Pacific Employers
Management Advisor
46 Years of Excellence!
March 2010

What's New!

Obama Targets Independent Contractors!

President Barack Obama has a message for Employers: "You Will Pay for Misclassifying Independent Contractors!" the message contained in the Obama Administration's proposed budget for the fiscal year 2011. While job creation may be the cry of the land, punishing employers seems to be the answer. The proposed budget contains significant spending for targeting employers who use independent contractors. It reads:

> *"As part of the 2011 Budget, the Departments of Labor and Treasury are pursuing a joint proposal that eliminates incentives in law for employers to misclassify their employees; enhances the ability of both agencies to penalize employers who misclassify; and restores protections to employees who have been denied them because of their improper classification."*

The 2011 Budget for the Department of Labor (DOL) includes an additional $25 million to target misclassification with 100 additional enforcement personnel. Now more than ever, misclassifying employees as independent contractors can expose employers to significant liability, including back wages and overtime pay.

Other areas of concern for employers, aside from liability under the wage and hour laws, include employment taxes, unemployment and workers' compensation insurance premiums, and participation rights in employee benefits plans. The reclassification of workers from independent contractors to employees also could make them eligible for union organizing and for protection under various federal and state anti-discrimination laws.

The misclassification of independent contractors has been a source of persistent confusion for all employers. The factors that affect the determination of whether a worker is an employee or an independent contractor include:

- Are the services rendered an integral part of the principal's business;
- The permanency of the relationship;
- The amount of the contractor's investment in facilities & equipment;
- The nature and degree of control by the principal;
- The alleged contractor's opportunities for profit and loss;
- The amount of initiative, judgment, competition for success; and
- The degree of independent business organization and operation.

The ultimate question that each factor seeks to examine is whether the economic reality of the working situation is such that the workers at issue are more like traditional employees or more like a business or businesses with an existence independent of the entity paying them for the work.

Red flags for government enforcement agencies include:

- Individuals designated as independent contractors performing the same kind of work that employees also perform for the business;
- Individuals designated as independent contractors performing work for which other businesses in the same industry use employees;
- Individuals designated as independent contractors performing work that is essential to the production work of the business;
- Independent contractor arrangements that preclude the purported contractor from selecting his or her own personnel and allow only for performance by one specific person; and
- Independent contractor arrangements where the purported independent contractor may not, or as a practical matter does not, perform similar services for other businesses.

To avoid a government investigation or potential claims, employers must re-examine and, if necessary, change their worker classification practices to ensure compliance with federal and state laws.

Employers unsure of a worker's proper classification may contact the staff of Pacific Employers for a review and detailed analysis that could save an expensive action by the DOL. [PE]

CHIPRA Notice Enclosed!

President's Report
~Dave Miller~

Recess Appointment?

On February 9, 2010 the Senate failed to invoke cloture on Craig Becker's nomination to the National Labor Relations Board (NLRB).

By a vote of 52 to 33, the Obama administration nominee to the National Labor Relations Board, Craig Becker, just failed to get the 60 votes needed for his nomination to proceed in the Senate.

Sen. Ben Nelson, D-Neb., came out against Becker's nomination. Senate Republicans and grassroots conservatives had been opposing Becker's nomination from the get-go. As a law professor, Becker had written a law review article about how the NLRB could be used to remake labor regulations in favor of unions without congressional approval. More recently, Becker had acted as counsel for the SEIU and AFL-CIO. Becker was perceived by opponents as marching in lockstep with a Big Labor agenda and unlikely to give businesses a fair shake on the NLRB.

Labor leaders were pushing Becker's nomination hard and were reportedly 'fuming' when Scott Brown was seated earlier than expected. This gave Senate Republicans the 41 votes necessary to threaten to filibuster his nomination.

Business interests are also quite pleased by this development. The National Association of Manufacturers stated "*Mr. Becker has asserted views that the NLRB should rewrite union election rules in favor of union organizers. Such policy decisions should only be determined by Congress. The NAM is particularly concerned that if confirmed, Mr. Becker would seek to advance aspects of the job-killing Employee Free Choice Act through actions of the NLRB.*"

There is a possibility that President Obama could make a recess appointment for Becker when the Senate goes into recess on President's Day. If that were to happen, Becker's appointment to the Board would last until the end of 2011. [PE]

What we anticipate seldom occurs; what we least expected generally happens. - Benjamin Disraeli (1804 - 1881)

Recent Developments

Mandatory Employer Notice Requirement!

The Department of Labor has published a model notice for employers to use to inform employees of state-based programs for group health plan premium assistance. As of January 2010, 40 states use funds from their Medicaid or Children's Health Insurance Program (CHIP) to help people who are eligible for employer-sponsored health coverage and need assistance in paying their health premiums. The notice is required in these 40 states.

In February 2009, President Obama signed the Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA). CHIPRA included a requirement that the Department of Labor and the Department of Health and Human Services develop a model notice for employers. The Department of Labor was required to provide the model notice to employers within one year of CHIPRA's enactment.

For purposes of the Employer CHIP Notice requirement, an employer providing benefits (directly or through insurance, reimbursement, or otherwise) for medical care in a state is considered to maintain a group health plan in that State. If that state provides medical assistance under a state Medicaid plan, or child health assistance under a state child health plan, in the form of premium assistance for the purchase of group health plan coverage, the employer is required to provide the Employer CHIP Notice.

If a group health plan provides benefits for medical care directly (such as through a health maintenance organization); or through insurance, reimbursement or otherwise to participants, beneficiaries, or providers in one of these states, the plan is required to provide the Employer CHIP Notice, regardless of the employer's location or principal place of business (or the location or principal place of business of the group health plan, its administrator, its insurer, or any other service provider affiliated with the employer or the plan).

Employers are required to provide these notices by the date that is the later of (1) the first day of the first plan year after February 4, 2010; or (2) May 1, 2010. Accordingly, for plan years beginning between from February 4, 2010 through April 30, 2010, the Employer CHIP notice must be provided by May 1, 2010. For employers whose next plan year begins on or after May 1, 2010, the Employer CHIP notice must be provided by the first day of the next plan year (January 1, 2011 for calendar year plans). **A notice for California employers is enclosed,** or you may download the national form at:

Pacific Employers – http://www.pacificemployers.com/forms.htm

or the DOL site – http://www.dol.gov/ebsa/chipmodelnotice.doc

[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.

Expanded Mental Health Parity Requirements

The Mental Health Parity Act of 1996 ("MHPA 1996") required group health plans to apply the same aggregate lifetime and annual dollar limits to mental health and medical benefits, but notably, did not extend its protections to substance-use disorder benefits. The Mental Health Parity and Addiction Equity Act of 2008 ("MHPAEA"), as implemented by the interim final regulations, expands on the requirements of the MHPA 1996 and introduces new rules that prohibit group health plans from creating disparities between medical/surgical benefits and mental health benefits, as well as substance-use disorder benefits.

"... DOES NOT REQUIRE GROUP HEALTH PLANS TO OFFER MENTAL HEALTH ..."

The MHPAEA, however, does not require group health plans to offer mental health or substance-use disorder benefits, but group health plans that offer these types of benefits will be required to comply.

The interim final regulations generally apply to group health plans and group health insurance issuers for plan years beginning on or after July 1, 2010, subject to certain exceptions. These exceptions include (i) the exclusion of employers with fewer than 50 workers, and (ii) an opt-out provision for certain nonfederal governmental employers. However, calendar-year health plans were subject to the statutory provisions of the MHPAEA as of January 1, 2010. Employers who comply with the interim final regulations prior to the effective date arguably will have shown a good faith effort to comply with the statutory provisions of the MHPAEA. [PE]

Guest-Worker Rules to Increase Wages

Labor Secretary Hilda Solis announced new rules for the temporary immigrant farm workers program, saying they would raise wages and strengthen labor protections for foreign and American workers.

Under the new rules, growers will no longer be able to attest that they tried to find American workers to fill jobs given to migrants, but will have to prove they conducted job searches. The Labor Department will establish a national electronic registry of farm jobs to assist the effort.

Growers' groups said the new rules would be costly and could be prohibitively cumbersome for many farmers, particularly smaller producers.

Many of the new measures restore previous procedures for the program, known as H-2A for the type of visa that foreign workers receive, after the rules were changed in the last days of the Bush administration.

California growers said that new restrictions on the jobs guest workers in the program could perform were too inflexible for the rapidly changing conditions of agriculture. Growers and farm workers agreed that the Obama administration should press Congress to pass legislation overhauling the immigration system. Most versions of that legislation include a bill that creates a new guest worker program that all sides in agriculture have long supported. [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 April 28th, 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 Beakfast

CHIPRA Notice Enclosed!

Human Resources Question with Candice Weaver

The Month's Best Question

Asking About Health Problems

Q: ***"An employee says she is going to need an FMLA leave for a health problem. I am afraid to ask her what is wrong. Do I have a right to know?"***

A: The answer is yes, and because the FMLA rules have changed, one of the most powerful tools you have to police FMLA leave is the more robust and complete health care provider certification form issued by the DOL as part of the new regulations. Use it because no one can complain about requiring the DOL's form, and it would be difficult to improve upon. Let employees know that you expect them to return a complete and satisfactory medical certification in the time allowed under FMLA guidelines — 15 days after you request the certification. This form is on our website **Forms** page.

The employee is entitled to FMLA leave only if she is unable to perform her job functions. The medical certification form has a section for the employee's essential job functions or you may attach a job description. The health care provider certifying the employee's right to FMLA leave should know the employee's job responsibilities before determining whether she is incapacitated and entitled to FMLA leave.

If the certification is questionable or unsatisfactory, exercise your right to clear up nagging questions about the medical document's veracity. If you have a reasonable basis to doubt the source of the certification (e.g., suspicious handwriting, document alteration, and inconsistencies), you are entitled to authenticate the document by contacting the health care provider directly to confirm the accuracy and authenticity of the certification. However, direct contact between the employer and the health care provider can be made only by an HR professional, leave administrator, or a leave manager. The employee's direct supervisor may not contact the health care provider.

If the certification is unsatisfactory (e.g., incomplete, inconsistent, vague, or illegible), you may require the employee to obtain a clearer or more complete certification. You must be specific about what information is unsatisfactory and how the form can be completed or corrected. The employee has seven calendar days to provide the corrected information. Don't settle for marginal medical certifications; require employees to complete satisfactory, detailed, and informative certifications as a condition of FMLA leave.

If the employee fails to get the adequate information within seven days, you have the option of obtaining a Health Insurance Portability and Accountability Act-compliant release from the employee allowing you to make direct contact with her health care provider. (Again, the employee's direct supervisor may not contact the provider.) However, it's better to leave the responsibility of obtaining a satisfactory medical certification with the employee. From a practical standpoint, second or third medical opinions don't work. They delay the process and muddy the waters in terms of medical conclusions, and the employer ultimately bears the cost of multiple examinations.

Employees with ongoing medical conditions or absences may be required to obtain updated certifications from their health care provider. If the original certification lists specific dates of incapacity, you can require recertification only after the specified time period has expired. If a medical condition (e.g., diabetes or asthma) lasts for an extended period of time, you can require recertification every six months. If the circumstances of the medical condition have changed from the original certification (e.g., an increase in the frequency or duration of the absences or some reason for questioning the legitimacy of the absences), you may require a new certification. Consistently requiring recertification lets employees know you're not asleep at the wheel when dealing with FMLA absences. [PE]

No-Cost Employment Seminars

The Tulare-Kings Builders Exchange, along with 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.

2010 Topic Schedule

♦ **Equal Employment Fundamentals -** Harassment & Discrimination in the Workplace - The seven (7) requirements that must be met by all employers. "The Protected Classes."
Thursday, March 18th, 2010, 10 - 11:30am

♦ **Safety Programs -** Understanding Cal/OSHA's Written Safety Program. Reviewing the IIPP or SB 198 requirements for your business.
Thursday, April 15th, 2010, 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 20th, 2010, 10 - 11:30am

♦ **Wage & Hour and Exempt Status -** Overtime, wage considerations and exemptions.
Thursday, June 17th, 2010, 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 15th, 2010, 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 16th, 2010, 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 21st, 2010, 10 - 11:30am

♦ **Discipline & Termination -** The steps to take before termination. Managing a progressive correction, punishment and termination program.
Thursday, November 18th, 2010, 10 - 11:30am

There is No Seminar in December

Want Breaking News by E-Mail?
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CHIPRA Notice Enclosed!

Pacific Employers
306 North Willis Street
Visalia , CA 93291
559 733-4256
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State Hikes Workers' Comp Premiums

Amid budgetary woes, the California Legislature has authorized a workers' compensation premium assessment (WCPA) to offset Department of Industrial Relations funding cuts.

The temporary premium assessment seeks to stabilize funding for the Division of Workers' Compensation (DWC), the Division of Occupational Safety and Health, and the Division of Labor Standards Enforcement, which enforces the legal requirement for employers to carry workers' comp insurance.

The state has restored programs designed to facilitate the courts' ability to adjudicate workers' comp claims quickly and to improve the overall efficiency of the state's workers' comp system. ***The cost of restoring those funds comes at a price for employers.*** [PE]

EEOC - Put Unattractive Worker at Front Desk

Under Title VII, an unlawful employment practice is established when an employee demonstrates that gender is a motivating factor for an adverse employment action.

Under that analysis, the 8th U.S. Circuit Court of Appeals has upheld the Title VII claims of a female hotel desk clerk who was fired after a company decision-maker complained that the employee lacked the pretty and "Midwestern girl" look desirable in a front desk employee. *Lewis v. Heartland Inns of America*.

The line between sexual orientation – which is not yet prohibited by federal law – and discrimination "because of sex" can be difficult to draw. However, employers must recognize that an employer who takes an adverse action against an individual because he or she does not fit within sexual stereotypes is engaging in sex discrimination because that discrimination would not have occurred but for the individual's sex. If a company's disciplinary actions are meant to punish or belittle non-compliance with gender stereotypes, the actions may constitute a violation of Title VII's "because of sex" provision. [PE]

ADA Discrimination

Akeena Solar Inc. will pay $30,000 to a payroll/accounts technician and implement preventative measures to settle a federal disability discrimination lawsuit, the U.S. Equal Employment Opportunity Commission announced Thursday.

This resolved the EEOC's suit alleging that a woman hired to be a payroll/accounts technician was fired by Akeena Solar within hours of her first day after her supervisor at San Jose-based Akeena discovered that her left arm was paralyzed.

The EEOC said its investigation determined that the employee, Gladys Tellez, was fully qualified and capable of performing the essential functions of the position despite her disability.

Title I of the Americans with Disabilities Act prohibits employment discrimination against people with disabilities in the private sector and state and local governments.

Akeena Solar will pay Tellez $30,000 in damages, post a notice in the workplace concerning the company's commitment to complying with the ADA, institute annual training on preventing disability discrimination to staff involved in hiring and recruitment, and report to the EEOC any disability discrimination complaints that arise for the next three years." [PE]

UNLIMITED CONSULTATION?

A benefit of Pacific Employers' Membership is unlimited, direct, phone consultation on labor, safety or personnel questions on the Pacific Employers' Helpline at
(559) 733-4256 or Toll Free (800) 331-2592