Pacific Employers
Management Advisor
47 Years of Excellence!
February 2011

What's New!

New Law Strengthens Cal/OSHA's Enforcement Authority

California former Governor Schwarzenegger signed legislation that increases the ability of the California Division of Occupational Safety and Health ("Cal/OSHA") to issue citations to employers for "serious violations" of occupational safety and health standards. The bill, AB 2774, makes significant statutory changes that have important ramifications for employers subject to enforcement by Cal/OSHA.

Two years ago 47 Cal/OSHA staff members, including district managers, took the extraordinary step of sending an open letter to the Appeals Board to express their concerns that Appeals Board policies and practices were undermining Cal/OSHA's ability to ensure safety and health in California workplaces, including its ability to hold employers accountable after serious workplace injuries have occurred.

Based in part on these allegations, Federal OSHA initiated a special study of California's program and appeals process. Shortly before AB 2774 was signed into law, Federal OSHA issued an evaluation that is highly critical of certain elements of California's program, including the Appeals Board's handling of citations issued by Cal/OSHA for "serious violations."

AB 2774 expands the definition of "serious violation" set forth in California Labor Code section 6432.

The bill also establishes a rebuttable presumption that a serious violation has occurred in certain circumstances, and enables Cal/OSHA to rely on the testimony of its inspectors to prove the existence of serious violations. AB 2774 took effect on January 1, 2011.

California law specified that a serious violation exists "if there is a substantial probability that death or serious physical harm could result from a violation." Labor Code § 6432(a). AB 2774 relaxes this standard in two ways: it eases the "substantial probability" requirement and it expands the definition of "serious physical harm."

Under the old law, "substantial probability" refers to "the probability that death or serious physical harm will result assuming an accident or exposure occurs as a result of the violation." Labor Code section 6432(c). The Appeals Board interpreted this requirement to mean that Cal/OSHA must prove that death or serious injury is "more likely than not" to resulted from the violative condition.

AB 2774 changed the "substantial probability" requirement to "a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation." The "realistic possibility" standard is not defined in the bill or elsewhere in the Labor Code, but it is clear from the legislative history that the new standard is intended to be a significantly lower likelihood of occurrence of death or serious physical harm than required under the old law.

AB 2774 established a rebuttable presumption that a serious violation exists when Cal/OSHA demonstrates "that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation."

Successful employer appeals of citations for serious violations will be more difficult, in part because the standard to overcome the rebuttable presumption is high and because Cal/OSHA will be able to provide the existence of serious violations based only on inspector testimony. Employers may need to provide expert witness testimony to counter testimony by Cal/OSHA inspectors. [PE]

Labor Law Update Enclosed!

President's Report
~Dave Miller~

Labor Law Update

The new health care reform law, affectionately known as "Obama Care" and a few new state and federal employment laws that go into effect in 2011 may impact your business and your policies. We have included in this issue of the ***Management Advisor*** a Labor Law Update flyer so that you may review these laws to determine whether you need to take action to modify current employment policies and to ensure that your business is in full compliance with new or updated employment regulations. [PE]

"The only thing necessary for evil to triumph is for good men to do nothing."
Edmund Burke - British Statesman

NLRB Poster On Its Way

The National Labor Relations Board ("NLRB") has issued a Notice of Proposed Rulemaking that would require all Employers subject to the National Labor Relations Act to post "Notices" physically and electronically.

In a proposed rule issued on December 22, 2010, the NLRB requires all Employers to post 11 by 17 inch Notices and e-mail employees (where the Employer customarily communicates with employees by such means) a Notice identifying the statutory rights of employees to organize unions. The NLRB intends to punish all Employers who fail to make the required postings through their unfair labor practice process.

The Notices explain the statutory protections under the National Labor Relations Act for employees who desire to form unions. The Notices will not only inform employees of their rights, wrote the NLRB, but will also dissuade Employers from violating those rights.

Employers subject to the National Labor Relations Act are the vast majority of private sector employers other than common carrier employees and certain agricultural employees. Virtually all other employees, and Employers, are within the jurisdiction of the NLRB regardless of whether or not the employees have previously determined to unionize. The proposed form is available on our What's New web page at:

www.pacificemployers.com/whatsnew.htm [PE]

Recent Developments

Payroll Company Not an "Employer"

If an employer "outsources" payroll services to another company, can that payroll service company be held liable for wage-hour violations as an "employer?" No.

The California Supreme Court in *Martinez v. Combs* determined who is liable under California wage and hour law - i.e., who is an "employer?" The court of appeal in *Futrell v. Payday California, Inc.,* applied *Martinez*'s definition of "employer" in deciding that a payroll service provider was not an "employer."

Futrell provided private police / crowd control services for Reactor, a production company that makes commercials. The production company "payrolled" its employees through Payday, a payroll service company. Futrell brought a class action against Payday, alleging wage-hour violations. Payday prevailed on a motion for summary judgment because the trial court held Payday was just a vendor of Futrell's actual employer, the production company.

The court of appeal held that *Martinez* restricts who may be held liable for wage-hour violations. The court rejected Futrell's argument that Payday exercised control over his wages. It stated:

"There is no evidence in the record showing Payday exercised any control over Futrell's hours or working conditions. Reactor hired Futrell, and arranged and supervised the location shoots. . . . This means the only possible linchpin for finding that Payday was Futrell's employer is whether Payday "exercised control over his wages."

"If Payday had merely collected tax information from workers, kept track of time cards, calculated pay and tax withholding, and submitted reports to Reactor detailing such information, leaving it for Reactor to issue paychecks to the workers on its productions, we would have an easy case; Reactor would be the only employer. In our view, the issue in this case then comes down to whether Payday exercised "control over workers' wages" by going beyond handling the ministerial tasks of calculating pay and tax withholding, and by also issuing paychecks, drawn on its own bank account. We think not.

"... good news to PEOs and other HR outsourcing companies ..."

" . . . Writing on a clean slate, we conclude that "control over wages" means that a person or entity has the power or authority to negotiate and set an employee's rate of pay, and not that a person or entity is physically involved in the preparation of an employee's paycheck. This is the only definition that makes sense. The task of preparing payroll, whether done by an internal division or department of an employer, or by an outside vendor of an employer, does not make Payday an employer for purposes of liability for wages under the Labor Code wage statutes."

The court then reached a similar conclusion under the federal Fair Labor Standards Act. Although the FLSA applies a slightly different test than California law, the predominant factor remains the control an alleged employer exercises over an employee. Incorporating the reasons explained above into the FLSA test, we find Payday was not Futrell's employer for purposes of the FLSA. The economic reality existing between Futrell and Payday is that the latter prepared paychecks for the former for the work he performed on behalf of his actual employer, Reactor.

The case is good news to PEOs and other HR outsourcing companies, who may have been sued as "joint employers" for wage and hour violations. This court also held that nothing in the opinion affects the analysis of who is the "employer" under any other body of law except wage-hour. [PE]

Expand Paid Family Leave, Says Study

California's Paid Family Leave program – the first of only two state programs in the country that offer paid leave to workers when they take time off to care for a new child or sick family member – gets high marks from employers and employees alike, according to a new study by researchers from UCLA/CUNY and the Center for Economic and Policy Research released today.

" . . . authors call for an expansion of Paid Family Leave . . . "

The authors call for an expansion of Paid Family Leave to build on its early successes, and for efforts to promote increased awareness of it across California.

"Employers and employees we surveyed overwhelmingly give the program high marks, and for those who use it, the result has been better economic, social, and health outcomes," says Ms. Milkman.

Co-author Eileen Appelbaum, says almost all employers found the program "had positive or neutral effects on areas such as productivity, turnover and morale. If anything, the single biggest problem with Paid Family Leave in California is that not enough people know about it."

She contends that California will not realize the full potential of Paid Family Leave "until all residents know it's there to be used."

The report is based on results from surveys conducted in 2009-2010 of 253 employers and 500 individuals across the state about their experiences with the California PFL program. [PE]

Wage tax holiday for workers in 2011

H.R. 4853, the Tax Relief Unemployment Insurance Reauthorization and Job Creation Act of 2010 is now in effect. It contains a special gift for all workers in the new year of a temporary reduction of two percentage points in the payroll tax rate for employees and the self-employed (independent contractors) in 2011. As a result, the Social Security payroll tax is 4.2% for employees and 10.4% for the self-employed in 2011.

The law makes no change to the Social Security payroll tax rate for employers (6.2%) or to the amount of wages and net self-employment income subject to the payroll tax ($106,800 in 2011). To protect the Social Security Trust Fund from a loss of revenues resulting from a temporary reduction in the payroll tax rate for employees and the self-employed, the law appropriates to the Social Security Trust Fund amounts equal to the reduction in revenues to the Treasury. The temporary reduction of payroll taxes for workers will expire on December 31, 2011

The tax savings from the wage tax holiday are not insubstantial to the estimated 73 million workers affected. For example, the tax cuts at various income levels are set forth below:

Annual Income = Increase in Take Home Pay Per Year

* $20,000 = $400
* $50,000 = $1,000
* $100,000 = $2,000

The maximum benefit will be $2,136 for a worker earning more than $106,800, the maximum subject to FICA tax. [PE]

Want Breaking News by E-Mail?
Just send a note to
peinfo@pacificemployers.com
Tell us you want the News by E-Mail!

Labor Law Update Enclosed!

Human Resources Question with Candice Weaver

The Month's Best Question

COBRA Subsidy Ends

Q: ***"What has happened to the COBRA subsidy?"***

A: June 1, 2010 marked the end of the federal COBRA subsidy for many who began receiving it when the subsidy was first made available with the passage of the American Recovery and Reinvestment Act (ARRA).

In February 2009, Congress passed the ARRA in their attempt to deal with the nation's economic crisis. A part of ARRA was health insurance funding for workers who had involuntarily lost their jobs.

Under ARRA, laid-off employees who were eligible for COBRA received help paying for health insurance coverage. The federal subsidy paid 65% of the cost of a worker's monthly COBRA premium for up to nine months for people laid off between September 2008 and December 2009.

Congress extended the COBRA subsidy several times since the initial passage of ARRA.

The end of the federal COBRA subsidy could affect millions of Americans. An estimated 7 million people were expected to take advantage of the subsidy in 2009, according to The Congressional Budget Office and Joint Committee on Taxation. Between September 2008 and March 2009 alone (the period during which many of those about to lose their subsidy first lost their jobs), over 3 million Americans were added to the numbers of the unemployed. Many of these, along with their dependent spouses and children, enrolled in COBRA and benefitted from the subsidy.

The subsidy was designed to cover 65% of the cost of individual or family COBRA health insurance premiums for up to 15 months. Most of those rolling off the subsidy, beginning June 1, will have the option to continue their COBRA coverage for three months, if they can afford to pay the full-price of their monthly premiums. Those who can't afford COBRA without the subsidy will be forced to seek other, more affordable health insurance alternatives or risk going without insurance entirely. [PE]

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.

No-Cost Employment Seminars

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.

2011 Topic Schedule

♦ **Employee Policies -** Every employer needs guidelines and rules. We examine planning considerations, what rules to establish and what to omit.
Thursday, February 17th, 2011, 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 17th, 2011, 10 - 11:30am

♦ **Safety Programs -** Understanding Cal/OSHA's Written Safety Program. Reviewing the IIPP or SB 198 requirements for your business.
Thursday, April 21st, 2011, 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 19th, 2011, 10 - 11:30am

♦ **Wage & Hour and Exempt Status -** Overtime, wage considerations and exemptions.
Thursday, June 16th, 2011, 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, 2011, 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 15th, 2011, 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, 2011, 10 - 11:30am

♦ **Discipline & Termination -** The steps to take before termination. Managing a progressive correction, punishment and termination program.
Thursday, November 17th, 2011, 10 - 11:30am

There is No Seminar in December

Pacific Employers
306 North Willis Street
Visalia , CA 93291
559 733-4256
(800) 331-2592
www.pacificemployers.com
email - peinfo@pacificemployers.com

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Labor Law Update Enclosed!

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2008 Chamber Visalia of Commerce Small Business of the Year

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.

Stress Over Flying Is Not "Disability"

Although the 2008 Americans with Disabilities Act Amendments broadened the coverage of the ADA by expanding the definition of "disability," some ADA plaintiffs' efforts to test the limits of the definition have been unsuccessful.

For instance, a federal court of appeals recently rejected an ADA claim by a sales representative who was allegedly fired because she advised her boss that flying to and attending a company-sponsored sales conference would be too stressful for her and against her physician's advice. *Faiola v. APCO Graphics Inc.*

The sales representative's doctor had instructed her to avoid undue stress. The First Circuit elected not to decide whether flying is a "major life activity," choosing instead to affirm the summary judgment against the plaintiff on the grounds she had failed to show she was disabled. The plaintiff's claims under Massachusetts law were likewise found legally deficient. [PE]

New IRS Mileage Rate

The Internal Revenue Service issued the 2011 optional standard mileage rates used to calculate the deductible costs of operating an automobile for business, charitable, medical or moving purposes.

Beginning on Jan. 1, 2011, the standard mileage rates for the use of a car (also vans, pickups or panel trucks) will be:

* 51 cents per mile for business miles driven
* 19 cents per mile driven for medical or moving purposes
* 14 cents per mile driven in service of charitable organizations

The standard mileage rate for business for 2010 had been 50 cents per mile. [PE]

Discrimination Settlements Surge

The monetary value of settlements of the top 10 private plaintiff employment discrimination class-action lawsuits paid or entered into in 2010 totaled $346.4 million compared with $84.4 million for the top 10 during 2009, according to a new 664 page report on employment law cases.

The largest was the $175 million settlement in Velez et al. vs. Novartis Pharmaceuticals Corp., which involved allegations that Switzerland-based Novartis discriminated against 5,600 current and former female sales representatives in pay and promotions.

Wage and hour class actions were the most frequently filed type of workplace class action, according to the report. "This trend also was manifest in more wage and hour class action and collective action decisions by federal and state court judges than any other area of workplace litigation," according to the report.

Employees who visit plaintiff lawyers are "more likely than not" to be asked what they are paid and probed for potential wage and hour claims.

The top 10 private wage and hour settlements during 2010 totaled $336.5 million, a 7.4 percent decline from 2009. [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 Wednesday, April 27th, 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 Breakfast