Pacific Employers
MANAGEMENT ADVISOR
Over 50 Years of Excellence!
Summer 2016

WHAT'S NEWS!

Governor Signs Accessibility Bill

A Cal Chamber supported law that incentivizes disability access and education was signed by Gov. Brown.

SB 269 will limit frivolous litigation and claims regarding construction-related accessibility violations by providing businesses that have proactively sought to become compliant with the Americans with Disabilities Act with an opportunity to resolve any identified violations.

SB 269 is a balanced approach between preserving the civil rights of those who are disabled to ensure their access to all public accommodations, while limiting the number of frivolous lawsuits threatened or filed against businesses that do not improve accessibility.

The bill seeks to incentivize businesses to proactively take steps to become accessible by providing them with 120 days from receipt of a Certified Access Specialist (CASp) report to resolve any violations identified without being subject to statutory penalties or litigation costs. This proposal will assist businesses who are trying to ensure they are compliant from being subject to frivolous claims or litigation.

SB 269 also provides a limited time for businesses to resolve violations of minor, technical construction-related standards that do not actually impede access to the public accommodation. [PE]

New Smoking Rules

Gov. Brown signed smoking legislation now in effect that changes the rules relating to the smoke-free workplace protections.

THE NEW RULES:

- Treats the use of e-cigarettes and other nicotine-delivery devices, such as vaporizers, as "smoking" — thus extending existing smoking bans to cover such products.
- Expands smoke-free workplace protections by getting rid of most of the existing exemptions that permitted smoking in certain work environments, such as bars, hotel lobbies, warehouse facilities and employer-designated smoking break rooms.
- Expands the workplace smoking ban to include owner-operated businesses.
- Raises the legal smoking age from 18 to 21, except for active military personnel.

[PE]

EDD Will Soon Require Electronic Submittal

Beginning January 1, 2017, employers with 10 or more employees are required to electronically submit employment tax returns, wage reports, and payroll tax deposits to the EDD.

All remaining employers will be subject to this requirement beginning January 1, 2018.

For more information, visit: *www.edd.ca.gov/EfileMandate*

[PE]

Child Labor Law Flyer Enclosed!

President's Report
~Dave Miller~

Pacific Employers Goes Facebook!

We are finally taking advantage of another way to connect with our clients, Pacific Employers now has a Facebook Page! We are hoping to bring you new and answers to questions in an organized and timely fashoion with the use of our FB page.

With our formerly monthly Newsletter going to a quarterly publication schedule, we also will be able to welcome other staff members to the writing tasks by allowing all of our office to post information on our **Facebook** page.

Visit and ***Like*** Pacific Employers new **Facebook** page at

https://www.facebook.com/pacificemployers/

[PE]

"It would be thought a hard government that should tax its people one tenth part." -- Benjamin Franklin (1706-1790) US Founding Father

This Fall - A Legislative Roundup!

The California Legislature has been very active this year. We will be hosting a Legislative Roundup for this October to cover the new laws.

New regulations that have been enacted since the first of the year make it important to review their effect for planning purposes. Minimum wage increases for the near future and immediate discrimination law changes are topics that we will cover.

Because October is our Guest Speaker Seminar, we have invited Susan K. Hatmaker with the Hatmaker Law Group of Fresno, to address the changes in labor law that affect the California Employer.

Susan Hatmaker handles labor and employment law and litigation. She counsels and trains employers about employment compliance on state and federal law. She also provides representation of school districts in charter school law and related matters.

Pacific Employers will host this seminar at the Builders Exchange at 1223 S. Lovers Lane at Tulare Avenue, Visalia, CA. RSVP to Pacific Employers at 733-4256. This mid-morning seminar include refreshments and informational handouts. Thursday, October 20th, 2016, 10 - 11:30am. [PE]

Recent Developments

Requests For Accommodation

The California Office of Administrative Law recently approved regulations drafted by the California Fair Employment and Housing Council. These new regulations, covering the entire gamut of employment law topics within the Fair Employment and Housing Act (FEHA), went into effect on April 1, 2016.

Courts were previously split on the issue of whether merely requesting an accommodation constitutes protected activity. Part of the new regulations, California Code of Regulation (CCR) section 11068(k), concerns the question of what constitutes protected activity and clarifies this point by making it law that *"a request for an accommodation is a protected activity"* that could give rise to a claim of retaliation or discrimination.

Now it is clearly unlawful to retaliate against a person for requesting a reasonable accommodation of a disability, regardless of whether the employer ultimately grants the request.

"... APPROACH ALL REQUESTS FOR ACCOMMODATION FROM A PROBLEM-SOLVING POINT OF VIEW..."

The regulation's statement of purpose has also been amended to clarify that employers should approach all requests for accommodation from a problem-solving point of view. CCR section 11064(b) has also been revised to specify that the interactive process requires an individualized assessment of (1) the requirements of the job at issue and (2) the specific physical and mental limitations of the individual that are directly related to the need for reasonable accommodation. [PE]

Non-Union Employee's "Bad Attitude" Protected by the NLRA

As a reminder that non-union employees are also protected by the National Labor Relations Act (NLRA), the Seventh Circuit Court of Appeals in Chicago recently upheld a National Labor Relations Board (NLRB) decision holding that Staffing Network Holdings, LLC ("Staffing Network") violated the NLRA by twice threatening non-union employees with discharge for engaging in protected, concerted activity, and for actually discharging an employee Griselda Barrera for the same. See Staffing Network Holdings, LLC v. NLRB.

In this case, supervisor Andy Vega, told two employees to work more quickly. After one of the employees told Vega that he would not work faster for $8.25 an hour, Vega told the employee to go home since he was unable to keep up with work and because of his attitude. This caused an immediate reaction among other employees who briefly stopped working to confront Vega about his decision. Vega told the employees to get back to work or he would send them home as well. Barrera, refused. Vega told Barrera again that he could send her home. To this, she asked if she was being threatened and said that she could send a letter to the Department of Human Rights. Vega replied by telling her to collect her things and go home. Barrera refused to go home, insisted that she had done nothing wrong, and continued to get other employees "worked up" about the "injustice." Vega directed his assistant to tell Barrera to go home or he would get security to escort her out. She believed that she was told not to come back to work.

"... CONTINUED TO GET THE LADIES IN THE LINE WORKED UP ..."

As a result, Barrera filed an unfair labor practice charge with the NLRB. Staffing Network argued that it acted legitimately in light of the employees' insubordination. Specifically, Vega argued that he did not send Barrera home because she was complaining about "injustice," but because she had been abusive and insubordinate, causing him embarrassment in front of other employees. These arguments were rejected by the Administrative Law Judge and the NLRB. Affirming the NLRB's decision, the Seventh Circuit found that, per Vega's own description of events, he asked Barrera to leave because she ignored his request that she get back to work and instead "continued to get the ladies in the line worked up saying this was going against the law and that they have to stand up against all the injustice…" Accordingly, the court held:

> It is well settled that a brief, on-the-job work-stoppage is a form of economic pressure entitled to protection under the Act. *Molon Motor & Coil Corp. v. N.L.R.B.*
>
> Staffing Network terminated Barrera because of her concerted, protected activity in protesting Vega's treatment of Juan in relation to the terms and conditions of his employment and that of the pickers. Namely, Barrera and Gutierrez both testified that Vega told Barrera to leave because she and the other pickers protested Vega's unfair treatment of Juan. Therefore, substantial evidence supports the Board's finding that the company violated the Act when it discharged Barrera for engaging in protected, concerted activity.

What an Employer To Do?

Prior to taking action, managers should be trained to consider (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst or alleged misconduct; and (4) whether the conduct was provoked by a perceived unfair labor practice. Train management on how to avoid inciting such behavior in the first place. For example, here, the fact Vega chose to make an example of the first employee on the shop floor in front of the other employees, invited their reaction to the same. Note that while Barrera may have been disrespectful, rude, or even used profane language, her actions remained protected under the NLRA. The NLRB has often protected an employee's use of profane language and refusal to return to work. This does not mean that "anything goes." Management should consider whether the insubordinate conduct is so hostile as to threaten to or cause harm to a supervisor or other employees. An employee engaged in concerted activity that is a safety risk or violation of the law, will not be protected.

Just another reminder that the NLRA protects non-union employees and evidences the NLRB's push to target non-unionized employers and expand worker rights. [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 with a continental breakfast on October 26th, registration at 7:30 am, Seminar 8:00-10:00 am, at the Lamp Liter Inn, Visalia.

RSVP Visalia Chamber - 734-5876

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

Certificate – Forms – Guides – Full Breakfast

Human Resources Question with Candice Weaver

The Month's Best Question

SHPT Rules Changed?

Q:" I have heard that the new Fair Employment and Housing Act regulations affect Sexual Harassment Prevntion Training (SHPT)? Is there anything new that an employer must do?"

A: New California Fair Employment and Housing Act regulations that went into effect April 1, 2016, requiring employers to have a discrimination, harassment, retaliation, and prevention policy also set new guidelines for sexual harassment training procedures.

California's AB1825 has governs mandatory sexual harassment training by employers with at least 50 employees. The new FEHA regulations add to the already lengthy list of compliance requirements for training in terms of process, recordkeeping, and content.

The new rules say that other means of training such as audio, video, or computer technology are merely "supplemental" and, by themselves, cannot fulfill the AB 1825 training requirements.

Requirements for trainers have also been expanded so the trainer must now have the ability to train supervisors on identifying behavior that may constitute unlawful harassment, discrimination, and retaliation and be able to train on supervisors' obligation to report harassing, discriminatory, or retaliatory behavior of which they become aware.

More stringent requirements for tracking compliance:

- Requiring E-learning t trainers to maintain questions received and responses or guidance for 2 years.
- Requiring employers to keep a copy of webinar training for two years after the date of the webinar.
- Maintain documentation of training including names of the supervisors, date, sign-in sheet, certificates of attendance or completion, and a copy of all written or recorded materials.

Expanded list of topics for discussion to include:

- Pre- or post-training quizzes or tests, small group discussion questions, discussion questions that accompany hypothetical fact scenarios, brief scenarios discussed in groups, activity ensuring interactive participation as well as the ability to apply what is learned to the supervisor's work environment.
- Remedies available for victims in civil actions, and potential employer or individual exposure or liability.
- Supervisory obligations to report sexual harassment, discrimination, and retaliation of which they become aware.
- Discussion of strategies to prevent harassment and steps necessary to take appropriate remedial measures to correct harassing behavior.
- Review abusive conduct (which was added as a training topic in January 1, 2015) in a "meaningful manner.".

Employers subject to California's AB1825 should review their training procedures and material content carefully to ensure they are up to date with these new requirements. [PE]

Want Breaking News by E-Mail?
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No-Cost Employment Seminars

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

2016 Seminars

♦ **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?

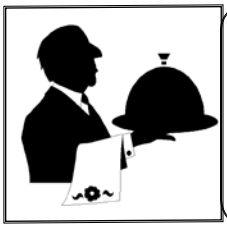
Thursday, September 15th, 2016, 10 - 11:30am

♦ **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



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.

Child Labor Law Flyer 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.

Vaping Prohibited Under New Rules

California's new smoking regulations treats the use of e-cigarettes and vaping devices as "smoking" — thus extending existing workplace smoking bans to cover such products as electronic cigarettes and other nicotine-delivery devices.

In addition, the federal Food and Drug Administration (FDA) has just announced that it was extending its authority over tobacco products to include "the regulation of electronic nicotine delivery systems (such as e-cigarettes and vape pens), all cigars, hookah (waterpipe) tobacco, pipe tobacco and nicotine gels, among others." [PE]

SF First City to Require Parental Leave

The San Francisco Board of Supervisors unanimously approved an ordinance that provides six weeks of parental leave for bonding with a new child at 100% of the employee's rate of pay (subject to certain caps). The ordinance which will take effect beginning January 1, 2017, will make San Francisco the first U.S. city to require employer-paid parental leave.

The new ordinance will go above and beyond the California state mandate, which currently provides covered employees six weeks of paid family leave at 55% of their pay for baby bonding or to care for a sick family member. That paid leave is funded by the employee who is taking the leave, through regular payroll contributions to the California State Disability Insurance ("SDI") program.

The new ordinance requires covered San Francisco employers to pay the remaining 45% of a covered employee's wages during the six weeks of paid parental leave.

Effective Date	Size of Employer
1-1-2017	- 50 or more employees regardless of the employees' location.
7-1-2017	- 35 or more employees regardless of the employees' location.
1-1-2018	- 20 or more employees regardless of the employees' location..

[PE]

DOL's "Persuader" Regulations Expand

The U.S. Department of Labor's Office of Labor-Management Standards ("OLMS") recently issued its long-debated "persuader" regulations which, as of July 1, 2016, will require employers and their labor relations consultants, including legal counsel, to publicly disclose relationships which had long been permitted to remain confidential under the Labor-Management Reporting and Disclosure Act ("LMRDA").

The current rules carve out a key exception to its reporting requirements for relationships which are restricted to the provision of "advice" to the employer. Significantly, the "advice" exemption has long been interpreted to mean that, in the absence of direct contact with employees, labor relations consultants and attorneys could provide employers with unreportable advice, including much of the advice regularly provided to employers throughout the union organizing and bargaining processes.

However, the OLMS' new final rule – which largely adopts the rule it first proposed nearly 5 years ago, in June 2011, which met substantial resistance from business groups, the American Bar Association and state Attorneys General, among others – will significantly narrow the "advice" exemption by defining "advice" to mean "an oral or written recommendation regarding a decision or a course of conduct."

As a result, the rule will trigger LMRDA reporting of any persuader activity, irrespective of whether or not an employer's labor relations consultants and attorneys have direct contact with employees. [PE]

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