Attendance Record & Vacation Scheduler Enclosed!

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Seminar Series at The Depot Restaurant 207 E Oak Ave, Visalia

Hugging May Have Caused Hostile Work Environment

Victoria Zetwick, a county correctional officer, alleged that the county sheriff created a sexually hostile environment in violation of Title VII and the California Fair Employment and Housing Act by, among other things, greeting her and other female employees with unwelcome hugs on more than 100 occasions and a kiss at least once during a 12-year period of time.

The district court granted defendants' motion for summary judgment based on their argument that the conduct was not objectively severe and pervasive and was, instead, merely innocuous, socially acceptable conduct.

The United States Court of Appeals for the Ninth Circuit reversed, holding that the correct legal standard that the trial court should have applied is whether defendants' conduct was "severe or pervasive" and not "severe and pervasive."

The Court further held that the district court erred by failing to consider whether a reasonable juror would find that hugs of the kind, number, frequency and persistence described by Zetwick created a hostile environment. [PE]

Service Advisors Are Not Exempt!

An amendment to the Fair Labor Standards Act ("FLSA") exempts from its overtime requirements "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements."

The U.S. Department of Labor ("DOL") subsequently issued an opinion letter and amended its Field Operations Handbook to state that service advisors also are exempt from overtime under the statute.

However, in 2011, the DOL issued a new rule that limited the exemption only to employees who sell automobiles, trucks, or farm implements, thus giving service advisors a right to overtime under the FLSA. In this opinion, the United States Court of Appeals for the Ninth Circuit held (following remand from the United States Supreme Court) that service advisors do not fall within the exemption from the FLSA's overtime-compensation requirement. [PE]

Notice! Seminar Location Change

The Southern Pacific Depot Restaurant

To improve the experience for our seminar attendees with sufficient restrooms more parking, and greater privacy, we are moving our monthly seminars to:

The Depot Restaurant
207 E Oak Avenue
Visalia, CA 93291

PE's Monthly Seminars

For over two decades, Pacific Employers has sponsored a monthly seminar series on employee labor relations topics for all employers. We start promptly at 10:00 am on the third Thursday every month, except August & December, bringing you the topics listed on page 3 inside. [PE]

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Pacific Employers
MANAGEMENT ADVISOR
Over 50 Years of Excellence!
Fall 2017

What's News!

AFL-CIO Dismissing Staff!

The AFL-CIO is dismissing dozens of staff members as part of a restructuring amid continuing declines in union membership and fresh political threats to labor rights.

"We will have to end support for some programs that don't go to our core priorities," said AFL-CIO spokesman Josh Goldstein, who declined to discuss the number of staff affected. "This is about reimagining and realigning our core priorities to best serve our affiliates."

The affected employees, who include both union members and management, were informed Wednesday and Thursday of the cuts. Three people familiar with the cutback said several dozen jobs were lost. The AFL-CIO's latest federal filing listed about 400 employees.

Amid "well-financed anti-union opposition," Goldstein said, the federation is undergoing a shift in resources. Labor officials expect that restructuring to be a major topic of debate when the AFL-CIO's executive council meets next month in Texas.

In 2016, 10.7 percent of wage and salary workers in the U.S. belonged to a union - just over half the rate it was 1983. [PE]

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PE Goes Facebook and Email!

Breaking News by Facebook & E-mail! We take advantage of another way to connect with our clients. In addition to a new platform for our E-mail, we now have a Facebook Page! We now bring you the latest information and the answers to many of your questions in an organized and timely fashion with E-mail and our FB page.

With our Newsletter going to a quarterly publication schedule, we also will be able to welcome all our staff members to the writing tasks by allowing them to post information on our **Facebook** page.

Visit and ***Like*** Pacific Employers new **Facebook** page at
https://www.facebook.com/pacificemployers/

All-In-One Labor Law Posters

Copies of Pacific Employers' 2017 "All-in-One" posters are in both English and Spanish are available at the office during business hours. We can also prepare you an Industrial Labor Commission Wage Order for you business. [PE]

Attendance Record & Vacation Scheduler Enclosed!

President's Report ~Dave Miller~

Guest Speaker Seminar!

Annually, in October, we bring you a speaker for a timely discussion of labor relations, HR and safety issues of interest to the employer..

This year we will have a panel of speakers to discuss an evolving issue of interest to our clients. New laws change the way each employer must deal with their employees, this topic changes lots of long held rules and procedures.

Thursday, October 19th, 2017, 10 - 11:30am [PE]

Future Dues Increase!

As previously mentioned, our dues and fees have had a cost of living increase. Current members will not see the dues increase until the billing for 1st Quarter 2018.

We have adjusted prices of other services, such as our hourly fees and the charge for creation and updating handbooks and safety programs. We last increase our rates in 2008 and will be making an annualized 5% increase for the decade which amounts to a quarterly dues rate of $180. We hope that you appreciate our service and understand the need to maintain sufficient insulation between us and the wolf at our door. [PE]

SB 1001– Immigration Documents

A new law this year prohibits employers from doing any of the following:

- Request more or different documents than are required under Federal law.
- Refuse to honor documents tendered that on their face reasonably appear to be genuine.
- Refuse to honor documents or work authorization based upon the specific status or term of status that accompanies the authorization to work.
- Attempt to reinvestigate or reverify an incumbent employee's authorization to work using an unfair immigration-related practice.

For any violations, workers may file a complaint with the Department of Labor Standards Enforcement and can recover penalties up to $10,000. [PE]

Notice: Domestic Violence Protection

Firms with 25 or more employees must provide written notice of rights under the domestic violence protections under CA law.

The Labor Commissioner must first develop the notice so that employers can post the notice. [PE]

"When the people find they can vote themselves money, that will herald the end of the republic."-- Benjamin Franklin (1706-1790)

100% Healed Requirement Violates Law!

The California Department of Fair Employment and Housing ("DFEH") recently obtained a settlement on behalf of a custodian for a school district who was fired after an on-the-job injury. As part of the settlement, the employer agreed to pay $290,000 and offer reinstatement with reasonable accommodations.

During an investigation by the DFEH, the district told the DFEH that it relies on a test of physical capabilities to determine if a person is able to perform custodial duties. Anyone taking the test must be able to exert "maximal force." Because the custodian had a lifting restriction that prevented him from being able to exert "maximal force," he was not considered eligible to take the test.

DFEH Director Kevin Kish stated: "The testing requirements in this case meant, in practical terms, that the employee had to be 100% healed from an injury before he would be permitted to take a test for a job he was already successfully performing. That doesn't make sense. Policies requiring employees to be '100% healed from injury' in order to work deny employees their right to an individual assessment and violate the FEHA."

This settlement is a reminder to employers that when an employee seeks an accommodation for his or her disability, the employer must determine whether that employee can perform the duties of the job, with or without an accommodation. Employers should review their accommodation policies to ensure that such policies do not have the unintended consequence of requiring employees to be fully healed in order to work. [PE]

DOL Rolls Back Obama-Era Guidance

The U.S. Department of Labor ("DOL") announced that it was rolling back an Obama-era policy that attempted to increase regulatory oversight of joint employer and contractor businesses.

Courts and agencies use the joint employer doctrine to determine whether a business effectively controls the workplace policies of another company, such as a subsidiary or sub-contractor. That control could be over things like wages, the hiring process, or scheduling.

In a short statement, the DOL signaled that it was returning to a "direct control" standard. "U.S. Secretary of Labor Alexander Acosta today announced the withdrawal of the U.S. Department of Labor's 2015 and 2016 informal guidance on joint employment and independent contractors. Removal of the administrator interpretations does not change the legal responsibilities of employers under the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Worker Protection Act, as reflected in the department's long-standing regulations and case law."

However, the DOL's announcement rescinds its guidance on "indirect control" and also rescinds guidance on independent contractors, which essentially stated that the DOL considered most workers to be employees under the Fair Labor Standards Act and that it was likely to apply a broad definition of "employee" and "employer" when investigating a company's practices. This decision is a big win for businesses and business groups. [PE]

The Court determened that a payroll proccessing company is not a "Joint Employer" in *Goonewardene v. ADP, LLC,* the plaintiff sued her employer, Altour, and ADP, LLC (and related companies) for, among other things, wrongful termination, wage violations, breach of contract and negligence.

The plaintiff claimed she had an employment relationship with ADP by virtue of its contract with Altour to provide payroll services.

The Second Appellate District of California disagreed, finding there was no employer-employee relationship between the plaintiff and ADP; thus, ADP could not be liable for any employment-based claims.

However, ADP could be liable for breach of contract or negligence under a third party beneficiary theory based on the contract between Altour and ADP. [PE]

NLRB Finds Work Rules Overly Broad

The National Labor Relations Board ("Board") believes work rules may chill an employee's exercise of his or her Section 7 rights under the National Labor Relations Act (the "Act").

The Employer in Component Bar Products, Inc., 364 NLRB No. 140, maintained a personal conduct and disciplinary action policy that prohibited, among other things: (1) insubordination or other disrespectful conduct; and (2) boisterous or disruptive activity in the workplace.

In regard to the rule that prohibited "insubordination or other disrespectful conduct," the Administrative Law Judge ("ALJ"), relying on prior Board precedent, found that this rule would impermissibly prohibit employee complaints about supervisors and working conditions that "supervisors may perceive as an affront to their authority." Rules that solely prohibit insubordination, however, have been upheld by the Board.

In regard to the rule that prohibited "boisterous or disruptive activity in the workplace," the ALJ was concerned that this rule would prohibit an employee's right to engage in a work stoppage, as well as other activity permitted under Section 7 of the Act. Further, the ALJ found that unlike similar rules prohibiting disruptive activity that have been upheld in the past, the Employer's rule here did not include any example or limitations that clarified the scope of the rule.

In affirming the ALJ's decision, a 2-1 majority of the Board stated that it agreed with the ALJ's concerns. Thus, it is clear that the Board continues to focus on the "chilling effect" that broadly drafted work rules may have on an employee's exercise of his or her Section 7 rights.

Although it is likely that a Republican-led Board under President Trump will overturn decisions such as this one, this will take time and Regional Directors will continue to enforce decisions like it for the foreseeable future.

Accordingly, we recommend that employers conduct a close review of their current employment policies to ensure that they cannot be misconstrued as limiting an employee's Section 7 rights. [PE]

Human Resources Question with Candice Weaver

The Month's Best Question

Piece-Rate Compensation

Q: "Has the law changed so much that I have to change the way I compensate piece-rate paid employees?

A: The California legislature continues to create and encourage new ways for employers to be sued for wage and hour violations. The onslaught of wage and hour class actions filed across the state has not abated. Large and small employers must look closely at their compensation practices and audit wage and hour compliance.

Employers faced with a new claim say "But that is the way we have always done things," or "The employees like this system." Unfortunately, none of those "defenses" carry weight in court or at the Labor Commissioner's Office.

Laws have changed, penalties for noncompliance are higher and, fair or not, employers are expected to know when the law changes. As you audit your practices, a few key areas to focus on are as follows:

Piece-rate compensation: Piece-rate compensation systems can take many forms. Truck drivers paid by the mile or the percentage of the load are essentially piece-rate workers. Carpenters and roofers paid by the number of square feet framed or completed are piece-rate workers. In agriculture, paying employees by the number of boxes picked or lumped or number of vines thinned are piece-rate systems.

Labor Code section 226.2 requires piece-rate workers be paid separately for rest and recovery periods at the greater of minimum wage or the "average hourly rate determined by dividing the total compensation for the workweek, exclusive of compensation for rest and recovery periods and any premium compensation for overtime, by the total hours worked during the workweek, exclusive of rest and recovery periods." They must also be separately paid for "nonproductive time," which is time on the clock that is not directly related to earning the piece rate.

Pay stubs: California law has more specific requirements regarding the information that must be on an employee's pay stubs than any other state in the country. Two notations that need to be on the pay stub;

- All applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee;
- If applicable, the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis.

Knowing the requirements of Labor Code Section 226 and double-checking compliance can save an employer from a class-action lawsuit. [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 Oct. 25th, registration at 7:30am, Seminar 8:00-10:00am, at the Lamp Liter Inn, Visalia.

RSVP Visalia Chamber - 734-5876
PE & Chamber Members $40 - Non-members $50
Certificate – Handouts – Full Breakfast

New Location for Seminars!

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RSVP to Pacific Employers at 733-4256.

These mid-morning seminars include refreshments and handouts.

2017 Topic Schedule

♦ **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 19th, 2017, 10 - 11:30am

♦ **Discipline & Termination -** The steps to take before termination. Managing a progressive correction, punishment and termination program.
Thursday, November 16th, 2017, 10 - 11:30am

There is No Seminar in August or December