Pacific Employers
MANAGEMENT ADVISOR
Over 50 Years of Excellence!
July 2015

WHAT'S NEWS!

Judges Can Review EEOC

In a unanimous ruling, the U.S. Supreme Court ruled that judges have the authority to review whether the Equal Employment Opportunity Commission (EEOC) fulfilled its statutory duty to attempt to resolve bias complaints before it files lawsuits against employers. The case is Mach Mining v. EEOC.

Under Title VII, the EEOC must to attempt to resolve bias claims with the employer and end any alleged unlawful practices before filing a lawsuit. To meet this duty, according to the Court, the EEOC "must tell the employer about the claim – essentially what practice has harmed which person or class – and must provide the employer with an opportunity to discuss the matter to achieve voluntary compliance."

The EEOC must engage in some form of discussion with the employer – either written or oral – to give the employer the opportunity to remedy any discriminatory practices.

This case was closely watched by many who believe that the EEOC has simply been going through the motions in its conciliation efforts and has been pushing cases forward to litigation without first trying in good faith to resolve cases.

The EEOC argued that its conciliation efforts are not subject to judicial review. The U.S. Supreme Court disagreed.

The Supreme Court said it has "long applied a strong presumption favoring judicial review of administrative action" and that same presumption should apply here. The determination as to whether the EEOC is complying with the law can't rest in the EEOC's own hands; instead judicial review is appropriate.

The Court, however, said that the scope of any judicial review should be narrow, looking only at whether the EEOC gave the employer notice and an opportunity to achieve voluntary compliance. If an employer can offer credible evidence that the EEOC did not provide the required information about a complaint or attempt to engage in a discussion about resolving the claim, then a federal court can review the dispute.

If a court finds that the EEOC's efforts were not adequate, the court can order the EEOC to undertake the mandated conciliation efforts. [PE]

Fair Chance Employment Act is The Law

State contractors may not ask about conviction history in initial hiring process of construction workers.

The Fair Chance Employment Act is now the law (AB 1650) and it requires that any person submitting a bid to the state on a contract involving onsite construction-related services shall certify that the person will not ask an applicant for onsite construction-related employment to disclose orally or in writing information concerning the conviction history of the applicant on or at the time of an initial employment application.

The law shall not apply to a position for which the person or the state is otherwise required by state or federal law to conduct a conviction history background check, or to any contract position with a criminal justice agency.

Exception is also made for a person to the extent that he or she obtains workers from a hiring hall pursuant to a bona fide collective bargaining agreement. [PE]

New CFRA Poster Enclosed!

President's Report
~Dave Miller~

Leaves, Leaves & More Leaves

California's Fair Employment and Housing Act (FEHA) provides for protected leave very similar to leave granted under the federal Family and Medical Leave Act (FMLA), with one major difference. The California law provides that when an employee is suffering from a disability due to pregnancy, childbirth, or a related medical condition, she is entitled to take up to four months of leave and be reinstated to the same job or, in certain instances, a comparable job.

The FEHA's pregnancy disability leave (PDL) applies to California employers with five or more employees, which is substantially lower than the 50-employee threshold under the FMLA and the California Family Rights Act (CFRA). Furthermore, PDL does not have any minimum eligibility requirements for length of employment or hours worked like the FMLA and CFRA do (i.e., one year of employment and at least 1,250 hours worked).

In application, if a pregnant employee in California suffering from a pregnancy-related condition satisfies the eligibility criteria under the FMLA and the CFRA, her time away from work due to her pregnancy-related disability would count against her California PDL (four months) and her FMLA leave (12 weeks), but it would not count against her CFRA allotment. So if she suffered from the pregnancy-related disability for four months and then gave birth, she would also be entitled to 12 weeks off to bond with the baby under the CFRA. That repsults in a protected seven-month absence from work.

Moreover, in the last few years, case law has made it clear that if a pregnant employee has exhausted all of her protected leave time and is still suffering from a disability, she may be entitled to additional leave as a reasonable accommodation under the FEHA. [PE]

Once in a while you will stumble upon the truth, but most of us manage to pick ourselves up and hurry along as if nothing had happened. - Winston Churchill

Recent Developments

New Changes To The CFRA

The new ammendemts to the California Family Rights Act ("CFRA") has changed the law to include expansive changes to the regulations that clarify and increase an employer's duties and rights under the CFRA. Many of the changes are aimed at more closely aligning the CFRA with the federal Family Medical Leave Act ("FMLA").

"Includes --- Penalties for Employee Noncompliance"

Key provisions of the new CFRA regulations include:

Definitions

- Adds guidance on joint employer situations.
- Expands the definition of "eligible employee" to clarify the 12-month length of service requirement.
- Expands the definition of "spouse" to include coverage for same-sex spouses.
- "Inpatient care" is expanded to include not only overnight stay at a hospital, but anticipated overnight stay (even if the overnight stay does not occur).

Notice Posting Requirement

- Every employer must post a notice explaining the CFRA provisions and procedures for filing complaints "in conspicuous places where employees are employed." Employers must post the notice "where it can be readily seen by employees and applicants for employment."

Responding to CFRA Request

- Updates the process of responding to CFRA leave requests—reduced to only five business days rather than 10 calendar days.

Reinstatement and Key Employee Provisions

- Expands reinstatement guarantee, permissible defenses to a refusal to reinstate, and "key employee" rules. The CFRA regulations have essentially adopted the FMLA regulations' definition of a "key employee." Subject to certain notice requirements, an employer can deny a key employee who takes CFRA leave reinstatement to the same or comparable position.

Health Benefits

- States that an employee's right to maintenance of health benefits under the CFRA is a separate and distinct right from an employee's right to maintenance of health benefits under the Pregnancy Disability Leave ("PDL") regulations.

Disability Benefits or Partial Wage Replacement

- Employees receiving disability benefits or partial wage replacement benefits while on CFRA leave are not considered to be on "unpaid leave." Therefore, employers cannot require those employees to use any accrued paid leave during the CFRA leave.

Interference and Retaliation

- Expands protections against interference with protected CFRA rights and retaliation.

Fraud Provision

- Adds a new permissible defense for CFRA leave that is fraudulently obtained or used.

Penalties for Employee Noncompliance

- Adds provisions regarding the consequences of an employee's failure to respond to employer inquiries regarding the leave request and failure to return a required medical certification.

Posters and Notices

- Updates the required workplace poster, adds a new medical certification form, and removes language from CFRA that permits the use of the Department of Labor's ("DOL") sample medical certification form. Employers should, therefore, stop using the DOL certification form and instead use the sample CFRA certification form.

Next Steps

The new CFRA changes have greatly expanded which California employers and employees are covered under CFRA and increased an employer's obligation to be transparent and efficient in its communications with employees regarding their medical leave.

Further, with the added CFRA penalty provisions, employees will be held more accountable for their noncompliance with CFRA regulations. Employers should begin the process of updating their CFRA policies, procedures, and forms to ensure compliance with the new regulations.

The Department of Fair Employment and Housing should soon be publishing the new workplace poster. When the Poster is available, Pacific Employers will provide it to you. [PE]

Wage Notice May Cause Confusion

California's new paid sick leave law, "The Healthy Workplaces, Healthy Families Act of 2014," which gives almost all California employees the right to accrue paid sick leave began July 1, 2015.

"... but it doesn't mention the July start date."

Although employees don't begin earning this leave until July, there are posting and administrative compliance responsibilities beginning on January 1, 2015.

The Labor Commissioner has produced the official new Paid Sick Leave Poster as well as the new Wage Theft Prevention Act notice. California employers should post their new posters and begin using these new documents on January 1, 2015.

Both the poster and the notice are intended to provide employees with basic information about the paid sick leave law. The new poster is pretty clear and mentions that the leave doesn't begin to accrue until July 1, 2015, however, the new wage theft notice (which must be given to all non-exempt new hires) may lead to some confusion. The wage theft notice has a section about paid sick leave, but it doesn't mention the July start date. [PE]

Human Resources Question with Candice Weaver

The Month's Best Question

Non-Compete Rules

Q: "If I pay my employees $1,000 to get a Non-Compete Agreement, will it stand up in court?"

A: Don't bet on it. California has the strictest law against restrictive employment covenants in the country.

The noncompete statute (Section 16600 of California's Business & Professions Code) states that "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."

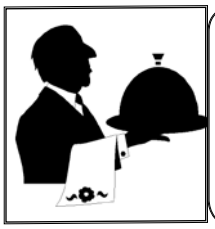
For almost a century, the California courts have broadly interpreted this statute in favor of open competition and employee mobility, even at the expense of what – in other states – could be considered the employer's legitimate business interests.

This makes it notoriously difficult to enforce noncompete agreements against former employees in California. And the Ninth Circuit Court of Appeals has just made it even harder.

In ***Golden v. California Emergency Physicians Medical Group (CEP),*** Dr. Golden had sued CEP, his former employer, for discrimination. In return for "a substantial monetary amount," he agreed to dismiss his lawsuit and waive any rights to employment with CEP or at any facility CEP may own or contract with in the future. But then, Dr. Golden refused to sign the settlement agreement. His attorney, in an effort to collect his contingency fee, moved to enforce the agreement. The district court ultimately ordered the settlement agreement enforced. Dr. Golden appealed to the Ninth Circuit, arguing that waiving his right to future employment violated California's noncompete statute.

The Ninth Circuit, in a 2-1 decision, agreed and held that California's prohibition on restraining employees' employment was not limited to agreements with traditional noncompete provisions. Instead, the broadly worded noncompete statute encompasses "every contract" that restrains a person's profession, trade, or business: "We have no reason to believe that the state has drawn Section 16600 simply to prohibit 'covenants not to compete' and not also other contractual restraints on professional practice." Section 16600's stark prohibition on restraints of trade "extends to any restraint of a substantial character, no matter its form or scope" and "extends to a larger category of contracts than simply those where the parties agree to refrain from carrying on a similar business within a specified geographic area" (in other words, a traditional noncompete agreement).

As a result, the Court concluded that a no-employment provision could violate Section 16600. The Court remanded the case to the district court to determine whether Dr. Golden's no-employment provision constitutes a restraint of a substantial character to his medical practice. If so, the provision would be void. [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

Pacific Employers hosts this Seminar Series at the Builders Exchange at 1223 S. Lover's Lane at Tulare Avenue, Visalia, CA. RSVP to Pacific Employers at 733-4256.

These mid-morning seminars include refreshments and handouts.

2015 Topic Schedule

♦ **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 16th, 2015, 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 17th, 2015, 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 15th, 2015, 10 - 11:30am

♦ **Discipline & Termination -** The steps to take before termination. Managing a progressive correction, punishment and termination program.
Thursday, November 19th, 2015, 10 - 11:30am

There is No Seminar in December

Sexual Harassment & Abusive Conduct Training

Visalia Chamber of Commerce & Pacific Employers, will host a Supervisors' Sexual Harassment & Abusive Conduct Prevention Training Seminar & Workshop with a continental breakfast on July 22nd, registration at 7:30am Seminar 8:00 to 10:00am, at the Lamp Liter, Visalia.

RSVP Visalia Chamber - 734-5876
PE & Chamber Members $35
Non-members $50
Certificate – Forms – Guides – Full Breakfast
Future 2015 Training date: 10-21-15

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New CFRA Poster 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.

AB 2288: The Child Labor Protection Act Provides Additional Damages for Victims

The Child Labor Protection Act of 2014 ("CLPA"), effective January 1, 2015, broadens the potential penalties against violators of these laws.

The CLPA authorizes treble (that means triple) damages to an individual who was "discharged, threatened with discharge, demoted, suspended, retaliated against, subjected to an adverse action, or in any other manner discriminated against in the terms or conditions of his or her employment" because the individual filed a claim or civil action alleging a violation of employment laws that arose while the individual was a minor.

Treble damages are available whether a claim or civil action was filed before or after the individual reached the age of 18. Under the CLPA, the statute of limitations is tolled until the individual allegedly aggrieved by an unlawful employment practice reaches the age of 18. [PE]

Kroger Sued by EEOC for Violating ADA

Claims Cashier Fired Because of Back Impairment

The Kroger Company of Michigan violated federal law by failing to provide a reasonable accommodation to an employee with a disability and then firing her, the U.S. Equal Employment Opportunity Commission (EEOC) charged in a lawsuit.

According to the EEOC's suit, Kroger allowed an employee at its Howell, Mich., store, who was hired as a stock person, to work as a cashier as a reasonable accommodation. However, a few months later, after it found out her restrictions were permanent, Kroger fired her, the EEOC said.

Such alleged conduct violates the Americans with Disabilities Act (ADA). The EEOC filed suit (EEOC v. The Kroger Company of Michigan, Case No. 2:14-cv-13757) in U.S. District Court for the Eastern District of Michigan, after first attempting to reach a voluntary settlement through its pre-litigation conciliation process. The EEOC seeks to recover monetary compensation for the fired employee, including back pay and compensatory damages for emotional distress, as well as punitive damages.

"Federal law expressly prohibits employees from refusing to provide a reasonable accommodation to disabled employees," explained EEOC Trial Attorney Nedra Campbell.

"The ADA places an affirmative duty on employers to work with employees to find an accommodation of their restrictions." [PE]

Driver Licenses for Illegal Immigrants

In case you haven't heard, illegal immigrants may now obtain a California drivers license.

AB 60 was passed in 2013 allowing people who cannot prove their eligibility to be in the United States legally the ability to obtain a driver license. The California DMV now begins issuing these drivers licenses.

The licenses are marked with the phrase "federal limits apply" on the front of the license in the same size and color of text as the other text. This statement will be located in the top right corner above the Class designation on the licenses. The back of the license will have the statement "not valid for official federal purposes."

The California driver licenses issued under AB 60 are not valid documentation to prove eligibility to work in the United States. It is important for employers to train their personnel who are responsible for verifying documents when completing the Form I-9 to ensure that all documents presented by the worker are valid for I-9 purposes. In addition, it would be a good time for you to audit your Form I-9 process and document retention policies. [PE]

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