Pacific Employers
MANAGEMENT ADVISOR
47 Years of Excellence!
January 2011

WHAT'S NEW!

IMPORTANCE OF INTERACTIVE PROCESS

The Sixth Circuit announced its decision in *Jakubowski v. The Christ Hospital, Inc.* which demonstrates the attention that employers need to pay to the ***interactive process*** when an employee approaches it for a reasonable accommodation for a disability.

Jakubowski was a family medicine resident at Christ Hospital, which noted a number of deficiencies in his performance due to cognitive issues that were later diagnosed as Asperger's Disorder. Specifically, Jakubowski was having difficulty communicating his thoughts to people and processing what people communicated to him. Upon receiving the Asperger's diagnosis, Jakubowski's attorney contacted the hospital proposing that it accommodate Jakubowski's disability with "knowledge and understanding." In other words, Jakubowski believed that he could successfully continue his residency if the hospital employees were made aware of his condition and its symptoms and triggers. He acknowledged that he would still need to improve his patient communication skills, but insisted he could do that on his own.

The hospital met with Jakubowski about the proposed accommodation, but advised him that it did not have sufficient resources to comply. The hospital, however, offered to assist Jakubowski in finding a residency in pathology, a field that requires little or no patient interaction. When the parties could not agree on an accommodation, Jakubowski was terminated and later filed a lawsuit. During the course of discovery, Jakubowski presented expert testimony identifying many ways in which the hospital could have accommodated his Asperger's that apparently had not been considered by either Jakubowski or the hospital.

In response, the hospital presented expert witnesses who offered opinions suggesting that Jakubowski's inability to communicate with other hospital employees and patients endangered the patients' safety. The U.S. District Court for the Southern District of Ohio granted the hospital's motion for summary judgment, finding that Jakubowski was not "an otherwise qualified individual" entitled to the protections of the ADA and Ohio disability discrimination laws.

Under the ADA, the term "qualified individual" means an individual "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." As a result, once it concluded that the ability to clearly communicate with hospital staff and patients was an essential function of Jakubowski's job, the Sixth Circuit's analysis focused on the interactive process. ***First, the court noted that Jakubowski had the initial burden to propose a reasonable accommodation,*** but concluded that his proposal did not remove a key obstacle preventing his successful performance of his work – the ability to communicate with patients themselves. The court then found that the hospital's actions in giving consideration to Jakubowski's proposed accommodation and in offering a reasonable alternative demonstrated that it engaged in the interactive process. Therefore, the court upheld summary judgment in favor of the hospital.

This holding does not excuse employers from participating in the interactive process by engaging in a reasonable discussion of accommodations proposed by a disabled employee. It does, however, indicate that unless an impaired individual can describe and request an accommodation that allows him or her to undertake the essential functions of the job, that individual cannot support a lawsuit under the ADA. [PE]

Cal/OSHA Form 300 Enclosed!

President's Report
~Dave Miller~

Labor Law Seminar

On Thursday, January 20th, from 10 am till 11:30 am, we will be presenting the first of our 2011 monthly seminars. The topic will be the annual Labor Law Update. Read more about the topic and location on page 3. [PE]

Form 300 Rules

California employers in high hazard industries with 10 or more employees are required to comply with Cal/OSHA's enclosed Form 300 recordkeeping standard. With this issue we supply you with the Form 300; on its reverse side we include the Summary, which is the part of the form that you actually are required to post.

Governments never learn. Only people learn. - Milton Friedman

Employers are required to complete both OSHA Form 300 Log of Work-Related Injuries and Illnesses and OSHA Form 300-A Summary of Work-Related Injuries and Illnesses, however, only the latter, the Form 300-A, is required to be posted in the workplace.

The reason you post only the Summary is that it does not have the privacy concerns of the Form 300 and the former Log 200.

You must post the Summary only, not the Log, by February 1st of the year following the year covered by the form and keep it posted until April 30th of that year. [PE]

Earned Income Tax Credit Notification

The Annual Federal Earned Income Tax Credit Notification (EITC) season is upon us. Employers are required to notify their employees about the availability of the EITC.

Written notification must be provided to employees in person or by mail. Notification must be provided within one week before or after, or at the same time, that you provide an annual wage summary, including, a Form W-2 or a Form 1099.

The EITC Notice can be downloaded at our Website on our **Forms** page or the **What's New Page:**

http://www.pacifcemployers.com

Recent Developments

Employers Need Only "Provide" Meal Periods

For more than two years, we have been waiting for the California Supreme Court to answer the meal-period question that has clogged our court system with innumerable lawsuits. Must management simply "provide" the opportunity for meal periods or must they affirmatively "ensure" that those meal periods are taken? Well, our local appellate district is tired of waiting. Within the past week, our Court published its own opinion in *Hernandez v. Chipotle Mexican Grill, Inc., 2010 Cal. App. LEXIS 1853*

In the case, plaintiff Rogelio Hernandez ("Hernandez") was an hourly worker for the restaurant chain, Chipotle Mexican Grill ("Chipotle"). After his termination, Hernandez filed a lawsuit against the company alleging meal and rest period violations.

Filed as a class action, Hernandez attempted to pursue his claims on behalf of more than 3,000 current employees and hundreds of former employees. When seeking certification of the case as a class action, Hernandez relied on Chipotle's time records revealing a lack of meal periods by employees, which according to his expert, impacted 92 percent of the employees. Hernandez also provided declarations from 23 employees who stated that management denied or interrupted their breaks. In opposition, Chipotle submitted evidence that it had always paid its employees for break periods (and provided free food), and thus the relaxed or inaccurate time keeping it maintained concerning meal periods was insignificant.

> "The trial court sided with Chipotle, and denied . . . class certification.."

Chipotle then produced the declarations of 57 employees who stated that they took all of their meal and rest periods, even though they sometimes forgot to clock in and out for them. In addition, sixteen of Chipotle's managers described how they would be informed of inaccurate meal period clock-ins and clock-outs*, and their policy was to not correct the records because the employees' pay would not be affected.* The trial court sided with Chipotle, and denied Hernandez' motion for class certification.

The Court of Appeal did the same, and affirmed the trial court's ruling. The Court first analyzed the current status of California's meal-period law, acknowledging the "provide" versus "ensure" debate presently before the Supreme Court in *Brinker Restaurant v. Superior Court* and *Brinkley v. Public Storage*. In a bold move, the Court agreed with the trial court's conclusion that the Supreme Court was likely to favor the "provide" standard over the "ensure" standard. The Court opined that requiring employers to "ensure" meal periods would unduly burden employers, particularly large ones that do not remain in contact with their employees during the day.

The Court denied class certification and reasoned that the evidence in the case demonstrated a lack of universal practice with regard to break periods. Some employees took them, some did not. Some took them but forgot to clock in and out, while some were not permitted by their managers to take them. In addition, some of the employees only took partial meal periods, and it was unclear why, given the employees' and managers' declarations. And Chipotle's time records did not provide any assistance. As a result, there were too many individualized variables affecting the employees' meal period practices, precluding any class-wide treatment of the workers' claims. [PE]

Have a seat -- it's legal, says court

California law is clear when it says employers must provide seating to their workers where and when practical, a state appellate court has ruled.

> " . . . ALL WORKING EMPLOYEES SHALL BE PROVIDED WITH SUITABLE SEATS . . . "

The 2nd District Court of Appeal ruled in a case in which Eugina Bright sued her employer, 99 Cents Only Stores (NYSE: NDN) of Commerce in Southern California. Ms. Bright was a cashier and was required to stand while doing her job.

Her lawsuit contended that the retailer, which has stores throughout the Central Valley, violated an Industrial Welfare Commission wage order that says "all working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats" and that when "employees are not engaged in the active duties of their employment and the nature of the work requires standing, an adequate number of suitable seats shall be placed in reasonable proximity to the work area and employees shall be permitted to use such seats when it does not interfere with the performance of their duties." [PE]

Verizon settles California lawsuit for $6 Million

Verizon Communications Inc. has agreed to pay up to $6,011,190 to current and former California employees to settle a class action lawsuit filed by the state Department of Fair Employment and Housing.

The complaint challenged the company's family medical leave practices. The settlement, which is subject to court approval, covers Verizon's voice, data and video operations in California, which employ more than 7,000 people.

The lawsuit alleges Verizon denied or failed to timely approve requests for leave for serious health conditions, to care for a family member with a serious health condition, or to bond with a new child. The Department further alleged that the company fired some for violating Verizon's attendance policy when they missed work for a CFRA-qualifying reason.

Settlement of the lawsuit -- the largest in DFEH history -- could result in payment of more than $6 million dollars, an amount equivalent to an entire year of Enforcement Division settlements.

As part of the settlement, Verizon agreed to review and revise its leave policies and procedures and to continue an existing internal review process that employees can invoke to appeal denials. Verizon also agreed to train all California officers, managers, supervisors and human resources personnel on the procedures and to submit regular updates to the DFEH regarding the company's compliance. [PE]

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

Cal/OSHA Form 300 Enclosed!

Human Resources Question with Candice Weaver

The Month's Best Question

Service Dogs

Q: ***We would like to know the current rules on service dogs in restaurants. If the dog isn't a service dog, can we ask the owner and it to leave the premises? We've had experience with this before; in fact one lady wanted $5000.00 for us refusing her service when she had her service dog with her."***

A: Businesses that serve the public must allow people with disabilities to enter with their service animal.:

Businesses may ask if an animal is a service animal or ask what tasks the animal has been trained to perform, but cannot require special ID cards for the animal or ask about the person's disability.

- People with disabilities who use service animals cannot be charged extra fees, isolated from other patrons, or treated less favorably than other patrons. However, if a business such as a hotel normally charges guests for damage that they cause, a customer with a disability may be charged for damage caused by his or her service animal.
- A person with a disability cannot be asked to remove his service animal from the premises unless: (1) the animal is out of control and the animal's owner does not take effective action to control it (for example, a dog that barks repeatedly during a movie) or (2) the animal poses a direct threat to the health or safety of others.
- In these cases, the business should give the person with the disability the option to obtain goods and services without having the animal on the premises.
- Businesses that sell or prepare food must allow service animals in public areas even if state or local health codes prohibit animals on the premises.
- A business is not required to provide care or food for a service animal or provide a special location for it to relieve itself.
- Allergies and fear of animals are generally not valid reasons for denying access or refusing service to people with service animals.
- Violators of the ADA can be required to pay money damages and penalties.

Pacific Employers' staff can help provide guidance so that your employees have information that guide them in what they can ask and how to keep from creating a ADA complaint or lawsuit. [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

♦ **Labor Law Update -** The courts and legislature are constantly "Changing the Rules" - Learn about the recent changes to both the California and U.S. laws that affect employers of all types and sizes.
Thursday, January 20th, 2011, 10 - 11:30am

♦ **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

Cal/OSHA Form 300 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.

NLRB Approves Prerecognition Employer-Union Bargaining

National Labor Relations Board (NLRB or the Board) in *Dana Corp., 356 N.L.R.B. No. 49 (Dec. 6, 2010)*, upheld the ability of employers and unions to negotiate substantive terms and conditions of employment before a union is recognized as a group of employees' bargaining representative. In doing so, the Board distinguished long-standing precedent prohibiting such prerecognition bargaining.

This decision facilitates nontraditional union organizing (i.e., organizing through neutrality and card check agreements) by giving unions the ability to offer substantive concessions in exchange for an employer's agreement not to oppose the union's organizing efforts. For employers that are under pressure to enter into a neutrality and card check agreement, this decision provides an opportunity to define the parameters of the collective bargaining agreement that will be negotiated if and when the union succeeds in organizing the employees at issue.

Dana represents the latest (but certainly not the last) Obama Board decision making the atmosphere for union organizing more favorable. Employers, particularly those in industries where neutrality agreements are common, should expect renewed union interest in and pressure for such agreements, accompanied by the union's promise of a Dana-type agreement to provide some substantive commitments to the employer in the event the union's organizing drive is successful. However, since each such agreement will be evaluated on its facts, employers should proceed carefully when negotiating a Dana-type agreement. [PE]

Wage and Hour Division gives American Bar Association direct access

The Federal Wage and Hour Division (WHD) **announces key wage & hour news for United States Department of Labor with the following.**

The Wage and Hour Division and the American Bar Association began an unprecedented collaboration providing for an Attorney Referral System.

When Fair Labor Standards Act or Family and Medical Leave Act complainants are informed that the WHD is declining to pursue their complaints, they may also be given a toll-free number to contact the newly created ABA-Approved Attorney Referral System.

In addition, WHD will also provide prompt relevant information and documents on the case to complainants and representing attorneys. Please visit the WHD Attorney Referral System Webpage for more information on this collaboration.

This Update Notes: *This email is intended for background information only and not intended for press purposes.* [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 Jan 26th, 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