computer linked to the Internet, and can be taken anytime 24/7.

#### Benefits include:

- **Consistency** – everyone trained is on the same page, with consistent quality
- **Easy Implementation** – quickly deploy and train entire workforce
- **Self-Paced** – learn at your own pace. On line training allows you to leave the training, and pick it up again where you left off.

With over 11 courses to choose from, including AB1825 Sexual Harassment Awareness Training, once a course has been completed, a Certificate of Completion is available to print.

#### EMPLOYER FORUMS

Quarterly forums provide employers with a time and place where discussions and connections happen around employment laws and business-building information face-to-face. Come spend time with your peers, learn something, and share your unique perspective on the forum's topic. Quarterly employer forums are hosted in Fresno, Sacramento, San Diego, Orange County and San Francisco! [PE]

## New Training & Seminar Flyers Enclosed!

### President's Report ~Dave Miller~

#### New Offerings

**O**ver the phone consultation on labor and safety matters continues to be the focus and the vast majority of Pacific Employers' activity. We began business in 1964 with a rather narrow area of practice that expanded, based on our member's needs.

#### Clients regularly contact us for the following:

- Background Checks • Drug Testing • Conflict Resolution
- Hazardous Materials Business Plans • Health Insurance • Payroll
- Retirement Programs • Safety Training • Secure Fuel Purchases
- Harassment Investigations • Sexual Harassment Prevention Training
- Temporary Workers • Webinars • Workplace Violence & Security

In order to provide access to all these service, and more, we have identified resources and created partnerships with experts in these areas and have scheduled the introduction of these strategic partners.



#### GUEST SPEAKER SEMINAR

Our October Guest Speaker Seminar will present Strategic Partners and be an opportunity for you to meet some of our major resources including Kim Parker, Executive Vice President and Craig Strong, Regional Director from *California Employers Association*.

#### OBAMACARE SEMINAR

In addition to our regular September Seminar on "Posters and Forms," (see page 3) we will be having an **ObamaCare Seminar** to bring you up to date on what is happening in the Federal and State mandated programs under the **Affordable Health Care Act**. There is no charge and will be at the Builders Exchange on Sept. 5th from 10:00 to noon.

#### COMMISSION PAY FACT SHEET

Our good friends at California Employers Association have provided us with a Fact Sheet that gives you the "Facts" that you need to know on the California requirement that commissioned employees have a written Commission Agreement. The "Fact Sheet" is enclosed.

**NOTE: The 2013 Spanish All-In-One Poster is now available at our office. [PE]**

The big thieves hang the little ones. -Czech proverb

## Recent Developments

### Provide ObamaCare Notice by October 1<sup>st</sup>.

**U**nder Obamacare, employers subject to the Fair Labor Standards Act (FLSA) must provide a “Notice of Coverage Options” to each employee, whether full-time or part-time and regardless of whether the employer is covered by an employer health care plan. The purpose of this Notice is to inform employees that they may obtain health insurance through their state’s Health Insurance Marketplace. With respect to employees who are current employees before 10/1/13, employers are required to provide the notice not later than 10/1/13. For each new employee hired on or after 10/1/13 the notice must be given at the time of hiring. For 2014, the Department of Labor will consider a notice to be provided at the time of hiring if the notice is provided within 14 days of an employee’s start date.

#### Employers Subject to the Requirement

Generally, the FLSA applies to employers that have annual sales or receipts of \$500,000 or more. More information is available through the Department of Labor (DOL) Wage-and-Hour Division’s FLSA compliance tool.

#### Content of the Notice

The Notice must inform each employee of the existence of a new Marketplace as well as contact information and a description of the services provided by the Marketplace. The notice must also inform the employee that the employee may be eligible for a premium tax credit under section 36B of the Code if the employee purchases a qualified health plan through the Marketplace; and a statement informing the employee that if the employee purchases a qualified health plan through the Marketplace, the employee may lose the employer contribution (if any) to any health benefits plan offered by the employer and that all or a portion of such contribution may be excludable from income for Federal income tax purposes.

The DOL proves a model Notice for employers that offer a health plan and a model Notice for employers that do not offer a health plan. Employers may create their own version of the Notice provided that it meets the content requirements described above. **Go to our “What’s New” page on our website for the forms and FLSA tool.** <http://pacificemployers.com/whatsnew.htm>

#### Delivering the Notice

The notice must be provided in writing, free of charge, in a manner calculated to be understood by the average employee. It may be provided by first-class mail or it may be provided electronically if the requirements of the DOL’s electronic disclosure safe harbor are met. Generally, those requirements are:

- actual receipt of transmitted information (e.g., using return-receipt or notice of undelivered electronic mail features, conducting periodic reviews or surveys to confirm receipt of the transmitted information);
- protection of the confidentiality of personal information relating to the individual’s accounts and benefits (e.g., incorporating into the system measures designed to preclude unauthorized receipt of or access to such information by individuals other than the individual for whom the information is intended);
- the electronically delivered documents must be prepared and furnished in a manner that is consistent with the style, format and content requirements applicable to the particular document (e.g., attaching a PDF version of a document to an email); and
- notice must be provided to the employee, in electronic or non-electronic form, at the time a document is furnished electronically, that apprises the individual of the significance of the document when it is not otherwise reasonably evident as transmitted (e.g., the attached document describes changes in the benefits provided by your plan) and of the right to request and obtain a paper version of such document.

Typically, electronic notices would be provided via the company email system. [PE]

### Court Rejects Multiple Inconsistencies

**T**he 7th Circuit Court of Appeals reversed summary judgment in favor of a company on a fired employee’s claim that her employment was terminated because she was pregnant, finding the company’s explanations for her firing were shifting, inconsistent, and/or facially implausible.

Jennifer Hitchcock worked as a client services supervisor for Angel Corps, a non-medical home care agency that performs personal care services for clients. After her supervisor learned Hitchcock was three months pregnant, the supervisor asked if Hitchcock would be “quitting.” She also increased Hitchcock’s workload to include tasks that were normally performed by someone else.

Several weeks later, Hitchcock went to a home of a new client to do an assessment. This appointment had to be rescheduled because Hitchcock was ill on the original date a few days earlier. Hitchcock got an uneasy feeling from the son regarding his 100-year-old mother and when she saw the woman, thought she may be sick or dead. Hitchcock left and told her supervisor, who then called adult protection services, who then instructed them to call emergency personnel. The woman had been dead for several days.

Angel Corps fired her nearly a month later. Reasons given for the termination included that she performed a full admission on an expired client, although she did this at the request of the supervisor; that Hitchcock compromised the health and safety of the client; and she performed a deficient assessment on the potential client, but there was no explanation how the assessment was deficient.

Hitchcock sued alleging violation of Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act. Magistrate Judge Roger B. Cosby granted summary judgment to Angel Corps.

Judge Ann Claire Williams pointed to the four potentially different explanations given for Hitchcock’s firing and how their inconsistency or suspicion create a reasonable inference that they do not reflect the real reason for Hitchcock’s firing.

“Angel Corps’s brief attempts to make sense out of these disparate explanations, but it does so by piling on additional ever-evolving justifications that may cause a reasonable juror to wonder whether Angel Corps can ever get its story straight,” she wrote in *Jennifer Hitchcock v. Angel Corps, Inc.*

The judges also noted that Hitchcock’s supervisor gave her more work to perform after learning she was pregnant and asked if she was “quitting.” An affidavit from a former co-worker who was pregnant while at Angel Corps said that the supervisor suggested that the employee get an abortion when learning she was pregnant.

“In sum, we find that the evidence provides a sufficient basis for a rational jury to conclude that Hitchcock was fired because she was pregnant. Naturally, Angel Corps disputes several of the critical factual assertions made by Hitchcock. We leave it to the jury to decide whom to believe,” Williams wrote. [PE]

### Sexual Harassment Prevention Training

**V**isalia 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 23<sup>rd</sup>, 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

#### Commission Agreements

**Q:** "I'm still confused about commissioned employee agreements. Can you help?"

**A:** Yes, we can clear up some of the confusion for you.

The Commission Agreement Law (CA Labor Code Section 2751) is in effect and requires employers that pay "commissions" to do the following:

1. have a signed written commission contract with the employee;
2. include the method for calculating and paying the commissions; and
3. require the employee to sign a "receipt" retained by the employer.

If you say, I only give my employees "bonuses" and "incentive compensation" as awards for making sales, not "commissions." The law clearly does not apply to me, right?! Wrong. Section 2751 may apply because it does not turn on the employer's choice of name for the incentive compensation. Section 2751 defines "commission" as "compensation paid to any person for services rendered in the sale of such employer's property or services and based proportionally upon the amount or value thereof." Thus, compensation constitutes a "commission" where:

- The employee is involved principally in the selling of a product or service, not making the product or rendering the service; and
- The amount of compensation is a percentage or other ratio of the value of the property or service sold.

Even if a payment is called a "bonus" (or some other term), if it is paid as the result of the employee's sale, and is based proportionally on the amount or value of the sale, it is very likely going to be considered a "commission" for purposes of Section 2751.

Any Exceptions? Yes. Not all sales-based compensation is automatically a "commission." Section 2751 clarifies that it does not apply to three types of sales-related compensation:

- Short-term productivity bonuses, like those that are paid to retail clerks;
- Temporary, variable incentive payments that increase, but do not decrease, payment under the written contract;
- Bonus and profit-sharing plans, unless there has been an offer by the employer to pay a fixed percentage of sales or profits as compensation for work to be performed.

**Beware** — Section 2751 applies to non-exempt *and exempt employees!*

If the terms of your commission plans change (as often happens at least annually for many sales employees), you need to make sure you distribute a signed copy of the new plan to employees and obtain a new signed receipt. This is particularly important because the law states: "in the case of a contract that expires and where the parties nevertheless continue to work under the terms of the expired contract, the contract terms are presumed to remain in full force and effect until the contract is superseded or employment is terminated by either party." Distributing new agreements when new commission plans are issued will help to protect you from claims that the terms of expired plans continue to apply.

Employers should look closely at any forms of compensation paid to employees that might actually constitute "commissions" under Section 2751. If an employer determines that a payment does constitute a "commission," the employer should ensure that an agreement is in place that comports with Section 2751's requirements. Employers should also remember to ensure ongoing compliance with Section 2751 by updating and re-issuing written commission agreements as required by Section 2751 when commission plans change. [PE]

## NO-COST EMPLOYMENT SEMINARS

**T**he 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

#### EXTRA SEMINAR

♦ **ObamaCare Seminar** - In addition to our regular September Seminar on "*Posters and Forms*," we will be having an **ObamaCare Seminar** to bring you up to date on what is happening in the Federal and State mandated programs under the **Affordable Health Care Act**.

**Thursday, September 5<sup>th</sup>, 2013, 10:00am - Noon**

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

**Thursday, September 19<sup>th</sup>, 2013, 10 - 11:30am**

♦ **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 17<sup>th</sup>, 2013, 10 - 11:30am**

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

**Thursday, November 21<sup>st</sup>, 2013, 10 - 11:30am**

**There is No Seminar in December**

Want Breaking News by E-Mail?

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### \$372,739 for Alleged Discrimination

**T**ufts Associated Health Plans Inc. (Tufts) has agreed to pay \$372,739 to 12 Asian, Hispanic and African American workers following an investigation by the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP).

The federal contractor allegedly retaliated against employees that OFCCP had determined were victims of discrimination in an earlier investigation. In May 2009, Tufts agreed to hire minority workers as customer service representatives to settle an OFCCP finding that the contractor's hiring practices discriminated against minorities.

The OFCCP received a complaint of discrimination from an individual alleging he had been terminated due to his race and retaliated against due to his status as an OFCCP class member. The worker alleged that minority class members were segregated from other employees and held to stricter standards than non-class members during the training program. [PE]

### Sex Discrimination Against Men

**I**t's Just Lunch USA, LLC, (IJL) a company that provides matchmaking services nationwide, has agreed to settle a sex discrimination lawsuit filed by the U.S. Equal Employment Opportunity Commission (EEOC). The EEOC charged that the company refused to hire men as dating directors and inside sales representatives.

The EEOC also alleged that IJL fired Lynda Twist, its human resources director, in retaliation for her opposition to IJL's sex-based hiring practices. The settlement agreement requires IJL to pay approximately \$900,000, to implement a detailed applicant tracking system, to provide training to managers, human resources personnel and employees, and to provide quarterly hiring reports to EEOC for three years. [PE]

### Cal/OSHA Cites For Failure to Train

**E**xpress Chipping Inc., was issued a citation by Cal/OSHA, for failing to identify the hazards of working within the confined space of a cement mixer, and failing to train its workers about this hazard, after a 1,200-pound slab of concrete fell and killed the worker while he was chipping concrete.

Christine Baker, director of the Department of Industrial Relations commented, "Employers have a responsibility to protect their workers and prevent this type of tragedy." Seven citations were issued with \$50,400 in penalties. Also, A&A Concrete, where the death occurred, was fined \$7,500 for failing to inform rescue services of the serious hazards. [PE]

### Fired Due to Vision Impairment

**T**he Equal Employment Opportunity Commission (EEOC) has charged that Riviera Consulting & Management Consulting, LLC, failed to accommodate an employee with retinitis pigmentosa and instead terminated him.

According to the EEOC, when Farhang Dahmubed was hired as a senior bookkeeper, he told his employer about his condition. To accommodate his vision impairment, Dahmubed simply arranged (on his own initiative) for additional light near his immediate workspace.

He was terminated approximately one month later, allegedly due to his inability to drive to deliver paychecks. The EEOC found that driving as a job requirement had not been raised before, and although Dahmubed suggested possible solutions to accomplish these tasks, the company refused to consider any accommodations.

EEOC San Francisco Regional Attorney William R. Tamayo said, "Rather than accommodate Mr. Dahmubed's vision impairment through one of several simple solutions, this employer chose to ignore the law and got rid of him because of his disability. The law protects employees from precisely such actions." [PE]