

Heat Illness & Child Labor Flyer Enclosed!

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# Pacific Employers

## MANAGEMENT ADVISOR

Over 50 Years of Excellence!



Summer 2017

### WHAT'S NEWS!

#### New Criminal Background Regulations

**C**alifornia's Department of Fair Employment and Housing (DFEH) issued new regulations on employers' use of criminal background information in employment decisions. The regulations were recently approved by the Office of Administrative Law (OAL) and take effect July 1, 2017.

The regulations reiterate existing prohibitions on the use of criminal history information in California and further prohibit employers from seeking or using any criminal history information that has an "adverse impact" on a protected class unless the information sought is job-related and consistent with a business necessity.

The rules apply to all employment decisions — hiring, promotion, discipline, termination, etc. In essence, the rules prevent an employer from simply screening out all applicants based on a criminal record. Instead, the employer will need to dig further to determine if the criminal offense is, in fact, related to the job.

The rules set forth a complex process that employers must follow. Employees can sue for violations of the law.

#### Job Related and Consistent With Business Necessity

The employer must demonstrate that any criminal background check policy or practice is job-related and consistent with business necessity. The policy or practice must bear a "demonstrable relationship" to successful performance in the job, in the workplace and measure the person's fitness for the specific position at issue.

The criminal background check policy or practice must be "appropriately

tailored" to the job. To meet this standard, the policy must take into account the:

- Nature and gravity of the offense;
- Amount of time that has passed since the offense and/or since the sentence for the offense was completed; and
- Nature of the job held or sought. [PE]

#### OSHA Delays Electronic Reporting Rule

**E**mployers will be relieved, at least temporarily, of the requirement to file injury information through an electronic recordkeeping system that was scheduled to take effect this July 1<sup>st</sup>.

The Occupational Safety and Health Administration (OSHA), which had issued a rule requiring the posting of such information for most employers, has announced that the filing deadline will be postponed for an undetermined period of time. (!) (?)

#### What The Rule Would Have Done

It is important to remember that the electronic recordkeeping rule would not have created new obligations in terms of reporting. Those employers covered by the new rule would have been asked to simply use data from their OSHA Forms 300, 300A, and 301 when using the electronic reporting method. However, OSHA was prepared to electronically post injury and illness data on its website from all workplaces with 20 or more employees and for those in certain high-risk industries, making the information publicly available for consumption by unions, plaintiffs' attorneys, and others. Submission was to be phased in based on employer establishment size and industry. [PE]



Seminar Series at The Depot Restaurant 207 E Oak 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.

#### FORCING EMPLOYEE TO DISCLOSE HER HIV STATUS

**D**iallo's of Houston, a Houston-area nightclub and party venue, will pay \$139,366 and furnish other relief as a result of a disability discrimination lawsuit filed by the Equal Employment Opportunity Commission (EEOC).

In its lawsuit, the EEOC charged that Diallo's violated federal law when it forced employee Felicia M. Parks to provide medical documentation to prove she was not HIV-positive, and then allegedly fired her when she failed to provide such documentation. The EEOC charged that Diallo's owner/manager approached Parks and informed her that she had "heard" from an unidentified third party that Parks was HIV-positive.

The owner/manager demanded on two occasions that Parks provide documentation to show she was not HIV-positive, based only on the owner/manager's assumption that Parks' alleged HIV status was hazardous to the company's business. The owner/manager then allegedly fired Parks when she did not provide the required documentation. [PE]

#### EMPLOYEE WITH INTELLECTUAL DISABILITY FIRED!

**T**he owners of a Farmington, Utah Papa John's Pizza will pay \$125,000 and furnish other relief to settle a disability discrimination lawsuit filed by the U.S. Equal Employment Opportunity Commission (EEOC).

According to EEOC's lawsuit, Papa John's allegedly discriminated against Scott Bonn, who has an intellectual disability, specifically Down syndrome. The EEOC alleged that Papa John's employed Bonn successfully at its Farmington location for more than five months and allowed an independently employed and insured job coach to assist him.

EEOC further charged that after an operating partner visited the Farmington location and observed Bonn working with the assistance of his job coach, the operating partner ordered Papa John's local management to fire Bonn. In appropriate circumstances, the use of a job coach may be a reasonable accommodation under the ADA. [PE]

### NOTICE! IMMEDIATE Seminar

#### Location Change



**T**o improve the experience for our seminar attendees with sufficient restrooms more parking, and greater privacy, we are moving our monthly seminars to:

**The Depot Restaurant  
207 E Oak Avenue  
Visalia, CA 93291**

#### PE's MONTHLY SEMINARS

For over two decades, Pacific Employers has sponsored a monthly seminar series on employee labor relations topics for all employers. We start promptly at 10:00 am on the third Thursday every month, except August & December, bringing you the topics listed on page 3 inside. [PE]

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

### Heat Illness & Child Labor Law Flyer Enclosed!

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

#### Hospital Meal Waivers Valid!

**H**ospitals use of meal period waivers was called into question by a 2015 Court of Appeal decision in Gerard v. Orange Coast Memorial Medical Center, which held that the provision in Wage Order 5 allowing waivers even when employees work over 12 hours was invalid.

Following two more years of litigation, the panel that reached the 2015 decision has reversed itself and in its new opinion, the Court confirmed that the special meal period rules for health care employees in Wage Order 5 are, in fact, valid. [PE]

#### Future Dues Increase!

**A**s we mentioned in April this year, our dues and fees have had a cost of living increase. Current members will not see the dues increase until the billing for January 2018.

We have adjusted 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!

**B**reaking 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 and 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/>

"In the whole history of law and order, the biggest step was taken by primitive man when... the tribe sat in a circle and allowed only one man to speak at a time. An accused who is shouted down has no rights whatever." Curtis Bok (1897-1962) Pennsylvania Supreme Court justice, philanthropist, writer, Quaker

## Apple Pays \$2M For Missed Meal Periods

**M**ost California employers know that they are required to provide a 30 minute meal break to nonexempt employees. That meal break must begin no later than 5 hours and 59 minutes into one's shift, unless the shift can be completed in less than six hours, in which case it can be waived. If the employer impedes an employees' ability to take the meal break or discourages an employee from taking timely breaks, the employee is owed one hour of pay for the missed meal break(s).

Apple must have forgotten this rule. A class action lawsuit filed by retail Apple employees claimed that not only were employees unable to take their meal breaks, they were discouraged from discussing the missed meal breaks and other working conditions at work. This resulted in a \$2 million verdict against Apple in favor of the employees.

Apple also failed to provide final paychecks as required under California law. Remember, if an employee gives you more than 72 hours notice that he or she is quitting, the final paycheck is due on that last day of work. If you are given less than 72 hours notice, you have 72 hours to prepare the final paycheck.

Just when we think meal breaks and final pay are old news, we are reminded of the difficulty with California labor and employment law compliance. [PE]

## National General Strikes

**A** group called Strike4Democracy has called for a national general strike and plans on "over 100 strike actions across the United States, and beyond." The campaign calls for participants to forgo work on Fridays and, instead "plan or take part in an event in your community" and "occupy public space with positive messages of resistance and solidarity."

Several labor and activist groups are calling for national general strikes and boycotts this week to protest policies enacted and proposed by the new Trump Administration and the Republican Congress.

The first action, "A Day Without Immigrants," was held on Thursday, February 16. The campaign, promoted in Spanish and English, spread through Facebook, fliers, and word of mouth and called on immigrants and their supporters "not to go to work, open businesses, shop, eat in restaurants, buy gas, go to classes, or send children to school."

The organizers do not plan on stopping there. They intend to use these national general strikes to "build towards a series of mass strikes," with other mass strikes planned during the spring, and "a heightening resistance throughout the summer."

### So, What Does This Mean For Employers?

While these general strikes and those planned for the future could wreak havoc on an employer's operations — as employees fail to report to work or leave shifts early — the National Labor Relations Act provides protection for employees who engage in political advocacy that relates specifically to job concerns and to other workplace issues.

Employers have the right to enforce "neutrally applied work rules" to restrict employees from leaving work for political activities unrelated to workplace concerns. As discussed above, whether an employee's actions are protected or unprotected turns on whether the employee's absence relates to activity directed

at "terms and conditions of employment" which the employer controls or to workplace concerns that affect all employees. If the absence is due to political activity totally unrelated to workplace concerns, employees could be subject to discipline, although discipline is not necessarily the prudent course to take.

Given the myriad issues to be addressed in these strikes, from immigration reform to minimum wage laws to worker's rights, employers may be hard pressed to show that employees who participate in these strikes in lieu of working have engaged in unprotected activity. Employers could find themselves in further "hot water" with the NLRB if they discipline employees for absenteeism or tardiness related to the employees' political activities. [PE]

## CPRA Covers Private Email and Personal Devices

**I**n a major victory for transparency, the California Supreme Court ruled that when government officials conduct public business using private email or personal devices, those communications may be subject to disclosure under the California Public Record Acts (CPRA).

In the unanimous opinion, the court overturned an appellate court ruling, writing: CPRA and the [California] Constitution strike a careful balance between public access and personal privacy. This case concerns how that balance is served when documents concerning official business are created or stored outside the workplace. The issue is a narrow one: Are writings concerning the conduct of public business beyond CPRA's reach merely because they were sent or received using a nongovernmental account? Considering the statute's language and the important policy interests it serves, the answer is no. Employees' communications about official agency business may be subject to CPRA regardless of the type of account used in their preparation or transmission.

*"THE PURPOSE OF CPRA IS TO ENSURE TRANSPARENCY IN GOVERNMENT ACTIVITIES."*

An amicus brief states: [The court of appeal's] holding violates both the letter and spirit of the California Public Records Act and Article I, section 3 of the California Constitution by holding that emails related to official business are outside the PRA merely because they are sent and receiving using non-governmental accounts.

The California Supreme Court pointed out in its ruling that agencies aren't just disembodied entities, but rather rely on human beings to prepare, retain, or use records: "When employees are conducting agency business, they are working for the agency and on its behalf."

The court added: "The whole purpose of CPRA is to ensure transparency in government activities. If public officials could evade the law simply by clicking into a different email account, or communicating through a personal device, sensitive information could routinely evade public scrutiny." [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 July 26<sup>th</sup>, registration at 7:30am, Seminar 8:00-10:00am, at the Lamp Liter Inn, Visalia.

RSVP Visalia Chamber - 734-5876  
PE & Chamber Members \$40 - Non-members \$50  
Certificate - Forms - Guides - Full Breakfast  
Future 2017 Training date: Oct. 25th



## Human Resources Question with Candice Weaver

### THE MONTH'S BEST QUESTION

#### Do I Have To Hire Crooks?

**Q:** California's Department of Fair Employment and Housing (DFEH) issued new regulations on employers' use of criminal background information in employment decisions. What can I do?

**A:** Employers can demonstrate that considering criminal history information is "appropriately tailored" to the job in one of two ways:

Conduct an individualized assessment of the circumstances and qualifications of the applicant or employee who was excluded as a result of the criminal background check.

- You must provide the person with notice that he/she has been screened out based on a criminal conviction and give the person a reasonable opportunity to show that the criminal history exclusion shouldn't apply due to his/her particular circumstances.
- You must also consider this information and determine whether an exception to the exclusion is warranted.

Show that any "bright-line" conviction disqualification policy (not based on an individual assessment) properly distinguishes between those who do and those who do not pose an unacceptable level of risk. An employer must also show that the conviction has a direct and specific negative bearing on the person's ability to perform the duties or responsibilities of the position.

- Any bright-line policy that considers conviction history that is seven or more years old will be presumed not to meet the regulatory standard. The burden will be on the employer to rebut this presumption.

In addition, if an employer obtains criminal information from a source other than the applicant or employee (such as through a third-party background check or internally generated research), the employer must notify the individual and provide him/her the ability to challenge the factual accuracy of the information. This notice must be provided before any adverse action can be taken.

If the applicant or employee shows that the information is inaccurate, it can't be considered.

Importantly, even if the employer shows that use of the criminal information is job-related and consistent with business necessity, an individual still gets one more chance to show a legal violation.

### Jobs Requiring Background Checks

Some employers must comply with federal or state laws prohibiting employment of individuals with certain criminal records from holding particular jobs. Some laws also mandate criminal background checks for certain positions or occupational licenses. Examples include peace officers and those in health care facilities with regular access to patients or controlled substances.

In these situations, employers that must comply with a federal or state law can use the compliance mandate to defend themselves against any adverse impact claim. [PE]

## NEW LOCATION FOR SEMINARS!

**T**o improve the experience for our seminar attendees with sufficient restrooms, more parking, and greater privacy, we are moving our monthly seminars to:

### The Depot Restaurant

207 E Oak Avenue, Downtown Visalia.

## PE'S MONTHLY SEMINARS

For over two decades, Pacific Employers has sponsored a monthly seminar series on employee labor relations topics for all employers. We start promptly at 10:00am on the third Thursday every month, except August & December, bringing you the topics listed below:

RSVP to Pacific Employers at 733-4256.

*These mid-morning seminars include refreshments and handouts.*

### 2017 Topic Schedule

♦ **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.