Pacific Employers
MANAGEMENT ADVISOR
Over 50 Years of Excellence!
June 2016

What's News!

DOL INCREASES O/T ELIGIBILITY

The Department of Labor's final rule updating the overtime regulations has been released. It will automatically extend overtime pay protections to over 4 million workers within the first year of implementation. This long-awaited update will require HR and payroll personnel to review whether employees earning less than the the new minimum salary should receive a boost in pay or be re-categorized to non-exempt status.

Previously, California's compensation requirements were higher than the federal requirement. Now that the federal requirement surpasses the $41,600 California minimum, employers must make a decision. Either increase exempt employee salaries to $47,476 or re-categorize the employee to non-exempt. Because employers can count up to $4,747 in non-discretionary bonuses and incentive payments toward the salary requirement, make sure to include these amounts in your analysis. Employers have until December 1, 2016 to re-classify any employees who will not earn enough to remain exempt.

This change impacts many areas of an exempt employee's work. Evaluate how to communicate the new guidelines, such as recording hours worked, rest and meal periods, overtime expectations, working off-the-clock, company-provided laptops and off-site access to e-mail and working from home. Because employees who are reclassified may not have had to consider some of these issues previously, it is important to clearly inform them of the policies that will be applicable to them. [PE]

PE Goes Facebook!

We are finally taking advantage of another way to connect with our clients, Pacific Employers now has a Facebook Page! We plan to bring you new information and the answers to many of your questions in an organized and timely fashion with the use of our FB page.

With our formerly monthly Newsletter going to a quarterly publication schedule, we also will be able to welcome other staff members to the writing tasks by allowing all of our office to post information on our **Facebook** page. ***The next PE Newsletter will be the Summer Edition!***

Visit and ***Like*** Pacific Employers new **Facebook** page at

https://www.facebook.com/pacificemployers/

[PE]

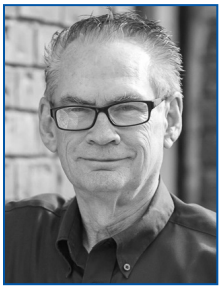
Time Off For Voting

The California Presidential Primary Election is on June 7, 2016 and your employees may take time away from work to vote. If an employee does not have sufficient time outside of working hours to vote in a statewide election, the employee may, without loss of pay, take up to two (2) hours of working time to vote.

The time off must be taken at the beginning or end of the regular working shift, whichever gives the employee the most free time for voting and the least time off from working. You and the employee may mutually agree to a different part of the working shift when the time off can be taken. The employee must notify you at least two (2) working days in advance to arrange a voting time. [PE]

Heat Illness Poster Enclosed!

President's Report
~Dave Miller~



Form I-9 Remains Effective!

Until further notice, employers should continue using Form I-9, Employment Eligibility Verification. This current version of the form continues to be effective even after the Office of Management and Budget control number expiration date of March 31, 2016, has passed.

U.S. Citizenship and Immigration Services (USCIS) will provide updated information about the new version of Form I-9 as it becomes available. Employers must complete Form I-9 for all newly hired employees to verify their identity and authorization to work in the U.S.

The USCIS published a notice in the Federal Register on March 28, 2016, to inform the public of proposed changes to Form I-9, Employment Eligibility Verification. [PE]

Heat Illness Regulations

With the season's higher outside temperatures, you should keep in mind the need to comply with California's Heat Illness Prevention regulations.

California heat illness regulations require employers in certain outdoor industries to (a) have a written procedure which sets forth how the employer will comply with these regulations and (b) provide heat illness prevention training to employees and supervisors.

The regulations have many requirements, including special requirements for when the temperature exceeds 80 and 95 degrees Fahrenheit. Among other things, employers must provide fresh water and employees must be allowed to rest in the shade to prevent overheating.

Employers with employees near sources of heat or inside buildings with limited cooling capabilities must ensure that their Injury and Illness Prevention Program is effective and in writing *(i.e. work areas with risk of heat illness have been identified and evaluated, and appropriate corrective measures and training have been implemented to protect workers).*Examples: foundries, ovens, dryers, boilers, warehouses without AC. [PE]

"Heat Illness Prevention" Poster is enclosed.

We all live under the same sky, but we don't all have the same horizon.
Konrad Adenauer, statesman (5 Jan 1876-1967)

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Recent Developments

$226.5 Million Settlement in IC Case

In a closely watched case, a California federal court conditionally approved a $226.5 million settlement with FedEx drivers in a class action lawsuit filed in federal court in California. The lawsuit alleged that the drivers were improperly classified as independent contractors.

The settlement is a result of a 2014 Ninth Circuit decision which rejected FedEx's classification of its drivers as independent contractors because FedEx exercised significant control over the drivers (Alexander v. FedEx Ground Package System, Inc., 765 F.3d 981 (9th Cir. 2014)). The settlement resolves claims dating back to 2000, and the company no longer operates the same classification model for drivers.

"California generally applies the "right to control" test. . ."

The settlement involves over 2,000 drivers. The approval of the settlement is conditional because only about 77 percent of the class has already submitted claim forms. The court is asking the drivers' counsel to reach out to other class members who have not yet submitted claim forms.

California generally applies the "right to control" test to determine if the worker is an employee or an independent contractor. If your company controls the details and the worker does not have meaningful discretion in how he/she completes work, it is likely the worker will be found to be an employee and not an independent contractor.

In this case, indicators of control included:

- regular schedules, restricting the times during which the drivers could provide services and loading and unloading packages at FedEx terminals every day
- assigned service areas
- lack of control over which packages were delivered
- packages only delivered to FedEx customers at FedEx rates
- requiring them to wear FedEx uniforms
- requiring vehicles be painted a specific shade of white and marked with the FedEx logo

The court found "powerful evidence" of FedEx's right to control the manner in which the drivers performed their work and held that the drivers were employees as a matter of law. [PE]

Staffing Agency Workers and ACA

The final regulations on the Affordable Care Act's (ACA) "pay or play" rules have been released. Under the rules, there are potential penalties imposed on large employers that do not offer substantially all full-time employees coverage that qualifies as affordable and minimum value.

In determining who is a full-time employee of an employer under the ACA rules, the IRS has indicated that it intends to use a fact-based "common law" definition of employee. Thus, an employer must be careful to analyze the facts and determine who is an employee for IRS purposes in order to be certain to make an appropriate offer of coverage and thereby avoid potential penalties.

Where an employer uses a staffing agency to supply workers, making the determination as to who is a common law employee becomes potentially more complex. However, the final rules allow for some relief for an employer who might otherwise incur the "pay-or-play" penalties with respect to workers hired through staffing agencies that are reclassified by the IRS as common law employees of the client employer. The requirements for obtaining this relief are addressed below.

Common Law Employee Determination

Under the "play-or-pay" rules of the ACA, an employer who fails to make an offer of coverage to 95 percent of its full-time employees in 2016 will be liable for a penalty if a single one of its employees obtains coverage on the exchange and receives a premium subsidy. The amount of the penalty for the year can be significant – $2,084 multiplied by the total number of full-time employees (after a reduction of up to 30 employees). An employer who offers coverage to the required percentage of employees may owe a penalty if the coverage offered is either not affordable or fails to provide sufficient value. The amount is $3,126 for each employee who obtains coverage from the exchange and receives a premium subsidy. Given these potential stakes, it has become even more important to determine who is an employee.

For IRS purposes, an "employee" means a common law employee of the employer. Generally, a worker providing services to an employer is a common law employee if the employer has the authority to direct and control the manner in which services will be performed. The IRS states on its website:

> *Under common-law rules, anyone who performs services for you is your employee if you can control what will be done and how it will be done. This is so even when you give the employee freedom of action. What matters is that you have the right to control the details of how the services are performed.*

Employers who make use of staffing agencies will want to carefully consider the risk that workers provided by staffing agencies could be characterized as the employer's common law employees. If there is a risk, the employer will want to consider how many staffing agency workers are typically part of the workforce to determine whether ACA penalties may be triggered.

The final regulations under the "pay-or-play" rules permit an employer to take credit for an offer of coverage made by a staffing agency, but only if the employer pays the staffing agency more for a worker who accepts the offer of coverage than the employer would pay if the worker did not accept the offer of coverage

An employer at risk will want to review and, if necessary, amend its agreements with staffing agencies to **take advantage of the protection offered** by the final regulations. [PE]

Sexual Harassment Prevention Training

The Visalia Chamber of Commerce and Pacific Employers, will host a state mandated Supervisors' Sexual Harassment Prevention Training Seminar & Workshop with a continental breakfast on July 27th, registration at 7:30 am, Seminar 8:00-10:00 am, at the Lamp Liter Inn, Visalia.

RSVP Visalia Chamber - 734-5876

PE & Chamber Members $35 - Non-members $50

Certificate – Forms – Guides – Full Breakfast

Future 2016 Training date is October 26th

Human Resources Question with Candice Weaver

The Month's Best Question

Political Free Speech

Q: "The presidential and other elections are now the prime topic of water cooler discussions. What are the free speech protections when it comes to political discussions? In addition, do all employees have the right to take time off to vote?"

A: California provides strong protections for political activity; protections that can limit your ability to restrict employees' political participation at work.

California's Labor Code section 1101 prohibits employers from adopting or enforcing any rule, regulation or policy that:

- Forbids or prevents employees from engaging or participating in politics or from becoming candidates for public office.
- Controls or directs, or tends to control or direct the political activities or affiliations of employees.

Similarly, California Labor Code section 1102 provides that no employer "shall coerce or influence or attempt to coerce or influence his employees through or by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity."

In addition, Labor Code section 96(k) allows employees to bring claims for lost wages when they are disciplined or discharged for lawful conduct during non-working hours.

In one case, a California court found that a newspaper editor who was fired after publicly stating his support for a mayoral candidate had a cause of action for wrongful termination (*Ali v. L.A. Focus Publication*). The court noted that the Labor Code "reinforces the substantial public interest in protecting the 'fundamental right' of employees to engage in political activity without interference or threat of retaliation from employers."

Let's say you demote an employee for ongoing performance issues, but that employee has also been a recent vocal supporter of one particular presidential candidate, engaging in heated workplace discussions with co-workers and even his supervisor, who disagree with him about his political views. Your disciplinary measure may now be scrutinized if the employee claims that his political beliefs were the actual reason for the discipline. [PE]

No-Cost Employment Seminars

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

These mid-morning seminars include refreshments and handouts.

2016 Seminars

♦ **Wage & Hour and Exempt Status - Overtime, wage considerations and exemptions.**
Thursday, June 16th, 2016, 10 - 11:30am

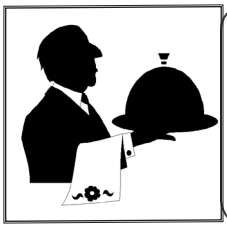
♦ **Hiring & Maintaining "At-Will" -** Planning to hire? Putting to work? We discuss maintaining "At-Will" to protect you from the "For-Cause" Trap!
Thursday, July 21st, 2016, 10 - 11:30am

There is No Seminar in August or December

♦ **Forms & Posters -** and Contracts, Signs, Handouts, Fliers - Just what paperwork does an Employer need?
Thursday, September 15th, 2016, 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, 2016, 10 - 11:30am

♦ **Discipline & Termination -** The steps to take before termination. Managing a progressive correction, punishment and termination program.
Thursday, November 17th, 2016, 10 - 11:30am



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.

Pacific Employers
306 North Willis Street
Visalia , CA 93291
559 733-4256
(800) 331-2592
Fax 559 733-8953
www.pacificemployers.com
email - peinfo@pacificemployers.com

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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.

LA Approves 6 Days Paid Sick Leave

Last July the now infamous CA Healthy Families Act, came into law for nearly all California employers. This July, employees working in Los Angeles will be entitled to six (6) days of paid sick leave each year, twice the number to which they are entitled under State law.

The Los Angeles City Council approved a measure under which the City Attorney will draft an ordinance providing that employees who work in the city on or after July 1, 2016, for the same employer for 30 days or more within a year from commencement of employment would be entitled to six days of paid sick leave. The entitlement will begin on the first day of employment, or July 1, 2016, whichever is later.

A small bit of good news for employers. Employers that have a paid leave or paid time off policy, or that provide payment for compensated time off equal to or not less than 48 hours, would not be required to provide additional time off. [PE]

Confidential Information Leak

An intellectual-property infringement case between U.S.-based health-care software provider Epic Systems Corp. and Tata Consultancy Services Ltd. spotlights the challenge of policing system permissions on jobs involving third-parties.

A U.S. federal jury ordered TCS, India's largest outsourcer by revenue, t**o pay Epic $940 million** after an employee was found to use credentials from a previous contracting job to access an Epic Web portal containing confidential information.

"This is basically every computer information technology officer's nightmare – unauthorized access to sensitive data and information by offshore contractors that are a direct or indirect part of their supply chain," Avivah Litan, vice president and distinguished analyst at Gartner Inc., said in an email.

The key to managing such risk is a matter of follow-through, according to one analyst. "A common mistake is that you codify the terms of engagement in a legal document but you don't adequately monitor or audit those things," said Jon Oltsik, senior principal analyst at the Enterprise Strategy Group. [PE]

Workplace Fatalities on the Rise

The National Safety Council has been focused on preventing deaths and injuries on the job for over 100 years. While improvements in on-the-job safety have resulted in millions of lives being saved in the last century, the Bureau of Labor Statistics recently finalized its data on worker fatalities for 2014, and the news isn't good.

The U.S. workplace fatality rate increased for the first time since 2010, and the total number of on-the-job deaths was the highest since 2008. Here is what we know about the workers that died:

- 4,454 were men and 367 were women;
- Most were between 45 and 64 years old.

Among industries most affected were construction (899 deaths), transportation and warehousing (766), agriculture (584), government (435), professional and business services (425) and manufacturing (349)

More than 13 workers die on the job every day. The most common cause of workplace fatalities are car crashes, which resulted in 1,984 worker deaths in 2014. With thousands of crashes involving distraction, it is important to avoid using electronic devices behind the wheel, even if they are hands-free. The National Safety Council encourages every organization to put safe driving policies in place. Making that client call or participating in a meeting via phone while driving is not worth the risk. [PE]