Pacific Employers
Management Advisor
49 Years of Excellence!
April 2013

What's News!

CA's Top Five New Laws

Here is an overview of the top five new laws now in effect and what you should do to comply with them.

New Requirements for Commissions

All employers with California-based employees paid in whole or in part on a commission basis must now provide employees with written agreements setting forth the method by which commissions will be calculated and paid. If the employee continues to work after the agreement expires, the contract terms are presumed to remain in effect until superseded or terminated in writing. Employees may file a claim against an employer who fails to provide the required written contract.

Wage Statements & Access to Personnel Records

Employers are now required to retain personnel files for at least 3 years following an employee's termination of employment. The law clarifies that access to personnel files must be given to both current and former employees. Generally, under the law, current and former employees (or their representatives) are entitled to inspect and receive a copy of their personnel records within 30 days of having made a request. Violations of the law constitute an infraction that may result in a penalty of $750, in addition to injunctive relief and attorney's fees.

New Pregnancy-Related Regulations Adopted which:

- Clarify that the calculation of "four-months" of unpaid pregnancy disability leave per pregnancy is based on one-third of a year or 17 1/3 weeks and is calculated based on hours instead of days; as such, an employee who works 40 hours a week, is entitled to 693 hours of leave, while an employee who works 20 hours per week, is entitled to 346.6 hours of leave;
- establish additional reinstatement obligations;
- require employers to post, and give employees affected by pregnancy, new forms that provide detailed information about pregnancy disability leave and California Family Rights Act leave; and,
- create employer liability for acts of discrimination based on an employee's "perceived" pregnancy.

FEHA Expanded to Protect Breastfeeding

To prevent breastfeeding discrimination in the workplace, the California legislature has expanded the scope of discrimination on the basis of "sex" under the California Fair Employment and Housing Act (FEHA) to include breastfeeding and medical conditions relating to breastfeeding. As a result, employees who believe that they are being discriminated against because of breastfeeding now have a cause of action under FEHA.

Disability Discrimination and Accommodation Regulations

Employers must initiate the interactive process when they become aware of an employee's need for an accommodation through "observation" or are informed of the need for an accommodation by a third party. "Reasonable accommodation" now explicitly includes reserved parking spaces, modifying supervisory methods and employer policies, permitting telecommuting, and bringing assistive animals to the workplace. Employers must provide accommodations to disabled employees to allow them to "enjoy equivalent benefits and privileges of employment" as similarly situated, non-disabled employees. [PE]

Hiring Checklist Enclosed!

President's Report
~Dave Miller~

New I-9 Form Released

U.S. Citizenship and Immigration Services ("USCIS") recently announced the release of the new I-9 Employment Eligibility Verification Form.

All employers **may** use the new I-9 immediately to verify the identity and employment authorization eligibility of their employees. The USCIS wants employers to begin to use the new I-9 Form immediately but has provided a 60-day grace period for employers to continue to use the current version of the form issued 08/07/09 (the 02/02/09 version is also still valid) until May 7, 2013.

Failure of an employer to ensure proper completion and retention of Forms I-9 may subject the employer to penalties of up to $1,100 per I-9, and, in some cases, criminal penalties. Although the new two-page Form I-9 mainly contains format changes, additional data fields, and further instructions to the employer, it increases the administrative burden placed on employers.

Find the new I-9 Form available from our website's Forms page at < *http://www.pacificemployers.com/forms.htm* > [PE]

FMLA Updated Notices Should Be Posted

Amendments to the Family and Medical Leave Act ("FMLA") have now taken effect which change the provisions governing military caregiver leave for veterans, qualifying exigency leave for paternal care, and job-protected leave for airline personnel and flight crews.

The amendments extend the right to take military caregiver leave to eligible employees whose family members are recent veterans with serious injuries or illnesses, and expand the definition of a serious injury or illness to include injuries or illnesses that result from preexisting conditions. The amendments also expand the right to take qualifying exigency leave to eligible employees with family members serving in the Regular Armed Forces, and added a requirement that for all qualifying exigency leave the military member must be deployed to a foreign country.

Employers with <u>more than 50 employees</u> must now post the revised FMLA poster. The poster is on the top of the page of Pacific Employers' website's ***What's New*** page at --

< *http://www.pacificemployers.com/whatsnew.htm* > [PE]

"The policy of American government is to leave its citizens free, neither restraining them nor aiding them in their pursuits."
-- Thomas Jefferson (1743-1826),

Recent Developments

$50,000 for Failure to Provide Extended Leave

An Irvine, California-based company has agreed to pay $50,000 and furnish other relief to settle a disability discrimination lawsuit brought by the U.S. Equal Employment Opportunity Commission (EEOC). The EEOC had charged REDC Default Solutions, LLC with unlawfully failing to accommodate a disabled worker at its Plano, Texas location.

"... COMPANY DENIED ... REASONABLE ACCOMMODATION ..."

According to the EEOC, the company denied an employee the reasonable accommodation of additional leave time that was required by her disability. The EEOC charged that Asset Manager Terria Wiley went out on medical leave in March 2011 after suffering a stroke. In response to a letter from the company's HR director, Wiley promptly submitted a note from her treating physician indicating a specific date when she would be able to return to work without restrictions.

The EEOC charged that instead of granting a modest extension of leave as a reasonable accommodation, REDC fired Wiley. Robert A. Canino, Regional Attorney for the EEOC, commented that "The EEOC brought this lawsuit because the company was unwilling to be flexible and reasonable in considering Ms. Wiley's request for an extended leave period…Federal law gives employees with disabilities, like Ms. Wiley, a means to continue their employment with the benefit of an accommodation." [PE]

Fifth Circuit Finds NLRB Overreach

In NLRB v. Arkema, Inc., the Fifth Circuit Court of Appeals recently dealt the National Labor Relations Board (NLRB) a setback, finding that the employer (Arkema) did not violate the National Labor Relations Act (NLRA)when it disciplined a union-supporter for threatening another employee before an election and when it distributed an anti-harassment reminder to its employees. The Court accordingly refused to enforce the NLRB's order to the contrary.

Before 2008, the United Steelworkers of America represented a bargaining unit of 35 employees at Arkema's Houston plant. In April 2008, a campaign to decertify the union began, and, in August, a secret-ballot election was held. Employees voted to decertify the Union by a vote of 18-17.

Prior to the decertification election, a male union-supporter at the plant approached one of the facility's female employees and began talking to her about the union's need for her support. The female employee depended on the physical help of her male counterparts to perform her job duties and she claimed that the union-supporter "threatened that male union employees would not come to [her] aid in an emergency if she did not support the union in the election." She complained to management about this threat and the male employee was disciplined. Shortly thereafter, Arkema's Plant Manager sent out an email advising employees of their right not to be harassed or punished based on their stance towards the union and advising employees to report any violations of these rights to the NLRB's Houston office.

On August 19, the Union filed an objection to the election results along with other unfair labor practice charges. An Administrative Law Judge found that the Company's actions in disciplining the male union supporter and sending out the anti-harassment memorandum had violated the NLRA. Moreover, the ALJ determined that, because the violations took place before the decertification election, the election was tainted and its results should be invalidated. The Board subsequently affirmed the ALJ's findings and applied to the Fifth Circuit for enforcement of its order.

The Fifth Circuit flatly disagreed with each position taken by the Board and the General Counsel. As an initial matter, the court rejected the Board's decision that Arkema had violated section 8(a)(1) of the Act by disciplining the union-supporter who made threats to a co-worker. The Court found that the employee's conduct "exceeded persuasion—he sought to threaten and intimidate [the female employee.] His own testimony verifies that he intended to communicate to her that he would withdraw the help on which she depended to do her job [if she did not support the union]." Accordingly, the Court found that these "threats do not fall under the protection of the Act and are subject to employer-discipline."

In addition, the Fifth Circuit held that Arkema did not violate the Act by sending out an e-mail reminding employees of the Company's anti-harassment policies. The Court disagreed that employees would interpret this e-mail as prohibiting protected activity. Rather, it found that an employer has the right to assure employees that it will not allow them to be threatened by anyone. The Court was further reassured that the memo was lawful because it was directed to all employees and not solely focused on reporting against those employees who were union advocates.

Because the Court found that these pre-election activities did not violate the Act, it concluded there was no basis to overturn the election results. This decision provides further support for employers to appeal unfavorable Board rulings where they believe the Board has overreached. The more favorable law of a Circuit Court of Appeals, and the opportunity to have a panel of federal judges examine evidence from a different perspective, may result in having adverse Board rulings rendered unenforceable. [PE]

Appeals Court Upholds $425,000 Award

The U.S. Court of Appeals for the Seventh Circuit has affirmed a $425,000 judgment (including $9,000 in costs) against AutoZone, Inc. for allegedly violating the Americans with Disabilities Act (ADA). The decision also upholds an injunction requiring the national auto parts retailer to provide reasonable accommodations to employees with physical disabilities in all of its stores in central Illinois.

The Equal Employment Opportunity Commission (EEOC) filed suit after first attempting to reach a pre-litigation settlement through its conciliation process. At trial, the EEOC presented evidence that the company's managers insisted that Parts Sales Manager John P. Shepherd III mop floors at the end of the day, an activity that aggravated Shepherd's back impairment and caused intense pain. As the Court of Appeals observed, "Shepherd's store manager called him a good salesman who could 'sell ice cubes to an Eskimo,' and noted that customers would specifically ask for Shepherd's assistance.

As a result, Shepherd averaged the highest sales per customer among the employees at his store in 2003." The EEOC presented evidence that despite repeated requests from Shepherd and his doctor, company officials refused to eliminate the mopping assignments, eventually causing serious injury. The ADA requires that employers make reasonable accommodations to the known physical limitations of employees with disabilities. Such accommodations may include the elimination or modification of a non-essential job duty, or the transfer of a non-essential job duty to another employee. [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 23rd, registration at 7:30am
Seminar 8:00 to 10:00am, at the Lamp Liter, Visalia.

RSVP Visalia Chamber - 734-5876
PE & Chamber Members $35 - Non-members $50
Certificate – Forms – Guides – Full Breakfast
Future 2013 Trainings on 7-24-13, 10-23-13

Human Resources Question with Candice Weaver

The Month's Best Question

Labor Code Wage Statement Rules

Q: ***"What are the new Wage Statement rules and penalties?"***

A: Under California law, employers must provide their employees with wage statements that contain nine specific categories of information. See Cal. Labor Code § 226(a)(1)-(9). Plaintiffs in California wage and hour actions regularly and routinely have included section 226 claims with other wage allegations, claiming non-compliance by employers. And until January 1, 2013, employers have, in some circumstances, defended against section 226 claims and escaped monetary liability by arguing that employees must show some sort of injury resulting from any technical violation under the express language of section 226. The new law responds to several conflicting court opinions on the definition of "injury" by defining "suffering injury" to recover damages for wage statement violations under section 226. Specifically, an employee suffers injury if:

1. the employer fails to provide a wage statement; or
2. the employer fails to provide accurate and complete information as required by any one or more items listed in section 226(a)(1)-(9) and the employee cannot "promptly and easily" determine one or more of the following "from the wage statement alone" (i.e., without reference to other documents or information):
   - the amount of gross wages or net wages paid during the pay period;
   - the total number of hours worked (if the employee is not salaried);
   - the number of piece-rate units earned and applicable piece rate (if the employee is paid on a piece-rate basis);
   - deductions made;
   - inclusive dates of the pay period;
   - all applicable hourly rates in effect during that pay period and the corresponding number of hours worked at each hourly rate;
   - the name and address of the employer (as well as certain additional information if the employer is a farm labor contractor as defined in section 1682); or
   - the name of the employee and either the last four digits of his or her social security number or an employee identification number other than the social security number.

The amendments did not change the existing penalties for a violation under section 226: the greater of all actual damages, or $50 for the initial pay period and $100 for each violation in a subsequent pay period, up to a $4,000 maximum.

These amendments make now a good time for private sector employers to confirm that the wage statements accompanying employee paychecks (regardless of whether such paychecks are issued directly by an employer or by a service) are in compliance with the requirements of Labor Code section 226, as amended. [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.

2013 Topic Schedule

♦ **Safety Programs -** Understanding Cal/OSHA's Written Safety Program. Reviewing the IIPP or SB 198 requirements for your business.
Thursday, April 18th, 2013, 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 16th, 2013, 10 - 11:30am

♦ **Wage & Hour and Exempt Status -** Overtime, wage considerations and exemptions.
Thursday, June 20th, 2013, 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 18th, 2013, 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 19th, 2013, 10 - 11:30am

♦ **We have established a strategic partnership with California Employers Association.** Our Guest Speaker Seminar will feature **Kim Parker, Executive Vice President, Sacramento office, and Craig Strong, Regional Director of the Madera office**.
Thursday, October 17th, 2013, 10 - 11:30am

♦ **Discipline & Termination -** The steps to take before termination. Managing a progressive correction, punishment and termination program.
Thursday, November 21st, 2013, 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.

Hiring Checklist Enclosed!

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Majority of Employers Hope to Avoid Health Care Reform Compliance Costs

A survey released by *Willis Group Holdings* shows a majority of employers say avoiding costs increases brought on by health care reform is very important to their business. Nearly two-thirds of employers who have calculated cost compliance say the law has led to increases, according to the survey.

After the U.S. Supreme Court upheld the constitutionality of the Patient Protection and Affordable Care Act in July and with President Barack Obama elected to a second term in November, businesses are finally coming to grips with compliance of the law, according to a survey release by Willis Human Capital Practice, a unit of Willis Group Holdings.

The survey, which was released Feb. 14, states most employers are hoping to avoid cost increases to their group health plans brought on by health care reform, but more than half have not calculated those expected increases yet. However, nearly two-thirds of responding employers that have calculated the costs of health care reform said the new law has led to increases.

Sixty percent of employers said avoiding cost increases is very important to their business. But when asked about aspects like plan design and benefits offerings, the majority of employers said health care reform has not affected their plans, according to the survey. And only 20 percent of respondents indicated they expect to adjust dental plans and salaries and bonuses, among others, to offset the cost of compliance with the law.

"The survey suggests that employers continue to recognize the value of providing medical benefits, how important those benefits are to their employees, and that providing benefits allows them to attract and retain the employees they need," Willis' National Legal and Research Group Practice Leader Jay Kirschbaum said in a statement. "Therefore, they generally plan to continue offering competitive medical benefits. However, they are considering several potential options, even including the possibility of coverage through state exchanges."

Other key findings from the survey include:

• 55 percent of employers felt that competitors would shift costs to employees; however, only 34 percent of employers indicated that they might take this same action.

• Employers indicated that they are now much more likely to voluntarily relinquish grandfathered status (in fact, this year 39 percent of employers chose to voluntarily forego grandfathered status; last year, only 13 percent of employers made the same decision).

• Most employers intend to "play" under the "pay or play" mandate, and are predominantly planning to offer coverage that exceeds the "minimum essential coverage" requirement, and then adjust coverage and contributions after the fact in order to manage expenses. [PE]

On-Time Attendance As an Essential Function Is a Fact-Based Determination

Employers beware – you cannot assume that on-time attendance is an essential function of every job, as the U.S. Court of Appeals for the Second Circuit recently ruled. In *McMillian v. City of New York*, the court held that the determination of which jobs compel on-time attendance requires a fact-based analysis, which must include the consideration whether an employee's "physical presence" in the workplace is in fact necessary.

In an era where more employers are allowing telecommuting, remote work, and flexible hours, employers that want their employees to report to a physical place and be on time should take steps now to make sure that these requirements are documented so that it can be proven that attendance is in fact an "essential function of the job." [PE]