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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.

California Poised to Reclassify Potentially Millions of Independent Contractors

The state Senate passed AB 5 on September 10. Now it goes back to the Assembly, which has until September 13 to pass the Senate's version of the bill. If the Assembly passes the bill as expected it would go to the desk of Gov. Gavin Newsom, who would have until October 13 to sign it into law.

Several types of workers would be exempt from the ABC test including:

- Certain professionals including physicians, surgeons, dentists, podiatrists, psychologists, veterinarians, lawyers, architects, engineers, private investigators, and accountants;
- Certain Service Providers such as marketing contractors, HR administrators, travel agents, graphic designers, grant writers, fine artists, still photographers, photojournalists, and freelance writers; and
- Certain construction industry contractors. [PE]

Padding Employee Timecards is Never a Good Idea

I was recently promoted and will be taking over a team that previously reported to my boss. A couple years ago, due to a new law regarding exempt employees, the team was switched from exempt to nonexempt. They were given a nice bonus, $5,000, to help "soften the transition." Recently, my boss let me know he's been adding three hours per week to their timecards. Additionally, he allows them to clock out from home after leaving the office. For example, one employee left the office at 4 p.m. but clocked out at 6:15 p.m. I told my boss I would be stopping these practices. Am I micromanaging the team by asking them to clock out when they leave the office?

Oh, boy, I hate micromanaging, but this is not micromanaging. This isn't even close to micromanaging. This is managing, and basic managing, like what you would expect from the shift manager at the local fast-food restaurant.

Your boss made a huge mistake, and your employees will be very unhappy when you cut off the gravy train. But cut it off you must. Your boss put the company at risk by padding his team's paychecks, and continuing this will only make the situation worse.

The Fair Labor Standards Act has strict rules regarding paying non-exempt employees, and California is even stricter. One of the key components is that employees must be paid for every hour they work. By not keeping accurate hours, your boss has opened the company up to possible disastrous results if someone complains or if the U.S. Department of Labor does an audit.

I'm sure he'll argue he's adding to their paychecks, not taking away from them, so there's not a problem. And it's probably true that none of the employees are going to complain about extra money in their paychecks.

But that's not the only problem. Let's talk about fraud. Let's talk about theft. Because that is what is going on. Employment attorney Jon Hyman says he probably wouldn't advise a company to press charges in this situation, but he would advise that the manager be fired.

He's put you in a terrible situation. You've got to tell employees their paychecks are going to be cut, and you need to report what has been going on to human resources. If you don't report it, you are complicit in the fraud. And as much as you want to forget this, at least one employee will complain about how you cut pay, so it's no longer going to be a secret. [PE]

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Pacific Employers
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What's News!

California Extends Paid Family Leave from 6 to 8 Weeks!

Beginning on July 1, 2020, California will extend the maximum duration of Paid Family Leave (PFL) benefits from six weeks to eight weeks. Individuals may receive benefits from California's state disability insurance (SDI) program:

- To care for a seriously ill child, spouse, parent, grandparent, grandchild, sibling, or domestic partner.
- To bond with a minor child within one year of the birth or placement of the child through foster care or adoption.

The PFL program is not a leave right and does not provide job protection, but other state and federal laws such as the federal Family and Medical Leave Act (FMLA), the California Family Rights Act (CFRA) and the Parental Leave law can provide such protection for eligible employees.

The PFL program started in July 2004 and provides wage replacement to workers who take time off from work for an ill child, spouse, parent, grandparent, sibling, or domestic partner, or to bond with a child within one year of birth or adoption. Governor Gavin Newsom signed into law the most recent enactment, Senate Bill 83, on June 27, 2019. Senate Bill 83 was part of a larger state budget package for the new fiscal year that starts July 1, and is a move toward the governor's goal of ultimately expanding paid family leave to six months (for two parents if leave is taken consecutively). To that end, Senate Bill 83 also requires the governor to propose, by November 2019, further benefit increases and job protections for individuals receiving PFL benefits, including an increase in PFL duration "to a full six months by 2021–22."

In the next year, before Senate Bill 83's extension takes effect, employers should consider reviewing and revising leave policies, procedures and practices, and their parental or other paid leave benefits to ensure compliance. [PE]

Independent Contractors Being Retroactive: To Be, Or Not To Be...

The question of whether California's worker-friendly test for independent contractors can be applied retroactively is once again unsettled. The 9th Circuit Court of Appeals surprised observers by withdrawing a recent ruling that the test was to be applied retroactively.
In its 2018 Dynamex ruling, the California Supreme Court established an "ABC test," under which a worker will be considered an employee under California's wage orders - which govern minimum wages, overtime, show-up time / reporting time requirements, meal and rest breaks and other working conditions - unless the hiring entity can show that the worker:

- Is free from control and direction of the work, both under the contract and in fact;
- Performs work that is outside the usual course of its business;
- And is customarily engaged in an independently established trade, occupation or business.

Earlier this year, the 9th Circuit held in the case of Vazquez v. Jan-Pro Franchising Int'l, Inc., that the Dynamex ruling can be applied retroactively.

But on July 22, the 9th Circuit withdrew its Vazquez opinion and said it will ask the California Supreme Court to decide the question of whether Dynamex applies retroactively.

Federal courts often ask state courts to decide matters of state law, as recently happened when the 9th Circuit asked the highest court in Washington state to determine whether obesity qualifies as a disability under the Washington Law Against Discrimination (WLAD). However, it is rare for them to do so after having already decided a question, as the 9th Circuit did with Vazquez.

Further complicating matters, California's legislature is considering a bill that would codify and expand the Dynamex test.[PE]

New Vacation Scheduler Enclosed!

Dave's Report
~David E. Miller~



Clarifying Mandatory Arbitration Agreements

Recently, the National Labor Relations Board addressed several important questions involving employers' arbitration agreements and the National Labor Relations Act. Specifically, the Board determined 3-1 that

- The NLRA does not prohibit employers from telling employees that failing or refusing to sign an arbitration agreement will result in their discipline or discharge.
- The NLRA does not prohibit employers from promulgating mandatory arbitration agreements after employees have opted in to a collective action under the Fair Labor Standards Act or state wage-and-hour laws.
- However, the NLRA does prohibit employers from taking adverse action against employees for engaging in concerted activity by filing a class or collective action, consistent with the Board's long-standing precedent.

This was the first Board decision to address the lawfulness of employer conduct surrounding mandatory arbitration agreements since the Supreme Court's 2018 decision in Epic Systems v. Lewis. In Epic Systems, the Court held that arbitration agreements requiring employees to waive class or collective actions in court did not violate the NLRA. [PE]

Newsom Extends Anti-Harassment Deadline!

On August 30, 2019, Governor Gavin Newsom signed Senate Bill (SB) 778, which amends Section 12950.1 of the California Government Code. SB 778 extends California employers' obligation from January 1, 2020 to January 1, 2021, to comply with sexual harassment trainings as outlined under California Government Code section 12950.1.

Please recall, per Govt. Code section 12950.1, an employer with 5 or more employees must provide at least 2 hours of interactive training regarding sexual harassment to all supervisory employees and at least 1 hour of interactive training regarding sexual harassment to all nonsupervisory employees within 6 months of their assumption of a position. The deadline initially imposed was January 1, 2020. Please find a Jackson Lewis article discussing these obligations here.

SB 778 amends Govt. Code section 12950.1 to instead require that an employer with 5 or more employees provide the sexual harassment training by January 1, 2021, and once every 2 years thereafter. This bill further clarifies that an employer who has provided sexual harassment training in 2019, is compliant with the training requirements and is not required to provide it again until 2 years thereafter. Accordingly, as the training deadline extends to January 1, 2021, employers who trained in 2018 will now have the opportunity to train again in 2020, instead of 2019. This extension addresses employers' confusion with the compliance training deadlines.

SB 778 took effect immediately on the Governor's signing as an urgency statute. [PE]

"The road to success and the road to failure are almost exactly the same"— Colin R. Davis (1927-2013) English Conductor.



HR Report
~Tiffany Harris~

Mandated Retirement Plans for Most Employers?

Employers with five (5) or more will be subject to providing retirement plans.

Over the next three years, employers with five (5) or more employees will have to either enroll in the CalSavers program, or will need to implement their own retirement program.

Beginning in July 2019 California employers (for-profit and nonprofit) can voluntarily start participating in the state sponsored retirement plan, CalSavers. However, there is a three year phase-in that will mandate employers to either join the CalSavers plan, or implement their own independently sponsored retirement plan for their business. The implementation deadlines are as follows:

- June 30, 2020: Businesses with 100 + employees
- June 30, 2021: Businesses with 50 + employees
- June 30, 2022: Businesses with 5 + employees

What is CalSavers?

CalSavers is Roth IRA's only at this point. Eligible employees will be auto-enrolled at 5% of their gross pay if they do not opt-out, or make an election. Their contribution will also be Auto-Escalated each year by 1% up to a maximum of 8%. Federal Modified Adjusted Gross Income (MAGI) limits apply and each employee is responsible for opting out of the plan if they do not qualify for a Roth IRA.

Employees will be offered State Street investment Options:

Target Dates Funds from 2015 - 2065, State Street Global Equity Funds, one State Street Bond Fund, and a Money Market Fund.

Who is an Eligible Employee?

Any employee that is at least age 18, paid by W-2, and has worked for the business for 30 days.

Fees and Penalties for the Employer:

There is no "cost" to register the business for the CalSavers plan. All fees are passed on to the individual employees participating in the plan. The proposed penalties for non-compliance of either establishing an independent Retirement Plan, or not complying with the CalSavers requirements, start at $250 per eligible employee if the employer remains noncompliant after 90 days from being served a notice. The penalties can increase up to $500 per eligible employee if non-compliance reaches 180 days or more after receiving a notice.

What does this mean for me?

In a nut shell, Employers will be required to provide retirement benefits for their employees based on the guidelines above. We strongly encourage you to contact your financial professional for guidance on how to navigate these new laws.

Pacific Employers has already vetted the following firm:
True Legacy Financial and Insurance:
Point of Contact: Bryce Harris
Phone: (559)688-2900 [PE]

Common Questions Regarding Paid Sick Leave

Can employers require doctor's notes from employees who take paid sick leave?

California's Paid Sick Leave law does not address if an employer may require employees to provide a doctor's note in order to take paid sick leave. The DIR's frequently asked questions also do not address this specific question, and only provides the following guidance about the required notice an employee must provide to take PSL.

Can employees take a vacation day and ask for it to be a paid sick leave?

No. An employer is not required to allow an employee to use accrued paid sick days for reasons other than those listed in the statute, which are:

(1) Paid sick time for nonexempt employees shall be calculated in the same manner as the regular rate of pay for the workweek in which the employee uses paid sick time, whether or not the employee actually works overtime in that workweek.

(2) Paid sick time for nonexempt employees shall be calculated by dividing the employee's total wages, not including overtime premium pay, by the employee's total hours worked in the full pay periods of the prior 90 days of employment.

(3) Paid sick time for exempt employees shall be calculated in the same manner as the employer calculates wages for other forms of paid leave time. [PE]

ICE Heats up During Summer Months

U.S. Immigration and Customs Enforcement (ICE) issued thousands of Form I-9 audit notices this summer. As ICE worksite enforcement continues to increase, California employers need to keep in mind state requirements when served with a Form I-9 audit notice.

California's Immigrant Worker Protection Act has been in effect since January 2018 and, even though the Department of Justice challenged the law, California employers have several notice obligations when facing an ICE audit/inspection.

Upon receiving an ICE audit/inspection notice, employers must post a notice to all current employees informing them of the federal inspection of Forms I-9 or other employer records within 72 hours of receiving the notice.

The notice must also be given to the collective bargaining representative, if any. Additionally, employers must provide, upon request, a copy of the federal notice of inspection to the requesting employee.

Once the inspection is over and within 72 hours of receiving the inspection results, employers must provide a copy of the results and a written notice of the employer's and employee's obligations arising from the inspections to each "affected employee," meaning employee identified by the inspection results as potentially lacking work authorization or having deficient documents.

The notice must relate only to the affected employee and, if possible, must be hand delivered at the workplace. If hand delivery is impossible, the notice must be delivered by mail and/or email. Unions also have the right to receive notices.

Employers can be fined between $2,000 and $10,000 for each violation of the notice requirements. Additionally, both state and federal law impose fines and penalties for failing to comply with other worker authorization requirements.

The Labor Commissioner developed a template to meet the posting requirement. Employers can use the Notice to Employees: Government Inspection of Employment Eligibility Records and Notice to Employees: Government Inspection of Employment Eligibility Records – Spanish.

Employers need to make sure they are ready to meet all notice requirements — the 72-hour timeframes are short and standardized processes will help employers meet their compliance obligations. Employers should consult with legal counsel if they have any questions or concerns. [PE]



Human Resources Question with Candice Weaver

The Month's Best Question

Exempt Employees

Q: "Does My Salaried Exempt Employee Need to Track Their Hours?"

A: The short answer to that is no, but only if that employee TRULY qualifies as salaried exempt.

Things to consider

Strict Duties Test

In order to be considered an exempt employee in California, an employee will generally need to meet a strict duties test. For most exemptions, more than fifty percent of an employee's time must be spent performing exempt job duties.

Job Title Irrelevant

Job titles do not determine a California employee's exempt or nonexempt status. An employee with an impressive job title may not qualify as an exempt employee if his/her actual duties do not meet the requirements for one of the exemptions.

Labor Commissioner's Determination

To determine whether the California employee is primarily engaged in exempt work, the California's Labor Commissioner examines the work performed by the employee during the workweek.

Salary Considerations

Exempt employees in California generally must earn a minimum monthly salary of no less than two times the state minimum wage for full time employment. Simply paying an employee a salary does not make them exempt, nor does it change any requirements for compliance with wage and hour laws.

Discretion and Independent Judgment

Most California employees who are classified as exempt customarily and regularly exercise discretion and independent judgment in their jobs. Discretion and independent judgment involve comparing and evaluating possible courses of action and making a decision after considering various possibilities.

Federal Salary Basis Rules

While California law has more rigorous standards than federal law, federal law still warrants some attention. The Department of Labor Standards Enforcement (DLSE) has indicated that, although there are differences between the state and federal exemption standards, the federal regulations may serve as a guide where there is no conflict.

Deductions from Salary of Exempt Employees

The "salary test" required for exempt employees provides that the full weekly salary be paid for any week in which any work is performed, with only very limited exceptions. As a result, deductions from the salary of an exempt employee are limited.

Impermissible Deductions

There are a few examples of impermissible deductions, including:

Unavailability of Work - Do not make deductions when work is unavailable because of the operational requirements of the business, provided exempt employees are ready, willing and able to work. Thus, if July 4 falls on a Tuesday and you shut down the business for the balance of the week, any exempt employee who worked on Monday of that week is entitled to a full week's pay.

For more information regarding this topic, please contact the Pacific Employers office. [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

♦ **Legal Update -** Susan Hatmaker will be your guest speaker and will speak on the new laws passed and what 2020 will look like for employers.

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

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.*

Employee & Supervisor Sexual Harassment Prevention Training

Pacific Employers will host a state mandated Sexual Harassment Prevention Training Seminar & Workshop for employees and supervisors on the following dates:

- November 13th
- December 12th

Training 9:00 to 11:00am, at the Wyndham, Visalia.

RSVP Pacific Employers - 559-733-4256
PE Members (Supervisor) $40
PE Members (Non-Supervisor) $30