Pacific Employers
MANAGEMENT ADVISOR
Over 50 Years of Excellence!
April 2016

WHAT'S NEWS!

Pay Stub Violations Now Curable!

In this last legislative year, among all the really bad stuff that the legislature was putting together, there were some good ones for employers. One that is now law is AB 1506 which stipulates that pay stub violations are "curable" or correctable under PAGA.

Under existing California law, an employer must present each employee with an itemized pay stub that includes all the required information —

- The name of the employee;
- An employee identification number or the last four digits of the social security number;
- The gross wages earned;
- Sick days available;
- All deductions;
- Net wages earned;
- The total hours worked;
- The applicable hourly rates and the corresponding number of hours worked at each rate;
- The number of piece rate units earned and the applicable piece rates;
- The inclusive dates of the period for which the employee is paid; and,
- The name and address of the legal entity that is the employer.
- *If An Agricultural Employer* - The employer's federal and state employer identification numbers,

The Private Attorneys General Act ("PAGA") gives that employee the right to sue the employer for the violation and collect penalties on behalf of all affected employees. If any of the required items on a paystub are missing, employers can be fined up to $4000 per employee.

With the passage of AB 1506, an employer is now given the opportunity to cure its failure to include the pay period and the employer's proper name and address on the pay stub. Now, before an employee can sue under PAGA for the violation, that employee has to give the employer notice of the violation. The employer would then have 33 days to cure the violation by providing corrected wage statements to all employees for each pay period in the prior 3 years.

Importantly, the new law limits an employer's cure rights to only once in any 12-month period for the same violation, so be sure that it doesn't happen again! [PE]

Revised Arbitration Agreement Example Enclosed!

President's Report
~Dave Miller~

$1 Million Retaliation Suit!

The Los Angeles County jury found that although an employer wasn't liable for sexual harassment, it was liable for over $1 million in damages for retaliating against an employee for exercising her right to report sexual harassment.

The company asked the trial court to overturn the jury verdict on the retaliation claims or grant a new trial on them. The trial court granted a new trial of the entire case, not just the retaliation claims. The appellate court analyzed whether the trial court's ruling was correct.

The appellate court held that the trial court committed no reversible error and affirmed the judgment, but it sent the matter back to the trial court to give Merle Norman the opportunity to accept the jury's compromise by withdrawing its motion for a new trial or accepting the trial court's ruling granting a new trial on all the issues. *Kelley v. Merle Norman Cosmetics.*

This case serves as yet another example of how jurors often find no liability for alleged sexual harassment but nevertheless find the employer liable for retaliating against an employee who complains about the alleged harassment. [PE]

Indoor Heat Illness is Big Topic at Safety Program (IIPP) Seminar

Safety Programs - Understanding Cal/OSHA's Written Safety Program. Reviewing the IIPP or SB 198 requirements for your business.

Employers with employees near sources of heat or inside buildings with limited cooling capabilities must now ensure that their Injury and Illness Prevention Program is effective and in writing. Examples include foundries, ovens, dryers, boilers, warehouses without AC.

Make sure that your Safety Program is up to date with all the required changes in Heat Illness, Violence and Hazard Communications. Attend our free Seminar on Thursday April 21st from 10-11:30am at the Tulare-Kings Builders Exchange (1223 S. Lover's Lane in Visalia).

Dave Miller and Candice Weaver will be our presenters. RSVP to Pacific Employers at 733-4256 to make sure you have a spot. [PE]

Too often we enjoy the comfort of opinion without the discomfort of thought. - John F. Kennedy

Recent Developments

NLRB Strikes Down Another Common Policy

Issuing yet another blow to commonly promulgated workplace rules, the National Labor Relations Board ("NLRB") struck down a Whole Foods Market policy prohibiting employees from recording conversations, meetings, phone calls and other activities at work. *Whole Foods Market, Inc. 363 N.L.R.B. No. 87.*

Despite Whole Foods' explanation that the policy was specifically designed to "encourage open communication, free exchange of ideas, spontaneous and honest dialogue and an atmosphere of trust," and "to eliminate a chilling effect on the expression of views . . . especially when sensitive or confidential matters are being discussed," the NLRB found that the policy could have a chilling effect on an employee's section 7 rights.

"... dissenting NLRB member sided with Whole Foods ..."

Whole Foods argued that the policy fostered open dialogue in its Town Hall meetings where managers meet with employees outside the presence of their direct supervisors, in part to hear criticism of store management, and helped to facilitate meetings regarding confidential requests for assistance from the company's emergency fund. In a 2-1 decision, however, the majority disagreed, finding that the policies could be read to limit the exercise of an employee's section 7 rights under the National Labor Relations Act ("NLRA"). In particular, the NLRB struck the rules because they did not specifically carve out an exception for recordings made in the furtherance of section 7 activity. Notably, the dissenting NLRB member sided with Whole Foods, finding that the policies expressly encouraged open communication.

Given the NLRB's narrow reading of Whole Foods' policies, along with other 2015 NLRB decisions striking down common workplace policies, employers should consider reviewing their handbooks and policies for any that could be viewed as chilling NLRA Section 7 rights. [PE]

DOL Sets Joint Employer Definitions

Employers who contract out for services are increasingly being held responsible by enforcement agencies for wage and hour and other labor violations.

The U.S. Department of Labor (DOL) has issued new joint employer guidance in an attempt to hold more companies responsible for workers they may hire indirectly, such as when a company uses a temp agency. In addition to the guidance, the DOL created a web page devoted to joint employment issues which includes answers to frequently asked questions and additional fact sheets.

"California has already implemented legislation . . "

The DOL notes the increasing trend of joint employment situations. According to the DOL, economic forces and technological advances have led to increasingly changing labor arrangements, including outsourcing, sharing employees, third-party management companies, independent contractors, staffing agencies and other labor providers. Examples might include nurses placed at a hospital by a staffing agency, production line workers supplied by a temp agency for a specific function or restaurant workers shared between two different, but related, restaurants.

Dr. David Weil, the administrator of the DOL's wage and hour division, calls this "the fissured workplace" — where there is no longer a traditional brick and mortar company owned and operated by a single employer, but instead companies have contracted out or shed activities to be performed by other businesses. In this situation, according to Weil, an employee might not know whom they actually work for.

For example, last year the DOL obtained a joint employment judgment against DirectTV to pay $395,000 in back wages and damages to installers. DirectTV subcontracted installation to another corporation and claimed that it was not the installers' employer and not responsible for federal wage and hour violations. A court disagreed, finding that DirectTV was a joint employer of the installers and responsible for the wage and hour violations.

In its newly released guidance, the DOL clearly intends that joint employment be defined broadly, focusing on the "economic realities" of the working relationship between the employee and the potential joint employer. For instance, according to the DOL, the core question in determining joint employer status where there is an intermediary employer, like a staffing agency, is whether the worker is "economically dependent" on the company that hired the staffing agency and whether the company is ultimately benefitting from the work. There are several factors to be applied, but none of them should be applied in a manner that loses sight of the core question.

This stance is similar to guidance issued by the DOL on the matter of independent contractor misclassification last July.

Moreover, the National Labor Relations Board also recently redefined the joint-employer standard, increasing collective bargaining power for temp workers through its decision in *Browning Ferris Industries of California* , 362 NLRB No. 186 (August 27, 2015).

California has already implemented legislation that increased liability on employers who contract for labor. Labor Code section 2810.3 holds companies accountable for wage-and-hour and other violations when they use staffing agencies or other labor contractors to supply workers. [PE]

Sexual Harassment Prevention Training

The Visalia Chamber of Commerce and Pacific Employers, will host a state mandated Supervisors' Sexual Harassment Prevention Training Seminar & Workshop with a continental breakfast on April 27th, registration at 7:30 am, Seminar 8:00-10:00 am, at the Lamp Liter Inn, Visalia.

RSVP Visalia Chamber - 734-5876
PE & Chamber Members $35 - Non-members $50
Certificate – Forms – Guides – Full Breakfast
Future 2016 Training dates:
July 27th, & Oct. 26th

Human Resources Question with Candice Weaver

The Month's Best Question

What is DOL Looking For?

Q: "The Federal Department of Labor has been in the neighborhood checking other employers. What type of things are they looking for?

A: The Department of Labor's (DOL) Wage and Hour Division investigates for violation of the Fair Labor Standards Act (FSLA). The most frequent wage and hour violations are:

1. Misclassification of Exempt Employees

Misclassification continues to be the #1 trap. Job titles mean little; actual work performed by the employee is determinative.

2. Misclassification of Independent Contractors

The misclassification of independent contractors is currently a national enforcement priority for the DOL, and for many state agencies and tax authorities.

3. Preliminary and Postliminary Activities

An employees' activities preparing for work, such as donning and doffing of protective gear or required clothing, may be compensable if the activities are essential to the job.

4. Controlled On-Call Time

An employee must be paid for "on call" time if they cannot use the time as their own for normal activities outside of work.

5. Improper Deductions from Exempt Employee Salaries

With few exceptions, exempt employees must be paid their full salary for any workweek in which they performed any work.

6. Failure to Calculate Regular Rate Properly

Employers often miscalculate overtime owed because of additional earned compensation.

7. Tips, Service Charges and Tip Pools

Tips, service charges and tip pools are often misreported.

8. Travel Time

Regular commute time is non-compensable, but application of the rules for paid travel time is complex.

9. Meals Periods, and Auto-Deduct Practices

Non-exempt employees must be paid for all time "suffered or permitted" to work under the FLSA. Breaks of less than 20 minutes are compensable under the FLSA.

10. Inadequate Record Keeping

Many employers have an informal or inadequate means of properly recording hours worked by non-exempt employees.

Employers should proactively conduct vulnerability audits, and remedy potential problems. Have a Question? Give the staff at Pacific Employers a call. [PE]

No-Cost Employment Seminars

Pacific Employers hosts this Seminar Series at the Builders Exchange at 1223 S. Lovers Lane at Tulare Avenue, Visalia, CA. RSVP to Pacific Employers at 733-4256. ***These mid-morning seminars include refreshments and handouts.***

2016 Seminars

♦ **Safety Programs -** Understanding Cal/OSHA's Written Safety Program. Reviewing the IIPP or SB 198 requirements for your business.
Thursday, April 21st, 2016, 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, May 19th, 2016, 10 - 11:30am

♦ **Wage & Hour and Exempt Status -** Overtime, wage considerations and exemptions.
Thursday, June 16th, 2016, 10 - 11:30am

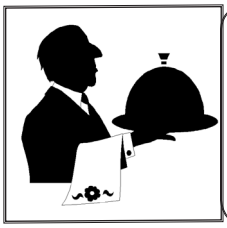
♦ **Hiring & Maintaining "At-Will" -** Planning to hire? Putting to work? We discuss maintaining "At-Will" to protect you from the "For-Cause" Trap!
Thursday, July 21st, 2016, 10 - 11:30am

There is No Seminar in August or December

♦ **Forms & Posters -** and Contracts, Signs, Handouts, Fliers - Just what paperwork does an Employer need?
Thursday, September 15th, 2016, 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 20th, 2016, 10 - 11:30am

♦ **Discipline & Termination -** The steps to take before termination. Managing a progressive correction, punishment and termination program.
Thursday, November 17th, 2016, 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.

Revised Arbitration Agreement Example Enclosed!

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Reluctance To Embrace Wellness Programs

A study finds employees are reluctant to embrace wellness programs. The new survey reports that despite the array of wellness programs being offered, U.S. employers are finding it difficult to engage employees in the programs.

The survey by global professional services company Towers Watson found that 88% of employers offering financial incentives for participation in wellness programs will reassess their incentives over the next three years.

The Global Benefit Attitudes Survey found that health is a clear employee priority, but employees haven't connected to their employers well-being programs. Just one-third said the well-being initiatives offered by their employers encouraged them to live healthier lifestyles.

In addition, 71% of employees prefer to manage their own health, and 32% said the initiatives offered by their employers don't meet their needs. Forty-six percent of those surveyed said they don't want their employers to have access to their personal health information, and 30% don't trust their employers to be involved in their health and well-being. [PE]

UAW and German Union Form Partnership!

The United Auto Workers (UAW) and German trade union IG Metall announced the launch of the Transnational Partnership Initiative (TPI), a joint project to explore new models of employee representation in the United States.

The UAW statement said one goal of the TPI is to collaborate to improve wages and working conditions for employees at German-owned auto manufacturers and suppliers in the U.S. South.

The statement said the unions believe some German manufacturers exploit low-wage environments in the South. Another goal is to expand on the principle of co-determination between management and employees by establishing German-style works councils or similar bodies to promote employee representation. [PE]

Reverse Discrimination Is Illegal!

It should be pretty obvious, but a recently issued decision serves as a good reminder to employers that all race discrimination is illegal, whether it's against members of minority groups or whether it's against Caucasians.

A three-judge panel of the U.S. Court of Appeals for the Seventh Circuit reversed summary judgment for a company that allegedly told a white worker that he was being terminated from a Mississippi River bridge construction project and not rehired because the company wasn't meeting its minority targets for the project.

The supervisor allegedly stated to the employee, "[m]y minority numbers aren't right. I'm supposed to have 13.9 percent minorities on this job and I've only got 8 percent." The company denies that these statements were made, but the Seventh Circuit said that's for the jury to decide.

Perhaps more remarkable is the fact that the company got summary judgment at all, considering the alleged statements. [PE]

Want Breaking News by E-Mail?
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peinfo@pacificemployers.com
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