Pacific Employers
MANAGEMENT ADVISOR
Over 50 Years of Excellence!
September 2015

WHAT'S NEWS!

$2.2 Million Wage Theft Fine

The California Labor Commissioner recently issued more than $2.2 million in citations against three residential care facilities in San Diego County for egregious wage theft violations after an investigation found that caregivers were working 24-hour shifts, six to seven days a week, for $1.25 to $1.80 per hour.

The citations included minimum wage, overtime, meal period and workers' compensation violations. The residential care facilities must pay $1,332,129 for underpaid wages and premiums, $716,846 for liquidated damages and $171,305 in civil penalties.

The Labor Commissioner has made it a top priority to address "wage theft." Generally, "wage theft" is a phrase used to refer to infractions of the California Labor Code involving the payment of wages to workers.

The care facilities in this matter employed caregivers for elderly residents who suffered from advanced stage dementia or Alzheimer's. Although the caregivers worked 24-hour shifts, six to seven days a week, they were only paid between $900 and $1,300 each month in cash. In addition, while operating the facilities for eight years, the employer did not report wages to the proper state, federal and local agencies or have workers' compensation coverage.

Interestingly, it wasn't just the business entity that was cited for the violations. In this instance, the "Managing Member" was also cited as an individual "because he caused the violations through his daily control of the facilities' operations."

While the care facilities closed before the case reached a conclusion, they reopened under a new name with a daughter of the original owners named as the owner and sole proprietor.

The Labor Commissioner indicated that DIR is holding individuals who engage in wage theft responsible so that they "will have a difficult time avoiding liability to workers." [PE]

OBAMA'S UNLAWFUL LABOR BOARD

A federal appeals court struck down a ruling of the National Labor Relations Board because its acting general counsel was in the job illegally. The "illegal" was Lafe Solomon who may be remembered for his legal complaints against Boeing for wanting to build planes in right-to-work South Carolina instead of union-dominated Washington. Now it turns out that Mr. Solomon was the one violating the law.

A unanimous three-judge panel of the D.C. Circuit Court of Appeals struck down a 2014 NLRB ruling against an Arizona ambulance company, SW General. The panel found that Messrs. Solomon and Obama had violated the Federal Vacancies Reform Act, which generally holds that a person cannot serve as an "acting" officer of an agency while also nominated for the post.

Mr. Obama directed Mr. Solomon to serve as NLRB acting general counsel in June 2010. Six months later he nominated Mr. Solomon for the post. The Senate refused to confirm him and he left the NLRB in November 2013. Yet before he departed Mr. Solomon issued the complaint against SW General and many other companies.

Congress passed the vacancies reform law to prevent precisely this kind of presidential gambit. In 1997 Republicans blocked the nomination of Bill Lann Lee for assistant attorney general at the Justice Department. President Bill Clinton then named Mr. Lee in an "acting" capacity—a move designed to let him serve the remainder of the Administration without Senate approval. Congress then tightened the rules, which Messrs. Obama and Solomon violated so flagrantly that the Administration barely offered a defense in court.

Judge Karen Henderson, a George H.W. Bush appointee, wrote the opinion and was joined by two Obama appointees. The ruling only applies to the SW General case, but it is an open invitation to Mr. Solomon's other corporate targets to seek relief as well.

This is the third legal strike against Mr. Obama's NLRB. The D.C. Circuit ruled against his recess appointees in 2013 and the Supreme Court did the same in 2014. [PE]

Updated Hiring Checklist Enclosed!

President's Report
~Dave Miller~

Panel of Experts

October is our Guest Speaker Seminar - Annually we bring you a speaker for a timely discussion of labor relations, HR and safety issues of interest to the employer.

This year we will have a panel discussion on preparing for the law changes that take place on January 1, 2016. It will include the increase in the minimum wage, Obamacare for 50 or more employees and the new year implementation of the 3 day sick leave law; the DOL crackdown on Independent Contractors, and the new Exemption rules from Washington.

See you at the Builders Exchange on Thursday, October 15th, 2015, 10 - 11:30am. [PE]

HIRING CHECKLIST LINKS TO FORMS

One of the items most used by our members is the Hiring Checklist that can be found enclosed and on our Websites' *Forms Page.*

http://pacificemployers.com/forms.htm

Many of the documents referenced in the Hiring Checklist have been updated since we last published it. For example, because of the 3 Day Sick Leave law, the New Employee Information Form has the second page changed to provide information on your policy on providing mandated sick leave.

What is great about this form on our *Forms Page* is that each of the mandatory documents check marked in the form are included in the hiring form section of the web page. It makes it easy to just download the newest forms at the time of hire.

When you visit the *Forms Page* take a look at the other forms that are available for your use and convenience. [PE]

"The best argument against democracy is a five-minute conversation with the average voter." -- Winston Churchill

Recent Developments

Witness Statements Available

For over 35 years, the National Labor Relations Board (NLRB) held that witness statements obtained by unionized employers during pre-arbitration investigations were exempt from disclosure to the union.. However, on June 26, 2015, the NLRB reversed its own long-standing precedent and ruled that such witness statements must be provided to a union bargaining agent before an arbitration hearing. Employers no longer enjoy this blanket exemption and therefore should adjust their practices accordingly.

NLRB Reverses Course With New Ruling

In the case of *American Baptist Homes of the West dba Piedmont Gardens,* the majority of the current Board disagreed with the 1978 ruling in *Anheuser-Busch, Inc.,* which had provided that witness statements should be subject to a blanket exemption from disclosure. Instead, the Board held that these statements should only be protected if the employer can demonstrate that there is a substantial interest in keeping them confidential. Indeed, the Board noted that the same balancing test that applies to all other information that employers claim to be confidential should also apply to witness statements.

Two Board members (Philip A. Miscimarra and Harry I. Johnson) dissented, arguing that the ruling in *Anheuser-Busch* protected the integrity of workplace investigations and should not be rejected by the Board. The dissent's biggest concern echoes those of many employers: by being required to disclose these witness statements, an employer's ability to properly investigate various workplace claims would be impeded.

"... NLRB's second effort to overrule Anheuser-Busch. ..."

Nevertheless, in its majority opinion, the Board acknowledged its departure from long-standing precedent and noted that the new standard would not apply retroactively to past cases where the employer has already refused to provide requested witness statements.

This is the NLRB's second effort to overrule *Anheuser-Busch.* A December 2012 decision against this same employer on the same grounds was set aside in 2014 following the U.S. Supreme Court's *Noel Canning* ruling. In that case, the SCOTUS held that President Obama's January 2012 recess appointments were unconstitutional, invalidating many NLRB decisions involving Board members who were ruled to have been impermissibly appointed. Once the administration complied with the Court's appointment standards, the issue was resolved and the path was cleared for this 2015 decision.

What Should Employers Do?

Given the Board's new ruling, employers should seek counsel at the earliest possible opportunity to help conduct or assist with workplace investigations. Furthermore, when conducting these investigations, give consideration as to when to take an employee's statement during an investigation, as opposed to simply taking investigative notes without regard to potential consequences. Finally, be mindful to refrain from assuring employees that their statements will remain confidential, as there is a good chance they may need to be produced to the union. [PE]

Challenge to NLRB Fails

The National Labor Relations Board has won a second legal victory in connection with its "quickie" election rule. U.S. District Court Judge Amy Berman Jackson has rejected arguments raised by the U.S. Chamber of Commerce and other business groups seeking to invalidate the rule for exceeding the Board's authority under the National Labor Relations Act and for violating the Administrative Procedures Act and the First and Fifth Amendments to the U.S Constitution.

The rule, which went into effect on April 14, 2015, effects twenty-five changes to the procedures governing the election of union representatives for collective bargaining purposes. One of the most significant and criticized changes is the shortening of the time in which union elections are conducted. The Board claims the new rule will "modernize the representation case process and fulfill the promise of the National Labor Relations Act."

"... mischaracterizations of what the Final Rule actually provides ..."

The Chamber, which sought to invalidate the entire rule, claimed the "sweeping changes to the election process…sharply curtails employers' statutory, due process and constitutional rights;" however, objections were raised only to certain provisions of the rule, including, among others: (1) the requirement that employers post and distribute a "Notice of Petition for Election" following the filing of an election petition by a union; (2) the restriction on the right of employers to introduce evidence on eligibility to vote or unit inclusion issues; (3) the requirement that the employer file an extensive written statement of position before the date of the pre-election Board hearing; (4) the increased amount of contact information employers must disclose to the union about their employees ; and (5) the elimination of mandatory post-election Board review through stipulated election agreements.

Judge Jackson rejected each of these concerns in her 72-page opinion, characterizing them as "dramatic pronouncements… predicated on mischaracterizations of what the Final Rule actually provides…." Arguments under the APA also were dismissed "[g]iven the level of deference that applies [to such cases] particularly in the labor context" and Judge Jackson's finding that "the Board engaged in a comprehensive analysis of a multitude of issues relating to the need for and the propriety of the [rule]…."

Judge Jackson concluded that while the Chamber's "policy objections may very well be sincere and legitimately based… in the end, this case comes down to a disagreement with choices made by the agency entrusted by Congress with broad discretion to implement the provisions of the NLRA and to craft appropriate procedures."

Judge Jackson's opinion comes less than two months after the U.S. District Court for the Western District of Texas also dismissed a parallel challenge in favor of the Board. *Associated Builders & Contractors of Tex., Inc. v. NLRB*. The Texas decision has been appealed to the United States Fifth Circuit Court of Appeals. [PE]

Human Resources Question with Candice Weaver

The Month's Best Question

Refusing FMLA

Q: "An employee is eligible for a leave under the Family and Medical Leave Act (FLMA) but does not want to take it. Can I require them to use FLMA?"

A: An employee might request leave for a situation that clearly appears to be covered as FMLA leave and not want to designate the time off as FMLA because the employee wants to take more time off from work.

For example, if an employee requests FMLA leave, many employers require the employee to first exhaust all paid time off and sick leave (this is optional). Because PTO time runs concurrently with FMLA, it counts against FMLA leave, so an employee with four weeks of vacation would be off work for 12 weeks (paid for the first four weeks). However, if the employee were to first take his/her four weeks of vacation/PTO time and then ask to be put on FMLA, that same employee would end up being off work for 16 weeks. Make sense? It's up to you as the employer to decide whether or not you want to require employees to first exhaust all PTO time before taking FMLA/CFRA.

Case law says you cannot force an employee to take FMLA. In *Escriba v. Foster Poultry Farms, Inc.,* an employee specifically requested vacation time and said she had no intent to use FMLA leave, even though the reason for her leave qualified as FMLA leave. When the employee failed to return to work at the end of her vacation, she was fired for violating the employer's three-day no-call, no-show policy. In response, the employee claimed that the employer was legally obligated to designate her leave as FMLA leave, and that she had a right to 12 additional weeks of leave. The employer argued that by declining FMLA leave at the outset, the employee had taken her absence outside of the protections of the FMLA.

The employee challenged the employer's position by claiming that she could not be viewed to have declined FMLA because declining leave is tantamount to waiving it, and the FMLA regulations provide that "[e] employees cannot waive, nor may employers induce employees to waive their rights under FMLA." 29 C.F.R. § 825.220(d). The Court disagreed with the employer and concluded that "an employee can affirmatively decline to use FMLA leave, even if the underlying reason for seeking the leave would have invoked FMLA protection." The Court also noted that to conclude that an employer can force an employee to take FMLA would in itself be a potential claim that the employer is interfering with the employee's FMLA rights.

Employers should carefully document whether an employee is accepting or declining FMLA leave, after first ensuring they are FMLA eligible.

An employer cannot force an employee to apply for and use FMLA leave at that time if they refuse the leave.

Employees who avoid FMLA leave in order to maximize their time away from work must realize that they are preserving their leave for future use and do not have FMLA protections during their vacation/PTO leave. [PE]

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.

No-Cost Employment Seminars

Pacific Employers hosts 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.

2015 Topic Schedule

♦ **Forms & Posters -** as well as Contracts, Signs, Handouts, Fliers - Just what paperwork does an Employer need?
Thursday, September 17th, 2015, 10 - 11:30am

♦ **October is our Guest Speaker Seminar - Annually we bring you a speaker for a timely discussion of labor relations, HR and safety issues of interest to the employer. This year we will have a panel discussion on preparing for the law changes that take place on January 1, 2016. It will include the increase in the minimum wage, Obamacare for 50 or more employees and the new year implementation of the 3 day sick leave law; the DOL crackdown on Independent Contractors, and the new Exemption rules from Washington.**
Thursday, October 15th, 2015, 10 - 11:30am

♦ **Discipline & Termination -** The steps to take before termination. Managing a progressive correction, punishment and termination program.
Thursday, November 19th, 2015, 10 - 11:30am

There is No Seminar in December

Sexual Harassment & Abusive Conduct Training

Visalia Chamber of Commerce & Pacific Employers, will host a Supervisors' Sexual Harassment & Abusive Conduct 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
PE & Chamber Members $35
Non-members $50
Certificate – Forms – Guides – Full Breakfast

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Updated Hiring Checklist Enclosed!

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Court Prohibits Bakery from Firing Employee

Peters' Bakery, a family-owned business in East San Jose, may not terminate a sales clerk whose allegations of ethnic and racial harassment and retaliation are the basis for a federal lawsuit by the U.S. Equal Employment Opportunity Commission (EEOC).

According to a preliminary injunction recently issued by the U.S. District Court for the Northern District of California, San Jose Division. U.S. District Court Judge Beth Labson Freeman found that Peters' Bakery "gave no legitimate business reason for terminating Ms. Ramirez," and that "the EEOC is likely to succeed on its Title VII claims."

According to EEOC's complaint (13-CV-04507-BLF) filed Sept. 30, 2013, owner Charles "Chuck" Peters harassed sales clerk Marcela Ramirez with repeated derogatory jokes and comments, such as "Mexicans would rather lie than tell the truth," and "I never trusted your kind of people," and ultimately discharged her because of her national origin.

The lawsuit further alleged that after Ramirez filed charges with the EEOC, her employer retaliated by filing a defamation lawsuit against her (dismissed May 2012), by delaying the reinstatement Ramirez won through a union arbitration in 2012, and by circulating her charge to her co-workers and writing her up. [PE]

BLS Reports Employee Benefits

New data from the Bureau of Labor Statistics indicates that full-time workers in state and local government had high rates of access to major benefits: 99 percent had access to retirement and medical care benefits, and 98 percent to paid sick leave.

For part-time workers, 39 percent had access to retirement benefits, 24 percent to medical care benefits, and 42 percent to paid sick leave.

Paid holidays were provided to 90 percent of full-time and 37 percent of part-time workers in private industry. In state and local government, 74 percent of full-time workers and 30 percent of part-time workers had access.

The share of premiums workers were required to pay for their medical coverage varied by bargaining status. Private industry nonunion workers were responsible for 23 percent of the total single coverage medical premium, whereas the share of premiums for union workers was 13 percent. The share of premiums for family coverage was 35 percent for nonunion workers and 16 percent for union workers. [PE]

Papa John's -- $500k For "Wage Theft"

Attorney General Eric T. Schneiderman and Administrator for the U.S. Department of Labor's Wage and Hour Division Dr. David Weil have announced charges against Abdul Jamil Khokhar and BMY Foods, Inc., which together owned and operated nine Papa John's franchises throughout the Bronx.

According to court documents, the owner and company allegedly failed to pay minimum wage and overtime to approximately 300 current and former employees, created fictitious identities to conceal overtime worked by employees, and filed fraudulent quarterly tax returns with New York State in order to cover up their alleged wage theft.

Charges filed by the Attorney General's Office seek jail time and $230,000 in back wages to Khokar's current and former employees. Administrator Weil announced the filing of a consent judgment whereby Khokhar would pay an additional $230,000 in liquidated damages to employees and $50,000 in civil monetary penalties. [PE]

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