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Family Care and Medical Leave and Pregnancy Disability Leave Notice Enclosed!

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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.

Dynamex IC Test

Sacramento lawmakers are considering two bills introduced in the wake of last year's landmark decision in *Dynamex Operations West, Inc.* In that case, the California Supreme Court adopted a new legal standard for determining whether workers should be classified as employees or as independent contractors for purposes of California wage orders.

The court adopted the "ABC test" utilized by other jurisdictions, which ultimately makes it much more difficult for businesses to classify workers as independent contractors, as all three of the following factors must be met: "(A) that the worker is free from control and direction" of the employer as it relates to performance of the work; (B) that the work is performed "outside the usual course of the hiring entity's business" and (C) that the worker engages "in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity."

In response, Assembly Member Lorena Gonzalez introduced Assembly Bill 5, which would codify the ABC test.

Alternatively, lawmakers could take the opposite approach and support Assembly Bill 71, introduced by Assembly Member Melissa Melendez. That bill would override the Dynamex decision by adding section 2750.7 to the California Labor Code, providing for a multifactor test to determine whether an individual is an employee or an independent contractor. [PE]

Commission Employees Need Agreements!

If you have an employee working for your company and you pay them commission, you must have a written commission agreement with that employee. This law is new enough that many employers don't realize that it exists!

All California employers must ensure that all commission employees have commission agreements that:

- Include a method for calculating and paying the commissions:
- Are signed by the employee; and,
- Are documented with an employee acknowledgment form (receipt of the agreement).

What is a Commission?

A "commission" is a payment that varies in proportion to the value or number of units sold. Earned commissions are a form of wages. Once earned, wages cannot be forfeited. The definition of an "earned" commission also affects when a commission must be paid.

Earned commissions must be paid with the next regular paycheck. Earned commissions are due with final paychecks just as vacation and paid time off are due to employees who leave the employer with their final pay. It is therefore imperative that the commission agreements explicitly define when the commissions are earned and payable. [PE]

Want Breaking News by E-Mail?
Just send a note to
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Tell us you want the News by E-Mail!

Pacific Employers
MANAGEMENT ADVISOR
Early Spring 2019
Over 50 Years of Excellence!

What's News!

Harassment Training Schedules!

California law now requires all employers with 5 or more employees to train all employees in at least one hour of Sexual Harassment Prevention Training by January 1, 2020.

It also requires all supervisors be trained in a two hour supervisor training.

Pacific Employers is facilitating this mandated training monthly on the fourth Thursday at 9am - 10am regular employees and 9am - 11am for supervisors at the Wyndham Hotel Visalia, 9000 W. Airport Dr., Visalia, CA. 93291. Members of Pacific Employers receive a discounted rate of $40 per supervisor attendee (2 hours) and regular employees $30 for the required 1 hour training. Completion Certificates will be provided.

Please make your reservations today to ensure your seat. Call (559) 733-4256.

New Requirements for Sexual Harassment Training

- For at least one hour for all nonsupervisory employees;
- For at least two hours for all supervisors;
- Within six months of new employees assuming their position and once every two years thereafter;
- By January 1, 2020 *(which means all employee training must happen in 2019).* [PE]

New Required Poster April 1

Attention California employers! Another required posting is coming your way. The Office of Administrative Law (OAL) approved the Fair Employment and Housing Council's (FEHC) changes to the Family Care and Medical Leave (CFRA Leave) and Pregnancy Disability notice (now called Family Care and Medical Leave and Pregnancy Disability Leave), adding information about the New Parent Leave Act (NPLA).

California employers covered by the California Family Rights Act (CFRA) and the NPLA are required to post this new notice starting April 1, 2019.

The NPLA is a narrowly tailored California leave law that took effect last year. Both the CFRA and NPLA provide 12 weeks of unpaid, job protected leave to bond with a newborn or a child placed with the employee for adoption or foster care. The CFRA applies to employers who have 50 or more employees and the NPLA applies to employers who have less than 50 employees but have at least 20 employees. While the CFRA provides additional medical leave, the NPLA does not and is limited to baby bonding leave.

For now, effective April 1, 2019, employers with 20 to 49 employees will need to post the Family Care and Medical Leave and Pregnancy Disability Leave notice in their workplace and employers with 50 or more employees will need to replace their existing notice with the new version. [PE]

Family Care and Medical Leave and Pregnancy Disability Leave Notice Enclosed!

Dave's Report
~David E. Miller~



Is Reporting to Work Reporting by Phone?

A California Court of Appeal announced a sweeping change in California's reporting time pay rules which now prohibits a common scheduling practice used by employers throughout the state. ***(Ward v. Tilly's, Inc.)***

California employers are again thrown into a period of uncertainty, given a recent trend of California appellate decisions that have upended established legal "answers" regarding certain employment law issues. Following last year's decision by the California Supreme Court in *Dynamex* to adopt a new "ABC test" to determine employment status under the Wage Order, and the Court of Appeal's decision in AMN Healthcare that cast doubt 33 on years of established authority regarding non-solicitation of employee provisions, the Court of Appeal in *Ward v. Tilly's, Inc.* recently adopted a new standard for reporting time pay.

Because disputes over reporting time pay may lead to class action claims, this decision is particularly important for California employers.

California is one of a few states requiring employers to pay a certain minimum amount to nonexempt employees as "reporting time" (also referred to as "show-up pay") if the employee reports to work but does not actually work the expected number of hours. Specifically, each of California's Industrial Welfare Commission wage orders requires employers to pay employees "reporting time pay" for each workday "an employee is required to report for work and does report, but is not put to work or is furnished less than half said employee's usual or scheduled day's work."

In *Ward v. Tilly's,* a divided Court of Appeal has expanded the "reporting time" obligation to situations where employees are required to contact their employer two hours before on-call shifts—even though they never actually physically report to work. [PE]

"Compassion is the use of public funds to buy votes."
Thomas Sowell (1930-) Writer and economist

Supreme Court Strikes Down Significant Pay Equity Case!

The Supreme Court took the unusual step of vacating a 2018 federal appeals court decision because one of the judges counted in the majority was deceased by the time the decision was published, reversing a landmark pay equity ruling that concluded employers could not justify wage differentials between men and women by relying on prior salary.

Although the justices did not examine the merits of the 9th Circuit's Yovino v. Rizo ruling in today's unsigned five-page opinion, their decision plunges employers back into a state of uncertainty regarding a controversial pay equity practice.

Paid Less Than Others Solely Because Of Salary History

The facts of the case are straightforward. Aileen Rizo was hired as a math consultant by the Fresno County Office of Education in 2009. The county's Standard Operating Procedure for determining salary dictated that new employees would be given a 5 percent raise from whatever their salaries had been at their previous job and then placed into a structured salary schedule. Rizo was earning a little over $50,000 at her previous post in Arizona before joining Fresno County, so she was slotted into the appropriate step as dictated solely by that previous salary. The county did not take prior experience or any other factors into account when setting Rizo's salary.

A few years later, Rizo learned that male colleagues subsequently hired in similar roles had been placed into higher salary steps—assumedly because their salaries at previous employers had been higher than her previous salary. An internal complaint did not resolve the matter to her satisfaction, so she filed an Equal Pay Act (EPA) claim against the county in 2014. [PE]

Workers Can't Sue Employer's Payroll Co.

The Second Appellate District court decided that an employee could not state claims against her employer's accounting firm for the breach of duties arising from its alleged status as her employer.

Travel agency Altour International, Inc., entered into a contract with ADP, LLC and related entities to provide Altour's payroll services. Altour provided its employees' time cards to ADP, which, in turn, calculated the employees' earnings, including any overtime, and provided them with wage statements. According to former Altour employee Sharmalee Goonewardene, the statements provided by ADP never contained a breakdown of her regular hours, overtime hours or double overtime hours, and did not reflect data regarding meal and rest breaks. She was paid twice a month on a basis that was "intentionally confusing." When she complained about these issues, she was fired. Goonewardene sued Altour for various Labor Code violations and wrongful termination. She subsequently amended her complaint to allege the same causes of action against ADP, along with causes of action for breach of contract, negligent misrepresentation, and negligence.

The trial court sustained ADP"s demurrers without leave to amend. Goonewardene appealed.

The court of appeal affirmed in part and reversed in part, holding that Goonewardene could not sue ADP for the breach of duties arising from its alleged status as her employer. Notwithstanding the myriad duties delegated to it by Altour, ADP did not have the power to hire or fire Goonewardene or to control the circumstances of her work. That ADP allegedly controlled the payment of Goonewardene's compensation did not render it her employer. Accordingly, Goonewardene's claims of Labor Code violations, discrimination, and wrongful termination against ADP necessarily failed. Goonewardene did, however, state a viable claim against ADP for breach of contract. Goonewardene's complaint adequately alleged that she and her coworkers were third party creditor beneficiaries of the Altour-ADP contract. As alleged by Goonewardene, ADP undertook to discharge Altour's wage-related duties, including the calculation of employees' wages and the provision of earnings statements, to Altour's employees for their benefit. To the extent that ADP breached that contract, it could be liable to the employees who were damaged by that breach. Goonewardene also adequately alleged a cause of action for negligent misrepresentation based on alleged inaccuracies and omissions in her earnings statements. Finally, Goonewardene sufficiently alleged a duty of care owed her by ADP to support a cause of action for negligence. Goonewardene v. ADP, LLC. [PE]

CA National Origin Discrimination Regulations

Last year's new regulations from California's Fair Employment and Housing Council (FEHC) that clarified protections from national origin discrimination go into effect.

The new regulations are extensive and include clarifications on the definitions of "national origin" and "national origin groups," the permissible and prohibited types of employer policies governing language restrictions in the workplace, the permissible and prohibited inquiries regarding immigration status, and the permissible and prohibited types of height and weight requirements for work.

The Meaning of "National Origin" and "National Origin Groups"

The new regulations clarify that the definition of "national origin" includes an individual's "actual or perceived:

(1) physical, cultural, or linguistic characteristics associated with a national origin group;

(2) marriage to or association with persons of a national origin group;

(3) tribal affiliation;

(4) membership in or association with an organization identified with or seeking to promote the interests of a national origin group;

(5) attendance or participation in schools, churches, temples, mosques, or other religious institutions generally used by persons of national origin group; and,

(6) name that is associated with a national origin group."

The Equal Employment Opportunity Commission (EEOC) and various courts have provided the following examples of the types of associational and perception-based harassment and discrimination based on national origin that are prohibited:

- Harassment of an employee whose husband is from Afghanistan;
- Refusal to promote an employee because he attends a mosque;
- Harassment of a Hispanic person by a harasser who perceived that the individual was Pakistani;
- Coworkers repeatedly referring to an employee of Indian descent as "Taliban" or "Arab"; and,
- Harassment of a Sikh man wearing a turban because the harasser perceived him to be Muslim.

The regulations also provide that "national origin groups" include "ethnic groups, geographic places of origin, and countries that are not presently in existence." In other guidance from the EEOC, the commission has explained that a geographic region may include "a region that never was a country but nevertheless is closely associated with a particular national origin group, for example, Kurdistan or Acadia." [PE]

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.*



Human Resources Question with Candice Weaver

The Month's Best Question

Prohibited Questions?

Q: "What hiring questions have been banned?"

A: More interview questions are now off-limits in California and the distinction between "okay" and "over-the-line" is critical. Whether you conduct your own interviews or rely on assistance from a recruiter, be sure to steer clear from these six topics:

1. Any Criminal History? California employers with five or more employees are prohibited from asking applicants any questions about conviction history until after a conditional job offer has been made. Even then, a specific process must be followed. See our fact sheet for more information.

2. How Much Do You Earn at Your Current Job? Since 2018, it has been unlawful to ask a job candidate any questions about their current or prior salary. An employer can ask a candidate about their salary expectations for the position for which they are applying, but not about their salary in past positions.

3. When Did You Graduate? Stay away from questions that reveal a candidate's age. Instead, ask whether the employee has the required degree or credential and, if verification is important, ask for a copy. The date a job applicant graduated is not as important as whether they graduated. Any questions regarding a candidate's age are prohibited under California law.

4. Are You Married? Do you Have any Kids? While these types of questions may seem natural to discuss when you are trying to get to know someone, they must be avoided during the recruitment process. The Department of Fair Employment clearly states that employers may not ask any questions about marital status or age or about the number of children/dependents.

5. That's an Interesting Name—Where Is it From? Asking someone about their name can result in claims of national origin or ancestry discrimination, both prohibited under California law.

6. Do you have a California Drivers License? What is Your Driver's License Number? If the position you are recruiting for does not require the employee to drive, don't ask the candidate for their driver's license. Doing so could violate California's protections against national origin and citizenship discrimination. If the job requires driving (not just on occasion, but it's part of the position) or if a license is required by law for the job, you can ask about a valid drivers license during an interview.

In case you are wondering, yes, an employer must still verify eligibility to work after hire and some employees will choose to present a drivers' license as part of that process. [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.***

2019 Topic Schedule

♦ **Equal Employment Fundamentals -** Harassment & Discrimination in the Workplace - The seven (7) requirements that must be met by all employers. "The Protected Classes."
Thursday, April 18th, 2019, 10 - 11:30am

♦ **Safety Programs -** Understanding Cal/OSHA's Written Safety Program. Reviewing the IIPP or SB 198 requirements for your business.
Thursday, May 16th, 2019, 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 20th, 2019, 10am - 11:30am

♦ **Wage & Hour and Exempt Status -** Overtime, wage considerations and exemptions.
Thursday, July 18th, 2019, 10 - 11:30am

No Seminars in August or December

♦ **Forms & Posters -** and Contracts, Signs, Handouts, Fliers - Just what paperwork does an Employer need?
Thursday, September 19st, 2019, 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 17th, 2019, 10 - 11:30am

♦ **Discipline & Termination -** The steps to take before termination. Managing a progressive correction, punishment and termination program.
Thursday, November 21st, 2019, 10am - 11:30am

No Seminar in December

Supervisor Sexual Harassment Prevention Training

The Visalia Chamber of Commerce and Pacific Employers will host a state mandated Supervisors' Sexual Harassment Prevention Training Seminar & Workshop on April 24th, registration at 7:30am Seminar 8:00 to 10:00am, at the Lamp Liter, Visalia.

Future 2019 training dates 7-24-19 and 10-23-19.
RSVP Visalia Chamber - 559-734-5876
PE & Chamber Members $40
Non-members $50
Certificate – Handouts – Beverages