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# Pacific Employers

## MANAGEMENT ADVISOR

Over 50 Years of Excellence!



Spring 2017

### WHAT'S NEWS!

#### Commission-Paid Employees Entitled To Separate Rest Period Pay

**Workers paid on a commission basis must be separately compensated for legally required rest periods, a California appellate court ruled (*Vaquero v. Stoneledge Furniture LLC*).** When combined with a state Supreme Court ruling late last year requiring employers to provide workers with duty-free rest breaks, these decisions will force many California employers to alter their pay practices.

California IWC Wage Orders require that non-exempt employees working at least 3.5 hours in a workday receive a paid 10-minute duty-free rest period for each four hours of work or major fraction thereof. Rest period time must be counted as hours worked "for which there shall be no deduction from wages."

Piece rate employees must be paid separately for non-productive time, including rest periods. In 2013's *Bluford v. Safeway Stores, Inc.*, the court requires separate compensation for rest periods to comply with California minimum wage law.

When the California legislature passed AB1513 (LC §226.2) it established a special rate of pay to be provided to piece-rate employees on rest and recovery periods: the applicable minimum wage or the average productive rate, whichever is greater. These amounts were in addition to compensation for "other non-productive time" at only the applicable minimum wage.

According to the court, the commissions earned for productive selling time similarly did not account for non-selling time spent on rest periods. The court reasoned the commission would be the same regardless of whether rest periods were taken. For these reasons, the court concluded neither a draw nor a commission payment constituted compensation for rest periods.

Rather, the court found that the time spent on rest periods was, in effect, deducted unlawfully because it was unpaid time regardless of how much money was earned for commissions. Such unproductive time, in other words, had to be compensated separately and could not be included or averaged with commissions paid for productive time to satisfy the applicable minimum wage requirements

Review your commission compensation plans to see if you are adequately compensating your salespersons for non-selling time and properly disclosing the method of calculation on their pay statements, Wage Notices (LC §2810.5), and written pay plans. If you have a hybrid pay plan, you should also make sure that you are correctly defining, accounting for, and compensating for selling versus non-selling time including rest periods and other non-productive time. Taking effective action to audit current commission pay agreements and related practices could help you avoid expensive litigation and potential liability.

If you have any questions, please contact PE staff. [PE]



SEMINAR SERIES NOW AT 823 W. CENTER AVE., VISALIA

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.

#### WAGE AND HOUR CLAIMS NOT COVERED BY ARBITRATION

**California Court of Appeal issued its opinion in *Vasserman v. Henry Mayo Newhall Memorial Hospital*, rejecting the hospital's appeal of a trial court order denying its motion to compel the plaintiff to arbitrate wage and hour claims she brought against the hospital.**

The court acknowledged that the applicable collective bargaining agreement (CBA) included a provision requiring arbitration of claims arising under the agreement, but held that it was not "clear and unmistakable" from this provision that the parties intended to waive a judicial forum for claims based on statute (i.e. meal and rest breaks, overtime).

As such, the plaintiff could not be required to arbitrate her wage and hour claims. Even if a CBA contains a clear and unmistakable waiver of the right to a judicial forum for resolution of statutory wage claims, this court hinted that it still may not be enforceable, citing caselaw suggesting that a union may not prospectively waive an employee's right to a judicial forum for resolution of certain statutory claims (discrimination claims).

However, the court did not decide this issue, stating that it did not need to because the waiver was not clear and unmistakable in any event. [PE]

#### DISCLOSURE/CONSENT FORM VIOLATES THE FCRA

**The Ninth Circuit Court of Appeals issued its opinion in *Syed v. M-I, LLC*, holding, on an issue of first impression, that an employer willfully violated the Fair Credit Reporting Act ("FCRA") by including a liability waiver on the background check disclosure and consent form it provided to prospective employees.**

The Ninth Circuit held that the FCRA expressly states that before obtaining a consumer report for employment purposes, an employer must disclose its intent to secure a consumer report for employment purposes and inform the consumer of his/her rights under the FCRA. The FCRA states that this information must be provided in writing in a document "consisting solely

of the disclosure." The FCRA goes on to state that the employer must obtain the consumer's authorization to procure the report and that the authorization can be on the same document as the disclosure. In this case, the employer had a disclosure and consent form, as required by the FCRA. However, the employer's form included a provision stating that the applicant signing the form agrees to release the employer from any and all liability stemming from its reliance on information derived from the consumer report.

The Ninth Circuit held that the inclusion of this liability waiver on the disclosure and consent form violated the FCRA's express mandate that the disclosure consist "solely of the disclosure." The Ninth Circuit reasoned that the inclusion of extraneous information, such as a liability waiver, in the disclosure form violates the law. [PE]

#### HEAT ILLNESS RULES INCLUDE INDOOR EMPLOYEES

**Regulations have establish heat illness prevention standards for outdoor workers.** The regulations include requirements for providing sufficient drinking water at no charge to the employee, allowing for recovery or "cool down" periods, providing shade when the temperature exceeds 80 degrees Fahrenheit, and creating written safety standards.

Senate Bill 1167 expands California's heat illness regulations to protect indoor employees. The bill requires the Division of Occupational Safety and Health to propose by July 1, 2019, a heat illness and injury prevention standard applicable to indoor workers that minimizes heat-related illness and injury among such persons. [PE]

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

### Child Labor Law Flyer Enclosed!

#### President's Report ~Dave Miller~



#### Spanish "All-in-1" Posters! We now have the New 2017 Spanish "All-in-1" Poster.

**NOTE:** Copies of Pacific Employers' 2017 English and Spanish "All-in-1" Posters are available at the office during business hours. [PE]

#### Future Dues Increase!

**It has been about a decade since Pacific Employers has had a dues increase. In order to keep up with inflation, we will be making a cost of living increase beginning in the first quarter of 2018.**

We will also be adjusting prices of other services, such as our hourly fees and the charge for creation and updating handbooks and safety programs. We hope that you appreciate our service and understand the need to maintain sufficient insulation between us and the wolf at our door. [PE]



PE Goes Facebook and Email!

**Breaking News by Facebook & E-mail!** We take advantage of another way to connect with our clients. In addition to a new platform for our E-mail, we now have a Facebook Page! We now bring you the latest information and the answers to many of your questions in an organized and timely fashion with E-mail and our FB page.

With our Newsletter going to a quarterly publication schedule, we also will be able to welcome all our staff members to the writing tasks by allowing them to post information on our Facebook page.

Visit and Like Pacific Employers new Facebook page at:  
<https://www.facebook.com/pacificemployers/>

"It would be thought a hard government that should tax its people one tenth part." -- Benjamin Franklin (1706-1790) US Founding Father

## State Bans the Box on Juvenile Crime

**C**alifornia employers are no longer allowed to ask about juvenile criminal convictions or determinations on employment applications. (AB1843). The Department of Fair Employment and Housing has limited the ability for employers to ask for and/or use background information during the hiring process.

For Employers it means the winds are blowing stronger each year in favor of removing the question "Have you ever been convicted of a crime?" from all job applications in California. The purpose behind all of these new rulings is to reduce discrimination against those with a criminal background when it comes to applying for an open position. Employers are still allowed to ask about a criminal background once the interview begins and/or require background checks after a job offer.

The City of Los Angeles is "banning the box" for all applicants through its Fair Chance Initiative for Hiring which prohibits employers from asking about criminal convictions before a job offer has been made. Although enforcement is delayed until July, employers can receive a written warning for a violation.

Pacific Employers can help you with a new Employment Application, which is recommended.

## First Aid Reporting Changes in 2017

**E**ffective January 1, 2017, your workers' compensation carrier is required to report all workers' comp claims—including first aid injuries—to the Workers' Compensation Insurance Bureau.

An employer who used to pay an urgent care clinic or other medical provider out-of-pocket for first aid claims, is no longer permitted to do so. Your workers' comp carrier should have already communicated their expectations in this area and you should now be prepared to submit any first aid injury, that requires payment, to your carrier.

Let's look at an example to further explain the change.

An employee who cuts herself at work and uses the antibiotic cream and patch from the first aid kit will not need to be reported to your carrier. However, if that same employee requires additional treatment at the clinic, which requires payment—this will now need to be reported to your carrier. Previously, employers could choose to pay out of pocket for such services but this is no longer an option. It may cost an employer less to submit the claim to the carrier because the carrier will cover part of the cost, however, the downside to the new reporting change is that an employer's experience modification rating may be negatively impacted.

Talk with your carrier as to any new procedures to follow. This change only impacts reporting to your workers' comp carrier and does not impact any other laws or reporting requirements. [PE]

## Restaurant Owner Gets Prison For Wage Theft

**Z**ihan Zhang, owner of Antique Thai Cuisine in San Diego, has been sentenced to two years in jail for grand theft and labor violations and ordered to repay \$20,000 in stolen wages and tips to six of her restaurant workers, according to the Labor Commissioner.

Ms. Zhang targeted immigrant workers who were promised wages but then often paid only in tips, the state says. Some of the kitchen staff was paid as little as \$4 an hour and forced to work during breaks and meal periods.

The owner further collected a portion of the tips from the unpaid workers, and charged them \$5 a shift for "glass breakage" to offset her

operating costs, the state says.

Ms. Zhang was convicted of two felony counts of grand theft of labor for failing to pay workers as promised, one felony count of grand theft of tips and six misdemeanor charges, including two for refusing to pay wages when she had the ability to do so and four counts for failing to provide itemized wage statements.

**"THE FIRST CRIMINAL CONVICTION OF ITS KIND IN OUR STATE"**

The trial included testimony from one worker who worked 12 days in a row, including double shifts, and was not paid her hourly wage. Video footage showed the worker asking Ms. Zhang about payments she was owed when Ms. Zhang fired her. Ms. Zhang also charged another server for customers' meals when they left before the food was served.

The wage theft came to light in 2014 after some of the workers filed wage claims with the Labor Commissioner's Office. The Labor Commissioner's Office cited Antique Thai \$36,617 in July 2014, including assessments of \$14,567 for rest and meal period premiums, wages, overtime and liquidated damages, and civil penalties of \$22,050 for failure to provide itemized wage statements as well as overtime, minimum wage, rest and meal period requirements. [PE]

## Court Enjoins DOL's Persuader Rule

**T**he federal district court in Texas has issued a permanent injunction blocking implementation of the U.S. Department of Labor's ("DOL") controversial "Persuader Rule."

The rule, which would have imposed broad disclosure requirements on employers responding to union-organizing campaigns, has been mired in controversy since it was proposed in 2011.

**"... DISCLOSE... ABOUT THIRD-PARTY CONSULTANTS..."**

The new Persuader Rule, which would have taken effect in July 2016, has been so controversial because it appeared to require employers to disclose information not only about third-party consultants trying directly to affect employees' decisions whether to unionize, but also about third-party consultants—including outside lawyers—who had no direct contact with employees at all. The rule would have required any covered employer or third party consultant, on pain of criminal prosecution, to disclose (1) the identity of any outside lawyer or other consultant; (2) the goals, terms, and conditions of the arrangement; and (3) the activities performed and to be performed by the consultant. Many feared that the rule would have been used to force employers to disclose information protected by the attorney-client privilege.

Presumably, withdrawal of all appeals by the incoming Trump administration would effectively terminate the rule once and for all. However, either way, for the time being, there is no need for employers — or their counsel — to comply with the enjoined regulations. [PE]

## Sexual Harassment Prevention Training

**T**he Visalia Chamber of Commerce and Pacific Employers, will host a state mandated Supervisors' Sexual Harassment Prevention Training Seminar & Workshop with a continental breakfast on April 25<sup>th</sup>, registration at 7:30 am, Seminar 8:00-10:00 am, at the Lamp Liter Inn, Visalia.

RSVP Visalia Chamber - 734-5876  
PE & Chamber Members \$35 - Non-members \$50  
Certificate – Forms – Guides – Full Breakfast  
Future 2017 Training dates:  
July 26<sup>th</sup>, & Oct. 25<sup>th</sup>



## Human Resources Question with Candice Weaver

### THE MONTH'S BEST QUESTION

#### The New Form I-9

**Q:** "What's new on the I-9 Form?"

**A:** Not too much, however, be aware of these changes:

The list of acceptable documents that establish identity and employment authorization has not changed under the new form. In addition, the new form is designed to be easier to complete on a computer. The new form introduces "smart" features, such as on-screen embedded instructions, drop-down lists, error messages and calendars for filling in dates.

However, the Form I-9 still has to be printed and signed by the employee and employer. Employers also have the option of using a printable version to be completed by hand. The instructions are contained on a separate document, in addition to the instructions embedded in the computer version.

Changes to Section 1, to be completed by the employee, include:

- request for "other last names used" by the employee, rather than "other names used"
- streamlining of certification for certain foreign nationals, by requiring the Alien Registration number, I-94 number or foreign passport number, not both the Alien Registration number or I-94 number and the foreign passport number;
- auto-fill of certain areas of Section 1 when the employee selects citizenship status
- ability to enter multiple preparers of translators of the form who assisted the employee in completing the form, and a supplemental page for the preparer or translator

Changes to Section 2, to be completed by the employer, include:

- error messages on the smart form for documents entered incorrectly by the employer (i.e., an error message appears if an employer selects "U.S. Passport" as a verification document for an employee that has selected a non-corresponding citizenship status)
- auto-fill of certain areas once a verifying document is selected
- an "Additional Information" box for use by the employer to notate a variety of additional information, such as employment authorization extensions, additional document description or other relevant information.

Employees and employers must fill in "N/A" to a question if there is no information to provide and the Form I-9 is being completed by hand.

The USCIS website has links and instructions for the following: the smart form, the printable version, the supplemental form for preparers and/or translators and the Spanish-language version.

Given the expected renewed focus on strict compliance with immigration laws and regulations, employers are advised to review their immigration compliance practices, including adopting the current Form I-9 and ensuring the processes for completing the form are fully compliant with the law and regulations.

The new Form I-9 may be found on the Pacific Employers' "Forms" page at: <http://www.pacificemployers.com/forms.htm> [PE]

## NEW ADDRESS FOR SEMINARS

**P**acific Employers hosts the Seminar Series at the Builders Exchange which has relocated to 823 W. Center Ave., Visalia.

RSVP to Pacific Employers at 733-4256. *These mid-morning seminars include refreshments and handouts.*

### 2017 Topic Schedule

♦ **Safety Programs** - Cal/OSHA's Written Safety Program. Reviewing the IIPP or SB 198 requirements for your business.

**Thursday, April 20<sup>th</sup>, 2017, 10 - 11:30am**

♦ **Family Leave** - Fed & CA Family Medical Leave, California's Pregnancy Leave, Disability Leave, Sick Leave, Workers' Comp, etc.; Making sense of them.

**Thursday, May 18<sup>th</sup>, 2017, 10 - 11:30am**

♦ **Wage & Hour and Exempt Status** - Overtime, wage considerations and exemptions.

**Thursday, June 15<sup>th</sup>, 2017, 10 - 11:30am**

♦ **Hiring & Maintaining "At-Will"** - Planning to hire? Putting to work? We discuss maintaining "At-Will" to protect you from the "For-Cause" Trap!

**Thursday, July 20<sup>th</sup>, 2017, 10 - 11:30am**

**There is No Seminar in August or December**

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

**Thursday, September 21<sup>st</sup>, 2017, 10 - 11:30am**

♦ **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.

**Thursday, October 19<sup>th</sup>, 2017, 10 - 11:30am**

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

**Thursday, November 16<sup>th</sup>, 2017, 10 - 11:30am**



**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.