Pacific Employers
MANAGEMENT ADVISOR

50 Years of Excellence!

October 2014

What's News!

Sick Leave For Everyone!

Governor Brown has signed the Paid Sick Leave Bill (AB 1522) into law, making California the second state to mandate that employers provide paid sick leave to their employees *(CT was the first)*.

Starting in July 2015, California employers generally will have to provide their employees with at least 3 paid sick leave days per year. California employers who already provide paid sick leave to their employees will want to review their policies against the requirements of the new law to ensure compliance. Employers who currently do not provide paid sick leave will want to review the new law and adopt a compliant sick leave policy.

This bill mandates that all private and public California employers provide paid sick leave for employees, beginning in July 2015. Most employees will be entitled to one hour of paid sick leave for every 30 hours worked. Employees will be able to use sick leave for their own illness or for preventive care, to care for a sick family member, and/or to recover from certain crimes.

Employers will be able to cap annual sick leave use at 3 days (24 hours) per year, however unused, accrued sick leave will roll over from year to year, this rollover can be capped at no less than 6 days (48 hours). Employers will be able to set a minimum increment for use of sick leave, but the minimum increment cannot be greater than 2 hours. Employees will not be entitled to pay for unused sick leave at the time of separation of employment. Employers will be required to provide notice to employees of their accrued sick leave on their itemized wage statements or on a separate document provided at the same time as wages.

Employers will also be required to post a paid sick leave poster to be prepared by the Labor Commissioner's office. The bill also prohibits retaliation against an employee for using sick leave and establishes a rebuttable presumption of such retaliation if adverse action is taken against an employee within 30 days after the employee's use of sick leave.

Employees covered by collective bargaining agreements with paid sick leave provisions, providers of in-home supportive services and other enumerated criteria will be exempted from the new law. Employers that already have paid sick leave policies that comply with at least the minimum leave rights provided under the bill will not be required to provide additional leave. [PE]

Labor Law Update

Sick Leave - courtesy of "Big Brother" ♦ Our Guest Speaker for the October Seminar will be Tyler M. Paetkau, of Hartnett, Smith & Paetkau

New laws that affect employers are on their way!

- **Paid sick leave ordinances — CA & SF, who's obligated in the state to offer this now?**
- **The top wage and hour threats here in California, and tips for ensuring compliance**

Join us on Thursday, October 16th, at 10am to reivew and discuss changes in the Labor Law landscape.

2015 Vacation Scheduler Enclosed!

President's Report
~Dave Miller~

The 2015 Vacation Scheduler!

Enclosed in this edition of the *Management Advisor* is our 2015 Vacation Scheduler that provides the opportunity to visually and graphically display the employees' vacation choices. If you need additional copies, please contact our office or just stop by!

ATTENDANCE RECORD

Next month Pacific Employers will supply you with a new "2015 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, you may download a ***PDF*** copy from our website ***Forms*** page or you may contact our office.

UPCOMING POSTERS AND 2015 ALL-IN-ONE

In December, instead of our monthly "*Management Advisor*" you will receive the updated, 2015 version of the ***Pacific Employers' "All-in-1" Poster*** which includes the required federal and state postings for most businesses. Included in the updated poster will be a new poster required by AB 1522, the Three Day Paid Sick Leave law that becomes law in 2015

EMAIL NEWSLETTER

When circumstances move us, Pacific Employers sends out email newsletters that have information on breaking news, events and a few good jokes. Send a note to us at peinfo@pacificemployers.com and tell us you want "Breaking News by E-Mail." [PE]

"A society of sheep must in time beget a government of wolves."
Bertrand de Jouvenel (1903-1987)

Recent Developments

Personal Cell Phone Reimbursement

A California Court of Appeal held that class certification was appropriate in a case alleging that the employer failed to reimburse employees for expenses associated with using their personal cell phones for work calls.

"REIMBURSEMENT IS ALWAYS REQUIRED."

According to the Court of Appeal, all that is required to prove liability under Labor Code section 2802 is that the employee necessarily incurred expenses in the course of his job duties. The employee does not need to prove that he incurred expenses over and above what he would have incurred absent the job, nor does he have to prove that he actually paid his cell phone bill. The court held that if the rule were otherwise, the employer would receive a windfall by being able to pass on some of its operating expenses to employees. Thus, the court held that to be in compliance with Labor Code section 2802, "the employer must pay some reasonable percentage of the employee's cell phone bill" if the employee uses a personal cell phone for work purposes. In other words, "reimbursement is always required." The court did not define what a "reasonable percentage" is, but instead held that "the calculation of reimbursement must be left to the parties and the court in each particular case."

The case is *Cochran v. Schwan Home Service, Inc.* Employers that have employees using personal cell phones for business calls should review their expense reimbursement policies to ensure that these employees are reasonably compensated for the expense of making business calls on their personal devices. [PE]

Franchisors Not "Employers" or "Principals"

The California Supreme Court handed down an important decision addressing vicarious liability for franchisors in the employment context.

In *Patterson v. Domino's Pizza, LLC*, the plaintiff sued Domino's for sexual harassment by an employee of a franchisee. Domino's moved to dismiss the case and, although the trial court granted the motion, the Court of Appeal reversed.

The court held there was enough evidence to have the case go to a jury trial based on how much control Domino's exercised over its franchisees. What was disturbing to franchisors was that much of this "control" relied upon by the Court of Appeal is typical for franchisors and especially in the food service business.

One unusual aspect of the underlying case was that Domino's seemed to be very involved in the employment decisions of the franchisee. In particular, there was an allegation that a Domino's representative told the franchisee to fire the alleged harasser and the franchisee felt he had to do so or be terminated.

The Supreme Court reversed the Court of Appeal's decision overturning summary judgment in the franchisor's favor. The high court went into a comprehensive analysis of the nature of franchising and its special features, emphasizing its explosive growth and importance to the economy. The court concluded that the fact that the franchisor prescribed certain standards (part of the essential nature of franchising) does not mean a franchisor is automatically liable for the conduct of franchisees. Instead, a traditional employer/principal analysis is required of who has retained the general right of control over factors such as hiring, supervision, and discipline, and it is clear that this was the franchisee. The court dismissed the role of Domino's in the termination, concluding it was the franchisee's decision.

The court did note that a franchisor will be liable if it has retained the right of general control over the day-to-day operations of its franchisees. While this is an unlikely scenario, franchisors with interests in California will probably be taking a look at their relationship to consider the potential liabilty from their "control" over the franchisee's personnel decisions.

The court clarified that its decision does not imply that franchisors can never be held accountable for harassment at franchise locations. The court also emphasized that a franchisor that imposes and enforces "a uniform marketing and operational plan cannot automatically" be held responsible for the wrongful actions of a franchisee's employee.

Several law firms commenting on this decision noted that the California Supreme Court's decision stands in significant contrast to current efforts by the National Labor Relations Board's General Counsel to hold franchisors liable for the alleged unfair labor practices of franchisees, despite long-established precedent to the contrary.

The overall reasoning of this decision, and its recognition of the economic reality of the separation between franchisors and franchisees, will definitely provide franchisors with ammunition to argue against liability in vicarious liability claims. [PE]

Court: NLRB Is Acting Like A Union Subsidiary

A Pennsylvania judge accused a federal labor arbiter of acting as an extension of a powerful labor union in a dispute with a local hospital.

Federal Judge Arthur J. Schwab said that the National Labor Relations Board overstepped its bounds when it demanded personnel information from the University of Pittsburgh Medical Center Presbyterian (UPMC) during an investigation into alleged unfair labor practices filed by SEIU. The hospital objected to three requests because they would aid the union's attempt to organize the workplace.

Schwab called the NLRB's requests "overly broad and unfocused" and unprecedented in their "massive nature."

"The scope and nature of the requests, coupled with the NLRB's efforts to obtain said documents for, and on behalf of, the SEIU, arguably moves the NLRB from its investigatory function and enforcer of labor law, to serving as the litigation arm of the Union, and a co-participant in the ongoing organization effort of the Union," the ruling states.

The NLRB is in charge of enforcing labor law and overseeing the unionization process. Regional officials were called in to UPMC to investigate union charges that UPMC management had interfered with pro-union employees. The company appealed to the federal courts to determine if the "investigation has a legitimate purpose [and] the inquiry is relevant to that purpose." [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 October 22nd, 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

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.

Human Resources Question with Candice Weaver

The Month's Best Question

Reporting Time Rules In California

Q: "What is *reporting time pay* and when is it due?"

A: Reporting time pay is one of the provisions of California wage and hour law that is often overlooked by employers. The requirement to pay reporting time is set forth in Section 5 of all but one of the 17 Wage Orders, and it guarantees workers that they will be paid for at least half of their scheduled shift in the event they are sent home early. It also provides for a minimum of two hours of pay for employees who are required to report to work for a second time in one workday. The purpose of the provision is to discourage employers from deliberately over-staffing and then sending home excess workers without any pay. Yet, many employers are unaware of these rules!

Under the reporting time regulation, if a worker is scheduled to work 8 hour days, but is sent home after working only 2 hours, they are entitled to an additional 2 hours of reporting time pay. But, if they are sent home after four hours, they are only entitled to be paid for the time they actually worked, because the regulation only requires that the employee be provided with half of their usual or scheduled day's work.

Also, reporting time pay guarantees at least two, but no more than four, hours of pay in a single workday. Therefore, an employee who is scheduled for only a three-hour shift is guaranteed two hours of pay, while an employee who works 12-hour shifts is only guaranteed four hours of pay.

Employers Still Have to Pay: If an employee is unexpectedly called in to work without advance notice, then the employee is guaranteed at least two hours of reporting time pay. *Price v. Starbucks.*

When does this happen? This type of situation may arise where an employee is called in for a disciplinary meeting on a day when they are not scheduled to work. Even if the meeting lasts only long enough to tell the employee "you're fired," they are entitled to be provided with two hours of reporting time pay. But, if the employee is fired at the beginning of a scheduled eight-hour shift, the employer still must pay for four hours.

Note: The reporting time regulation does not provide employees with a right to a "minimum shift guarantee" of two hours every time they are required to report to work. Employers may require employees to work for periods of less than two hours, and pay them only for time actually worked, as long as these work periods are scheduled in advance. *Aleman v. Airtouch Cellular.*

When does this happen? Short work periods may arise when employees are required to attend meetings on their days off, which happens often for businesses that operate seven days a week, like restaurants, retail stores and hospitals. Of course, employers are still required to pay employees for at least half of the scheduled duration of these short work periods.

Employee Chooses to Take Off? Employer Is Off the Hook! It is important to note that employers are not required to provide reporting time pay to employees who leave work early of their own accord. So, a worker who leaves early due to illness or to attend to a personal matter is only entitled to be paid for the time they actually worked.

Other Exceptions: Let's hope you never encounter these situations, but reporting time pay is not required if work cannot commence because of threats to employees or property, or because of instruction from authorities, where there is a failure of public utilities to supply water, sewage, electricity, or gas, or where an "Act of God" prevents or interrupts work.

Workplace Solutions: Through careful planning, employers can minimize the amount of reporting time pay they provide to their employees. Take care when scheduling employees, so as not to overstaff and then send employees home for lack of work. If employees are required to come in on their regular days off, be sure to schedule such events in advance, and let employees know how long they will last. And when all else fails and employees are called in on their days off or are sent home early, be sure to have procedures in place to provide them with the proper reporting time pay. [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.

- Our Next 2014 Seminars -

♦ **Guest Speaker Seminar - Our Guest Speaker for the October Seminar will be Tyler M. Paetkau, of Hartnett, Smith & Paetkau,** the attorney responsible for representing *Tiri v. Lucky Chances, Inc.* winning the decision that permits an arbitration agreement which included a provision expressly delegating to the arbitrator, authority to determine issues of enforceability of the agreement.

Thursday, October 16th, 2014, 10 - Noon!

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

Thursday, November 20th, 2014, 10 - 11:30am

There is No Seminar in December

Seminar Topic Talk with Dawn

Guest Speaker Seminar

We recently featured an article regarding *Tiri v. Lucky Chances, Inc.* in which the CA Court of Appeal held that the trial court erred in even reaching the issue of whether the agreement was unconscionable because the arbitration agreement included a provision expressly delegating to the arbitrator, authority to determine issues of enforceability of the agreement.

Our Guest Speaker for the October Seminar will be Tyler M. Paetkau, of Hartnett, Smith & Paetkau, the attorney responsible for representing ***Tiri v. Lucky Chances, Inc.*** in their dramatic reversal of the lower court's decision.

Mr. Paetkau will focus on arbitration developments (having just won the *Tiri v. Lucky Chances* arbitration decision in the First District Court of Appeal), but will be happy to address any or all important labor and employment law developments affecting California and Central Valley employers.. (of which there are many!) ***The Seminar will be held for extended time - 10:00am to Noon!***

We recommend arbitration agreements, and our October seminar can help you look carefully at the provisions in your arbitration agreement. [PE]

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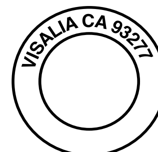

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Articles in this Newsletter have been extracted from a variety of technical sources and are presented solely as matters of general interest to employers. They are not intended to serve as legal opinions, and should not be deemed a substitute for the advice of proper counsel in appropriate situations.

CA Law Prohibits Retaliation against Whistleblowers Who Lack Work Authorization

California Governor Jerry Brown recently signed Assembly Bill No. 2751 (AB 2751) to amend a recently-enacted law that prohibits employers from retaliating against undocumented workers who engage in protected activity.

AB 2751 amends the recently-enacted Assembly Bill No. 263, which, among other things, restricted employers' ability to take disciplinary action against employees who had misrepresented their personal information, including their criminal history and immigration status. [PE]

Firings for Facebook Comments Unlawful

An employer violated the National Labor Relations Act (NLRA) by discharging two employees because of their participation in a Facebook discussion about their employer's State income tax withholding mistakes, by threatening employees with discharge for their Facebook activity, by questioning employees about that activity, and by informing employees they were being discharged because of their Facebook activity, the NLRB has ruled. The Board also ruled the employer's Internet/Blogging policy violated the NLRA. *Triple Play Sports Bar and Grille*.

The employer contended it had not violated the NLRA because the plaintiffs had adopted an ex-employee's allegedly defamatory and disparaging comments, which were unprotected.

The employer also asserted the Facebook posts were unprotected because they were made in a "public" forum, accessible to employees and customers, and they had undermined the co-owner's authority in the workplace and adversely affected its public image.

The Board also rejected the employer's argument that the employee's comment was unprotected because it was a workplace confrontation that could be seen by customers. The NLRB noted they joined the discussion as the ex-employee's Facebook friends, on their own initiative and in the context of a social relationship with him outside of the workplace, not because they were the employer's customers, and "[t]his off-duty indiscretion away from the [employer's] premises did not disrupt any customer's visit to the [employer].". [PE]

Oakland A's Will Pay Back Wages to Interns

The Oakland Athletics will shell out a quarter-million dollars to settle claims that they illegally underpaid their clubhouse workers and interns. Under an agreement with the U.S. Department of Labor, 86 current or former A's workers will receive a total of $266,358, a department spokesperson confirmed on Friday.

In an e-mailed statement, the A's said that they had conducted their own internal audit in 2013 and they were "pleased that the matter could be resolved quickly and informally with the DOL to both parties' satisfaction."

The A's follow at least two other Major League Baseball teams that have settled with the DOL over alleged wage theft since 2013. The Miami Marlins paid $288,290; the San Francisco Giants paid $765,508. The Baltimore Orioles are also currently under investigation, the Labor Department confirmed on Friday. [PE]

Court Rules Against Gay Marriage Bans

A U.S. appeals court issued a scathing, unequivocal ruling Thursday declaring that gay marriage bans in Wisconsin and Indiana violated the U.S. Constitution — a decision released a little more than a week after oral arguments from a normally slow and deliberative court.

The unanimous, 40-page decision by a three-judge panel of the U.S. 7th Circuit Court of Appeals in Chicago blasted the states' justifications for their bans, several times singling out the argument that only marriage between a man and a woman should be allowed because it is — simply — tradition. [PE]