Pacific Employers
MANAGEMENT ADVISOR
Over 50 Years of Excellence!
November 2015

WHAT'S NEWS!

SCHOOL ACTIVITY LEAVE IS NOW SICK LEAVE!

Governor Brown signed Senate Bill 579 (SB 579) into law which provides for additional circumstances under which employees may take school activities leave.

Because of SB 579, California school activities leave now includes the addressing of a child care provider emergency; a school emergency; finding, enrolling, and reenrolling a child in a school or with a child care provider. The pool of eligible employees is expanded by SB 579 to include employees who are stepparents, foster parents or stand in loco parentis to a child.

SB 579 also requires employers to permit employees to use sick leave for the purposes specified in the Healthy Workplaces, Healthy Families Act of 2014 and prohibits an employer from denying or retaliating against such employee for using sick leave for such purposes. [PE]

Home Health Care Workers Rule Reinstated!

A Federal court of appeal for the D.C. Circuit has reinstated the U.S. Department of Labor's (DOL) final home health care rule, which extended federal minimum wage and overtime requirements to home health care workers. Key portions of this rule were previously vacated by lower court decisions and the federal rule's January 1, 2015, implementation date was delayed pending litigation.

Now, the federal appellate court has overturned the lower court decisions. The court found that the DOL's decision to extend minimum wage and overtime protections to home health care workers was based on a reasonable interpretation of the law and not arbitrary or capricious.

Affected employers will need to wait and see how the DOL moves forward with implementation. The DOL issued a statement noting that its implementation program will help employers prepare for compliance and that it "stands ready" to provide technical assistance to states and other entities as they implement the final rule. More information on federal minimum wage and overtime for these workers can be found on the DOL Home Care webpage.

Importantly, California already extends minimum wage coverage to companions, as defined by the Federal Fair Labor Standards Act, and has provisions extending overtime to certain categories of workers providing in-home care. California's Domestic Worker Bill of Rights went into effect on January 1, 2014 and addresses overtime obligations for "domestic work employees" who are "personal attendants," as defined by statute.

Give us a call if you have any questions regarding the payment of home health care workers or other domestic workers and regarding the interaction of California and federal law. [PE]

Update Salaries for Exempt Employees

The CA minimum wage increase of $1.00 per hour on January 1st will raise the minimum wage to $10.00 per hour for the lowest wage workers and may result in a salary increase for many exempt employees.

California law requires in order to be classified as exempt, an employee must meet certain requirements with regard to the type of work that they are doing and earn a monthly salary which is twice the state minimum for a full time employee (40 hours per week). Currently the minimum salary for a full time, exempt employee is $37,440 per year. In 2016, employees will need to earn at least $41,600 per year to meet the minimum salary test for exempt status.

State minimum wage law will also impact the pay of commissioned inside sales employees. Under California law, an inside salesperson will be exempt from overtime pay if they earn more than 1.5 times the state minimum wage and more than half their income comes from commission. This means that in order to be exempt from overtime pay after January 1, 2016 an inside sales person must earn at least $15.01 per hour. [PE]

Employee Attendance Form Enclosed!

President's Report
~Dave Miller~

Raft of New Laws

The latest legislative session has just ended, and, true to form, the California Legislature has added more than a dozen new laws affecting employers doing business in the nation's largest state. These statutes are in addition to the other new laws reported on recently. Join us in January for the Labor Law Update Seminar.

Labor Law Update - The courts and legislature are constantly "Changing the Rules" - Learn about the recent changes to both the California and U.S. laws that affect employers of all types and sizes.

See you at the Builders Exchange on Thursday, January 21st, 2016, 10 - 11:30am. [PE]

NASTY NEW "PIECE RATE" LAW

Governor Brown, Jr. has signed legislation that re-writes the definition and rules governing the payment of piece-rate compensation in California.

Assembly Bill (AB) 1513 creates new California Labor Code section 226.2 and sets forth requirements for the payment of a separate hourly wage for "nonproductive" time worked by piece-rate employees, and separate payment for rest and recovery periods to those employees.

If you are a"piece rate" employer, such as an auto repair shop, crop havester or construction contractor, please review Candice's article on Page 3 of this edition of the Management Advisor. You may need to take immediate action! [PE]

"The American Republic will endure, until politicians realize they can bribe the people with their own money."
-- Alexis de Tocqueville (1805-1859) French historian

Recent Developments

10-Year Age Difference "Insubstantial"

The Ninth Circuit Court of Appeals held in *France v. Johnson* that an average age difference of less than ten years between a plaintiff and replacement employees creates a rebuttable presumption in an age discrimination claim that the age difference is "insubstantial."

John France, age 54, was employed as a border patrol agent for the U.S. Department of Homeland Security and unsuccessfully sought a promotion to a GS-15 level position. The four candidates who were selected for the position were 44, 45, 47 and 48 years old. France filed a lawsuit alleging age discrimination in violation of the ADEA.

"... SUCH A PRESUMPTION MAY BE REBUTTED ..."

After the trial court dismissed the age discrimination claim, France appealed the case to the Ninth Circuit. A key issue was whether France was able to assert a prima facie case of age discrimination, which includes a requirement that, among other things, France was denied a promotion in favor of a "substantially younger person." The court held that the average age difference between the plaintiff and the selected candidates in this case—8 years—would normally be insufficient to satisfy the requirement of a substantially younger person. In so holding, the Ninth Circuit adopted the "reasonable and workable rule" that an average age difference of less than ten years is presumptively insubstantial under the ADEA.

However, the court also held that such a presumption may be rebutted with other evidence of age discrimination, which happened in this case due to statements that the employer preferred "younger, less experienced agents" and strongly urged France to retire. On this basis, the court reversed and remanded the case for further proceedings. [PE]

ACA Reporting Begins in 2016

Beginning in 2016, employers subject to the Affordable Care Act's (ACA's) employer mandate must comply with reporting requirements concerning the health insurance coverage they offer to employees.

The ACA amended the Internal Revenue Code to require that "applicable large employers" (employers with 50 or more full-time and full-time equivalent employees) file information returns with the IRS detailing the coverage that they did or did not offer to full-time employees in the preceding year. These employers also must provide statements to employees about the coverage they were or were not offered.

The IRS will use the information to administer the ACA's employer mandate, and to determine if employees are eligible for premium tax credits. Applicable large employers must file their information returns with the IRS on or before February 29, 2016, or by March 31, 2016, if they file the information returns electronically (employers filing more than 250 returns must do so electronically). Applicable large employers must provide the required statements to their employees by February 1, 2016.

Employers can find resources on the reporting process on the IRS's ACA Information Center for Applicable Large Employers site. [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.

Temp Workers Can Vote! - NLRB

A National Labor Relations Board (NLRB) ruling will put thousands of companies on the hook for workplace disputes and union-organizing matters involving temporary and franchise workers.

The NLRB, in a 3-2 ruling splitting the Board on party lines, revised its "joint employer" standard for determining when one company shares responsibility for employees hired by another. The change will make it easier for unions to negotiate over wages and benefits for pools of contingent workers.

The change, fiercely opposed by many businesses, is at a time when more companies are turning to temporary contract workers as part of their business model. The ruling could also affect arrangements at franchise companies such as McDonald's Corp. that are in many instances a step removed from workplace matters at their franchises.

The change alters a decades-old approach by the NLRB that said one business couldn't be held liable for employment-related matters at another unless they had direct control over the employees in question.

The Board's Democrat majority said the NLRB hasn't kept pace with an evolving workplace in which an increasing number of U.S. workers are employed through temporary staffing agencies. They cited in their decision a "dramatic growth in contingent employment relationships" that "potentially undermines the core protections of the act for the employees impacted by these economic changes."

The ruling came in a case where a Teamsters local union, the Sanitary Truck Drivers and Helpers Local 350, asked the NLRB to consider Browning-Ferris Industries of California Inc. and Leadpoint Business Services, a Phoenix-based staffing firm that provides the company with temporary workers, joint employers of a group of subcontracted workers hired through the staffing agency.

In the past, companies generally had to share decision making on employment matters such as firing, hiring and discipline in ways the board said would have a meaningful effect on the workers. Under the revised standard, the NLRB also will consider if a business exercises indirect control through an intermediary, or has reserved the right to do so. The Board will consider this on a case-by-case basis, board officials said.

"Our aim today is . . . 'encouraging the practice and procedure of collective bargaining,'" the Democrats said.

The Board's dissenting Republicans said: "The result is a new test that confuses the definition of a joint employer and will predictably produce broad-based instability in bargaining relationships." [PE]

Sexual Harassment Prevention Training

Visalia Chamber of Commerce and Pacific Employers, will host a state mandated Supervisors' Sexual Harassment Prevention Training Seminar & Workshop with a continental breakfast on January 20th, registration at 7:30am Seminar 8:00 to 10:00am, at the Lamp Liter, Visalia.

RSVP Visalia Chamber - 734-5876

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

Certificate – Forms – Guides – Full Breakfast

Future 2016 Training dates:

April,20th, July 20th, & Oct.19th

Human Resources Question with Candice Weaver

The Month's Best Question

Onerous "New Piece" Rate Law

Q: ***"What is the new Piece Rate rule?"***

A: Assembly Bill 1513, which is effective January 1, 2016, adds Section 226.2 to the Labor Code and will make it even more difficult for California employers to pay employees on a piece-rate basis for any part of their work:

First, Section 226.2 will require employers to pay piece-rate employees for rest and recovery periods (and all periods of "other nonproductive time") separately from, and in addition to, their piece-rate pay.

Second, Section 226.2 will make wage statement compliance for piece-rate employers even more complex and burdensome. As Section 226.2 does not contain a collective bargaining exemption, the new law will apply even to employers of unionized employees.

Rest and recovery periods — Employers must pay piece-rate employees for rest and recovery periods at an hourly rate that is determined by dividing the employee's total compensation for the workweek (excluding compensation for rest and recovery periods and overtime premiums) by the total hours worked during the workweek (not including rest and recovery periods).

The bill allows certain employers some additional time to program their payroll systems to comply with the "average hourly rate" requirement, provided that they retroactively pay employees the required amount.

Other nonproductive time — Employers must pay piece-rate employees for "other non-productive" time (time when an employee is under the employer's control, but is not engaged in activity directly related to the piece-rate activity) at a rate that is no less than the minimum wage. If an employer pays employees a base hourly rate for all hours worked in addition to piece-rate wages, then the employer need not pay amounts in addition to this hourly rate for the "other non-productive time."

Additional Wage Statement Requirements

Section 226.2 will also mandate additional categories of information that must appear on a piece-rate employee's itemized wage statement.

"Safe Harbor" for Past Violations

Section 226.2 will permit employers to assert a limited "safe harbor" affirmative defense against claims for wages, damages, and penalties for the non-payment for rest and recovery periods and other nonproductive time. To come within this safe harbor, the employer must pay for all previously uncompensated rest and recovery periods and other nonproductive time, plus interest, for the period from July 1, 2012 through December 31, 2015. An employer seeking this safe harbor must also give written notice of its intent to do so to the Department of Industrial Relations by no later than July 1, 2016, and must make the back payments (to current and former employees) by December 31, 2016.

Immediate Action Required

Section 226.2 will require immediate action on the part of employers that pay employees on a piece-rate basis. As most employers must comply with the new requirements by January 1, 2016, and compliance likely requires significant modification to payroll systems and wage statements, employers should now begin evaluating how to implement the necessary changes. Employers should also begin considering whether to take advantage of the safe harbor provision. [PE]

No-Cost Employment Seminars

Pacific Employers hosts this Seminar Series at the Builders Exchange at 1223 S. Lover's Lane at Tulare Avenue, Visalia, CA. RSVP to Pacific Employers at 733-4256. ***These mid-morning seminars include refreshments and handouts.***

Final 2015 Seminar

Discipline & Termination

Nothing can get you in trouble faster than a bad discipline or termination. Do the words discipline and termination intimidate you? Are you unsure of how to proceed when problems with employees arise?

Learn progressive discipline techniques and the steps to take before termination at Pacific Employers' free Discipline & Termination Seminar on Thursday, November 19th, 2015, from 10-11:30am at the Tulare-Kings Builders Exchange, 1223 S. Lover's Lane in Visalia.

There is No Seminar in December

2016 Topic Schedule

♦ **Labor Law Update -** The courts and legislature are constantly "Changing the Rules." Learn about the recent changes to both the California and U.S. laws that affect employers of all types and sizes.
Thursday, January 21st, 2016, 10 - 11:30am

♦ **Employee Policies -** Every employer needs guidelines and rules. We examine planning considerations, what rules to establish and what to omit.
Thursday, February 18th, 2016, 10 - 11:30am

♦ **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, 2016, 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, 2016, 10 - 11:30am

♦ **Family Leave -** Fed & CA Family Medical Leave, California's Pregnancy Leave, Disability Leave, Sick Leave, Workers' Comp, etc.; Making sense of them.
Thursday, May 19th, 2016, 10 - 11:30am

♦ **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

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Employee Attendance Form Enclosed!

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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.

NLRB Cracks Down On Employment Policies

Continuing the National Labor Relations Board's (NLRB) focus on employer handbook provisions, an Administrative Law Judge (ALJ) for the agency ordered Verizon Wireless to rescind multiple sections from its handbook related to employee communications.

Provisions at issue included one section providing that the employer could discipline employees for causing Verizon Wireless "embarrassment," a clause (1), on using internal e-mail for solicitation, and (2), another on the disclosure of nonpublic company information.

Three out of the five sections considered by the ALJ were found to be in violation of Section 8(a)(1) of the National Labor Relations Act (NLRA), as the embarrassment provision was "overly broad," and a ban on using e-mail for solicitation could impact the ability of employees to communicate about wages, hours, and other working conditions.

The judge ordered the employer to rescind all the unlawful handbook sections and post notice about the action at Verizon Wireless workplaces. In a statement, the employer said it was considering its options, as "[t]here is no claim that Verizon Wireless violated any employee rights," and the case "concerns technical claims about the wording of certain Verizon policies." [PE]

Single Instance Sufficient For Claim

A single instance of unwanted touching was sufficient to support a hostile work environment claim, according to a decision from a Maryland federal court judge.

Tiffany Jones alleged that the CFO of Family Health Centers of Baltimore harassed her on multiple occasions by blocking her path in the hallway, making questionable comments, and hanging around her workroom. She also claimed that one day he came up from behind her, grabbed her waist, and pushed his genitals against her buttocks. She reported the incident and did not return to work.

The employer moved for summary judgment when Jones filed a Title VII lawsuit, but the judge denied the motion. Relying on a recent Fourth Circuit Court of Appeals decision where the court found the isolated use of an offensive racial epithet can render a workplace hostile, the judge said a single instance of unwanted sexual contact was similarly sufficient to keep Jones' case alive.

Further, because the employer failed to provide evidence that it distributed its anti-harassment policy, the court declined to credit the Faragher-Ellerth affirmative defense for the employer. [PE]

Supervisor's "Girl Power" Sex Discrimination

A New York federal court judge ruled that "girl power" was strong enough to provide the basis for a sex discrimination suit brought by a male employee.

Todd Lenart alleged that he experienced a hostile work environment and was discriminated against on the basis of his sex and gender by his female supervisor. Women were given preferential treatment during the hiring process and after they were employed, according to the plaintiff.

The supervisor allegedly said she wanted to have a staff of all women and after Lenart was terminated—purportedly due to a reorganization of the department—said she had created a "girl power team based in New York."

The employer moved to dismiss the suit but a federal court judge denied the motion. The supervisor's possibly innocuous message of female empowerment, when coupled with the fact that a female took over most of Lenart's duties after his termination, were sufficient allegations to move the case forward on his Title VII and state law claims of sex discrimination. [PE]

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