Pacific Employers
MANAGEMENT ADVISOR
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June 2015

WHAT'S NEWS!

Court Upholds $6.6M Suit

The Ninth Circuit recently upheld a large punitive damages award against United Parcel Service for the wrongful firing of a former UPS employee in retaliation for the employee filing wage-and-hour claims against the company.

The case arose after an employee brought a class action lawsuit alleging he and others were misclassified as exempt executive and administrative employees and were entitled to compensation for unpaid overtime and missed meal and rest breaks.

The company fired the employee while his wage-and-hour lawsuit was pending. This led to the employee filing a separate lawsuit claiming the termination was in retaliation for his wage-and-hour lawsuit, reporting safety violations, and encouraging other employees to file lawsuits.

The evidence presented at trial showed a company vice-president discussed the impact of the wage-and-hour lawsuit with senior staff and expressed displeasure over the impact on other supervisors who were filing similar claims. The vice-president viewed the wage-and-hour lawsuit as a "distraction" with a negative effect on employee morale. According to the Ninth Circuit, the jury reasonably concluded the vice-president's decision to terminate the employee "was a policymaking decision aimed at protecting the company 'culture.'"

Originally, a jury awarded the employee over $18 million, including over $15 million in punitive damages. The punitive damage award was later reduced to $6.6 million. The Ninth Circuit upheld the $6.6 million award finding there was sufficient evidence to support punitive damages.

Retaliation claims continue to rise and remain at the top of the list of the types of complaints received on both the state and federal level.

Training for supervisors on what constitutes retaliation and on your policy against retaliatory practices is essential. Best practices also include carefully reviewing discipline and termination decisions that involve individuals who participated in a complaint of unlawful workplace conduct and consulting legal counsel. [PE]

Child Labor Law Flyer Enclosed!

President's Report
~Dave Miller~

3 Days of Sick Pay

California's much talked-about AB 1522, containing the Healthy Workplaces, Healthy Families Act of 2014 (the Act) became law January 1, 2015. Under the new legislation, employers must provide nearly all California employees with three paid sick days per year. California is only one of a few states to impose a state-wide paid sick leave requirement.

Many California employers offer their employees at least three days of paid sick leave or other paid time off (PTO). Some of these employers mistakenly assume that this new law will not affect them. But the Act applies to virtually all employees who work in California for 30 or more days within a year. This includes part-time, temporary, and seasonal employees, who often are not covered by existing sick leave and PTO policies. The Act (and other related changes in AB 1522) also subjects California employers to new posting, notice, and recordkeeping requirements. [PE]

Those who will not reason, are bigots, those who cannot, are fools, and those who dare not, are slaves. -Lord Byron, poet (1788-1824)

Summer Vacation Time is Here!

On a personal note, many of you know that I have announced my semi-retirement in the recent past and have had the opportunity to take some real vacations after four and one half decades in the office.

My wife **Bev** and I have a motorhome and do enjoy getting on the road (taking a trip) from time to time. So far we have been able to do so almost seamlessly with **Candice** covering the office and taking care of local seminars, hearings and other events. With the help of the internet, I have continued to do the website, monthly newletters and handbooks and safety programs while on the road. In addition, Bev is in charge of billing and accounts receivable and, thanks to the internet, has been able to keep up with all her duties, even when she would be happier roasting marshmallows and making "s'mores."

This year Bev and I will be exploring the trail of **Lewis & Clark,** who, at the direction of **President Thomas Jefferson,** in 1804, attempted to find a water route to the Pacific Ocean from the newly acquired Louisiana Purchase.

Because we will accompany a small group of RV'ers, we are less sure that we will be able fulfill all of our normal duties and keep up with the caravan. Soooo, we just want to let you know that some services may be delayed or have to wait until we return in early July. [PE]

Recent Developments

Bound by a Binding Policy

California appeals court affirms that employee signature acknowledging clear arbitration policy makes policy binding.

In a recent opinion affirming an arbitrator's judgment in favor of an employer on various employment law claims, the California Court of Appeal held that an employee agreed to arbitrate all claims against her former employee when she signed an arbitration policy contained in an easy-to-read document distinct from any other document she signed at the time of her hiring. In doing so, the Court clarified important aspects of the test for enforcing an arbitration agreement signed by a company's employees.

"The Court of Appeal rejected this argument."

In Serafin v. Balco Properties Ltd., LLC, the plaintiff, Serafin, filed a state court action against Balco, her former employer, asserting causes of action for wrongful termination, harassment, and defamation. Balco moved successfully to stay the lawsuit pending the completion of binding arbitration, based on an arbitration agreement that Serafin signed when she was hired. After the arbitrator found in Balco's favor on all issues, Serafin appealed the state court's finding that her claims were subject to arbitration. Serafin argued, among other things, that her signature acknowledging Balco's arbitration policy did not constitute consent to arbitration, relying on cases in which courts found that the circumstances surrounding an employee's written agreement to an arbitration clause did not establish that the agreement was knowing, voluntary, and fair.

The Court of Appeal rejected this argument. It distinguished the case from those in which courts found that an arbitration agreement was not enforceable where it was one of many policies contained within an employee handbook, nor where disclaimers in such a handbook made clear that the employer did not intend for it to have the force of contract. Unlike in those cases, Balco's arbitration policy was set forth in easy-to read language, in a standalone document distinct from the company's employee handbook. The document was labeled "MANDATORY ARBITRATION POLICY" in capitalized lettering, and, in contrast to a policy intended not to be binding, stated that all employees would be required to "comply with" the policy. Finally, as part of Balco's employee orientation process, a human resources manager explained the document and offered to answer any questions about it. As such, the Court held, it was "a case where every effort was made to call Serafin's attention to the arbitration policy she was agreeing to at the time she signed the acknowledgement."

This case assures employers that California courts will uphold a clear arbitration agreement governing employment-related disputes, but should also remind employers to take steps to ensure that its employees' agreements to arbitrate are knowing, voluntary, and fair. [PE]

Court Will Review Augustus v. ABM Security

The California Supreme Court has just granted review of *Augustus*. Accordingly, the published decision is no longer citable and the Supreme Court will decide whether an employer must relieve employees of all duty during paid rest breaks.

In January 2015, the California Court of Appeal, Second District, published a landmark decision in *Augustus v. ABM Security Services* holding that employees are not "working" while on-call during rest breaks.

The case began 10 years ago when three security guards filed suit against ABM Security Services, Inc. ("ABM"), alleging that their employer's policy of requiring guards to remain on-call during their rest breaks violated California law. ABM conceded that it requires security guards to keep their radios and pagers on during rest breaks and remain vigilant and ready to respond in case of an emergency. The Plaintiffs contended that given these requirements, the rest breaks provided by ABM were indistinguishable from normal security work and, therefore, every rest break was invalid.

The trial court issued a tentative ruling stating, "if you are on call, you are not on break" and issued an award in favor of the class for over $55 million in damages, $31 million in pre-judgment interest, $2.5 million in penalties, and over $30 million in attorney fees. ABM appealed the judgment.

On December 31, 2014, the Second District Court of Appeal concluded that the trial court was incorrect. The Court disagreed with the trial court's view of the nature of rest breaks under California law, holding that employers are not required to relieve employees of all duty during their rest breaks.

In so holding, the Court examined the meal and rest break provisions of the Wage Orders and the Labor Code. Labor Code section 226.7 provides: "An employer shall not require an employee to work during a meal or rest or recovery period." The Court contrasted this language with the meal period provision in the Wage Orders, which requires that an "employee be relieved of all duty" during a meal period. The Court noted that the Wage Order did not contain similar language for rest breaks, which in its view, implied that employees are not required to be relieved of all duty during rest breaks.

. . . simply being on-call does not constitute "work."

The Court also noted that rest breaks, unlike meal periods, are paid. Accordingly, the Court concluded that simply being on-call does not constitute "work." The Court reversed the trial court's 2010 and 2012 orders including the $90 million award and the attorneys' fee award.

When the California Supreme Court decides this case, we will inform you and advise if this changes the law.

For now, the *ABM Security* decision is a clear victory for employers, and particularly those in industries where it is necessary for employees to remain on-call during rest breaks. [PE]

Human Resources Question with Candice Weaver

The Month's Best Question

EEOC Wellness Programs

Q: "How will the EEOC's proposed new rules for Employer Wellness Programs affect employers who have these programs?"

A: The EEOC is targeting wellness programs that financially penalize employees for not participating. The EEOC says that penalties, such as increasing health insurance premiums, render the wellness programs involuntary and violate the ADA and the Genetic Information Nondiscrimination Act.

The ADA limits the circumstances in which employers may ask employees about their health or require them to undergo medical examinations, but allows such inquiries and exams if they are voluntary and part of an employee health program.

According to the EEOC's press release, the proposed rule is intended to provide guidance as to how wellness programs offered as part of an employer's group health plan can comply with the ADA consistent with provisions governing wellness programs in the Health Insurance Portability and Accountability Act (HIPAA), as amended by the Affordable Care Act.

Here Are The Key Points:

- If a company health program seeks information about employee health or medical examinations, the program must be reasonably likely to promote health or prevent disease.
- Employees may not be required to participate in a wellness program, and they may not be denied health coverage or disciplined if they refuse to participate.
- Employers may not interfere with employees' rights under the ADA.
- Employees may not face threats, intimidation or coercion for refusing to participate in a wellness program or for failing to achieve certain health outcomes.
- The regulations set a limit on incentives; companies may offer incentives of up to 30 percent of the total cost of employee-only coverage in connection with wellness programs. These programs can include medical examinations or questions about employees' health (such as questions on a health risk assessment).
- Wellness programs may never be used to discriminate based on disability and safeguards must be in place to prevent such discrimination.
- Medical information collected as a part of a wellness program may be disclosed to employers only in an aggregate form that does not reveal the employees' identities, and must be kept confidential in accordance with ADA requirements. Best practices for securing confidentiality will be provided.
- Individuals with disabilities must be provided with reasonable accommodations that allow them to participate in wellness programs and to earn whatever incentives an employer offers.
- Employers will be required to provide employees with a notice that describes what medical information will be collected; with whom it will be shared; how it will be used; and how it will be kept confidential. [PE]

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

♦ **Wage & Hour and Exempt Status -** Overtime, wage considerations and exemptions.
Thursday, June 18th, 2015, 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 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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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 Heat Illness Amendments Now Effective

New heat illness regulations are now effective. The Office of Administrative Law approved changes to California's heat illness prevention regulations and granted the Occupational Safety & Health Standards Board's request for an accelerated effective date of May 1, in time for this year's growing season and warmer summer weather.

The changes include several significant provisions:

- Access to shade must be provided when temperatures exceed 80 degrees, instead of the current standard of 85 degrees;
- A change to what is considered "potable water" that must be made available to employees;
- Monitoring of employees taking a "preventative cool-down rest;" and
- Changes to high heat procedures.

Cal/OSHA issued guidance on the new requirements. The chart can be downloaded free of charge from Cal/OSHA's heat illness information page.

Cal/OSHA also updated the Heat Illness Prevention Enforcement Q&A and has started to revise educational materials on its website. [PE]

No! To Telecommuting

Sixth Circuit Holds That Ford Motor Co. Was Not Required to Accommodate Telecommuting.

On April 10, 2015, in an eagerly awaited decision interpreting the reasonable accommodation provisions of the Americans with Disabilities Act ("ADA"), the United States Court of Appeals for the Sixth Circuit ruled, en banc, in favor of Ford Motor Co., rejecting the EEOC's claim that Ford violated the ADA by not allowing a disabled employee to telecommute as a reasonable accommodation. EEOC v. Ford Motor Co., No. 12-2484.

Eight judges on the Sixth Circuit ruled in favor of Ford, while five dissented. The decision highlights many of the thorny issues concerning telecommuting as a potential reasonable accommodation under the ADA. It also underscores the importance of engaging in a good faith "interactive process" with a disabled employee requesting accommodation. [PE]

Bakery Cited $185,000-Wage Violations

A Vista-based wholesaler that sells its gourmet cookies to Whole Foods and gourmet grocery stores has been cited by California Labor Commissioner Julie A. Su for multiple wage theft violations.

The investigation revealed that Cookies con Amore systematically denied overtime pay, rest breaks and meal periods to 73 workers, and forced some of them to sign a statement agreeing to the wage theft violations.

Investigators interviewed employees and conducted an audit that revealed multiple violations of minimum wage, rest and meal period laws, and overtime premiums between October 2013 and December 2014.

Employees worked shifts of 10 hours or longer, but were paid at the straight time rate without overtime compensation. They were allowed only one 30-minute daily break with no other rest and second meal periods.

Some of the workers were forced to sign a written agreement consenting to substandard working conditions. If they disagreed, the workers were told to find another job.

Cookies con Amore was assessed $120,665 ($51,444 in overtime wages, $69,221 in rest and meal time period penalties) which will be paid to the affected workers, and $63,800 in civil penalties. [PE]

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