Pacific Employers
Management Advisor
47 Years of Excellence!
March 2011

What's New!

Favorable Decision on Wage Agreements

The California Court of Appeal in *Arechiga v. Dolores Press, Inc.,* has just ruled that an employer and employee may enter into an explicit wage agreement under which a non-exempt employee may receive a guaranteed fixed salary for all work (including overtime hours) so long as the employer pays the employee for all overtime wages at the correct premium rate.

In *Arechiga*, the employee worked 66 hours per week and received a set salary of $880.00 per week. The employer claimed that it had entered into an explicit wage agreement with the plaintiff under which the employee's fixed salary of $880.00 compensated him for both his regular and overtime work based on a regularly hourly wage of $11.14 and an hourly overtime wage of $16.71 ($11.14 x 1.5). The employee argued that his salary of $880.00 compensated him only for a regular 40-hour work-week at an imputed base pay of $22 per hour ($880 / 40 hours), and did not include his regularly scheduled 26 hours of overtime. California Labor Code section 515(d) provides that "[f]or the purpose of computing the overtime rate of compensation required to be paid to a non-exempt full-time salaried employee, the employee's regular hourly rate shall be 1/40th of the employee's weekly salary." Thus, according to the employee, the employer owed him overtime pay equal to 1.5 times his hourly based pay for his regularly scheduled 26 hours of weekly overtime (26 hours x $33.00 per hour ($22.00 x 1.5) = $858.00 per week in back overtime). The trial court rejected the employee's assertion that Section 515(d) prohibited explicit mutual wage agreements and held that the employee was not entitled to recover further overtime pay. The plaintiff appealed.

The Court of Appeals agreed with the trial court's application of the explicit wage agreement doctrine, stating "*Arechiga* cites no case law supporting his assertion that Labor Code section 515, subdivision (d) abolished explicit mutual wage agreements," which were authorized under case law prior to the enactment of AB 60 (which reinstated overtime for all hours worked in excess of 8 in a day for California's non-exempt employees). The Court noted that a Judicial Council of California Civil Jury Instructions still in effect and multiple federal cases post-AB 60 continue to acknowledge the viability of explicit mutual wage agreements. The Court also rejected the interpretation set forth in the Division of Labor Standards Enforcement (DLSE) manual that explicit wage agreements are "no longer allowed as a result of specific language adopted by the Legislature at Labor Code § 515(d)." The Court reaffirmed that the DLSE pronouncements unsupported by other binding authority are not entitled to any deference at all. Because there was sufficient evidence in the record to establish the employer's contention that the parties agreed to a base rate of $11.14 per hour and the $880.00 weekly salary fully compensated the employee for all hours of overtime worked, the Court of Appeal upheld the trial court's ruling for the employer.

To take advantage of this ruling, employers need to ensure that they have written wage agreements with employees that clearly and unambiguously explain the components of the employee's pay. Failure to have mutual wage agreements that explicitly lay out the terms and meet the test of this new case can result in significant potential liability for employers. Prudent employers should consult with experienced labor counsel to ensure that their wage agreements are enforceable. [PE]

Hiring Checklist Enclosed!

President's Report
~Dave Miller~

Appellate Court Rejects Meal and Rest Period Claims

A number of courts have held common sense language should be used to read the law. California law requires employers to "provide" meal periods. Does that mean "to make available" or to "require" a break?

In ***Tien v. Tenet Healthcare Corp.,*** the California Court of Appeal sided with *Brinker and Brinkley,* determined that a reading of the law does not find that employers must ensure employees take meal breaks.

The court instead sided with *Brinker and Brinkley,* holding that the ordinary dictionary meaning of "provide" means "to supply or make available," and does not mean employers must ensure employees take meal breaks. The court cited with approval several federal district court decisions holding that an employee is deprived of a meal period only when forced to forgo his or her meal period. [PE]

New Self Check E-Verify System

The Department of Homeland Security (DHS) has announced it will establish a new E-Verify Self Check System.

According to the DHS, the E-Verify Self Check is "voluntary and available to any individual who wants to check his own work authorization status prior to employment and facilitate correction of potential errors in federal databases that provide inputs into the E-Verify process."

When an individual uses E-Verify Self Check, he or she will be notified either that (1) their information matched the information contained in federal databases and they would be deemed work-authorized, or (2) his or her information was not matched to information contained in federal databases which would be considered a "mismatch."

If the information is a mismatch, the individual will be given instructions on where and how to correct their record(s). This newly established system will be included in the DHS's inventory of record systems. The program will be launched on March 18, 2011. [PE]

> Arbitrary power has seldom... been introduced in any country at once. It must be introduced by slow degrees, and as it were step by step. – Lord Chesterfield

Recent Developments

Company Can Require Call-In

The 8th U.S. Circuit Court of Appeals has held that an employee who was fired for repeatedly violating her employer's call-in policy cannot proceed with her lawsuit under the FMLA. *Thompson v. CenturyTel of Central Arkansas,LLC*

Loretta Thompson began working for CenturyTel, a telecommunications company, in 2003 and received an employee handbook that included a call-in policy that required employees to call the supervisor each day during a period of absence. Any employee who failed to provide proper and timely notice for three consecutive workdays, or for three separate workdays during a 12-month period was deemed to have voluntarily terminated employment. The departmental policies specifically provided that call-ins were to be made directly to her supervisor and if she was unavailable, that a voice mail message was to be left, notifying her of the absence. Employees were permitted to call in weekly, once a formal approval of FMLA leave had been issued.

In the summer of 2007, Thompson applied for and received a four-week FMLA leave. During this period, Thompson failed to call in as required. Once she returned from the leave, Her supervisor gave a verbal warning to her, and reminded her of the company's call-in policy.

"... DID NOT REPORT TO WORK AND DID NOT CALL IN ..."

On April 30, 2007, Thompson did not report to work and did not call in to report her absence for that day. When called at home, Thompson claimed not to have been aware that she was scheduled to work that day."

On November 16, 2007, Thompson called in sick and told her supervisor that she would be off work until November 21. Although Thompson had been scheduled to work on November 17, 20, and 21, she did not call in on those three days. Thompson subsequently claimed that she did not call in on those days because she planned to apply for FMLA leave for the absence. Thompson received a written warning for her failure to call in on those three days. The warning specifically stated that Thompson was "expected to follow Company policies and procedures," and that failure to do so "could lead to further disciplinary action up to and including termination."

On January 29, 2008, Thompson left a voice mail stating that she was sick. Thompson reported to work the next day, but left early for a doctor's appointment. Later that same day, Thompson left a message saying that she could not return to work until February 5, 2008, but did not speak to her supervisor or leave further messages for her after that. On February 5, Wilson returned to work and was told that her employment was terminated, because she had violated the call-in policy seven times within the past 12 months.

Thompson sued CenturyTel for violation of the FMLA, claiming they interfered with her leave under that Act. CenturyTel defended the claim by saying that Thompson was fired not because of her FMLA leave, but because she had violated the company's call-in policy. The lower court granted summary judgment for the employer, and the Eighth Circuit upheld the decision on appeal, in an unpublished opinion.

FMLA regulations specifically provide that an employer may require an employee on FMLA leave to "report periodically on the employee's status and intent to return to work." Thompson did not dispute that she failed to comply with the call-in policy, but argues that she would not have been terminated if she hadn't taken FMLA leave. The Eighth Circuit held that to the contrary, Thompson's repeated violations of the company's policy were not directly related to any particular FMLA leave but to her failure to report her own absences as required and, therefore, summary judgment in the company's favor was appropriate.

Here, the employer's clear, understandable, widely disseminated, and consistently enforced policy paved the way for the dismissal of Thompson's lawsuit. The fact that she had received the policy in writing in each of the years that she worked for her supervisor was a critical element of the company's successful defense in this case, and should be noted by employers who decide to implement a call-in policy for absences that include FMLA-related leaves. [PE]

Expanded ICE Audits

The federal government's Department of Homeland Security (DHS) is requiring as many as 1,000 companies to turn over their employment records for inspection as part of an expanding crackdown on businesses suspected of hiring illegal immigrants.

The audits represent the biggest such operation since 2009. At that time, Immigration and Customs Enforcement (ICE), a DHS unit, conducted an auditing sweep of businesses working in public safety and national security.

"... TARGETS AT LEAST A FEW REGIONAL FAST-FOOD CHAINS ..."

ICE has established an employment compliance inspection center to beef up coordination across states instead of having agents follow only local leads. The latest round of audits targets at least a few regional fast-food chains, according to people with knowledge of the operation.

Federal agents are expected to visit the companies in coming days to notify them of the requirement. The required documents include I-9 forms, used to verify an employee's identity and eligibility for employment in the U.S.

The big new sweep comes as state and federal lawmakers who champion tough immigration enforcement are pushing to mandate that all U.S. companies use a government-run electronic database to verify whether their new hires are legal workers. Currently, only federal contractors are required by law to use the program, called E-Verify.

That helps explain the push to expand the database system, which can weed out undocumented workers, and a recent surge of immigration enforcement by the Obama administration, which is stepping up its use of "silent raids," or audits of employee records that can lead businesses to dismiss hundreds of workers.

Audits last year ensnared the fast-growing burrito chain Chipotle Mexican Grill Inc., which in recent months was forced to dismiss hundreds of illegal workers in Minnesota. An ongoing investigation of 60 Chipotle restaurants in other states will likely force the company to shed more workers, according to immigration authorities.

Thousands of workers have been caught in the net by the Obama administration. Among other companies hit by the program are Abercrombie & Fitch Co., hip-clothing maker American Apparel Inc. and Gebbers Farms, a big apple grower in Washington state. [PE]

Hiring Checklist Enclosed!

Human Resources Question with Candice Weaver

The Month's Best Question

Reducing Work Schedules

Q: ***"We want to reduce our weekly work schedule from 5 eight-hour days per week to 4 eight-hour days for our hourly employees. Any restrictions?"***

A: Unless you have an individual employee contract or a union agreement, there is no law that prevents you from setting or changing a work schedule for hourly employees. Reducing hours is a valid alternative to layoffs during economic hard times.

Deciding the schedules for hourly employees, including reducing the hours and number of days worked, is at the employer's discretion. There are several other considerations of which employers should be aware.

Before making the decision to reduce hours, determine whether a an individual contract or collective bargaining agreement might limit your ability to make unilateral changes in scheduling. Unless the reduction affects all employees in a department, unit or classification, use objective criteria when choosing specific individuals.

Consider how a reduction in hours will affect existing sick leave, vacation, paid time off and health insurance policies. An employee's eligibility often is based on whether employment is full-time or part-time and a reduction in hours may cause a loss of eligibility.

If you choose to continue offering these benefits, update your policy to reflect any changes and contact your health insurance provider.

Employers may not reduce the established hours and days of an alternative workweek schedule. Employers may, however, unilaterally repeal the schedule with reasonable notice to employees. Another option is to propose a different alternative schedule and hold a new election.

Employees whose hours are reduced below full-time because of lack of work may he eligible for unemployment insurance benefits. The California Employment Development Department provides a work sharing program available to employers who are considering a reduction in hours as an alternative to layoffs. [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

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

♦ **Equal Employment Fundamentals -** Harassment & Discrimination in the Workplace - The seven (7) requirements that must be met by all employers. "The Protected Classes."
Thursday, March 17th, 2011, 10 - 11:30am

♦ **Safety Programs -** Understanding Cal/OSHA's Written Safety Program. Reviewing the IIPP or SB 198 requirements for your business.
Thursday, April 21st, 2011, 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 19th, 2011, 10 - 11:30am

♦ **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

Want Breaking News by E-Mail?
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Hiring Checklist Enclosed!

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Supreme Court Expands Title VII

Significantly expanding the scope of Civil Rights Act of 1964 Title VII's anti-retaliation provision to an ill-defined group of relatives, friends, and close associates of a discrimination claimant, the U.S. Supreme Court has ruled that an employee may sue his employer for retaliation after he was fired because his fiancé filed a sex discrimination charge against their mutual employer.

The law provides that "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees … because he has made a charge" under Title VII. The statute permits "a person claiming to be aggrieved" to file a charge with the EEOC alleging that the employer committed an unlawful employment practice, and, if the EEOC declines to sue the employer, it permits a civil action to "be brought … by the person claiming to be aggrieved … by the alleged unlawful employment practice."

According to the Court, this clearly follows its 2006 decision in Burlington N. & S. F. R. Co. v. White, in which it held that Title VII's anti-retaliation provision must be construed to cover a broad range of employer conduct and to prohibit any employer action that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." The Court thought "it obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired." [PE]

9th Circuit Says Resigning is Firing-

Employees who stopped reporting to work after their employer announced it would close in 12 days if it did not find a buyer for the business have suffered an "employment loss" under the federal Worker Adjustment and Retraining Notification Act ("WARN"), the federal appeals court in San Francisco has determined. *Collins, et al. v. Gee West Seattle LLC,*.

In a case of first impression, the Court rejected the employer's argument that as the 120 plaintiffs left of their own volition following the business closing announcement, fewer than 50 employees suffered "employment losses" at the time of the closing and WARN did not require it to provide 60 days' advance notice. The Court of Appeals found this argument "flips the basic structure of WARN on its head." Nevertheless, the Court noted that its decision does not affect other defenses or arguments (i.e., the "faltering business" exception) the employer may raise. [PE]

Sales Representatives Are Exempt

The U.S. Court of Appeals for the Ninth Circuit in *Christopher v. SmithKline Beecham Corp.* affirmed a district court decision holding that pharmaceutical sales representatives for GlaxoSmithKline ("Glaxo") are exempt from overtime under the Fair Labor Standards Act (FLSA) because they qualify as "outside sales" employees.

Pharmaceutical companies should find this decision helpful in arguing that they exercised good faith in classifying pharmaceutical sales representatives as exempt because of the decision's emphasis on the DOL's long history of acquiescence in this practice. [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, April 27th, 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 Breakfast