Pacific Employers
306 North Willis Street
Visalia , CA 93291
559 733-4256
(800) 331-2592
Fax 559 733-8953
www.pacificemployers.com
email - peinfo@pacificemployers.com

VISALIA CA 93277

PRESORTED STANDARD
U.S. POSTAGE
PAID
PERMIT NO. 520

Return Service Requested

?? Enclosed!

Pacific Employers
Management Advisor
Over 50 Years of Excellence!

Like us on facebook

Seminar Series at The Depot Restaurant 207 E Oak Ave, Visalia

Managers Serve Jail Time For No PPE!

Five managers will serve various prison sentences for not providing PPE to workers who were removing asbestos from a defunct factory. Managers at A&E Salvage instructed workers to remove asbestos-containing materials from a closed plant in Hamblen County, TN. The company didn't train the workers on proper asbestos removal or provide the necessary PPE to protect against the dangerous material. Five company leaders at A&E pleaded guilty to a criminal felony count of conspiring to violate the Clean Air Act's "work practice standards" for removal and disposal of asbestos, which can cause lung cancer, asbestosis and the fatal mesothelioma.

Here are the sentences the managers are slated to serve:

- Mark Sawyer, owner and operator, 5 years in prison followed by 2 years of supervised release
- Newell Smith, manager, 37 months (3 years, 1 month) in prison and 2 years of supervised release
- Eric Gruenberg, manager, 28 months (2 years, 4 months) in prison
- Armida DiSanti, 6 months in prison and 6 months of home confinement, and
- Milto DiSanti, 6 months in prison and 6 months of home confinement.

In addition, the managers were ordered to pay restitution of more than $10.3 million.

According to the charges, the managers did more than simply forget to provide workers with a pair of gloves. The Department of Justice called their actions "a multi-year scheme in which substantial amounts of regulated asbestos containing materials were removed." Expert testimony revealed a serious risk of injury the workers removing the asbestos. [PE]

Cuts To Labor And Employment Funding?

President Trump's budget proposal for fiscal year 2019 indicates the administration intends to scale back the Department of Labor (DOL) and National Labor Relations Board (NLRB). The White House is also interested in crafting a new parent paid leave program administered through the unemployment insurance system, boosting apprenticeship programs, and mandating the use of E-Verify.

Personnel Reductions at the NLRB and EEOC

Under the budget proposal, the NLRB's funding would decrease by about 9%, resulting in a 7.2% decrease in the number of full-time employees. There are currently about 170 open positions at the NLRB that have not been filled. The NLRB envisioned additional personnel cuts under the current fiscal year but has not implemented such cuts. It is unclear whether the additional reductions resulting from the decreased budget would be in addition to the numbers already targeted for removal.

Immigration

Funding for a border wall aside, the budget would boost ICE enforcement by funding 2,000 new officers in fiscal year 2019, double the number of new hires for fiscal year 2018. The budget proposal also calls for "mandatory, nationwide use of the E-Verify system." [PE]

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

Pacific Employers
Management Advisor
Spring 2018
Over 50 Years of Excellence!
50 Pacific Employers EST. 1964

What's News!

Sexual Harassment by Nonemployees!

Employers should take note: A 2017 court case in which a hotel employee was attacked and sexually assaulted by a trespasser determined that the employee can pursue a Fair Employment and Housing Act (FEHA) harassment claim against her employer for the attack *(M.F. v. Pacific Pearl Hotel Management, LLC)*.

Under the FEHA, an employer may be liable for sexual harassment by nonemployees if the employer knew or should have known about the conduct and fails to take immediate and appropriate corrective action. An employer also must take all reasonable steps to prevent harassment from occurring.

This case is a good reminder that employers can be liable for harassment not only by supervisors and co-workers, but also by third parties such as customers, vendors or other persons who may come into contact with your employees. The employer's duty under the FEHA includes ending the harassing conduct and preventing future harassment. Employers must always take complaints seriously, investigate as needed and take appropriate corrective action, including protecting other employees who may be at risk. [PE]

Layoff Triggers WARN Act

It's well known that California is an at-will employment state, which means that employers may generally terminate individual or small groups of employees without notice.

But that does not apply when an employer undergoes a mass layoff — in such cases, the Worker Adjustment and Retraining Notification Act (WARN Act) requires that employers give affected employees advance notice of the layoff.

And recently, a California Court of Appeal clarified that employers also must follow the WARN Act's notice provisions when the layoffs will be for a short period of time (*The International Brotherhood of Boilermakers, et al. v. NASSCO Holdings, Inc.)*

WARN Act Requirements and Penalties

Both the state and federal legislatures have passed WARN Acts, with California's Act primarily expanding on the protections offered at the federal level and covering more employers.

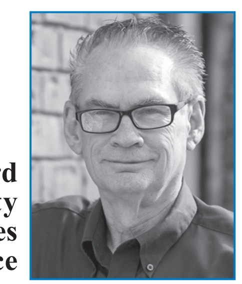
The WARN Act defines "mass layoff" as a layoff during any 30-day period of 50 or more employees.

California's WARN Act requires employers with more than 75 employees to provide affected workers and state officials with at least 60 days' notice of a mass layoff, relocation or termination, but does not specify how long a layoff must last to qualify for protections.

Employers that violate the WARN Act's notice provisions can be liable for back pay to affected workers, as well as civil penalties of up to $500 for each day of the violation. The penalties may be reduced if the employer believed in good faith that providing notice was not required. [PE]

Heat Illness and Child Labor Fliers Enclosed!

President's Report ~Dave Miller~



NLRB Majority!

The National Labor Relations Board shifts to a Republican majority with what many expect will be a series of reversals to Obama-era workplace policies.

The National Labor Relations Board ("Board") restored itself as the "exclusive power to deal with unfair labor practices and to prescribe the appropriate remedy" for such violations. This move came in *UPMC & UPMC Presbyterian Shadyside,* in which the Board ruled 3-2 that settlement offers may be approved over the charging party and General Counsel's objections if reasonable.

The ruling departed from precedent established just one year prior that precluding administrative law judges from accepting settlement offers that do not fully remedy each violation alleged when objected to by parties or General Counsel. The Board says that the full remedy standard "tied the hands not only of administrative judges but also of the Board itself." The standard placed the power of determining what constitutes an appropriate remedy for unfair labor practices with the charging party and the General Counsel. In ruling that reasonable, but less-than-full, settlement offers may be accepted despite any objections thereto, the Board freed itself of what it characterized as "an unacceptable constraint" on its ability to wholly exercise its statutory authority. [PE]

DOL Resumes Opinion Letters

In a welcome departure from its recent practice, the U.S. Department of Labor's Wage and Hour Division (WHD) recently issued its first new opinion letters in almost ten years. In addition to issuing three new opinion letters earlier this month, on January 5, 2018, WHD reissued seventeen opinion letters previously withdrawn under the Obama administration.

The resurrection of this practice offers employers a useful tool to ensure compliance with federal employment laws. Prior to the Obama administration, the WHD had a longstanding practice of issuing opinion letters in response to inquiries from employers concerning the application of the Fair Labor Standards Act (FLSA), the Family Medical Leave Act (FMLA) and other laws enforced by the WHD. These letters have traditionally provided guidance to both employers and employees concerning compliance with the laws and regulations under WHD's purview. Significantly, for employers, good faith reliance upon WHD's opinion letters can provide a defense to potential claims of a violation of the FLSA or other laws under the WHD's jurisdiction.

The fact that the WHD has resumed its practice of issuing opinion letters is a good sign for employers looking for answers on day-to-day issues. However, when seeking to rely on a WHD opinion letter, check WHD's website to make sure that the opinion letter in question remains in effect. This is particularly important in the year or two after the change of an administration from one party to another. [PE]

The fetters imposed on liberty at home have ever been forged out of the weapons provided for defence against real, pretended, or imaginary dangers from abroad.
-James Madison, 4th US president (16 Mar 1751-1836)

DOL Replaces Internship Test!

In a decision that surprised no one who has followed the litigation of wage hour claims by interns, the US Department of Labor (DOL) has abandoned its ill-fated six-part test for intern status in for-profit companies and replaced it with a more nuanced set of factors first articulated by the Second Circuit in 2015. The move officially eliminates agency guidance that several appellate courts had explicitly rejected as inconsistent with the FLSA.

The new leadership at the DOL not only scrapped the six-factor test entirely, but adopted the seven-factor *Glatt* test verbatim in a new Fact Sheet.

The FLSA requires "for-profit" employers to pay employees for their work. Interns and students, however, may not be "employees" under the FLSA—in which case the FLSA does not require compensation for their work.

The Test For Unpaid Interns And Students

Courts have used the "primary beneficiary test" to determine whether an intern or student is, in fact, an employee under the FLSA. In short, this test allows courts to examine the "economic reality" of the intern-employer relationship to determine which party is the "primary beneficiary" of the relationship. Courts have identified the following seven factors as part of the test:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.
2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

Courts have described the "primary beneficiary test" as a flexible test, and no single factor is determinative. Accordingly, whether an intern or student is an employee under the FLSA necessarily depends on the unique circumstances of each case.

If analysis of these circumstances reveals that an intern or student is actually an employee, then he or she is entitled to both minimum wage and overtime pay under the FLSA. On the other hand, if the analysis confirms that the intern or student is not an employee, then he or she is not entitled to either minimum wage or overtime pay under the FLSA. [PE]

Grubhub's Gig Economy Win

In a recent classification case involving the "gig" or shared economy, a U.S. magistrate judge handed down a significant win for Grubhub, concluding that a driver who sued the company under California's minimum wage, overtime and employee expense reimbursement laws was not covered by those laws because he was an independent contractor, not an employee.

This wasn't a slam-dunk decision in favor of Grubhub, however. The judge was troubled by the fact that several "secondary" factors pointed to an employer-employee relationship between Grubhub and its drivers. Specifically, she noted that Lawson was not engaged in a distinct occupation or business; that no special skills were necessary to operate as a delivery driver; that he and other drivers were essentially paid by the hour rather than by delivery; and that delivering food—the very task that drivers are retained to perform—is a regular part of Grubhub's business. These factors often lead courts to conclude that the individual in question should be classified as an employee.

However, she also pointed out that additional secondary factors weighed in Grubhub's favor: for example, the company did not provide him any tools for his work, and neither party contemplated the work to be long-term or regular, but instead episodic and at the driver's convenience. At the end of the day, the judge was forced to weigh all of the factors, both primary and secondary, and make a ruling that included consideration of all relevant aspects of the relationship. "Considering all the facts, and the case law regarding the status of delivery drivers," the judge concluded, "the court finds that all the factors weighed and considered as a whole establish that Mr. Lawson was an independent contractor and not an employee."

This decision is a significant step for gig economy companies and any other business that uses a freelance or contractor model. It provides the closest thing we will get to a blueprint when it comes to structuring operations to meet the legal tests established by the courts to answer a misclassification question. While we may never achieve absolute certainty, this case offers a step-by-step analysis of some very common factors in place at many gig economy businesses and points out which tip the scale towards contractor status and which point more towards employee status.. [PE]

ACA Penalty Still Applies In 2018!

Section 11081 of the Tax Cuts and Jobs Act — the new tax reform law passed by Congress in late 2017 — repeals the so-called "individual mandate" under the Patient Protection and Affordable Care Act (also known as the ACA, or more informally as Obamacare).

The individual mandate is set forth in Section 5000A of the Tax Code. It requires individuals to maintain minimum essential health coverage every month or else pay a tax penalty, also known as a "shared responsibility payment."

Importantly, the tax penalty still applies in 2018, as the repeal does not go into effect until 2019. In 2017, the amount of the penalty was $272 per month for an individual ($3,264 per year) and $1,360 per month for a family of five or more ($16,320 per year). The 2018 amounts are not yet known but are sure to rise.

Employer Mandate Not Repealed

Also, the employer mandate set forth in Section 4980H of the Tax Code — the requirement that applicable large employers offer coverage to full-time employees or pay a tax penalty — has not been repealed. Consequently, large employers must still make qualifying offers of coverage and navigate a challenging reporting process. [PE]

Sexual Harassment Prevention Training

The Visalia Chamber of Commerce and Pacific Employers will host a state mandated Supervisors' Sexual Harassment Prevention Training Seminar & Workshop on July 25th, registration at 7:30am, Seminar 8:00-10:00am, at the Lamp Liter Inn, Visalia.

Future 2018 training date: 10-24-18.

RSVP Visalia Chamber - 559-734-5876

PE & Chamber Members $40 - Non-members $50

Certificate – Handouts – Beverages

Human Resources Question with Candice Weaver

The Month's Best Question

Local Child Support Agency Demands Dependent Health Care!

Q: "I received a National Medical Support Notice for one of my employees. What is this notice and how do I respond?"

A: A National Medical Support Notice (NMSN) is a notice sent to an employer from a local child support agency when an employee's child is required, by a child support order, to be provided health care.

It consists of two parts:

- Part A, which is completed by the employer; and
- Part B, which is completed by the plan administrator for the employer's group health care plan.

An NMSN may come from a child support agency in California or in another state.

Timely Response All employers who receive an NMSN must timely respond to the notice. If the person identified in the notice has never been your employee or is not a current employee, or if you don't offer health care or if the employee is not eligible for health care benefits, you must indicate that on Part A of the NMSN and return it to the local child support agency that issued the NMSN within 20 business days from the date of the NMSN.

If the person identified in the NMSN is an employee who is eligible for your group health care plan, you must indicate that on Part A of the NMSN and return it to the local child support agency within 20 business days. You also must send Part B of the NMSN to your plan administrator, with instructions that the plan administrator enroll the employee's child in your group health care plan.

The plan administrator has 40 business days to enroll the employee's child, and complete and return Part B of the NMSN to the local child support agency. Once the child is enrolled, the plan administrator must send information about the health care coverage to the local child support agency.

Mandatory Enrollment An NMSN is a qualified medical child support order, which means that when an NMSN orders a child to be enrolled in your group health care plan, enrollment is mandatory. If the employee objects to the child being enrolled, you still must pro ceed with enrollment; it is up to the employee to contest the order with the local child support agency.

If your group health care plan requires that the employee be enrolled in order for the employee's child to be enrolled, you must enroll both the employee and the child to comply with the NMSN, even if the employee had previously declined coverage. You must enroll the employee and child within the time specified by the NMSN; you cannot wait until the next open enrollment period.

Both federal and state law require employers to comply with NMSNs. An employer who fails to comply with an NMSN can be found in contempt of court and face penalties and fines. In addition, employers must not discriminate or retaliate against an employee because of the existence of an NMSN.

More Information Employers with questions about how to complete and comply with an NMSN can find more information from the California Department of Child Support Services at www.childsup.ca.gov/ employer.aspx. [PE]

Monthly Seminars

Pacific Employers sponsors a seminar series on employee labor relations topics for all employers at The Depot Restaurant, 207 E Oak Ave, Downtown Visalia.

RSVP to Pacific Employers at 559-733-4256

These mid-morning seminars include refreshments and handouts.

2018 Topic Schedule

♦ **Safety Programs -** Understanding Cal/OSHA's Written Safety Program and reviewing the IIPP requirements for your business.

Thursday, May 17th, 2018, 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, June 21st, 2018, 10 - 11:30am

♦ **Wage & Hour and Exempt Status -** Overtime, wage considerations and exemptions.

Thursday, July 19th, 2018, 10 - 11:30am

No Seminars in August or December

♦ **Forms & Posters -** and Contracts, Signs, Handouts, Fliers - Just what paperwork does an Employer need?

Thursday, September 20st, 2018, 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 18th, 2018, 10 - 11:30am

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

Thursday, November 15th, 2018, 10 - 11:30am

No Seminar in December