Pacific Employers
Management Advisor
47 Years of Excellence!
June 2011

What's New!

NLRB Chases Runaway Shop

The National Labor Relations Board and Boeing Company are in a dispute regarding the location of Boeing's new South Carolina plant as a second assembly line to build its 787 Dreamliner.

The dispute has been widely covered by the media since last month when the NLRB filed a complaint demanding that the Boeing facility be shut down and that all the jobs be moved from South Carolina, a right to work state, to the state of Washington.

The NLRB complaint alleges that Boeing's 2009 decision to open the South Carolina facility constituted an unfair labor practice against a Machinist and Aerospace Workers local that represents employees in Washington and Oregon. South Carolina is a right-to-work state, meaning workers don't have to join unions even in organized workplaces. The NLRB complaint alleges that Boeing violated the National Labor Relations Act ("NLRA") because its executives noted that the risk of labor strikes and the costs associated with such strikes is one of the reasons they chose to open the plant in South Carolina. The NLRB claims that this proves that Boeing acted out of "anti-union animus." The NLRB complaint demands that the plant be opened in Washington stating: "To remedy the alleged unfair labor practices, the NLRB acting general counsel seeks an order that would require Boeing to maintain the second production line in Washington State." According to Boeing's CEO, this NLRB demand is made in the face of union contracts that expressly allow Boeing to open new facilities at its discretion and further points out that since the decision was made, Boeing has added over two thousand union jobs in Washington.

The complaint has sparked shock and anger in the employer community. Many view the allegations against Boeing as an escalation of the NLRB's "anti-business and pro-union" sentiment. Senate Republicans are already meeting to propose legislation to amend the NLRA to guarantee employers the right to decide where to open their business without such interference by the NLRB. South Carolina's lawmakers are especially outraged by the NLRB's actions. Boeing's CEO specifically struck back at the NLRB with an article in the Opinion section of the Wall Street Journal. Boeing's CEO, Jim McNerney, has written that the NLRB's actions "assaulted the capitalist principles" that sustain our country's competitiveness in the international marketplace and the actions by the NLRB are likely to accelerate the overseas flight of good paying American jobs.

This dispute appears to be headed for a long drawn out court battle that could even influence the 2012 Presidential election. The business and labor communities will be watching closely, as will we. In the meantime, the current lesson is that employers and their executives should be very careful about what they say publicly regarding how they feel about strikes and unions, because it may be used against them later to help prove alleged "anti-union animus." [PE]

Prevailing Wage & Child Labor Law Flyers Enclosed!

President's Report
~Dave Miller~

Supreme Court Again Protects Arbitration

The U.S. Supreme Court recently gave employers another reason to consider mandatory arbitration programs as a means to resolve employment-related disputes.

In the case *AT&T Mobility LLC v. Concepcion,* a divided Supreme Court determined that a State law, whether made by the legislature or a court, cannot condition the enforceability of arbitration agreements covered by the Federal Arbitration Act on the availability of class-wide arbitration procedures. Although AT&T was a consumer case, it has ramifications in the employment arena and may well insulate an employer from employee initiated class actions. [PE]

"No legal tender law is ever needed to make men take good money; its only use is to make them take bad money."
-- Stephen T. Byington September 1895

Court Upholds Firing Based on Threats

Employees engaging in workplace misconduct such as violence or threats of violence are not immune from termination simply because a mental disability may have caused the misconduct. A California court recently agreed with Orange County in *Wills v. Orange County Superior Court.*

A county clerk had a mental disability--bipolar disorder--that caused her to take several leaves of absence during her employment, all of which the County accommodated. Shortly before her last leave of absence, the plaintiff showed up at work one day and became very angry at having to stand in the heat outside before someone unlocked the door.

She told one or more co-workers that she was going to put them on her "Kill Bill" list as a result. Within a couple of days, the plaintiff took a leave of absence and provided a note indicating that her conduct was caused by her mental disability. The plaintiff's doctor eventually gave her a full release to return to work and explained she was not a threat.

The County nonetheless terminated the plaintiff's employment based on findings that she **had violated workplace conduct rules** prohibiting threatening and inappropriate behavior. The court held that an employer may discipline, and even terminate, a disabled employee for violence or threats of violence, regardless of whether the conduct was indisputably caused by a mental disability. [PE]

Recent Developments

Another Favorable Meal And Rest Break Decision For Employers

On May 10, 2011, the Second Appellate District of California issued a favorable decision for employers in Flores v. Lamps Plus, Inc. This case serves as additional support that so long as California employers provide meal and rest breaks to employees, they have met their obligations as set forth in California Labor Code §§ 226.7 and 512 and the IWC Wage Orders.

Lamps Plus was brought on a class action basis by three former Lamps Plus employees who were employed as non-exempt sales associates in Lamps Plus' San Rafael location and who all reported to the same manager. Plaintiffs alleged Lamps Plus violated California labor law by denying them meal and rest breaks among other things. Plaintiffs' complaint, in part, was premised on the theory that employers must ensure employees take meal and rest breaks.

"Lamps Plus had . . . a policy requiring meal and rest breaks."

Lamps Plus had an employee handbook distributed to all its employees which included a policy requiring meal and rest breaks. Lamps Plus required that each employee acknowledge receipt of its meal and rest period policy which included an additional acknowledgment directing employees to notify Lamps Plus Human Resources if they were not provided with a meal and/or rest period. Pursuant to California labor law, employee meal periods were logged into Lamps Plus' timekeeping system, but rest periods were not. Lamps Plus used a progressive discipline system for violations of their meal and rest period policy.

The Court held, consistent with federal courts, that "[i]t is an employer's obligation to ensure that its employees are free from its control for thirty minutes, not to ensure that the employees do any particular thing during that time." The Court continued that the mandatory language of the Labor Code and the Wage Order does not mean employers must ensure employees take meal breaks, but rather, employers must only provide breaks. The Court interpreted the word "provide" in the Labor Code's meal period provision to mean "to supply or make available" and in its rest period provision to mean "authorize or permit."

"The Court rejected plaintiffs' assertion . . ."

The Court rejected plaintiffs' assertion that employers must ensure employees take meal and rest breaks finding this "utterly impractical" for employers. The Court concluded that Lamps Plus made it clear to its employees it upheld California's meal and rest period laws and went so far as to discipline employees who skipped these required breaks. The Court found troubling plaintiffs' "hypothesis of law" that an employer, "which notified its employees they must exercise their right to take breaks or risk suffering discipline for failing to take a scheduled break, must nonetheless pay a penalty to every employee who chooses to skip a rest and/or meal break."

Despite this favorable ruling, employers should be cautious because the Brinker case is still pending before the California Supreme Court and it will address the identical issue. Similar to Lamps Plus, companies should ensure they have well written employee handbooks that are distributed to all employees and for which all employees must sign an acknowledgment that they have read and understand its contents. In addition, supervisory employees should be trained on California labor laws and advised to immediately advise management when violations occur. [PE]

Permanent Light Duty Required

Many employers offer light duty assignments to employees who are temporarily unable to perform the essential duties of their positions due to disability.

Notably, however, there is no legal obligation for an employer to offer permanent light duty or to create a new position for an employee who becomes permanently disabled from returning to his or her normal position. In Cuiellette v. City of Los Angeles, a California court held that notwithstanding these rules, an employer discriminated against an employee on the basis of the employee's disability by failing to provide the employee with a permanent light duty assignment.

". . . had funded and available permanent light duty positions . . ."

The wrinkle in the case was that there was evidence the employer actually had funded and available permanent light duty positions for the very purpose of accommodating employees (police officers) who became disabled from performing the duties of a police officer and that the employer routinely provided such assignments to disabled officers.

The employer nonetheless argued that it had never provided a permanent light duty position to an officer who had a workers' compensation rating of 100% disability--the rating given to the officer in this case.

The court dismissed the employer's argument, reasoning that a workers' compensation disability rating does not absolve the employer of the obligation to engage in the interactive process and determine whether the employee can perform the essential functions of an open alternative position. As such, the employer's decision to rely on the workers' compensation disability rating (and the advice of a third party workers' compensation administrator to terminate the employee) was the employer's downfall. [PE]

New, User-Friendly, I-9 Online Resource

The U.S. Citizenship and Immigration Services (USCIS) has just launched I-9 Central. This is a new online resource center dedicated to the most frequently accessed form on USCIS—Form I-9, Employee Eligibility Verification.

By law, United States employers must verify the identity and employment authorization for every worker they hire after November 6, 1986, regardless of the employee's immigration status. To comply with this law, employers must complete Form I-9 no later than three days after a new employee's start date.

". . . created by USCIS to provide employers and employees with access . . ."

I-9 Central was created by USCIS to provide employers and employees with access to resources so they can better understand the Form I-9 process. I-9 Central includes:

- sections about employer and employee rights and responsibilities;
- step-by-step instructions for completing the form;
- information on acceptable documents for establishing identity and employment authorization;
- a discussion of common mistakes to avoid when completing the form;
- guidance on how to correct form errors; and
- answers to recent questions about Form I-9.

I-9 Central can be accessed at the following web address:
http://www.uscis.gov/I-9Central [PE]

Prevailing Wage & Child Labor Law Flyers Enclosed!

Human Resources Question with Candice Weaver

The Month's Best Question

Indefinite Leaves of Absence

Q: ***" We continue to get doctor's notes for an employee who has been on medical leave for over 6 months. How long can this go on?"***

A: While we don't have a ruling on a 6 month wait, the Ninth Circuit Court has ruled in *Department of Fair Employment and Housing v. Lucent Technologies, Inc.,* that disability discrimination and failure to accommodate could not be proven against an employer who terminated an employee after a year of leave due to the employee's disability.

The employee at issue, Steven Carauddo, was an installer who became injured in the course of his job duties. The employee's injuries indisputably rendered him incapable of performing the essential duties of his position. As a result, Lucent placed him on a leave of absence. Lucent had a policy whereby employees who were unable to return to work after 12 months due to disability were terminated from employment. However, the employee could apply for an extended leave with a doctors' note indicating a prognosis for a full recovery within 6 months.

Lucent stayed in communication with Carauddo regularly throughout his leave of absence regarding his continued physical restrictions and inability to perform the essential functions of his job. One of the essential functions of his job was that he regularly lift up to 50 pounds. Carauddo remained unable to perform this function, according to his doctors, throughout the entire 12 month disability period. When Carauddo was unable to return to work after 12 months, Lucent terminated his employment pursuant to its policy. Over the next two months, Lucent continued to have communications with Carauddo's doctors regarding his lifting restriction, and Carauddo's doctor at that point cleared him to return to work with no restrictions. However, Lucent did not reinstate him.

The following year, the Department of Fair Employment and Housing sued Lucent on Carauddo's behalf for disability discrimination, failure to accommodate, and failure to engage in the interactive process. Lucent removed the case to federal court and the court granted Lucent summary judgment, throwing out the DFEH's claims. Notwithstanding its well-known pro-employee stance, the Ninth Circuit agreed with the lower court and affirmed the judgment in Lucent's favor. In so doing, the Ninth Circuit held that Lucent clearly and regularly engaged in the interactive process with Carauddo to determine whether he could perform the essential functions of his job or an alternative job. Lucent also reasonably accommodated him by giving him a 12-month leave of absence. Carauddo was still unable to perform the essential functions of his job (or any other available job) at the end of that 12 month period. As a result, the court held that Lucent lawfully terminated his employment because it was not required to provide an indefinite leave of absence or modify the duties of Carauddo's position in order to accommodate his disability.

The Ninth Circuit's decision is an unusually favorable decision for employers tackling disability discrimination cases. [PE]

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

♦ **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

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.

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Secretary of Labor Hilda L. Solis Provides Employees Hours Tracking Phone APP!

The U.S. Department of Labor (DOL) has launched a "timesheet" application for smartphones that allows employees to record their hours worked, break times, and overtime.

The application also allows users to make notes regarding their work, view a summary of work hours and projected gross pay, and email the information as an attachment. Additionally, the application provides users with access to the DOL's information regarding wage laws and DOL contact information.

In its press release, the DOL stated that the intent behind the application is to provide workers with a tool that they can use to obtain wages they believe they are owed. Secretary of Labor Hilda L. Solis stated that, "This app will help empower workers to understand and stand up for their rights when employers have denied their hard-earned pay." The DOL further stated that the information in the application may be "invaluable" during an investigation by the Wage and Hour Division.

That information may also impact private litigation. As part of discovery the parties may access the information kept in this application as evidence of the employee's claims. Employers may also explore in discovery whether the employee's smartphone recorded the person's location at the time they allege that they worked. That information may allow employers to confirm whether the person was at the job-site when they recorded time worked. Additionally, this move by the DOL stresses the importance of drafting and training managers to enforce clear timekeeping policies that direct employees to record all the time that they work. [PE]

$300,000 For Sexual Harassment

An employer, Dave's Supermarket, will pay $300,000 to four women to settle a sexual harassment lawsuit filed by the U.S. Equal Employment Opportunity Commission (EEOC).

The EEOC alleged that a former meat department manager at a Dave's Supermarket made repeated and unwanted sexual advances to female employees, and that even though upper management was aware of his behavior, they failed to stop it. The EEOC charged that the sexual harassment included an incident during which the manager allegedly exposed himself to a newly hired female employee.

The EEOC alleged that the female employee complained to upper management about the incident, but that management did not investigate or discipline the employee. Further, according to the EEOC, Dave's Supermarket eventually terminated the manager after another female employee complained that the manager sexually harassed her.

In addition to the monetary amount, Dave's Supermarket must also provide mandatory training to all staff on sexual harassment and the company's obligations under Title VII, the definition of sexual harassment, how to maintain a harassment-free workplace, and a review of the laws prohibiting unlawful retaliation.

EEOC Regional Attorney Debra Lawrence commented that "The decree here sends the same signal to employers that the EEOC has been sending for some time: sexual harassment is prohibited and the EEOC will move swiftly to stop it…Employers must promptly and thoroughly investigate sexual harassment complaints and must take effective steps to eliminate such harassment." [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, *July 27th*, registration at 7:30 am. Seminar 8:00 to 10:00 am, at the Lamp Liter, Visalia.

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