Pacific Employers
MANAGEMENT ADVISOR
46 Years of Excellence!
February 2010

What's New!

COBRA Subsidy Extended

President Barack Obama signed legislation into law on December 22, 2009 that extends the original federal COBRA subsidy created by the American Recovery and Reinvestment Act of 2009.

The legislation was part of the Department of Defense Appropriations Act, 2010 (H.R. 3326), a bill that appropriates funds for the Department of Defense. The bill passed the U.S. House of Representatives by a 395-34 vote and the U.S. Senate by an 88-10 vote last week. The legislation extends:

- the total allowable time an individual could receive the COBRA subsidy by six months (from 9 to 15 months); and
- the subsidy to individuals who are involuntarily terminated between January 1, 2010, and February 28, 2010.

Additionally, the legislation allows individuals whose subsidy periods already expired and who failed to pay their full unsubsidized premiums to retroactively pay them.

Employers will need to quickly revise previous documents and prepare new paperwork to meet the requirements of the new subsidy extension legislation. Among other things, employers will have to amend their current COBRA subsidy paperwork to reflect:

- the extra six months of coverage;
- the new February cut-off date to qualify for the subsidy; and
- the fact that individuals' eligibility for the subsidy is conditioned only on the date of their involuntary employment termination (instead of the date of their employment termination and the date their COBRA coverage period begins).

Employers will also need to include the above information in their standard COBRA package from this point on.

Additionally, employers will have to provide a notice to current and future COBRA beneficiaries that details the premium subsidy extension created by the new legislation.

The Premium Assistance Extension Notice must be provided:

■ By February 17, 2010, to individuals who were assistance eligible individuals as of October 31, 2009 (unless they are in a "transition period," discussed below) and to individuals who experienced a termination of employment on or after October 31, 2009 and lost health coverage;

■ Within 60 days of the first day of the "transition period," to individuals who are in a transition period.

An individual's "transition period" is the period which begins immediately after the end of the individual's original 9-month period of subsidized COBRA. An individual is in a transition period only if the subsidy provisions would continue to apply due to the extension from 9 to 15 months and the individual otherwise remains eligible for the subsidy (i.e., he or she is not eligible for coverage under Medicare or any other employer group health plan).

The new Notice can be downloaded at our Website on our **Forms** page or the **What's New Page:**
http://www.pacifcemployers.com

The House also recently passed a major appropriations bill with a provision that would extend the COBRA premium subsidy to individuals who are involuntarily terminated through June 30, 2010. However, the Senate is expected to act on this legislation early this year. [PE]

Labor Law Update Enclosed!

President's Report
~Dave Miller~

Employee Policies Seminar

On Thursday, February 18th, from 10 am till 11:30 am, we will be presenting "Employee Policies" - Every employer needs guidelines and rules. We examine planning considerations, what rules to establish and what to omit. The **Tulare-Kings Builders Exchange** is now taking part in hosting these monthly seminars at their new facility on the corner of Lover's Lane and Tulare Avenue in Visalia, CA. Read more about the seminar series on page 3. [PE]

Earned Income Tax Credit Notice

California employers who are required to provide unemployment insurance must notify all employees that they may be eligible for the federal Earned Income Tax Credit (EITC) within one week before or after, or at the same time, the employer provides an annual wage summary including but not limited to a Form W-2 or Form 1099. [PE]

The EITC Notice can be downloaded at our Website on our **Forms** page or the **What's New Page:**
http://www.pacifcemployers.com

Near-Record Number of Complaints

In an about face from what you would think that employees are more hesitant to file formal complaints against their employers or former employers in bad economic times, because of the fear of retaliation or bad references, it's just not the case.

The federal Equal Employment Opportunity Commission (EEOC) is reporting that it received 93,277 bias claims nationwide in 2009. This represents the second-highest number of annual employee complaints in EEOC history, coming in just shy of the record set in 2008. [PE]

A little inaccuracy sometimes saves a ton of explanation. - Saki/Hector Hugh Munro (1870 - 1916)

Recent Developments

Mandatory Arbitration for Union Members

The Supreme Court Okays Mandatory Arbitration of Discrimination Claims for Union Members.

The U.S. Supreme Court in *14 Penn Plaza L.L.C. v. Pyett*, held that a provision in a collective bargaining agreement that clearly and unmistakably requires union members to arbitrate federal age discrimination claims is enforceable as a matter of law. [PE]

Lawry's To Pay $1 Million

The U.S. Equal Employment Opportunity Commission (EEOC) settled a sex discrimination class action lawsuit for $1,025,000 and far reaching injunctive relief against *Lawry's Restaurants, Inc.*, doing business as Lawry's the Prime Rib, Five Crowns, and Tam O'Shanter Inn (Lawry's), for allegedly failing to hire men into food server positions for decades. Lawry's is a California-based corporation operating restaurants in Las Vegas, Chicago, Dallas, Los Angeles, Beverly Hills and Corona del Mar, Calif.

"... LONGSTANDING COMPANYWIDE POLICY ..."

In its lawsuit, the EEOC charged Lawry's with maintaining a longstanding companywide policy of hiring only women for server positions in violation of Title VII of the Civil Rights Act of 1964, which prohibits sex-based discrimination. The EEOC's involvement was initiated by a charge of discrimination filed in March 2003 by a male applicant in Las Vegas.

EEOC Los Angeles District Director Olophius E. Perry, who managed the administrative investigation preceding the litigation, added, "The EEOC will never condone discrimination in the name of so-called tradition. Every individual deserves a fair chance to obtain a job based on their talent and qualifications, regardless of gender." [PE]

Non-Disabled Employee Can Sue

A non-disabled applicant for employment can proceed to trial under the Americans with Disabilities Act (ADA) based on a company's unlawful pre-employment medical inquiry, according to a recent decision by the Eleventh Circuit Court of Appeals,.

The ADA makes it illegal for employers to discriminate against disabled individuals. To that end, the Act includes a provision that, prior to an actual offer of employment, an employer "shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability." The only inquiry that can be made is whether the applicant is able to perform job-related functions. In a case of first impression, the 11th U.S. Circuit Court of Appeals has held that a non-disabled employee can sue an employer for prohibited medical inquiry under the ADA. *Harrison v. Benchmark Electronics Huntsville, Inc.* [PE]

Arbitration Agreement Prevails

Properly Drafted Pre-Dispute Arbitration Agreement Precludes Labor Commissioner Hearing

The Second District Court of Appeal published its decision in *Sonic-Calabasas A, Inc. v. Moreno,* holding that a properly drafted arbitration agreement can be used by the employer to force an employee who filed a wage claim under section 98.2 of the California Labor Code to proceed with the claim under the terms and conditions of the arbitration agreement in the arbitral forum.

First, the Court of Appeal looked at section 229 of the California Labor Code and held that because the arbitration agreement was drafted under the provisions of the Federal Arbitration Act, the FAA superseded section 229 of the California Labor Code and therefore that statute was not a bar to arbitration. Second, the Court analyzed the arbitration agreement under the *Armenderiz and Gentry* standards. The Court of Appeal found that these prior California Supreme Court decisions did not preclude mandatory arbitration of the wage claim.

"..THEREFORE THAT STATUTE WAS NOT A BAR TO ARBITRATION."

This decision shows that employers can successfully avoid having to litigate wage claims before the California Labor Commissioner with a properly worded mandatory arbitration agreement drafted under the FAA. [PE]

Fund Firm Settles Racial Bias Suit

Vanguard Group Inc, one of the largest mutual fund companies, agreed to pay $300,000 to settle a U.S. Equal Employment Opportunity Commission lawsuit accusing it of racial bias in hiring.

In a Sept. 29 complaint, the EEOC alleged that Vanguard decided not to hire Barbara Alexander as a financial planning manager because she was black even after she was told throughout the hiring process, including at roughly 13 in-person interviews, that she was qualified for the job.

"... OFFERED THE JOB TO TWO LESS QUALIFIED WHITE MEN ..."

Despite Alexander's 14 years of financial management experience and master's degree in finance, Vanguard instead offered the Charlotte, North Carolina job to two less qualified white men, and one accepted, the EEOC said.

According to papers filed Monday with the federal court in Philadelphia, Vanguard will pay the $300,000 to Alexander, and entered a two-year consent decree calling for greater anti-discrimination training for managers and supervisors, and other remedies. It did not admit liability. [PE]

Woman Left Out Of Top Jobs At Outback

Outback Steakhouse will pay $19 million to settle a class-action sex-discrimination lawsuit initiated from complaints by two women who worked at the chain's metro Denver restaurants.

The women alleged they were denied promotions to lucrative managing-partner positions because of their gender.

The settlement is the largest ever for a case handled by the U.S. Equal Employment Opportunity Commission's district office, which covers Colorado and four other states, according to Rita Byrnes Kittle, a senior trial attorney for the agency in Denver.

"The EEOC brokered this far-reaching and comprehensive settlement in the public interest to foster a discrimination-free workplace at Outback," Kittle said. [PE]

Labor Law Update Enclosed!

Human Resources Question with Candice Weaver

The Month's Best Question

The New Alternative Workweek Rules

Q: ***"The Alternative Workweek rules have always seemed so complicated. Have the new amended rules gotten more "user friendly?"***

A: Well the answer to that is - Yes & No.

Last year the California legislature voted to amend California Labor Code section 511 to provide some additional flexibility to alternative workweek schedules. Under California law, an employee may work according to an alternative workweek schedule with shifts of up to 10 hours per day without the necessity of paying daily overtime.

However, the alternative workweek laws have been criticized as inflexible, causing many employers to reject alternative workweek scheduling. In response, the California Legislature passed AB 5, which allows employers to offer a regular 8 hour per day/5 day per week work schedule among a "menu of options" for alternative workweeks.

Under prior law, a regular 8 hour per day/ 5 day per week schedule could not exist among the alternative workweek "menu of options." Allowing employees to choose the regular workweek among other nontraditional options will likely increase the number of employees interested in adopting an alternative workweek schedule (AWS). However, like prior law, employers must accommodate any employee who cannot work an AWS.

The new law provides that employees can switch from one AWS to another from week to week with the employer's consent. The DLSE has previously taken the position that switching schedules from week to week invalidates the AWS. Now, employees can choose to work a normal workweek schedule one week and a nontraditional workweek schedule (such as a 10 hour day. 4 day week schedule) another week. All that is required is that both schedules be among the "menu of options" adopted by the employees under the employer's proposal and that the employer consents to the change in schedule.

The new law also defines the term "work unit," which was previously undefined in the Labor Code. In order to adopt an alternative workweek, two-thirds of the affected employees in a "readily identifiable work unit" must vote to adopt the proposed schedule. A "work unit" is a division, department, job classification, shift, separate physical location, or recognized subdivision, which may consist of one or more individual employees.

While the new provisions increase flexibility in adopting an AWS, California workweek law remains fairly complicated. [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 28th, registration at 7:30am — Seminar 8:00 to 10:00am, at the Lamp Liter, Visalia.

RSVP Visalia Chamber - 734-5876 – $25
Certificate – Forms – Guides – Full Beakfast

No-Cost Employment Seminars

The Tulare-Kings Builders Exchange, along with the Small Business Development Center and Pacific Employers host this Free Seminar Series at the Tulare-Kings Builders Exchange on the corner of Lover's Lane and Tulare Avenue in Visalia, CA. RSVP to Pacific Employers at 733-4256 or the SBDC, at 625-3051 or fax your confirmation to 625-3053.

The mid-morning seminars include refreshments and handouts.

2010 Topic Schedule

♦ **Employee Policies -** Every employer needs guidelines and rules. We examine planning considerations, what rules to establish and what to omit.
Thursday, February 18th, 2010, 10 - 11:30am

♦ **Equal Employment Fundamentals -** Harassment & Discrimination in the Workplace - The seven (7) requirements that must be met by all employers. "The Protected Classes."
Thursday, March 18th, 2010, 10 - 11:30am

♦ **Safety Programs -** Understanding Cal/OSHA's Written Safety Program. Reviewing the IIPP or SB 198 requirements for your business.
Thursday, April 15th, 2010, 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 20th, 2010, 10 - 11:30am

♦ **Wage & Hour and Exempt Status -** Overtime, wage considerations and exemptions.
Thursday, June 17th, 2010, 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 15th, 2010, 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 16th, 2010, 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 21st, 2010, 10 - 11:30am

♦ **Discipline & Termination -** The steps to take before termination. Managing a progressive correction, punishment and termination program.
Thursday, November 18th, 2010, 10 - 11:30am

There is No Seminar in December

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Labor Law Update Enclosed!

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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.

New - 2010 W-4 Form Published

Employers are required to furnish W-4 Forms to all new employees. This form incorporates IRS instructions to employees for filing exemption allowances.

Clients can download the form in PDF format from the Forms page on the Pacific Employers' Website. The form is found in the hiring documents along with the I-9 Form and other helpful forms at:

http://www.pacificemployers.com/forms.htm [PE]

New Standard Mileage Rate for 2010

The IRS Standard Rate is used to calculate the amount used to reimburse employees for using a personal vehicle in the scope of their employment.

Even if employers supply their own vehicles, they can apply this rate to calculate the allowable deduction for the business use of a vehicle for Federal income tax purposes. As of January 1, 2010, the standard mileage rates for the use of a car (also vans, pickups, or panel trucks) was set to 50 cents per mile for business miles driven. Reflecting generally lower transportation costs, the rate is a 5-cent reduction from last year's rate. [PE]

Circuits Split on 2 Member NLRB

Three recent federal appellate court decisions have created a circuit split of authority on whether the two current members of the National Labor Relations Board (NLRB) have the statutory authority to decide cases and issue final orders.

The U.S. Court of Appeals for the District of Columbia Circuit finds that the NLRB does not have such authority

The U.S. Courts of Appeals for the First and Seventh Circuits find that the NLRB does have such authority.

Despite the circuit split, the NLRB will most likely accept the D.C. Circuit's decision and reissue or adopt the decisions issued by the two-Member NLRB when a quorum is reestablished. [PE]

Guys Harassing Guys

Guys who are sexually harassed by other guys in the workplace are starting to speak up. Sexual harassment charges filed by men are on the rise: the percentage of sexual harassment charges men are filing with the Equal Employment Opportunity Commission (EEOC) doubled between 1992 and 2008, reports Newsweek, from 8% to 16%.

"We are receiving more and more charges by males complaining about sexual harassment," says EEOC spokesman James Ryan. "And anecdotally, more of these cases are male-on-male sexual harassment.

Although the EEOC keeps track of the number of men and women who file harassment claims, they don't keep statistics on the gender of the harasser. What the EEOC wants workers to know is that sexual harassment in the workplace of any kind is illegal.

"It is wrong regardless of the gender of the perpetrator or the victim," Ryan says. "It's just as illegal when it is male-on-male as when it involves different sexes." [PE]

UNLIMITED CONSULTATION?

A benefit of Pacific Employers' Membership is unlimited, direct, phone consultation on labor, safety or personnel questions on the Pacific Employers' Helpline at
(559) 733-4256 or Toll Free (800) 331-2592