Employee ICE Notice & Labor Law Update Flyer Enclosed!

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

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.

No Injury or Employer Knowledge Needed for Paystub Violations!

A California Court of Appeal dealt another blow to employers in a recent ruling interpreting the state's Private Attorneys General Act (PAGA).

In ***Lopez v. Friant & Associates,*** the court considered the proof required for a PAGA plaintiff to succeed on a claim based on underlying violations of Labor Code section 226(a). In short, the court held PAGA plaintiffs asserting such claims need not show the violation caused "injury" or resulted from "knowing and intentional" conduct, as required for a penalty award under a related Labor Code provision.

PAGA authorizes aggrieved employees to step into the shoes of the state Labor Commissioner to help enforce California's labor laws. Under this unique California law, employees may bring actions against employers to recover civil penalties on behalf of the state, themselves, and other aggrieved employees—in addition to any other remedies available to them under state or federal law.

PAGA claims are available through two mechanisms: (1) employees can collect any penalty already established by a Labor Code provision; and (2) employees can seek a penalty, set by PAGA, for violation of certain Labor Code provisions that do not include their own penalties. The default PAGA civil penalty is $100 per employee per pay period for an initial violation and $200 per pay period for any subsequent violations. If a PAGA plaintiff succeeds, 75% of any penalty recovered is paid to the Labor and Workforce Development Agency (LWDA), with the remainder distributed among aggrieved employees. [PE]

Preparing for an Increase in I-9 Worksite Enforcement!

After reviewing data related to time spent by U.S. Immigration and Customs Enforcement's (ICE) Homeland Security Investigations (HSI) unit on worksite enforcement, Acting Immigration and Customs Enforcement Director Thomas Homan issued a directive "to increase that [level of enforcement] by four to five times."

A review of Homeland Security Investigations (HSI statistics from the prior administration reveals that the number of employer audits reached a peak in 2013 with 3,127 nationwide, but by 2016, audits had dipped to 1,279 audits (down 59 percent).

The ICE directive comes following the largest fine on the I-9 enforcement record, as well as the White House release of President Trump's interior enforcement principles which include making participation in the now-voluntary E-Verify program mandatory. The distinct change in policy and the imminent exponential increase in employer audits have put I-9 compliance personnel on notice. [PE]

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What's News!

New Harassment Prevention Requirements!

California was the first state to go to great lengths to educate employers and employees about the negative consequences of harassment in the workplace. Starting in 2005, employers with 50 or more employees have been required to provide Harassment Awareness Training (AB1825). In 2015, the training was expanded to include abusive conduct (AB 2053).

As of January 1, 2018, the training will once again be expanded to include training on gender identity, gender expression and sexual orientation (SB396). With the recent news exposing Matt Lauer, Garrison Keeler and other high profile figures, employers are beginning to realize that it's important to educate all employees about Harassment Prevention in the Workplace, and not just managers and supervisors.

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 April 24th, registration at 7:30am, Seminar 8:00-10:00am, at the Lamp Liter Inn, Visalia.

Don't let the next headline about harassment be about your company! [PE]

The New Transgender Regulations

California regulations are in effect that specifically address protections for transgender persons, including equal access to use of facilities, such as restrooms.

- AB 1732 requires gender-neutral signage on single-user restrooms and adds section 118600 to California's Health and Safety Code:
- All single-user toilet facilities in any business establishment, place of public accommodation, or state or local government agency shall be identified as all-gender toilet facilities by signage that complies with Title 24 of the California Code of Regulations, and designated for use by no more than one occupant at a time or for family or assisted use.
- A "single-user toilet facility" means a toilet facility with no more than one water closet and one urinal with a locking mechanism controlled by the user.
- A "single-user toilet facility" with a toilet and a urinal must comply with this signage requirement.
- Does not apply to multi-stall restrooms.
- Businesses are not required to add/remove existing restrooms or alter current structures.
- Corresponding "all gender" or "restroom" sign is acceptable. A pictogram is not required. [PE]

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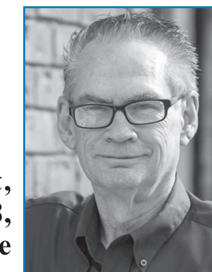
President's Report

~Dave Miller~



Drug-Free Workplaces

The Adult Use of Marijuana Act, became effective January 1, 2018, allowing adults over the age of 21 to smoke marijuana recreationally. Marijuana, is legal for medical use by patients who have a physician's recommendation, under California's Compassionate Use Act of 1996.

The affect on employers? California employers can be thankful that the new law leaves undisturbed an employer's ability to maintain drug-free workplaces. The Adult Use of Marijuana Act explicitly allows "public and private employers to maintain a drug and alcohol free workplace." Thus, employers can still drugtest employees for marijuana and discharge them for testing positive, even though marijuana is legal for recreational use in the State.

And employers likewise can still deny employment to job applicants who test positive for marijuana. The law provides that an employer need not "permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growth of cannabis in the workplace." [PE]

EEOC Online System

The EEOC's new online system is up and running! The EEOC launched a Public Portal that gives online access to people inquiring about discrimination. The secure online system makes both EEOC information and a person's own case information available whenever it's convenient.

Through the EEOC Public Portal a person can submit—online—initial inquiries and requests for intake interviews with the agency. Initial inquiries and intake interviews are typically the first steps for those who want to file a discrimination charge with the EEOC.

Under the new system people will be able to digitally sign and file a charge prepared for them by the EEOC. Once a person files a charge, he or she can use the EEOC Public Portal to provide and update contact information, agree to mediate the charge, upload documents to his or her charge file, receive documents and messages related to the charge from the agency, and check on the status of the charge. These features are available for newly filed charges and charges filed on or after January 1, 2016, that are in investigation or mediation.

The new system does not permit filing charges of discrimination online that have not been prepared by the EEOC or filing complaints of discrimination against federal agencies. [PE]

A free society is a place where it's safe to be unpopular. -Adlai Stevenson, governor, ambassador (1900-1965)

2018 Minimum Wage Increase

The Califronia wage is $11 for employers with 26 employees or more, and $10.50 for employers with 25 or fewer employees.

Exempt Employees

An exempt employee must earn a monthly salary equivalent to no less than two times the state minimum wage for full-time employment. Different rates apply, depending on whether an employer has 26 or more, or 25 or fewer, employees.

26 or more: $3,813.34 mo. and $45,760 annually.

25 or less: $3,640 monthly and $43,680 annually. [PE]

CA Immigrant Worker Protection Act!

What does the Act require of California employers? Effective January 1, 2018, California employers, both public and private, will be prohibited from:

1. Voluntarily consenting to allow an immigration enforcement agent to enter any nonpublic areas of the workplace without a judicial warrant.
2. Voluntarily consenting to allow an immigration enforcement agent to access, review or obtain employee records without a subpoena or judicial warrant. Importantly, this provision does not apply to I-9 Employment Eligibility Verification forms where the requisite three days' notice (Notice of Inspection) has been provided to the employer.

If an employer receives a Notice of Inspection, an employer must provide notice of the impending I-9 inspection to each current employee as well as any authorized union representative(s) within 72 hours of receiving the **Notice of Inspection.** See the following note!

The template Notice to Employees is included as an enclosure in this month's newsletter.

If during the course of an I-9 inspection by a federal immigration agency, an employee is identified as either lacking work authorization or possessing deficient work authorization documents, the employer must deliver to each "affected employee" an individual notice describing (1) the deficiencies identified during the course of the inspection, (2) the time period for correcting any potential deficiencies, (3) the time and date of any meeting with the employer to correct deficiencies and (4) informing the affected employee of his/her right to representation during any meeting with the employer.

Finally, the Act prohibits an employer from reverifying the employment eligibility of a current employee in a manner inconsistent with federal law.

What Are The Penalties For Noncompliance?

Employers who voluntarily provide immigration enforcement agents with access to nonpublic areas of the workplace, or who fail to comply with the above notice requirements, may be subject to a civil penalty of between $2,000 and $5,000 for a first violation, and between $5,000 and $10,000 for each subsequent violation. The penalty will not apply where access was obtained without the consent of the employer or other person in control of the workplace, or where the required notice was not provided at the express and specific direction of the federal government.

The Act does not preclude an employer from taking an immigration enforcement agent to a nonpublic area for the purpose of verifying whether a judicial warrant has been obtained, provided that no consent to search nonpublic areas is given in the process.

Does The Act Interfere With The Use Of E-Verify?

No. The Act states that "nothing…shall be interpreted, construed, or applied to restrict or limit an employer's compliance with a memorandum of understanding governing the use of the federal E-Verify system." [PE]

NLRB Reverses Course

Under the "New" National Labor Relations Board (Board) the "Old Law"is Restored and Stability After The Expiration Of Union Contracts.

The National Labor Relations Board just restored stability for employers attempting to maintain the status quo following the expiration of a collective bargaining agreement. In the spirit of giving, outgoing NLRB Chairman Miscimarra and the newly constituted Republican majority Board delivered yet another holiday gift to employers by further balancing the labor law landscape. [PE]

The National Labor Relations Board reversed its controversial bargaining unit determination decision in Specialty Healthcare & Rehabilitation Center of Mobile.

In the 2011 Specialty Healthcare decision, the Board saddled employers challenging bargaining units as under-inclusive (i.e., too small) with the burden to prove an "overwhelming community of interest" between included and excluded employees. Employers now will sometimes have an easier time with stopping elections from taking place in the bargaining units chosen unilaterally by unions when they file their election petitions with the Board. [PE]

The New NLRB!

The National Labor Relations Board ("NLRB") issued a number of pro-employer decisions that will have an immediate effect on union and non-union workplaces. The five member Board – with a recent influx of two pro-GOP appointees – unraveled its recent and much criticized changes to evaluating **joint-employment relationships, handbook provisions, and mandatory union bargaining subjects**.

Return to the old "joint employer" standard: In *Hy-Brand Industrial Contractors, Ltd.*, the Board reversed its Obama-era change in evaluating joint employment for purposes of the National Labor Relations Act ("NLRA"). In 2015, the Board's *Browning-Ferris Industries* decision upended decades of precedent by greatly expanding the definition of who could be considered a "joint employer." The broader "indirect control" standard exposed companies to unexpected union-organizing campaigns and labor disputes. This standard also created uncertainty among franchisor-franchisee relationships and contractor relationships.

The Board's return to the pre-*Browning-Ferris* joint-employment standard is hailed as a major win for employers. According to the NLRB, the decision is supported by the NLRA's policy of promoting stability and predictability in bargaining relationships. In future or pending cases in front of the NLRB, two or more entities will only be considered "joint employers" under the NLRA if one entity has actually exercised direct and immediate control over the other entity's employees.

Good news for handbooks: In a case involving *The Boeing Company's* "no camera" policy, the NLRB overruled an unpopular 2004 Board decision that restricted what employers could include in their own handbooks. Under the old standard, employers violated the NLRA simply by maintaining workplace rules that could be "reasonably construed" to prohibit the exercise of NLRA rights – even if the rules did not explicitly prohibit protected activities, were not adopted in response to such activities, or were not applied to restrict such activities.

In overturning that case, the NLRB returns to a more reasonable standard. Now when the NLRB evaluates a workplace policy that potentially interferes with NLRA rights, the Board will weigh: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule.

Applying this new standard, the Board concluded that Boeing's "no camera policy" that prohibited employees from using camera-enabled devices to photograph its facilities without a permit did not violate the NLRA. The Board explained that the rule potentially interfered with NLRA rights, but that the impact was comparatively slight and outweighed by, among other things, national security concerns.

These two decisions are viewed as wins for management and will affect nearly every aspect of labor relations. [PE]

Human Resources Question with Candice Weaver

The Month's Best Question

No Info on Prior Compensation or Benefits

Q: "May I ask an employee how much they were paid at their last place of employment?

A: AB 168, which creates Labor Code section 432.3, effective January 1, 2018, prohibits employers from seeking or taking into consideration an applicant's prior compensation and benefits when determining whether to hire the applicant, and in setting the applicant's compensation and benefits.

The new law creates applies to all employers, regardless of size.

Employers may not rely on salary history information of an applicant in determining whether to offer employment and in determining the about of compensation to offer.

Employers may not seek salary history information, which includes compensation and benefits, about the applicant.

Nothing in the law prohibits **employees** from voluntarily disclosing salary history to a prospective employer.

Employers should comply with the new law 1/1/2018. Some steps to consider include training hiring managers about new law and that they are not to seek information from applicants regarding prior salary and benefits history.

Remember to remove any requests or questions about salaries of prior employment on applications or other documents provided to candidates.

On reasonable request, an **employer** must provide the "pay scale" for the position to the applicant, so have a set **pay scale** prepared for the positions you are hiring for. The law does not set forth what information must be included on the pay scale.

In addition, the law does not explicitly require that this information must be provided in writing to the applicant. However, should be in writing in case there is a dispute about whether the pay scale was provided to the applicant and what information was conveyed to the applicant. [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 April 24th, registration at 7:30am, Seminar 8:00-10:00am, at the Lamp Liter Inn, Visalia. *Future 2018 training dates: 7-25-18 and 10-24-18.*

RSVP Visalia Chamber - 559-734-5876
PE & Chamber Members $40 - Non-members $50
Certificate – Handouts – Full Breakfast

Labor Seminars now 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.***

2018 Topic Schedule

♦ **Employee Policies -** Every employer needs guidelines and rules. We examine planning considerations, what rules to establish and what to omit.
Thursday, March 15th, 2018, 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, April 19th, 2018, 10 - 11:30am

♦ **Safety Programs -** Understanding Cal/OSHA's Written Safety Program. Reviewing the IIPP or SB 198 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

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.*