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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.

Worker Fired For Not Managing Seizures

A Golden Corral restaurant in Georgia has agreed to pay $31,000 to settle a U.S. Equal Employment Opportunity Commission (EEOC) disability discrimination lawsuit involving a former server with epilepsy, according to an EEOC press statement.

The EEOC said B. Fehr, LLC., doing business as Golden Corral, fired Alicea Cruce in 2016 and accused her of being "unwilling or unable to manage her seizure condition." According to the complaint, Cruce had several seizures while at work. After one, the employer requested a doctor's note prior to Cruce returning to work. Cruce was cleared to return but after another seizure, the restaurant fired her, citing her seizures. This alleged conduct violates the Americans with Disabilities Act (ADA), the EEOC said. In its statement, the federal agency said "the employer apparently concluded Ms. Cruce's condition posed a direct threat to herself or others in the workplace, however, that determination must be based on actual evidence and not mere speculation."

The restaurant also agreed to post a notice about the lawsuit, enact a policy forbidding discrimination, provide equal employment opportunity training to its management and non-managers and provide semi-annual reporting to the EEOC about disability discrimination complaints, the statement said. [PE]

Automation Continues to Reshape the Face of Work

It seems almost every day we are presented with more evidence that automation is having profound consequences on the nature of work in America—in expected and unexpected ways.

In a report issued at the end of June by Oxford Economics, researchers estimated that up to 20 million manufacturing jobs could be replaced by robots—roughly 8.5% of the global manufacturing workforce. As detailed in the report, the use of robots worldwide has tripled over the last 20 years to 2.25 million machines—but the global stock of robots in industry has more than doubled since 2010, and roughly one-third of the robots now being installed are in China. While the impacts of these changes will be felt nationally, the report identifies specific regions that are likely to be hardest hit in the manufacturing sector.

Finally, in California, the state legislature is considering a bill that would potentially devastate the gig economy by reclassifying millions of independent contractors as employees under state law (and thus bringing them within the scope of the state's burdensome wage and hour laws). It is not surprising that a number of ride-share companies are concerned with the potential impact of this legislation on their industry model. What is surprising was the response of California Governor Gavin Newsom, who, in declining to take a position on the pending bill, was quoted as observing that "the vast majority of [the ride share] business model is going to be automated" in 10 years such that extending employee status to drivers is merely "an interim conversation." [PE]

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Pacific Employers
MANAGEMENT ADVISOR
Summer 2019
Over 50 Years of Excellence!

What's News!

California Opinion Letter Extends DYNAMEX Reach!

It's been a busy week on the Dynamex front, and the news for businesses continues to get worse. As we recently discussed, the 9th Circuit held just last week that Dynamex and the ABC test should be applied retroactively. The very next day, California's Division of Labor Standards Enforcement (DLSE) released an opinion letter concluding that the ABC test applies to both IWC Wage Order Claims and certain Labor Code provisions that enforce Wage Order requirements.

According to the May 3 opinion letter, "Because wage order provisions are not independently actionable..., the obligations imposed by the wage orders do not appear only in the wage orders themselves. Wage order obligations are also imposed by certain Labor Code provisions, which serve to enforce the wage orders."

Therefore, the DLSE concluded that Labor Code provisions that implicate or "derive" from employer obligations under the IWC Wage are also subject to the ABC test. The agency specifically mentioned the following:

Minimum wage (Labor Code sections 1182.12 and 1197);
Overtime (Labor Code sections 510 and 1194);
Liquidated Damages (Labor Code section 1194);
Meal and Rest Periods (Labor Code sections 226.7 and 512;
Itemized Wage Statements (Labor Code section 226); and
expense reimbursement claims (Labor Code section 2802).

With respect to "waiting time" penalties under Labor Code section 203, the DLSE essentially said: it depends. "Where section 203 serves to enforce the underlying minimum wage and overtime obligations of the wage orders," the agency said, "application of the ABC test to these claims would be appropriate."

So how much weight should California employers accord DLSE's take on these issues? On the one hand, state and federal courts have held on numerous occasions that DLSE opinion letters are not entitled to administrative regulation deference, and have instead looked to interpret the scope of the law themselves. Therefore, a court ruling could reach a different result.

On the other hand, it is now clear that the positions taken in this letter are the way in which the DLSE will be interpreting the law in the near future. Therefore, employers with claims filed or pending before the DLSE will want to take note of their opinion on these matters. [PE]

Employee Bound By Arbitration Agreement

An employee argued she wasn't bound by an arbitration agreement because she informed her employer she wouldn't sign it even though she intended to remain employed by the company.

The court of appeal rejected her argument, finding she maintained her employment status for almost three weeks after she was informed that her continued employment constituted acceptance of the arbitration agreement and she was therefore bound by the agreement.

The court also rejected her argument that the agreement was a "take-it-or-leave-it contract of adhesion" on the grounds that it didn't involve surprise or other sharp practices. Moreover, because the employee was employed at will, the employer could unilaterally change the terms of her employment as long as it gave her notice of the change. [PE]

Sexual Harassment and Heat Illness Flyer Enclosed!

Dave's Report
~David E. Miller~



Is There Anything Left of the De Minimis Doctorine in California?

Last year, the California Supreme Court held the federal "de minimis" doctrine does not apply to California state law claims for unpaid wages for off-the-clock work allegedly performed on a regularly occurring basis in store closing and related activities. Troester v. Starbucks Corp., 5 Cal. 5th 829. However, the California Supreme Court also noted that it was "leaving open whether there are wage claims involving employee activities that are so irregular or brief in duration that employers may not be reasonably required to compensate employees for the time spent on them." So, what circumstances may qualify for the exception left open in Troester? The U.S. Court of Appeals for the Ninth Circuit may soon answer the question left open by the California court.

On June 14, 2019, a panel of the Ninth Circuit heard oral argument in consolidated appeals involving the compensability of pre-exit inspections of employees' bags when they are leaving their shifts at two retail clothing store chains. In both cases, the district court granted summary judgment to the employer, holding the federal de minimis doctrine applied to the plaintiffs' claims under the California Labor Code and the time spent on the inspections was not significant enough to render the time compensable. Rodriguez v. Nike Retail Services, Inc., 2017 U.S. Dist. LEXIS 147762 (N.D. Cal. Sept. 12, 2017); Chavez v. Converse, Inc., 2017 U.S. Dist. LEXIS 169167 (N.D. Cal. Oct. 11, 2017). Both of these rulings, however, were based on the law at the time, under which courts (including the Ninth Circuit) still recognized the federal de minimis doctrine. Months later, the California Supreme Court in Troester rejected those holdings, concluding that, at most, a limited form of the de minimis doctrine might apply in some circumstances.

During the June 14 oral argument, the employers contended that the facts of Troester were distinguishable, in that the post-shift time at issue in Troester was between four and 10 minutes per shift. By contrast, in the cases before the Court, an expert time-and-motion study demonstrated the pre-exit inspections typically took less than one minute. In support of their argument that such small amounts of time fall within the exceptional circumstances alluded to by the California Supreme Court in Troester, the employers pointed to the high court's statement that the applicable California laws "do not allow employers to require employees to routinely work for minutes off the clock without compensation."

The plaintiffs, on the other hand, argued that the holding of Troester unequivocally required the Court of Appeals to overturn the grants of summary judgment to the employers. They added that on remand in Troester, the district court rejected the employer's de minimis argument regarding the 35–45 seconds typically spent by shift supervisor escorting coworkers to their vehicles following the closing of the store. In so doing, that district court noted this activity was clearly listed in the employer's policies as a routine supervisory duty and, therefore, was not the type of rare or irregular event contemplated by the California Supreme Court as still falling within the state's de minimis doctrine. [PE]

"Democracy does not guarantee equality of conditions – it only guarantees equality of opportunity."
— Irving Kristol (1920-2009) American columnist, journalist, and writer



HR Report
~Steve McCartha~

-True Legacy HR- The Merge!

An introduction to the many clients of Pacific Employers.

Pacific Employers has recently merged with True Legacy HR. Steve McCartha and Tiffany Harris, the owners of True Legacy HR, provide on-site visits for their clients which include onboarding/terminations, situational consultation, personnel file audits, and other specialized services.

Pacific Employers will continue to operate business as usual, however there are additional options available to you as a member, should you feel the need to have a more integrated HR at your company. You may notice some subtle changes in Pacific Employers' company logo, and letterhead.

In addition to the previously mentioned changes, payment and billing options have also been updated. You can now pay your quarterly dues via ACH (Automatic Payment), Credit Card (with a five dollar processing fee), or you may continue to send your check by mail. Your billing options include receiving a paper invoice, or going paperless and receiving an emailed invoice.

Lastly, the company website is getting a revamp. Soon, you will be able to pay your bill on our website, navigate through a very user-friendly online portal, and have access to specialty documents and training videos. It will provide our members with quick and easy access to up to date and compliant documentation.

In October, Tiffany and I will be at our monthly seminar, and we will be celebrating at the seminar by passing out door prizes, providing additional refreshments, and discussing the various options available to you as a member.

I speak on behalf of True Legacy HR and Pacific Employers in saying that we are so happy to assist you, and if there's anything at all that we can help you with, please don't hesitate to ask. [PE]

Workers Summer Wishes?

Employees' most desired summer perks are flexible schedules (52%) and early departures on Fridays (27%), according to a survey from Accountemps, a Robert Half company. Only about 10% of workers said they'd prefer a more relaxed dress code or activities like picnics or potlucks.

About half of senior managers surveyed said they offer flexible schedules, more relaxed dress code and company picnics or potlucks as summer perks, while about one-third said workers are allowed to leave early on Fridays during the summer. Fourteen percent of respondents said they do not offer any of these perks.

Organizations in Denver and Philadelphia most often offer flexible summer scheduling, according to survey results, and workers in Atlanta and Tampa, Florida, most wanted "Summer Fridays," as a summer perk. Employers in Charlotte, North Carolina, and Denver are most likely to allow early departures on Friday, while Cleveland, Detroit, and Sacramento, California, are least likely to offer this work perk, the results showed. [PE]

Training Obligations Facing California Employers

California Employers with 5 or More Employees must provide sexual harassment prevention training to all employees (even nonsupervisory employees) by January 1, 2020. SB 1343 is a bill that was passed in 2018 that requires employers with 5 or more employees, including temporary or seasonal employees, to provide at least 2 hours of sexual harassment training to all supervisors and at least one hour of sexual harassment training to all nonsupervisory employees by January 1, 2020, and once every 2 years thereafter.

Harassment Prevention Training Topics

Harassment prevention training must cover certain topics which must include:

- The law that applies, such as California's Fair Employment and Housing Act ("FEHA") and Title VII of the Civil Rights Act of 1964.
- Remedies available for sexual harassment victims in civil actions, and potential employer and individual exposure and liability.
- How to prevent harassment.
- The essential elements of an anti-harassment policy and how to utilize it if a harassment complaint is filed.
- Anti-Bullying – A review of the definition of abusive conduct.

Employers Need To Develop An Anti-Harassment Policy that

Is In Writing;

- Lists all current protected categories covered under the law;
- Indicates that the law prohibits coworkers and third parties, as well as supervisors and managers from engaging in prohibited conduct;

Creates A Complaint Process;

- An employer's designation of confidentiality, to the extent possible;
- A timely response;
- Impartial and timely investigations by qualified personnel;
- Documentation and tracking for reasonable progress;
- Options for remedial actions and resolutions; and timely closures.

Provides A Complaint Mechanism that does not require an employee to complain directly to his or her immediate supervisor but can be a company representative, HR person, complaint hotline, ombudsman or EEOC.

Instructs Supervisors To Report Any Complaints of misconduct to a designated company representative.

Indicates That When An Employer Receives Allegations of misconduct, it will conduct a fair, timely, and thoroughly investigated.

States That Confidentiality Will Be Kept by the employer to the extent possible, but not indicate that the investigation will be completely confidential.

Indicates That If At The End Of The Investigation misconduct is found, appropriate remedial measures shall be taken.

State That Employees Shall Not Be Exposed To Retaliation. [PE]

The Vintage Press Restaurant

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.*



Human Resources Question with Candice Weaver

The Month's Best Question

Lactation Breaks

Q: My employee is returning from pregnancy leave and has asked to have time off and a suitable place to express milk at work. We have never had this request before. Can we deny her request and tell her to come back to work when she no longer has this need? "

A: No, you may not deny the employee's request to express milk at work or keep her from returning to work until she no longer has that need.

Both California and Federal law require that all employers, regardless of company size, reasonably accommodate an employee's request to express milk in private at work.

Space Requirements

While some employers have permanent rooms specifically designed and designated just for lactation, an employer with operational, financial or space limitations may designate a temporary location as long as the requirements of the applicable laws are met and it is free from intrusion and used only by the employee for lactation purposes while the employee is expressing milk.

It is important that employers ensure privacy. Although the law does not require a lock on the door, it may be a good idea because a sign could be ignored. Even in small work areas or offices, there generally is the ability to find a suitable private place for an employee.

Often a manager's or owner's private office or a conference room may be used as long as it is private and the employee is not interrupted. Individual stand-alone lactation pods are now on the market and may provide another option for an employer who has difficulty finding a private place in the workplace.

A car would not be an appropriate location for privacy reasons, even if it was the employee's car. The windows would allow others to look in and it would not have an electrical outlet required for pumping.

Asking the employee to go home would not satisfy the requirement of close proximity to the employee's work area, generally thought of as on the same floor, in the same building, etc. It also could mean that if you are not paying for that travel time, the employee would be losing pay.

Restroom Restriction

Changes made in 2019 to California law now prohibit the use of a restroom (not just a toilet stall) as an acceptable location. If an employer, however, is able to demonstrate to the Department of Fair Employment and Housing that it is an undue hardship due to the size of the employer, nature or structure of the business to have another location, then a restroom may be used.

Even in that event, the employer must make reasonable efforts to find a private and close location other than a toilet stall.

In addition to a private room or location, an employer must provide reasonable break time to the employee for this purpose, which may vary with the individual. While an employee has the use of the standard break and meal period time, if she needs additional time, the employer needs to make that available to her, but does not need to pay for that additional time.

Accommodation Period

Federal law limits the time for this accommodation to one year. California, however, has no time limit. An employee has the right to file a claim with the Labor Commissioner if the employee feels that the employer has not provided adequate break time and/or a suitable place to express milk. The Labor Commissioner may issue a citation and impose a $100 civil penalty for each violation. [PE]

Labor Seminars at the Depot!

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.***

2019 Topic Schedule

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

Thursday, July 18th, 2019, 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 19st, 2019, 10 - 11:30am

♦ **Legal Update -** Susan Hatmaker will be your guest speaker and will speak on the new laws passed and what 2020 will look like for employers.

Thursday, October 17th, 2019, 10 - 11:30am

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

Thursday, November 21st, 2019, 10am - 11:30am

No Seminar in December

Employee & Supervisor Sexual Harassment Prevention Training

The Visalia Chamber of Commerce and Pacific Employers will host a state mandated Sexual Harassment Prevention Training Seminar & Workshop for employees and supervisors on July 24th, registration at 7:30am Seminar 8:00 to 10:00am, at the Lamp Liter, Visalia.
The next 2019 training date is October 23, 2019.
RSVP Visalia Chamber - 559-734-5876
PE & Chamber Members $40
Non-members $50
Certificate – Handouts – Beverages