Pacific Employers
Management Advisor
46 Years of Excellence!
November 2010

# What's New!

## Doffing & Donning Ruling

**The question often arises whether the time spent "donning and doffing" clothes and personal protective equipment is compensable time.** Federal courts are divided over this issue

Recently, another district court weighed in on the definition of clothes and related issues. In McDonald v. Kellogg Co., many of Kellogg's hourly employees at its Kansas City bakery facility had to don company uniforms and personal protective equipment, including hairnets, ear plugs, safety glasses and beard guards before walking to their work stations. After their shift, they had to doff the uniforms and personal protective equipment. Kellogg did not pay employees for the time they spent donning, doffing, or walking to and from their work stations.

The district court addressed three issues: 1) Whether personal protective equipment is included within the definition of "clothes" under Section 203(o); 2) Whether the parties had a "custom or practice" that the employees would not be compensated for changing clothes, even though the collective bargaining agreement was silent; and 3) Whether donning and doffing clothes triggered the start of the employees' workday, even if they were non-compensable activities.

As an initial matter, the court held that personal protective equipment is included within the meaning of "clothes" under Section 203(o), and thus the time spent donning and doffing such clothing is not compensable. Following decisions by the Fourth, Sixth, Seventh and Eleventh Circuits, the court held that "clothes" includes not only uniforms but also personal protective equipment such as the safety glasses and ear plugs at issue, specifically rejecting the Department of Labor's 2010 Opinion Letter that reached the opposite conclusion. In refusing to defer to the DOL, the court noted that the agency had switched its position on the issue at least twice in the past decade. The court also refused to follow the employee-friendly Ninth Circuit because its position (which is similar to the DOL's) contradicts all of the other Circuits that have addressed the issue.

The court also looked to whether the time spent donning and doffing the personal protective equipment "triggered" the start of the workday and thus the start of the "time clock." The court held that when the employees changed their clothes it triggered the start of the workday because the activity was integral and indispensable to the work they performed, and therefore walking to and from their workstations would generally be compensable time.

This case reminds employers to be aware of the precedent in their jurisdiction when deciding whether the time employees spend donning and doffing personal protective equipment and uniforms is compensable. Furthermore, even if the time spent donning and doffing is not compensable under Section 203(o), employees changing their clothes might trigger the continuous workday rule, resulting in compensable time for the activities employees perform after donning and before doffing their clothes. [PE]

## *2011 Attendance Forms Enclosed!*

# President's Report
## ~Dave Miller~

### Attendance Record - 2011 Poster

**Attendance Record --** This month Pacific Employers supplies you with the new "2011 Attendance Record." Its purpose is to provide a way to keep track of an employee's annual attendance on a single sheet. A shorthand guide for keeping track of absences, injuries, leaves of absence, sick days, vacations, etc., will be included on the form. If you need additional copies, please contact our office.

**Next month,** instead of our monthly "*Management Advisor*" you will receive the 2011 version of the Pacific Employers' "All-in-1" Poster which includes the required federal and state postings for most businesses.

It will include the new state Workers' Compensation posting now required for all covered employers. [PE]

"The problem with Socialism is that eventually you run out of other people's money."
- Prime Minister Margaret Thatcher

## New E-Verify User Manuals for Employers

**U.S. Citizenship and Immigration Services (USCIS)** has released new E-Verify User Manuals for Employers, Employer E-Verify Agents, and Federal Contractors. The new manuals reflect changes to the E-Verify website and offer additional guidance and clarification.

E-Verify is an Internet-based system operated by USCIS, a part of the Department of Homeland Security (DHS), in partnership with the Social Security Administration (SSA). The system is designed to help employers verify the employment eligibility of new hires and existing employees and complements the I-9 employment eligibility review.

### The Manuals

The new User Manuals provide step-by-step instructions on how to enroll in the E-Verify system and verify an employer's workforce. It also details actions employers should take after receiving a tentative or final USCIS non-confirmation notification regarding an employee's employment eligibility. Also, the User Manuals describe how employers can create case reports and password-protect their E-Verify account.

### Federal Contactors

Federal contractors with contracts in excess of $100,000 and subcontractors with contracts over $3,000 also are required to use the E-Verify system. Federal contractors that do not comply, may be subject to penalties ranging from monetary fines to contractor debarment. [PE]

# Recent Developments

## Injunctions Against Employers

**The National Labor Relations Board's (NLRB)** Acting General Counsel, Lafe E. Solomon, recently announced an initiative to encourage and expedite the processing of Section 10(j) requests in cases involving alleged unlawful discharges during union organizing campaigns.

This initiative institutes new timelines and procedures to accelerate the review of unfair labor practice charges alleging an unlawful discharge occurring during a union organizing campaign (so-called "nip in the bud" cases) in order to expedite a decision by the NLRB as to whether to seek a federal court injunction pursuant to Section 10(j) of the National Labor Relations Act (the Act). The initiative requires the NLRB's regional offices to investigate charges involving discharges during union organizing campaigns and to submit a report within one week of their findings to the Acting General Counsel. The Acting General Counsel has committed to personally review all such reports within a significantly reduced time period. If the Acting General Counsel determines that a Section10(j) injunction is appropriate, he will seek authorization, as currently required, from the NLRB. Chairman Wilma Liebman stated that she concurs with the need to expedite requests for Section 10(j) authorization.

Beginning in October, the NLRB will post on its website the names and status of all cases in which the NLRB has authorized the Acting General Counsel to seek a Section 10(j) injunction.

### Section 10(j)

Since Taft-Hartley amendments of 1947, the NLRB has had the authority under Section 10(j) of the Act to seek an injunction in a federal district court for interim relief while an unfair labor practice case is being processed by the NLRB. The NLRB seeks a Section 10(j) injunction when it determines that the purposes of the Act would be frustrated if expedited and interim relief of alleged unfair labor practices is not obtained. A Section 10(j) injunction can be obtained within a few months, if not weeks, of the filing of an unfair labor practice charge, as opposed to the many months (and often years) it takes for the NLRB to make an administrative determination.

> "..aggressive approach does create potentially serious ramifications.."

Before the General Counsel can seek Section 10(j) relief he must receive authorization from the NLRB, although Section 10(j) authority can be, and on occasion has been, delegated from the NLRB to the General Counsel. Once authorization is received, the General Counsel files a complaint in the federal district court where the alleged unfair labor practice occurred. Although the various circuit courts of appeal have differing standards for granting Section 10(j) relief, none of the standards require the NLRB to establish a violation has occurred, but only that it has sufficient basis to so argue.

### What Should Employers Expect?

The NLRB's more aggressive approach does create potentially serious ramifications for employers alleged to have illegally terminated employees during an organizing drive. **It is not necessary to establish that the terminations are in fact unlawful in order to obtain an injunction that would result in a court order requiring the employer to reinstate the employees.** Rather, the NLRB need only establish a reasonable likelihood that the terminations could be unlawful. Employers could be compelled to reinstate terminated employees whose terminations are ultimately found to be justified perhaps years later. And because these cases will arise during union organizing campaigns, unions will be able to capitalize on the injunction as part of their organizing propaganda. [PE]

## OSHA's Penalty Policies to Dramatically Increase

**The Occupational Safety and Health Administration (OSHA)** took the next step in its 22-month effort to increase penalties and more vigorously enforce the OSH Act. OSHA head Dr. David Michaels sent to all of OSHA's Regional Administrators and the State Plan Administrators a memorandum outlining the deployment of the new Administrative Penalty. Effective October 1, 2010, all OSHA Area offices are directed to utilize the new penalty policy and the associated calculation system.

> "... Area Offices have less discretion ..."

Inspections opened prior to October 1 that reveal violations will lead to citations and penalties under the old penalty policy. However, employers can expect to see an informal influence from the new policy as they have witnessed in many recent citations. This "interim penalty policy" will remain in effect until OSHA is able to incorporate these changes into its Field Operations Manual. This comes on the heels of the Department of Labor Inspector General's report critical of the way OSHA handles penalty reductions in settlement negotiations. On a practical level, employers can expect to find that Area Offices have less discretion with regard to issuing citations and penalties, and will be less able and more reluctant to make reductions at Informal Conferences.

Under the new policy, the time period for considering an employer's past history of OSHA violations for purposes of determining a "repeat" violation and for determining penalty increases and reductions is expanded from three to five years. An employer who has been inspected by OSHA within the last five years and has no serious, willful, repeat or failure-to-abate violations will receive a 10% reduction in its penalty. However, where an employer has been cited by OSHA for a high-gravity, serious, willful, repeat or failure-to-abate violation within the previous five years, OSHA will increase penalties by 10% up to the statutory maximum. Those employers who have not been inspected or who have received a citation for serious violations that were not high-gravity will not receive either a reduction or an increase based on past inspection history.

The Assistant Secretary's memorandum concludes by noting that the changes in the new penalty policy increase the average penalty for a serious violation from approximately $1,000 to an average of $3,000 to $4,000. The Memorandum does not belabor that the cumulative impact of these changes in calculation formulas, coupled with the longer repeat period and a greater willingness to use willful citations will exponentially increase many penalties. [PE]

***2011 Attendance Forms Enclosed!***

## Human Resources Question with Candice Weaver

### The Month's Best Question

# Trade Secret Status For Customer Lists

**Q:** ***"We want our customer list to remain secret. How can we establish it as a proprietary or secret tool?"***

**A: There is no set rule for achieving trade secret status for a customer list, but there are many different steps a company can take to improve its odds. Here are a number of important ones:**

- **Establish Ownership.** Contractual clarity is helpful. Employment agreements should require employees to acknowledge that customer records and information, specifically including their identities and other data about their preferences, contact information and the like belong solely to the employer and are considered to be the company's trade secrets. This may even mean taking steps to ensure customer information is not disclosed through social media such as LinkedIn, Facebook or Twitter.
- **Prohibit Misuse Through Nondisclosure Agreements.** Employment agreements should contain nondisclosure agreements with language stating that employees may not use or disclose customer information except for the sole purpose of conducting business on behalf of the employer.
- **Maintain Computer Security.** Customer information should be protected in all forms, including on computers. Maintaining a secure computer system is not a simple task, but the following steps should be considered: require passwords; limit employee access to certain information on a need-to-know basis; implement controls on what can be downloaded; make sure your system has all of the latest security patches and fixes installed; and if the company's system is on the internet, use a firewall and routinely audit servers for security gaps.
- **Remind Employees.** Don't let employees forget that your customer information is company property and may not be disclosed. Flag computer systems with messages and dialog boxes with reminders. Include confidentiality language in policy manuals and handbooks. Send written reminders in annual compliance or business practice updates. Remind employees during meetings and review sessions. Periodic emails can be used. In short, take advantage of natural opportunities to remind employees.
- **Limit Access.** In addition to protecting computer systems, carefully monitor and limit access to customer files. Do not store customer records in areas that are accessible to the public or to all employees. Limit employee access to information only about the customers they personally service.

Pacific Employers' staff can help provide the tools to make your firm's intention clear to employees as to what is confidential and how the violations of the trade secret policy will be enforced. [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 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.***

### *Last 2010 Seminar*

♦ **Discipline & Termination -** The steps to take before termination. Managing a progressive correction, punishment and termination program.

**Thursday, November 18th, 2010, 10am - 11:30am**

**~ No Seminar in December ~**

Want Breaking News by E-Mail?
Just send a note to
peinfo@pacificemployers.com
Tell us you want the News by E-Mail!

## "All-in-1" Poster for 2011!

**We are working on it now!** In your mailbox in December, you will find Pacific Employers' Annual Christmas Card, the year 2011 version of the Pacific Employers' "All-in-1" Poster which includes the required federal and state postings for most businesses. Included is the new state Workers' Compensation posting now required for all covered employers.

Those who wish to obtain additional copies of the "All-in-1" Poster for each site. Stop by or just give us a call at the office to obtain extra copies of the poster.

***Note:*** *You're not done when you get the "All-in-1" Poster up. You still need to make sure you have the Industrial Welfare Commission's (IWC) order for your business posted. Contact our office or go to our Web site for information on the IWC orders for your business.*

### Spanish "All-in-1" Poster!

Pacific Employers also recently revised our **"All-in-1" Poster in Spanish.** While we are **not** making a general mailing of it, the poster is available from our office. [PE]

### No December Newsletter!

As the **"All-in-1" Poster** takes the place of Pacific Employers' Management Advisor, there will be no December 2010 issue of the printed newsletter. [PE]

2011 Attendance Forms Enclosed!

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2008 Chamber Visalia of Commerce Small Business of the Year

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.

## Taxi Company Pays $30,000 for Disability Discrimination

**Vegas Western Cab Company,** which provides taxi services in Nevada, will pay $30,000 to a disabled job applicant and furnish other relief to settle a disability discrimination lawsuit filed by the U.S. Equal Employment Opportunity Commission, the agency announced.

In its lawsuit *(EEOC v. Vegas Western Cab Company, Case)*, EEOC asserted that the taxi cab company refused to hire Joel Walden, a single-arm amputee who applied for a taxi driver position in 2006, due to his disability. Walden was rejected although he met all of the requirements stated in the job announcement, had experience as a driver and an unblemished driving record, EEOC said.

The agency further charged that the company commingled the medical records of employees, such as doctor's notes, with other personnel records, thus failing to maintain the confidentiality of those medical records.

"In this case, the applicant was ready, willing and able to do the work," said Anna Y. Park, regional attorney for EEOC's Los Angeles District Office. "When evaluating a disabled job applicant, the sole consideration should be whether the applicant can do the job. It is plainly and clearly illegal to deny employment to a qualified individual based on disability-related assumptions."

Employers must ensure that the medical information of employees and applicants is maintained separately from personnel records. Even the inadvertent mixing of medical and personnel documents is a direct violation of the ADA. [PE]

## Obesity in the Workplace Costs the U.S. $73.1 Billion a Year!

**Obese Americans have increased the cost of health care,** according to recent studies, but the doctor's office isn't the only place where obesity ups expenses:

The workplace is another. Research released Friday by Duke University found that the cost to employers of obesity among full-time employees was $73.1 billion a year.

Using survey data from the 2006 Medical Expenditure Panel Survey and the 2008 U.S. National Health and Wellness Survey, the Duke researchers estimated the extent to which obesity-related health problems affected absenteeism, work productivity and medical costs.

While previous estimates looked mainly at the direct health care costs of obesity, lead researcher Eric Finkelstein, deputy director for health services and systems research at Duke-National University of Singapore, and his colleagues found that "presenteeism," or the lost productivity incurred when employees try to work despite health problems, cost employers a whopping $12.1 billion per year, nearly twice as much as their medical costs. [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 Jan 26th, 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