Pacific Employers
MANAGEMENT ADVISOR
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April 2012

WHAT'S NEWS!

Disclose Arbitration Forum Rules

An employer must provide its employees with a copy of arbitration forum rules or direct them to where the rules can be found.

In *Mayers v. Volt Management Corporation,* a California court of appeal refused to enforce an employment arbitration agreement for, among other reasons, the failure of the employer to provide the employee with a copy of the arbitration rules or how to find them.

Although the arbitration agreement provided that the arbitration would be governed by "AAA rules," the agreement also failed to identity which of the several sets of AAA rules would apply. [PE]

PENALTIES REDUCED FOR GOOD FAITH EFFORTS

In *Thurman v. Bayshore Transit Management, Inc.*, a California court of appeal held that penalties for meal and rest break violations were properly reduced where the employer instituted good faith steps to comply. There, a union filed a representative action on behalf of its member bus drivers alleging that the employer failed to provide meal and rest breaks.

Although the court awarded penalties during the period of noncompliance, the court reduced the penalties after the employer took its obligations "seriously and attempted to comply with the law" beginning January 1, 2003 (leading to full compliance by July 2003).

"..THE PLAINTIFF-UNION MADE NO PREVIOUS EFFORT TO ENFORCE . . ."

The court noted that the plaintiff-union made no previous effort to enforce meal and rest breaks on behalf of its members, the employer began to enforce meal and rest break rules over the objections of the drivers and the union, and the union did not respond to nor did it cooperate with the employer's efforts to enforce meal and rest breaks. [PE]

$168 MILLION JURY AWARD TO HOSPITAL EMPLOYEE FOR ALLEGED SEXUAL HARASSMENT

This February, a federal jury in Sacramento, CA awarded almost $168 million in damages to the plaintiff in *Chopourian v. Catholic Healthcare West.*

Ani Chopourian worked as a physician's assistant. She alleged that she was subjected to daily sexual advances and other sexual conduct that created a hostile environment. Chopourian alleged that she was wrongfully terminated after complaining about such actions, and making other complaints concerning patient safety and the abuse of other women. Further, she asserted that the employer made false statements about her professional qualifications to prospective employers that prevented her from obtaining subsequent employment. The jury award included over $40 million in punitive damages. [PE]

NLRB Poster Enclosed!

President's Report
~Dave Miller~

Portions Of NLRB Poster Invalidated

The United States District Court invalidated portions of the National Labor Relations Board's recent "Notification of Employee Rights" rule, which requires private employers to post a notice to employees explaining their rights under the National Labor Relations Act (the "NLRA") by April 30, 2012.

In the recent ruling, the court upheld the Board's authority to require that the notice be posted. Judge Jackson held that the dissemination of information to employees about their rights under the NLRA "is well within [the Board's] bailiwick." Further, Judge Jackson noted "the Board is not attempting to regulate entities or individuals other than those that Congress expressly authorized it to regulate[.]"

"THE BOARD CANNOT MAKE A BLANKET ADVANCE DETERMINATION THAT A FAILURE TO POST WILL ALWAYS CONSTITUTE AN UNFAIR LABOR PRACTICE,". . ."

However, the court invalidated two portions of the rule which impose strict penalties. Specifically, Judge Jackson held the Board exceeded their authority by implementing the provision that: (1) deems a failure to post to be an unfair labor practice; and (2) tolls the six-month statute of limitations for filing unfair labor practice actions against employers who have failed to post.

While Judge Jackson ruled that "the Board cannot make a blanket advance determination that a failure to post will always constitute an unfair labor practice," Judge Jackson also noted that nothing prohibits the Board from finding on a case-by-case basis that a failure to post constitutes an unfair labor practice.

Even though two portions of the "Notification of Employee Rights" rule have been invalidated, this case will likely be appealed, and until the appeal is decided, the posting provision remains in effect. In addition, the Board still has the authority to determine on a case-by-case basis if a failure to post the notice is an unfair labor practice. For now, employers should be finalizing preparations to ensure the "Notification of Employee Rights" is posted, physically and electronically, by April 30th.

Enclosed is the new NLRB Employee Rights Notice Posting in the NLRB required 11x17 size. This makes the poster too large to become part of the Pacific Employers All-In-One poster that so conveniently allows you to post the required notices on one large printed multi-form format. As that is the mandate from the NLRB, it will remain on its own oversized poster to be displayed as the employer sees fit. [PE]

For every government law hurriedly passed in response to a current or recent crisis, there will be two or more unintended consequences, which will have equal or greater negative effects then the problem it was designed to fix..— John Mauldin (financial writer speaker)

Recent Developments

No Reasons For Sick Leave!

Employers with sick leave or attendance policies that require a doctor's note to disclose the nature/reason for an absence should be wary of a recent California case as well as a prior New York case relied on by the court in California.

"... ATTENDANCE POLICY VIOLATED THE ADA ..."

In EEOC v. Dillard's Inc. (S.D. Calif. 2012), the Court held that Dillard's attendance policy violated the federal Americans with Disabilities Act (ADA) because it required any health-related absence to be supported by a doctor's note stating "the nature of the absence (such as migraine, high blood pressure, etc...)." Dillard's later clarified this policy to mean that the doctor's note "must state the condition being treated." The Court held that the attendance policy was an impermissible disability-related inquiry because it required employees to disclose their underlying medical conditions. As the Court stated, "[this] invites intrusive questioning into the employee's medical condition, and tends to elicit information regarding an actual or perceived disability."

In rejecting the Dillard's attendance policy, the Court relied on an earlier decision from the US Court of Appeals for the Second Circuit in New York rejecting a similar policy. In *Conroy v. New York Department of Correctional Services*, the Second Circuit held that an employer's policy violated the ADA because it required employees returning to work after an absence of four days or more to provide a medical certification with a "brief general diagnosis." The Second Circuit held that "even what [the employer] refers to as a 'general diagnosis' may tend to reveal a disability" or "may give rise to the perception of a disability." But see *Lee v. City of Columbus* (rejecting claim that requiring doctor's note to state "nature of the illness" and capability to return to regular duty violated federal Rehabilitation Act, which is similar to the ADA but applies to federal employees, among others).

Disability-related inquiries are permissible under the ADA if they are job-related and consistent with business necessity—the Court in *Dillard's*, however, rejected Dillard's claim that the policy was necessary to verify the legitimacy of the medical absences and ensure that employees can return to work without posing a threat to others. The Court found that Dillard's had failed to show that it needed this information "because of excessive absences or in order to protect the health and safety of its other employees." As the Court stated, "[w]here a medical provider verifies in writing that the employee has a medical condition, which required her to be out of work, and also specifies when the employee may return to work, Dillard's has not explained why it is necessary to identify the underlying medical condition." [PE]

Class Action Case

Ninth Circuit applies *Concepcion* to invalidate California's "public injunction" exception to arbitration and further upholds *KeyBank's* "opt-out" clause

". . RULING MIGHT REDUCE THE EFFECTIVENESS OF CALIFORNIA'S ROBUST CONSUMER PROTECTION LAWS, . . ."

The pro-arbitration message in the United States Supreme Court's pro arbitration message from *Concepcion* has once again reached the Ninth Circuit U.S. Court of Appeals with a direct impact on California's Unfair Competition Law. In its March 2012, decision in the putative class action captioned *Kilgore, et al. v. KeyBank, National Association,* a three-judge panel of the Ninth Circuit scuttled a line of California cases mandating that arbitration agreements in California are not enforced where the plaintiff is "functioning as a private attorney general" in that the only relief sought is an injunction "enjoining future deceptive practices on behalf of the general public."

Despite misgivings that the ruling might reduce the effectiveness of California's robust consumer protection laws, the Ninth Circuit concluded that, following the Supreme Court's recent decision in *AT&T Mobility LLC v. Concepcion,* there could be no doubt that the Federal Arbitration Act ("FAA") preempts the California law.

The Ninth Circuit also ruled that the plaintiffs could not prevail on their alternative argument that the arbitration clause was unconscionable because *KeyBank* provided its borrowers with a meaningful opportunity to "opt-out" of arbitration. [PE]

California Creates Wage Theft Crime Unit

The state Labor Commissioner announced the creation of a Criminal Investigation Unit (CIU) to target employers who perpetrate "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. Wage theft might refer to employers who fail to pay for all hours worked, fail to pay nonexempt employees overtime, fail to pay minimum wage or fail to properly classify workers as employees and report them to the various state and federal agencies.

" . . . LEVELING THE PLAYING FIELD FOR CALIFORNIA EMPLOYERS . . ."

According to **Labor Commissioner Julie Su,** the new criminal unit "will be tasked with leveling the playing field for California employers by raising the stakes for those who underpay, underbid and under-report in violation of the law."

The goal is to protect workers and to allow companies who follow the law to compete. The CIU will handle cases including:

- Workers' compensation violations;
- Theft of labor (felony or misdemeanor);
- Payment of wages with bounced checks or insufficient funds;
- Unlicensed farm labor contractors and garment manufacturers;
- Kickbacks on public works projects; and/or,
- Violations involving minors on the job.

The CIU will conduct investigations, make arrests, file criminal charges and serve subpoenas and inspection warrants. The CIU will be made up of sworn peace officers who have completed the police academy and who qualify to carry firearms.

Employers should not forget that the Wage Theft Protection Act (AB 469) took effect January 1, 2012. Under AB 469, employers must provide nonexempt employees with a notice at the time of hire specifying certain wage and employment information. [PE]

Sexual Harassment Prevention Training

Visalia Chamber of Commerce and Pacific Employers, will jointly host a state mandated Supervisors' Sexual Harassment Prevention Training Seminar & Workshop with a continental breakfast on April 25th, registration at 7:30am — Seminar 8:00 to 10:00am, at the Lamp Liter, Visalia.

Quarterly Seminars also on 7-25-12 and 10-24-12

RSVP Visalia Chamber - 734-5876 – $25
Certificate – Forms – Guides – Full Breakfast

Human Resources Question with Candice Weaver

The Month's Best Question

Facebook vs. Privacy Rights

Q: ***"May I require applicants for employment to give their Facebook password as part of the hiring process?"***

A: Here is what Facebook's chief privacy officer said regarding Facebook's position on this practice on its Website.

"In recent months, we've seen a distressing increase in reports of employers or others seeking to gain inappropriate access to people's Facebook profiles or private information. This practice undermines the privacy expectations and the security of both the user and the user's friends. It also potentially exposes the employer who seeks this access to unanticipated legal liability.

"The most alarming of these practices is the reported incidents of employers asking prospective or actual employees to reveal their passwords. If you are a Facebook user, you should never have to share your password, let anyone access your account, or do anything that might jeopardize the security of your account or violate the privacy of your friends. We have worked really hard at Facebook to give you the tools to control who sees your information."

What is interesting about this, is that the position statement, published by Facebook's chief privacy officer, Erin Egan, offers her legal opinions to try to convince employers (private and public), colleges, and others not to engage in this practice. Egan, offers the following legal analysis in the position statement:

"We don't think employers should be asking prospective employees to provide their passwords because we don't think it's the right thing to do. But it also may cause problems for the employers that they are not anticipating. For example, if an employer sees on Facebook that someone is a member of a protected group (e.g. over a certain age, etc.) that employer may open themselves up to claims of discrimination if they don't hire that person. It also potentially exposes the employer who seeks this access to unanticipated legal liability."

Setting aside whether or not private employers in California should be getting their legal advice from Facebook's chief privacy officer, Ms. Egan's advice that engaging in this practice is subject to challenge is accurate.

However, Egan's statement fails to address the biggest problem for California employers (and colleges) who engage in this practice: the California Constitution's privacy protections. Her conclusion that requiring applicants to surrender their facebook password as a condition of employment or admission is a legally risky practice, appears to be very accurate. However, for California employers or employers hiring California applicants, the risks are even higher, due to the privacy protections of the California Constitution. [PE]

No-Cost Employment Seminars

The Tulare-Kings Builders Exchange and Pacific Employers host 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.

2012 Topic Schedule

♦ **Safety Programs -** Understanding Cal/OSHA's Written Safety Program. Reviewing the IIPP or SB 198 requirements for your business.
Thursday, April 19th, 2012, 10 - 11:30am

♦ **Family Leave -** Federal & California Family Medical Leave, California's Pregnancy Leave, Disability Leave, Sick Leave, Workers' Compensation, etc.; Making sense of them.
Thursday, May 17th, 2012, 10 - 11:30am

♦ **Wage & Hour and Exempt Status -** Overtime, wage considerations and exemptions.
Thursday, June 21st, 2012, 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 19th, 2012, 10 - 11:30am

There is No Seminar in August

♦ **Forms & Posters -** as well as Contracts, Signs, Handouts, Fliers - Just what paperwork does an Employer need?
Thursday, September 20th, 2012, 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 18th, 2012, 10 - 11:30am

♦ **Discipline & Termination -** The steps to take before termination. Managing a progressive correction, punishment and termination program.
Thursday, November 15th, 2012, 10 - 11:30am

There is No Seminar in December

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.

NLRB Poster Enclosed!

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Two Out of Three Discrimination Charges Resolved By the EEOC in 2011 Were Meritless

Minnesota Employer.com recently reported that the EEOC received an all-time high number of 99,947 charges of employment discrimination in its Fiscal Year 2011. In the same year, the EEOC resolved an all-time high number of 112,499 discrimination charges.

The EEOC's statistics show the vast majority of the cases resolved by the EEOC in 2011 were baseless. The EEOC's statistics show that 74,198, or 66%, of the cases resolved by the EEOC in 2011 resulted in a finding of no reasonable cause to believe that discrimination occurred. That number is higher than the number of no reasonable cause determinations from the EEOC in any previous year – both in terms of the overall number of no reasonable cause determinations and in terms of the percentage of all charges resolved.

Takeaways: In some cases, a frivolous charge of discrimination can be just as expensive to defend against as a valid charge of discrimination. While an employer cannot prevent employees from filing unsupported charges with the EEOC, having good HR practices in place should help an employer get a charge of discrimination dismissed quicker and cheaper. [PE]

Indiana's Right To Work Law Takes Effect

March 15 – the Ides of March – is when Indiana's new right to work law took effect in 2012. Most private employers are covered by the National Labor Relations Act ("NLRA"), which originally permitted collective bargaining agreements that required the termination of any employees who failed to join or at a minimum pay representation fees to the union.

While these "union security clauses" remain lawful in most states, the 1947 Taft-Hartley amendments added NLRA Section 14(b), which gave states the ability to enact laws providing employees the "right to work" without becoming a union member or paying dues. On February 1, 2012, Indiana became the 23rd state – the first since Oklahoma in 2001 and the first in the former "rust belt" heart of unionization – to pass a right to work law.

Indiana's right to work law only applies to agreements "entered into, modified, renewed, or extended after March 14, 2012" and does not affect any written or oral contract or agreement that was already in effect on that date. The law prohibits agreements requiring employees to become or remain a member of a union; pay dues, fees, or other charges to a union; or pay a charity or other third-party fees representing the charges that union members might otherwise pay. Thus, if it were entered into on or after March 15th, any collective bargaining agreement or practice between an employer and union that requires union membership or the payment of these fees would be unlawful and void. [PE]

Unpaid Internships: A No-No?

College students—and even high school students—have sought internships for decades to provide valuable work experience and to fill out their resumes. The recent recession has forced many college graduates who once would have been in the paid workforce into internships, many of which are unpaid. Companies benefit from the extra hands, and the intern gains work experience, a line on a resume, and perhaps eventually a paid job. So, what's the problem?

The problem is that federal law has strict guidelines controlling the circumstances under which interns may be unpaid. Many employers believe that if a student receives academic credit from a high school or college, that is "enough" to make the unpaid internship legal. That is not true; whether or not the student receives academic credit is immaterial under federal guidelines. State law may add even more requirements. [PE]