New 2020 Attendance Record Enclosed!

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Boston University Pays Woman After Firing Her for Not Returning From Maternity Leave

A woman was paid $144,000 by Boston University after she was fired for fail to return to work after manternity leave. Maria Alves completed maternity leave,but needed more time off. Boston University gave her an extension, but when she asked for a second one, she was terminated.

So why did Boston University have to pay up? Well, they were correct in knowing that the United States requires 12 weeks of unpaid time off for a situation that qualifies under FMLA, but what Boston University failed to recognize was the Americans with Disabilities Act (ADA).

Mrs, Alves had requested a second extension on the basis of postpartum depression and postpartum depression can be covered by the ADA. The ADA requires that an employee is provided with reasonable accommodations. It would have been a reasonable accommodation to provide the employee with additional time off. A jury found that Boston University did not take the proper steps to go through the interactive process to reasonably accommodate her needs. Thus the reason she was awarded $144,000 for back pay and emotional distress.

Would ADA require an employer to provide unlimited time off?

No. It requires the employer to provide reasonable accommodation. That does not mean an employee's job will be held for years and years. It does mean though, that an employer should go through the process of trying to accommodate the employee. This may mean offering the employee part-time work until they are able to return to a full capacity, or creating some other kind of solution rather than making a quick determination to fire the employee. [PE]

A List of Gifts Employees Loved Getting From Their Bosses

With the holidays rapidly approaching, employers may be thinking about gift giving, and the kind of gift employees would love to receive. Here is a list of a few things employees loved receiving as an appreciation gift:

- Grocery Store Gift Card
- Turkey Voucher
- Cash
- Branded Cold/Hot Travel Mugs
- Gift Certificates to a Movie Theater
- Revision to a Vacation Policy to Include More Vacation
- Books
- Coffee Shop Gift Cards
- Restaurant Certificates
- Sweets, Snacks, or Other Gift Baskets
- Various Gift Cards [PE]

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What's News!

EMPLOYERS TO DO LIST FOR 2020

Beginning on January 1, 2020, there are a few things that you should be preparing for. A few of those items that need to be addressed are:

1. Minimum Wage and Exempt Salary Threshold: As you are aware, minimum wage is increasing this year, so it's imperative that you evaluate employee wages to ensure they are being paid properly.
   - Employers with 25 employees or less will be increasing their minimum wage to $12.00 an hour.
   - Employers with 26 or more employees will be increasing their minimum wage to $13.00 an hour.
   - Employers with exempt employees should ensure those with 26 or more employees are paying salaries of no less than $54,080 annually, and those with 25 employees or less are paying no less than $49,920 annually.

2. Arbitration Agreements may need to be updated: Check with your legal counsel to ensure your arbitration agreement is compliant with AB51

3. Severance Agreements and No-Rehire Provisions: With AB 749 going into effect January 1, 2020, employers can no longer create severance agreements that obtain no-rehire clauses.

4. Handbook and Poster Updates: One policy that should be evaluated in handbooks is grooming standards, and ensuring the policy complies with the CROWN Act in ensuring the policy does not discriminate against natural hairstyles.

In addition to that, employers should ensure new required postings are up.

5. Lactation Accommodation: There were already standards set in regards to lactation accommodation but with the passing of SB 142 employers are required to provide additional time for lactation accommodation. [PE]

9th Circuit Finds in Favor of the Employer!!

A nurse who had multiple conflicts with her co-workers and who resigned not long after filing a complaint with HR was unable to show that the conduct created a hostile work environment on the basis of race (Tatum v. DaVita Healthcare Partners, Inc., No. 18-15762 (9th Cir. Oct 30, 2019).

The nurse claimed a co-worker started singing the USA for Africa song "We Are the World" after she tried to correct a co-worker's dosing procedures and also told an African American patient to "hang from a tree to keep dry" if it got too rainy during an upcoming vacation. Standing alone, the district court said these allegations were not "physically threatening or otherwise so extreme as to sufficiently affect the conditions of employment and implicate Title VII."

On appeal, the 9th U.S. Circuit Court of Appeals affirmed summary judgment in favor of the employer. The co-workers' conduct, said the 9th Circuit, "while offensive," generally consisted of "offhand comments" and didn't rise to the level of actionable discrimination. Additionally, said the court, even if the nurse had been subjected to a hostile work environment, her claim would still fail because there was no evidence that the employer knew about the mistreatment and failed to take remedial action, especially because the nurse quit just as the employer was starting to investigate her complaint.

According to the U.S. Equal Employment Opportunity Commission (EEOC), "slights, annoyances, and isolated incidents (unless extremely serious) will not rise to the level of illegality." A hostile work environment is generally considered one that is "intimidating, hostile, or offensive to reasonable people." Illegal conduct can include slurs, epithets, name-calling, offensive jokes, or interference with someone's work performance.

One court recently held that a few incidents over the span of multiple years was insufficient to substantiate an employee's claims of hostile work environment, disparate treatment, retaliation and constructive discharge. A different court stated that a plaintiff is not required to show that a workplace is "hellish" to prove a hostile work environment claim. These kinds of cases can go either way.

Prevention is always better than remediation when it comes to allegations of harassment, retaliation or bias, experts say. Few, if any workplaces are perfect, and attorneys recommend that complaints be investigated promptly and taken seriously by HR. Failing to investigate can easily lead to lawsuits. [PE]

New 2020 Attendance Record Enclosed!

Dave's Report
~David E. Miller~



Employees Have More Time To File a Claim

It isn't great news for California employers, but it is something employers need to take note of. Gavin Newsom, among the many bills signed, included the signing of Assembly Bill (AB) 9 which allows for employees an extension of two years to file a Fair Employment and Housing Act (FEHA) claim.

The Current statute of limitations on filing a FEHA claim is one year from the time the aggrieved conduct took place. A few things things to note in regards to AB 9

- Effective January 1, 2020 employees will now have three years to file FEHA administrative charges
- Employees will continue to have one year to file a lawsuit after they receive a right-to-sue letter from the DFEH.
- This law is not retroactive and will not revive claims that have lapsed before January 1, 2020 under their current one year rule. The law however, is not specific as to whether existing claims that expire after January 1, 2020 will expire under existing one year deadline, or the newly implemented three year deadline.

With this all changing January 1, 2020 employers should evaluate their recordkeeping practices and ensure key information is retained in employee files for at least four years, as it could take that long before an employer is aware of a harassment, discrimination or retaliation claim. [PE]

Increasing Penalties for Workers Signed by Newsom

On October 10, 2019, Governor Gavin Newsom signed AB 673 into law, expanding an employee's right to collect penalties for an employer's failure to timely pay wages.

Before the enactment of AB 673, Labor Code section 210 gave a penalty that was directly recoverable by the Labor Commissioner or by an employee authorized to bring a claim under California's Private Attorneys' General Act (PAGA). A recovery by the Labor Commissioner resulted in the penalties being paid directly to the State Treasury and California's Labor and Workforce Development Agency (LWDA). A recovery by an employee under PAGA resulted in the employees (and their attorneys) keeping 25 percent of the penalty, with the 75 percent remaining being paid to the LWDA. The penalties are $100 for each initial violation, $200 for each violation thereafter, plus 25 percent of the withheld wages.

Pursuant to AB 673, employees are now authorized to recover those penalties as part of a claim filed with the Labor Commissioner to recover unpaid wages or in civil court complaint filed under PAGA, but not both. The Labor Commissioner is no longer authorized to collect these penalties in an independent civil action. While the amounts of the penalties remain the same, AB 673 removes the requirement that the penalties recovered by the Labor Commissioner be paid to the LWDA and State Treasury.

What that could mean with the signing of AB 673 is employers may experience an increase in claims filed with the Labor Commissioner seeking unpaid wages and these statutory penalties. [PE]

"The road to success and the road to failure are almost exactly the same"— Colin R. Davis (1927-2013) English Conductor.



HR Report
~Tiffany Harris~

Five Things to Know About AB 5

Independent Contractors should be transitioned to employees in many scenarios

Effective January 1, 2020 independent contractors are going to be severely limited in continuing as independent contractors.

1. AB 5 codifies the California Supreme Court's ruling in Dynamex.

This means that in order for an individual to be properly classified as an independent contractor they must meet the criteria set by the ABC test which includes:

- A. Is the individual free from control and direction of the hiring entity in performing the work necessary for the job?
- B. Does the individual perform work that is outside the usual scope of which the hiring entity does business?
- C. Is the individual performing work that is an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity?

2. Some industries are exempt from AB 5

This bill exempts certain workers such as licensed barber or cosmetology services, licensed attorneys, licensed physicians and surgeons, architects, engineers, accountants, and certain investment advisers.

3. The penalties for misclassifying workers as independent contractors are steep.

There are significant penalties put in place for those who misclassify their workers as independent contractors. First and foremost, there are labor code violations for items such as unpaid wages, missed meal and rest period premiums, overtime, and other aspects that a misclassified independent contractor could file for. The cost of that could be quite large. There are also civil penalties which include $5,000 to $15,000 for each "willfull misclassification" of employees as independent contractors.

4. This new bill impacts multiple parties

Many individuals who are accustomed to opertaing on their own schedule will be impacted as the transition to becoming an employee will allow the company to exercise more control over the work being performed, and when the work is being completed. Employers will now have to consider the costs associated with providing the employee paid sick leave benefits, and other costs that come when employees are added.

5. When in doubt, transition to an employee

Unless you have an exemption, it isn't worth the potential costs associated with misclassifying an employee. There are too many penalties that come with misclassifying. When conducting the ABC test in deciding whether an individual should be an employee or independent contractor, air on the side of caution. [PE]

AB 51 Anti-Arbitration? Time to Review those Agreements

On October 10, 2019, California Governor Gavin Newsom signed into law a state statute purporting to prohibit employers from requiring employees to enter into certain types of arbitration agreements. This new law is creating significant uncertainty and anxiety among employers.

California's new statute prohibits and criminalizes the use of certain employment arbitration agreements.

AB 51 purports to ban employers from requiring applicants or employees, "as a condition of employment, continued employment, or the receipt of any employment-related benefit," to "waive any right, forum, or procedure for a violation of any provision of the California Fair Employment and Housing Act" (FEHA) or California Labor Code, "including the right to file and pursue a civil action or complaint with . . . any court." In short, AB 51 prohibits the use of mandatory employment arbitration agreements for claims under these state laws.

AB 51 also prohibits employers from retaliating against applicants or employees who refuse to enter into banned mandatory arbitration agreements, including by terminating their employment. Further, the statute provides that using an opt-out procedure will not prevent an agreement from being considered mandatory for purposes of the law.

AB 51 authorizes a plaintiff enforcing his or her rights under the statute to obtain "injunctive relief and any other remedies available" (presumably, lost wages and other damages), as well as attorneys' fees.

But that's not all. AB 51 amends the Labor Code by adding Section 432.6. Under Section 433 of the Labor Code, a violation of AB 51 is thus deemed a misdemeanor. An employer that violates this new law could be subject to criminal sanctions, including "imprisonment in a county jail, not exceeding six months, or . . . a fine not exceeding one thousand dollars ($1,000), or both" under Section 23 of the Labor Code.

AB 51 does not appear to cover mandatory employment arbitration agreements for claims under statutes other than the FEHA and the Labor Code. AB 51 also does not cover Financial Industry Regulatory Authority arbitration agreements, which are expressly excluded.

What this means for Employers

First, employers should not panic if they currently have mandatory employment arbitration agreements with California employees. By its own terms, AB 51 applies only to arbitration agreements "entered into, modified, or extended on or after January 1, 2020."

Again, there is a caveat: AB 51 does not explain what it means for an agreement to be "extended" after January 1, 2020. That means a plaintiff's attorney might argue any attempt after January 1, 2020, by an employer to enforce an arbitration agreement that was entered into before that date is prohibited by the law. Employers have the next couple of months to assess this issue.

Also, it is possible that the new law will be challenged prior to January 1, 2020. Employers may want to keep an eye on the legal news for updates.

In addition, employers may wish to decide whether their arbitration agreements should be revised prior to January 1, 2020. Arbitration agreements can be crafted to exclude any claims deemed non-arbitrable by non-preempted law.

Finally, irrespective of AB 51, employers may need to decide how to handle potential "transportation workers" under their arbitration agreements. Businesses using arbitration agreements with employees and/or independent contractors who could be classified as transportation workers may want to evaluate whether they can invoke a state's arbitration statute in place of the FAA or as a backup. [PE]



Human Resources Question with Candice Weaver

The Month's Best Question

Meal Period Premiums

Q: "My employee did not take their lunch on time, how much do I owe them for their meal premium?"

A: You owe them one (1) hour additional pay at the employee's regular rate of compensation.

A Few Things to Know When Paying Meal Premiums

Labor Code Section 226.7

(a) No employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission.

(b) If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided.

Regular Rate of Pay VS Regular Rate of Compensation

If you were paying an employee their regular rate of pay, you would need to calculate their normal hourly rate PLUS other forms of compensation earned during the workweek which can include: commissions, bonuses, the value of meals and lodging, piece work earnings, cash payments in lieu of health benefits, etc. In calculating the regular rate of pay, the employer would add up all the eligible earnings during the workweek and divide the total number by the number of hours completed during the workweek.

This means, if the employee earns anything other than their hourly wages, their regular rate of pay will always be higher than hourly wage.

Wouldn't the regular rate of compensation be the same as regular rate of pay? Actually no, according to a recent court case in which the definition of regular rate of compensation was argued.

Court Recently Ruled in Favor of Employer When Calulating the "Regular Rate of Compensation"

In a recent decision the court ruled that the regular rate of pay and regular rate of compensation are not synonymous. Jessica Ferra was a bartender at Loews Hollywood Hotel (Loews) and she alleged that she was improperly paid her meal premiums as she was paid her regular hourly rate. Loews did not take into consideration her other earnings during the week when providing her one extra hour of compensation for her meal premiums.

Ferra argued that compensation is just another word for pay, and because of that, she was improperly paid those premiums. Loews argued that the definition of rate of compensation is not clear and if the two definitions mean the same thing, the same word should have been used.

The court would agree with Loews in that the rate of compensation does in fact mean the regular hourly rate. In addition to that, the purpose of calculating the regular rate of pay is for hours actually spent working, whereas meal and rest period premiums are penalties for missed breaks. With the court ruling the two terms are not synonymous, paying an employee their straight hourly rate for meal premiums complies with the requirements of Labor Code section 226.7 [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.***

2020 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, January 16th, 2020, 10am - 11:30am

♦ **Labor Law Update -** The courts and legislature are constantly "Changing the Rules." Learn about the recent changes to both the California and U.S. laws that affect employers of all types and sizes.
Thursday, February 20th, 2020, 10am - 11:30am

♦ **Culture in Organizations -** Increasing morale, effectiveness, and decreasing turnover.
Thursday, March 19th, 2020, 10am - 11:30am

♦ **Equal Employment Fundamentals -** Harassment & Discrimination in the Workplace - The seven (7) requirements that must be met by all employers. "The Protected Classes."
Thursday, April 16th, 2020, 10 - 11:30am

♦ **Safety in the Workplace -** What do you need to know when an accident happens, or when OSHA walks onto your property?
Thursday, May 21st, 2020, 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 18th, 2020, 10am - 11:30am

♦ **Wage & Hour and Exempt Status -** Overtime, wage considerations and exemptions.
Thursday, July 16th, 2020, 10 - 11:30am

No Seminars in August or December

♦ **Customer Service -** and Contracts, Signs, Handouts, Fliers - Just what paperwork does an Employer need?
Thursday, September 17st, 2020, 10 - 11:30am

♦**Labor Law Update -** Susan Hatmaker will provide us with the interpretation of recent law changes and how they impact employers
Thursday, October 15th, 2020, 10 - 11:30am

♦ **Discipline & Termination -** The steps to take before termination. Managing a progressive correction, punishment and termination program.
Thursday, November 19th, 2020, 10am - 11:30am

The Vintage Press Restaurant

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.*

END OF THE YEAR MEMBER APPRECIATION PARTY

We will be hosting an end of the year member appreciation party at La Fiesta Restaurant and Bar. Appetizers and drinks will be provided. Come join us!!
Where: La Fiesta Restaurant & Bar
3222 N Demaree St. Visalia, CA. 93291
When: Tuesday, December 10th 3:00-6:00 PM Open House
RSVP Pacific Employers - 559-733-4256