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Seminar Series at The Depot Restaurant 207 E Oak Ave, Visalia

DBA Suffices for Compliant Wage Statement

Vaiula Savea sued his employer, YRC Inc., on a claim that YRC failed to provide the correct employer name and address on its wage statements, as required by Labor Code section 226(a)(8). YRC's wage statements listed only YRC's fictitious business name, "YRC Freight," and did not provide a mail stop code or YRC's ZIP+4 Code.

YRC demurred to the complaint on the grounds that listing the fictitious business name was proper, and that an employer's address need not contain a mail stop code or a ZIP+4 Code. YRC introduced evidence that its fictitious business name was registered with at least one county when the complaint was filed.

The trial court sustained YRC's demurrer without leave to amend, holding that even if YRC "did not strictly comply [with Section 226(a)(8)] …, it substantially complied by identifying its correct name, and a correct address where it could be reached."

The Court of Appeal granted review and affirmed the trial court's decision. The Court of Appeal held that because the name listed on the wage statement was YRC's actual, recorded fictitious business name in California at the time that Savea sued, YRC had complied with the Labor Code. The Court of Appeal agreed with the analysis of three federal district court cases, all holding that employers listing the fictitious business name, instead of the name registered with the Secretary of State, did not violate Section 226(a)(8).

The Court of Appeal further concluded that YRC complied with the requirement of providing the employer address on the wage statements, noting that Savea cited no authority for the proposition that the mail stop code or ZIP+4 Code is somehow required.

Because the Court of Appeal affirmed the trial court decision that YRC strictly complied with the requirements of the Labor Code, it did not reach the question whether Section 226 requires "strict" or "substantial" compliance.

The Court of Appeal's decision, representing one some might consider a relatively rare instance of judicial common sense prevailing over a hyper-technical Labor Code argument, is a small win for employers. While the Court of Appeal did not conclude whether "substantial" compliance with Section 226 will suffice, employers who operate under fictitious business names can now sleep a little better at night. [PE]

UI Benefit Online Protests!

EMPLOYERS: An online protest option is now available on e-Services for Business for employers to submit protests for Unemployment Insurance (UI) Benefit Charges listed on the Statement of Charges to Reserve Account (DE 428T), Statement of Reimbursable Benefit Charges (DE 428R), and School Employees Fund Employer Statement of Benefit Charges (DE 428F).

Employers may also submit online protests to their UI rate listed in the Notice of Contribution Rates and Statement of UI Reserve Account (DE 2088). For more information, visit FAQs - e-Services for Business. [PE]

Want Breaking News by E-Mail?
Just send a note to
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Pacific Employers
MANAGEMENT ADVISOR
Spring 2019
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What's News!

Successor Employers!

The National Labor Relations Board's (NLRB) recent decision in *Ridgewood Health Care Center, 367 NLRB No. 110* **will provide direction to employers acquiring businesses with a union represented workforce** to be clear in discussions with those workers about their intent to make changes in the pay scale, benefits and other terms and conditions of employment.

In determining a company's obligations when acquiring a unionized facility, the NLRB will find that an employer is a "successor" employer with an obligation to recognize and bargain with the union if there is a substantial continuity of business operations and a continuity in the workforce, according to *NLRB v. Burns Security Services, 406 U.S. 272 (1972).*

An employer that acquires a unionized company and even though it discriminatorily avoids hiring some but not "all" or "substantially all" of the former company's employees in order to avoid a bargaining obligation with a union, it can set its own initial terms and conditions of employment without first consulting or bargaining with the union, according to the National Labor Relations Board (NLRB) in its Ridgewood Health Care Center, 367 NLRB No. 110 decision. The decision, issued April 2, 2019, overruled precedent that's been in place since 1996. The employer has an obligation to recognize and bargain with the union moving forward, though.

Before *Ridgewood*, if an employer discriminatorily failed to hire some but not "all" or "substantially all" of the former employees in order to avoid a bargaining obligation, the NLRB would also order the company to bargain with the union prior to setting its initial terms and conditions of employment, according to Galloway School Lines, 321 NLRB 1422 (1996).

In this case the NLRB reasoned that there was no ambiguity about whether the new employer planned to retain all or substantially all of the former employees, and as an ordinary Burns successor it was free to set initial employment terms for its employees.

Employers will benefit from the *Ridgewood* decision's limitations on the "perfectly clear successor" exception and a successor employer's ability to set initial terms and conditions of employment when acquiring unionized facilities.

However, this case illustrates the importance for new employers acquiring businesses with a unionized workforce to be clear in their communications with employees about their intent in hiring the former employees of the business and any relevant changes to operations. [PE]

Harassment & Child Labor Law Inserts Enclosed!

Dave's Report
~David E. Miller~

New Training Options!

Pacific Employers is now partnering with the Visalia Chamber of Commerce to facilitate both Non-Supervisor and Supervisor harassment training at the Quarterly training at the Lamp Liter. We will be including one hour Sexual Harassment Prevention Training for regular employees as well as the two hour Sexual Harassment Prevention Training for supervisors.

The Visalia Chamber of Commerce and Pacific Employers hosts state mandated Sexual Harassment Prevention Training Seminar & Workshops on July 24th and October 23rd, with registration at 7:30am, Seminar 8am - 9am regular employees and 8am - 10am for supervisors, at the Lamp Liter, Visalia. RSVP Visalia Chamber - 559-734-5876

Pacific Employers will also be conducting additional training opportunities on the fourth Thursday of each month at 9am - 10am for regular employees and 9am - 11am for supervisors at the Wyndham Hotel Visalia, 9000 W. Airport Dr., Visalia, CA. 93291. Members of Pacific Employers receive a discounted rate of $40 per attendee. Completion Certificates will be provided. For the Wyndham training, make your reservations to Pacific Employers at (559) 733-4256. [PE]

$6M Security Check!

A federal case known as *Hamilton v Wal-Mart Stores, Inc.*, a California jury awarded more than $6 million in meal break premiums to a class of Wal-Mart employees who worked at the company's fulfillment center in Chino, California.

The jury found that by requiring workers to complete a mandatory security check prior to leaving the facility, Wal-Mart discouraged them from leaving the premises for meal breaks, failing to comply with its obligation to provide class members with required meal breaks.

In *Brinker,* the California Supreme Court held that an employer satisfies its obligation to provide meal breaks "if it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so."

The verdict – which should be appealed – provides guidance to California employers. See the similar facts *Taco Bell* case with a different outcome on Page 2. [PE]

"There is no crueler tyranny than that which is perpetrated under the shield of law and in the name of justice." -- Charles-Louis De Secondat (1689-1755) Baron de Montesquieu

Four-Factor Rule Limits Joint Employment!

Employers have been reeling since the January 2016 release of Administrator's Interpretation No. 2016-1, subtitled *"Joint employment under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act."*

This Obama-era guidance signaled that organizations engaged in multi-participant arrangements—such as outside-party management, joint ventures, staffing services, employee leasing, temporary help, subcontracting, certain kinds of "job sharing," and dedicated vendors or suppliers—were directly in the USDOL's crosshairs.

The agency essentially said that it wanted to put as many of them as possible on the hook for any alleged wage and hour violations filed under the FLSA.

But in June 2017, Secretary of Labor Alexander Acosta withdrew the guidance and created massive expectations for employers. The agency later announced that it expected to release a fully fleshed-out proposal by December 2018. Several months later, employers can say that the wait was well worth it.

A Summary Of The Proposed Regulations

This release from the USDOL proposes that if an employer suffers, permits, or otherwise employs someone to work and another entity simultaneously benefits from that work, the other entity would only be considered a joint employer under the FLSA for those hours worked if that person is acting directly or indirectly "in the interest of the employer" in relation to the employee. To make that determination "simpler and more consistent," the agency refashioned a common balancing test currently used by a plurality of federal appellate courts (the Bonnette standard), and proposes that it should examine whether the potential joint employer:

- hires or fires the employee;
- supervises and controls the employee's work schedule or conditions of employment;
- determines employee's rate and method of payment; and
- maintains the employee's employment records.

The agency points out that there are four very good reasons to adopt this four-part balancing test. First, it says that the factors are consistent with the FLSA itself. Second: "they are clear and easy to understand." Third, they can be used across a wide variety of contexts. And finally, they are highly probative of "the ultimate inquiry" in determining joint employer status: whether a potential joint employer "actually exercises sufficient control over an employee" to qualify as a joint employer under the FLSA.

The agency also said that other factors not specifically included in this four-part test may end up being considered in the joint employment determination, but only if they are indicative of whether the potential joint employer is exercising significant control over the terms and conditions of the employee's work, or otherwise acting directly or indirectly in the interest of the employer in relation to the employee. [PE]

Taco Bell Employees Required To Stay On Site

A Taco Bell had a policy of offering a discounted meal from the restaurant during the employees' meal breaks as long as the employees ate the meal on the company's premises. The ability to purchase discounted meals was voluntary. The policy was implemented to prevent theft.

An employee brought a putative class action alleging that Taco Bell's discounted meal policy effectively denied employees the ability to take a duty free meal break. The employees argued that because they were required to remain on the company's property in order to obtain the discounted meal they employees were not provided a duty free meal break. The court rejected Plaintiff's argument and held that Taco Bell's policy complied with California law. Here are the main issues California employers should understand about the decision:

The CA Labor Code requires that non-exempt employees who work more than five hours in a day be afforded a meal period of "not less than 30 minutes" and employees who work more than ten hours in a day must be provided a second meal period of the same duration. the California Industrial Welfare Commission ("IWC") Wage Orders requires employees be relieved of 'all duty' during the meal period.

The court found that Taco Bell's meal policy was compliant under California law because the company relieved the employees of all duty and relinquished control over their activities. In fact, Taco Bell had a policy prohibiting this, "as employees were required to take rest breaks and meal periods away from '[t]he food production area' and '[t]he cash register service area.'"

Employees need to record meal breaks. Although not an issue in this case, the Wage Orders require that meal breaks taken by the employees must be recorded by the employer. The CA Supreme Court held in *Brinker Restaurant Corp. v. Superior Court* that, "[i]f an employer's records show no meal period for a given shift over five hours, a rebuttable presumption arises that the employee was not relieved of duty and no meal period was provided." [PE]

EEO-1 Component 2 Data Due Sept. 30, 2019

Employers will have until Sept. 30, 2019, to cull and report pay data as part of their EEO-1 reporting, thanks to a federal judge's recent ruling. The U.S. Equal Employment Opportunity Commission (EEOC) proposed the September deadline after it appeared likely the judge would reinstate the previously stayed mandate.

In court filings, EEOC's chief data officer said the agency was not equipped to collect the data, but that it could meet a September deadline with the help of a third-party vendor.

The judge's order means EEOC must publish a notice on its website and in the Federal Register and that EEOC will have to collect a second year of data; it has to choose between 2017 or 2019 calendar year data and let the court know by May 3.

This is a key moment of clarity for employers looking to prepare their compliance efforts for EEO-1 reporting. The form consists of two components: a demographic survey and an employee pay data "snapshot." Employers are likely familiar with Component 1, which is unaffected by Thursday's announcement. 2018 EEO-1 Component 1 demographic data still must be filed with EEOC by May 31, 2019.

Component 2, however, has been at the center of controversy since the commission first decided to implement it during the 2017 EEO-1 reporting cycle. The move was made under the Obama administration but, after the White House changed hands, the Office of Management and Budget (OMB) stayed the requirement in Aug. 2017. Judge Tanya S. Chutkan vacated OMB's decision, effectively putting Component 2 reporting back on the table.

Now that the Sept. 30 deadline is official, EEOC and employers could face other issues. The say the process is fairly straightforward, despite perhaps being time-intensive.

Employers should take a good look at pay data before turning it over, performing due diligence should they discover any discrepancies and perhaps speaking with managers to see if those discrepancies can be accounted for.

Meanwhile, the Sept. 30 deadline may run up against the snapshot period for the 2019 EEO-1 reporting cycle. Employers will need to prepare for these changes, and might want to read up on strategies to help them through what is expected to be a "bumpy" period for compliance. [PE]

Human Resources Question with Candice Weaver

The Month's Best Question

Wage Statements

Q: "What must I include on my employee's pay stub?"

A: Paystubs must be provided whether or not the employee receives a paper check. In other words, even if an employee receives their wages via direct deposit, you must still provide them with a written pay statement or "pay stub."

Many employers now provide electronic paystubs or rely upon third-party payroll companies to provide the paystubs so that they do not have an additional task to complete each payday. In the event that you are not using a third-party payroll company below are some specific items that must be included on a paystub.

Nine Rules To Follow

The California Labor Code outlines nine specific items which must be included on a paystub:

- gross wages earned;
- total hours worked by the employee (with limited exemptions);
- the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis;
- all deductions made;
- net wages earned;
- the inclusive dates of the pay period;
- name of the employee and last four digits of an employee's social security number or an employee identification number;
- the name and address of the legal entity that is the employer; and
- all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate.

In addition, employers must list the amount of sick pay available on the pay statement.

Failing to follow the simple rules can have massive consequences. These requirements appear fairly simple, and you should have no difficulty complying with the technical components outlined. However, one error on a paystub that is replicated for every employee can result in hundred, if not thousands, of inaccurate paystubs.

And that's where potential penalties come into play. The Labor Code authorizes an employee suffering "injury" as a result of a knowing and intentional failure by an employer to comply with the requirements to recover the greater of actual damages or $50 for the initial pay period in which a violation occurs and $100 per employee for each violation in a subsequent pay period, not to exceed $4,000 per employee plus costs and reasonable attorneys' fees. [PE]

Labor Seminars at the Depot!

Pacific Employers sponsors a seminar series on employee labor relations topics for all employers at The Depot Restaurant, **207 E Oak Ave, Downtown** Visalia.

RSVP to Pacific Employers at 559-733-4256. ***These mid-morning seminars include refreshments and handouts.***

2019 Topic Schedule

♦ **Safety Programs -** Understanding Cal/OSHA's Written Safety Program. Reviewing the IIPP or SB 198 requirements for your business.
Thursday, May 16th, 2019, 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, June 20th, 2019, 10am - 11:30am

♦ **Wage & Hour and Exempt Status -** Overtime, wage considerations and exemptions.
Thursday, July 18th, 2019, 10 - 11:30am

No Seminars in August or December

♦ **Forms & Posters -** and Contracts, Signs, Handouts, Fliers - Just what paperwork does an Employer need?
Thursday, September 19st, 2019, 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 17th, 2019, 10 - 11:30am

♦ **Discipline & Termination -** The steps to take before termination. Managing a progressive correction, punishment and termination program.
Thursday, November 21st, 2019, 10am - 11:30am

No Seminar in December

Employee & Supervisor Sexual Harassment Prevention Training

The Visalia Chamber of Commerce and Pacific Employers will host a state mandated Sexual Harassment Prevention Training Seminar & Workshop for employees and supervisors on July 24th, registration at 7:30am Seminar 8:00 to 10:00am, at the Lamp Liter, Visalia.

The next 2019 training date is October 23, 2019.

RSVP Visalia Chamber - 559-734-5876
PE & Chamber Members $40
Non-members $50
Certificate – Handouts – Beverages