Pacific Employers
Management Advisor
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May 2010

What's New!

SEIU Lawyer to Join Labor Board!

President Barack Obama has announced the recess appointments of SEIU-lawyer Craig Becker and union-side Attorney Mark Pearce to the National Labor Relations Board. The March 27 announcement came one day after Congress broke for the Easter-Passover recess.

This announcement included thirteen other recess appointments to key administration posts which have remained vacant, according to the White House, due to "unprecedented" obstruction by Senate Republicans.

While the appointments effectively preclude Becker and Pearce from serving normal five-year terms on the NLRB, they would serve for about a year and-a-half, enough time to have a profound impact on labor relations in this country.

"Becker is widely known for his extreme views."

The President's actions confirmed widespread speculation over the past month that Becker and Pearce would receive recess appointments when Congress was scheduled to break for the Easter recess.

No nominee to the National Labor Relations Board has incited more controversy than Craig Becker, the current Associate General Counsel to the Service Employees International Union (SEIU). Becker is widely known for his extreme views. He believes employers should have no role in their employees' selection of a union representative and has expressed the opinion that the Labor Board should eliminate or restrict an employer's right to communicate with employees during a union's election campaign.

Out of concern for these views, a "hold" was placed on Becker's nomination last fall and the Senate unanimously decided not to carry his nomination over into 2010. Despite this, President Barack Obama immediately resubmitted his nomination in early January.

Hearings were held on Becker and Congressional Democrats thereafter sought a vote to close off debate over Becker's nomination. They lacked the votes to carry the motion, however. Consequently, all nominees to the NLRB were stalled. In response to the rumors that Becker's recess appointment was imminent Senate Republicans sent a letter to the president on March 25, urging that he "not ignore the bipartisan Senate vote by giving Mr. Becker a recess appointment to the NLRB...."

The President did not recess appoint Republican lawyer Brian Hayes, the Minority Labor Policy Director from the Senate Health, Education, Labor and Pensions Committee, whom he had previously nominated. The lone Republican currently serving on the Board is former arbitrator Peter Schaumber, whose term expires on August 27, at which point there will be two Republican vacancies. If those vacancies are not filled, there would be no Board Member to write dissenting opinions to help guide reviewing federal courts on appeal. Not since the New Deal and first six years of the NLRB, 1935-1941, has the Board been all Democrats or all from one party. The Taft-Hartley Act followed in 1947 to balance the scales. [PE]

Heat Illness Flyer Enclosed!

President's Report
~Dave Miller~

Health Care Reform

After considerable debate, health care reform has been enacted. The new legal requirements for health care come from two laws. President Obama signed the Patient Protection and Affordable Care Act on March 23, and he signed the corresponding Health Care and Education Affordability Reconciliation Act on March 30, 2010.

The new health care reform laws affect employers, group health plans, and insurance contracts—and impact all aspects of plan design and coverage, including lifetime and annual dollar limits, preexisting condition exclusions, waiting periods, claims procedures, plan communications, wellness programs, retiree coverage (and the prescription drug subsidy), and flexible spending accounts. In addition, the laws impose mandates on individuals and employers to provide eligible individuals with qualifying coverage, and they also impose penalties if coverage is not provided. Plans in effect on March 23 ("grandfathered" plans) are subject to some, but not all, of the new requirements.

The new obligations and restrictions are generally effective in 2014. However, several provisions take effect for plan years beginning after September 23, 2010 (which means January 1, 2011, for calendar-year plans). We will provide information on these new rules on our website through an e-mail newsletter with links to the Newsletter and inserts. [PE]

Retaliation, Latest Lawsuit Threat

In 2009, U.S. employees filed 93,277 workplace discrimination charges with the Equal Employment Opportunity Commission (EEOC) – the second highest number ever. And for the first time, race discrimination did not top the list of claims.

What came in first? Charges of retaliation — where employees claim they were fired, demoted or harassed because they complained they were victims of discrimination.

Observers of the employment law scene note that it's often easier for employees to prove retaliation than it is to lay out a compelling case for discrimination. "These statistics affirm what most management employment lawyers have known for some time — today, retaliation is employers' greatest liability risk," said Los Angeles attorney Joe Beachboard.

Another EEOC issue to watch: charges made under the Americans with Disabilities Act (ADA), which have skyrocketed by 44% in just four years. The increase coincides with recent changes to the ADA that made it easier for people to be classified as "disabled" under the law. And we can expect the trend to continue, Beachboard says: "The numbers will increase even more as workers have more success bringing disability discrimination lawsuits than in the past." [PE]

"All tyranny needs to gain a foothold is for people of good conscience to remain silent." — Thomas Jefferson

Recent Developments

The "Stacked Deck" – The Pro-Labor Majority at the NLRB

With the recess appointments of SEIU lawyer Craig Becker and union-lawyer Mark Pearce, current NLRB Chairman Wilma Liebman will forge a strong pro-labor majority (three out of five) with the power to change the law to help unions reverse their membership decline. This is what the new pro-labor majority will look like:

Chairman Wilma Liebman, a former union and Labor Board Attorney, believes fundamental changes are needed in federal labor laws to reverse the decline in union membership. She dissented from virtually every major decision of the Bush Labor Board and has repeatedly stated that her goal is to make federal labor law more "dynamic" and in tune with the "economic realities" of the 21st century. In recent remarks to the ABA "Developing Labor Law Committee," Chairman Liebman reiterated her view that the new Labor Board will have a clear opportunity to use rulemaking to re-shape current labor laws.

Mark Pearce represented unions in private practice after serving as an attorney for the NLRB. He is one of the founding partners of the Buffalo, New York law firm of Creighton, Pearce, Johnsen & Giroux, where he practices union-side labor and employment law before state and federal courts and agencies.

C**raig Becker** is currently Associate General Counsel of the SEIU, as well as Associate General Counsel to the AFL-CIO. He also was the putative architect of Illinois state law changes that resulted in the mass unionization of home care workers in that state. Becker has argued the right of the NLRB to implement Employee Free Choice Act-like changes without an act of Congress. [PE]

Employee or IC -- a $12.8 Million Decision

The decision to classify workers as employees or independent contractors has always been difficult. But recent events suggest that the choice, or at least the consequences of getting it wrong, is also expensive. The benefits of classifying workers as independent contractors, especially where the distinction is close, may no longer be worth the risk.

"... UPS CONTROLLED ALMOST EVERY ASPECT OF THE WORKING RELATIONSHIP."

Recently, shipping giant UPS agreed to pay a staggering $12.8 million to settle a class action lawsuit over the company's alleged misclassification of delivery drivers as independent contractors rather than employees. In the summer of 2008, several of UPS's delivery drivers filed a lawsuit in the United States District Court for the Northern District of California. The drivers claimed they were wrongfully classified as independent contractors rather than regular UPS employees, and as a result, were denied the benefits and protections of, among other things, the Fair Labor Standards Act ("FLSA"). Particularly, the drivers focused on the FLSA's minimum wage and overtime guarantees.

According to the drivers, UPS controlled almost every aspect of the working relationship. For example, the drivers alleged that UPS required packages be delivered and picked-up at certain times, that UPS dictated the drivers' dispatches, set the prices, and even controlled what the drivers wore. Essentially, the drivers claimed they were such an integral part of UPS's business, that they could not be said to have any separate or distinct business of their own. The court allowed the case to proceed as a class action, and the group eventually included roughly 2,400 UPS delivery drivers.

UPS denied the allegations, but eventually agreed to settle the case for $12.8 million (the settlement received provisional approval, but must still receive final approval from the court). Because the case settled before either a judge, jury, or more helpfully an appellate court, could decide the issue, we cannot know whether UPS in fact misclassified its drivers. [PE]

Intern Must Perform Essential Elements

A medical intern who misdiagnosed patients (including mistakenly identifying a patient as deceased), prescribed inappropriate medications or incorrect dosages, and who was "extremely argumentative" with his supervisors and co-workers was unable to perform the essential functions of his job and therefore, according to the 4th U.S. Circuit Court of Appeals, was not a qualified individual with a disability for purposes of the Americans with Disabilities Act. *Shin v. Univ. of Maryland Medical System Corporation*.

The intern had been let go after failing to perform his duties in a satisfactory manner. Dr. Shin ultimately filed a lawsuit under the ADA, alleging discriminatory discharge, and failure to provide a reasonable accommodation.

To prove wrongful termination and failure to accommodate claims under the ADA, Dr. Shin had to establish that he was a "qualified individual with a disability." The ADA defines a *"qualified"* individual as someone with a disability who, *"with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."* Therefore, Shin had to show not only that he was disabled, but that he qualified for the protections of the ADA.

"... WAS NOT A QUALIFIED INDIVIDUAL WITH A DISABILITY..."

To prove that he was qualified, Shin had to show that he was able to fulfill the essential functions of his job. Those essential functions, in essence, were "to provide competent medical care to patients with efficiency and reasonable autonomy." The Court held that Shin was unable to perform the essential functions of his job and, therefore, that he was not qualified to bring a lawsuit under the ADA. The Court went a step further, and addressed Shin's claim that he would have been "qualified" had UMMSC provided certain requested accommodation, including a permanent reduction in the number of patients for whom Shin was responsible. The ADA does not require an employer to assign an employee to *"permanent light duty"* or to reallocate job duties in order to change the essential functions of a job. On that basis, the Court held that no reasonable jury could conclude that a reduced work load was a reasonable accommodation under these facts.

The Fourth Circuit found Dr. Shin was not a qualified individual with a disability for purposes of the ADA - because he was not able to perform the essential function of his job - and his requested accommodations were unreasonable under the circumstances. Therefore, Shin didn't support his claims under the ADA. With many hospital systems moving to an "employment" model for physicians, it is critically important that hospital administrators and managers understand the employment-law implications of actions involving individuals in protected categories, and understand that ADA claims typically must be reviewed on a case-by-case basis. PE]

Heat Illness Flyer Enclosed!

Human Resources Question with Candice Weaver

The Month's Best Question

Fragrance in the Workplace

Q: ***"One of our employees says, 'I don't like her smell' and she isn't talking about a co-worker's BO. What is the employer supposed to do about offensive perfumes?"***

A: If it is a medical reason for the complaint, you have to listen and act. In a recent case an employee who said a co-worker's perfume made her throat "close a little" will receive $100,000 from her employer in a settlement. The company will also have to enact a new policy on personal scents.

City of Detroit employee Susan McBride filed her lawsuit under the Americans with Disabilities Act (ADA). She claimed the city failed to reasonably accommodate her allergy after she complained that a co-worker's perfume made it difficult for her to breathe.

The city argued the perfume allergy didn't qualify as a "major life activity" under the ADA. But a judge disagreed, saying that breathing qualifies as a major life activity.

Under a settlement reached with McBride, the city will have to post notices in buildings where McBride works, asking other city employees not to wear scents at work.

The notice will contain this language: "To accommodate employees who are medically sensitive to the chemicals in scented products, the city of Detroit requests that you refrain from wearing scented products, including but not limited to colognes, after-shave, lotions, perfumes, deodorants, body/face lotions, hair sprays or similar products."

Regarding the City of Detroit case, ask yourself this question: Wouldn't it have been easier — and less expensive — for the City of Detroit to have asked McBride's co-worker not to wear perfume?

Remember, as an employer, you may have an obligation to institute a workplace scent ban for health reasons. [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.

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

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

♦ **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

♦ **Workplace Security will be the topic for our 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

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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.

HIRE Act Signed

On March 18, 2010, President Obama signed the Hiring Incentives to Restore Employment Act (HIRE) into law, providing tax incentives for businesses hiring unemployed workers and extending deduction limits for small businesses that make capital improvements. Key HIRE Act Tax Benefits are:

* A 6.2 % payroll tax incentive for employers who hire unemployed workers this year (after Feb. 2, 2010, and before Jan. 1, 2011).

* A $1,000 general business tax credit for each worker retained by the employer for at least one year.

* Extending through 2010 the $250,000 deduction for small businesses that make capital improvements.

* Expanded eligibility for Build America Bonds to cover other qualified tax credit bonds .

* Extends surface transportation policy through Dec. 31, 2010. [PE]

How Did Workers Get Out Of Building?

Remember the incident in February in which a small private plane crashed into an IRS building in Austin, TX? Only one person inside the building was killed. Credit goes to regular fire and evacuation drills.

During a U.S. House hearing on federal building security, details on the evacuation of the building after the plane crash came to light.

Burning fuel from the plane quickly filled the building with black smoke, making it impossible for many in the building to see anything.

Among the actions that saved workers' lives:

* Employees near exits waited there so others could follow their voices and find their way out.

* Workers helped evacuate disabled employees.

* One IRS employee carried a disabled co-worker on his back down four flights of stairs.

* To counter the smoke, workers crawled on their hands and knees, breathing through clothing they'd dampened with water.

Do your employees know what to do? [PE]

21 Arrested in McDonald's Raid

A recent raid targeting illegal immigration led to the arrests of 21 Phoenix-area McDonald's workers, and authorities were still seeking 30 other employees as part of their investigation.

Those arrested during the raid of four McDonald's in Scottsdale, Tempe and Mesa were being held on suspicion of identity theft. It will take more time to determine whether any of them are illegal immigrants as officials suspect, said Maricopa County Sheriff Joe Arpaio.

Deputies also searched a mansion in the tony Phoenix suburb of Paradise Valley owned by Richard Coulston, who owns the restaurants, Arpaio said. Coulston was not arrested.

Deputies could be seen on local television stations swarming around Coulston's mansion, and McDonald's workers were shown crying and hugging each other. [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