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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.

Rose Acre Farms, Inc.

On August 1, 2018, the Department of Justice's Immigrant and Employee Rights division (IER) signed a settlement agreement with Rose Acre Farms, Inc. (Rose Acre), one of the largest egg producers in the United States, resolving the Division's suit alleging that the company discriminated against work-authorized non-U.S. citizens when verifying their work authorization.

The Division's amended complaint alleged that from at least June 2009 until at least December 22, 2011, Rose Acre engaged in a pattern or practice of unfair documentary practices in violation of 8 U.S.C. § 1324b(a)(6) by routinely requiring work-authorized non-U.S. citizens (but not U.S. citizens) to present specific documents to prove their work authorization.

Under the agreement, Rose Acre paid a civil penalty of $70,000, agreed that staff involved in the recruiting, hiring, or employment eligibility verification process will participate in Division-provided training on the antidiscrimination provision of the Immigration and Nationality Act (INA), committed to review and revise its hiring policies, and acknowledged that it would be subject to Division monitoring and reporting requirements for two years. [PE]

Mar-Jac Poultry, Inc.

On October 9, 2018, the Department of Justice's Immigrant and Employee Rights Division signed a settlement agreement with Mar-Jac Poultry, Inc. (Mar-Jac), a poultry processing company in Gainesville, Georgia.

The Division filed a lawsuit in July 2011 alleging that the company discriminated against work-authorized non-U.S. citizens when verifying their work authorization. On March 3, 2017, a tribunal found Mar-Jac liable for a pattern or practice of unfair documentary practices in violation of 8 U.S.C. § 1324b(a)(6) because Mar-Jac routinely required work-authorized non-U.S. citizens (but not U.S. citizens) to present DHS-issued documents to prove their work authorization.

The tribunal did not resolve some liability and remedies issues, which the parties continued to litigate following the March 2017 liability finding. Following the parties' settlement, on October 18, 2018, the tribunal dismissed the matter. **Under the settlement agreement, Mar-Jac will pay a civil penalty of $190,000,** pay up to $25,000 in back pay to compensate affected employees and applicants, and will have its relevant staff participate in Division-provided training on 8 U.S.C. § 1324b. Mar-Jac will also review and revise its hiring policies as necessary, and be subject to Division monitoring and reporting requirements for two years. [PE]

Want Breaking News by E-Mail?
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Pacific Employers
MANAGEMENT ADVISOR
Winter Extra 2019
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What's News!

New California Law Requires Sexual Harassment Training for all Employees!

Effective January 1, 2019, employers in California with 5 or more employees (or independent contractors) must provide sexual harassment training to all employees (SB 1343). The deadline for compliance with initial training is January 1, 2020.

Employers must then provide the training every 2 years. Currently, state law requires employers with 50 or more employees to provide training to supervisory employees only. Under the new law, covered employers must:

- Provide supervisory employees with 2 hours of training every 2 years
- Provide nonsupervisory employees with 1 hour of training every 2 years

Both supervisory and nonsupervisory employees must receive training within 6 months of hire or placement into their positions. Beginning January 1, 2020, seasonal and temporary employees, or any employee that is hired to work for less than 6 months must receive training within 30 days of hire or within 100 hours worked, whichever occurs first.

Training for temporary employees must be provided by the temporary services employer, not the client. Migrant and seasonal agricultural workers must receive training consistent with existing requirements for training nonsupervisory employees of farm labor contractors.

As required under existing law, the training must include a component on the prevention of abusive conduct in the workplace as well as information on harassment based on gender identity, gender expression, and sexual orientation.

Classroom or other effective interactive training is required. Training may be completed in shorter segments as long as the total hourly requirement is met. Employers may develop its own training as long as it meets the content requirements of the law.

The law requires the California Department of Fair Housing and Employment (DFEH) to make the poster, fact sheet, and online training courses available to employers in English and several other languages. The revised fact sheet will contain a link to the online training courses. [PE]

PE's "All-In-1" 2019 Poster Version 2.0

The State of California has issued new employment law posters after the first of the year that will be required posting for all California employers.

We always want to make available to you any required changes to your 2019 California and Federal Labor Law Posters

We have been notified that the California Department of Fair Employment and Housing (DFEH) released mandatory updates to its "California Law Prohibits Workplace Discrimination and Harassment" notice, relating to the expanded harassment education and training requirements of SB 1343 which took effect January 1, 2019.

As a result, we are updating our all-in-one 2019 California and Federal Labor Law poster and will make replacement posters available to all our clients.

We will have the new posters by the end of the first week of February 2019. We will also send out an email notification to all clients. [PE]

Labor Law Update Flyer Enclosed!

Dave's Report
~David E. Miller~



When To Train?

The new Sex Harassment Training Law, which we review above, requires employers with five (5) or more employees to provide training to all employees (both supervisory and non-supervisory) by January 1, 2020.

The new rules will require nearly all employers, large and small, to look at their calendars and figure out when they can train all their employees, supervisors and employees, to meet the Jan. 1, 2020 deadline.

Graciously, SB 1343 provides flexibility in planning your training as employees who are trained during 2019 will have two (2) years **after** January 1, 2020 to receive their next training.

This will allow employers to be proactive in getting their employees trained and have the training taken care of and the benefit of employees and supervisors being knowledgeable and in compliance with the law.

For SB 1343 compliance for employers with 5 or more employees, Pacific Employers will be providing training to **supervisors and non-supervisor employees** at the Wyndham Visalia, 9000 Airport Drive, Visalia on the following 2019 dates: February 28th, March 28th, April 25th, May 23rd and June 27th. Call us at 559 733-4256 [PE]

Entire ACA Unconstitutional!

A federal district court ruled that the entire Affordable Care Act (ACA) is unconstitutional because Congress' recent repeal of the individual mandate penalty undermined the U.S. Supreme Court's rationale for upholding the law in 2012. However, the U.S. District Court for the Northern District of Texas declined to grant an injunction invalidating the ACA, meaning that the law will likely remain in effect during a potentially lengthy appeals process.

After passage of the Tax Cuts and Jobs Act of 2017 (TCJA), which zeroed out the ACA's "individual shared responsibility" penalty beginning in 2019, 20 states and 2 individuals filed suit alleging that this change undercut the basis for the U.S. Supreme Court majority's decision in *NFIB)v. Sebelius*. In that opinion, Chief Justice John Roberts wrote that the individual mandate could be upheld only as an exercise of Congress's power to tax.

The district court agreed with the plaintiffs that the TCJA change negated this tax justification by eliminating the "shared responsibility" payment without repealing the mandate itself. [PE]

"To educate a man in mind, and not in morals, is to educate a menace to society."
Theodore Roosevelt (1858-1919) 26th US President

Supervisor Mocked Employee's Stuttering Problem!

In responding to claim of harassment, discrimination or retaliation based on protected categories, California employers must timely respond to and thoroughly investigate workplace complaints to avoid exposure.

On July 9, 2018, a California Court of Appeal court found an employer liable where an employee was mocking a person for having a stutter on more than five, but less than fifteen occasions over a two-year period from 2006 to 2008. In Caldera v. Department of Corrections and Rehabilitation, et al., the plaintiff brought suit after allegedly being subject to jokes over a two-year period of time. The jury awarded plaintiff $500,000. The trial court, finding the jury award excessive, granted a new trial as to damages. Both parties appealed.

The Court of Appeal reversed the trial court's decision to overturn the verdict. The Court noted that since two of the mocking incidents took place in front of several other employees and supervisors, and a psychologist testified that the mocking caused plaintiff to experience psychological disorders, a "totality of the circumstances" indicates that the harassing conduct was severe.

And even though neither plaintiff nor his witnesses could remember exactly how many times plaintiff was mocked or when exactly he was subject to any mocking the court found that the employer's culture supported the jury's finding that the harassing conduct was also pervasive. This case underscores the importance of being proactive to workplace concerns. California jurors and courts will not tolerate harassing conduct even when specifically linked to individuals mocking an employee's stuttering problem. [PE]

PAGA Claims Barred By Statute Of Limitations

Terri Brown brought a representative action against her employer, Ralphs Grocery Company, under the Private Attorneys General Act ("PAGA"), alleging wage and hour violations. In 2009, Brown filed a notice with the California Labor and Workforce Development Agency ("LWDA") as required under PAGA and also filed her complaint alleging PAGA violations.

When Brown filed a second amended complaint alleging new violations of the Labor Code, Ralphs successfully moved for judgment on the pleadings on the ground that the 2009 LWDA notice was deficient. In March 2016, Brown amended the 2009 notice and filed a third amended complaint. Ralphs successfully demurred on the ground that the PAGA claims were barred because the 2009 notice was deficient and the 2016 notice and third amended complaint were filed more than five years after the expiration of the statute of limitations. The Court of Appeal reversed, holding that part of the 2009 notice was adequate but Brown's later-added PAGA claims did not comply with the applicable notice requirements and were time-barred. See also Atempa v. Pedrazzani, 27 Cal. App. 5th 809 (2018) (employees had standing to recover civil penalties under PAGA from individual owner/president/secretary/director of employer). [PE]

Employer Successfull in Rounding Policy!

A California appellate court held an employer's use of a rounding policy for its non-exempt employees complied with California law because it did not disfavor employees. (*Donohue v. AMN Services, LLC.*)

AMN employed Donohue as a nurse recruiter who was non-exempt from California's overtime requirements. AMN tracked recruiters' time with a computer-based timekeeping system, in which recruiters would punch in for the day, punch out when they took a meal break, punch back in when they returned from their meal break, and punch out at the end of the day. AMN rounded recruiters' punch times to the nearest 10-minute increment. For example, all punch times between 7:55 a.m. and 8:04 a.m. would record as 8:00 a.m., and all punch times between 8:05 a.m. and 8:14 a.m. would record as 8:10 a.m. Donohue brought a class action lawsuit alleging AMN's rounding policy violated various California wage and hour laws. The trial court granted summary judgment for AMN, and the court of appeal affirmed.

The court noted that California law permits employers to use a rounding policy if it is "fair and neutral on its face and it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked." Under this standard, "an employer's rounding policy is fair and neutral if on average, it favors neither overpayment nor underpayment; but such a policy is unacceptable if it systematically undercompensates employees because it encompasses only rounding down."

The court held AMN satisfied this standard as a matter of law based on expert testimony from a labor economist. The economist analyzed 311 recruiters' time records and determined that AMN's policy resulted in a net surplus of 1,929 work hours in paid time for the recruiters, including a net surplus of 9.82 hours for the representative plaintiff herself. The court rejected the plaintiff's attempt to raise a triable issue based on expert testimony from a statistics professor. Although the statistics professor found that the rounding policy resulted in AMN failing to pay certain employees for 2,631 hours worked, the court held his testimony was flawed because it focused solely on employees who happened to have a late or short meal period. Because AMN's rounding policy on the whole was neutral as to all class members, the policy was lawful. [PE]

Court Confirms Validity Of Meal Period Waivers!

The California Supreme Court handed down its unanimous decision in *Gerard, et al. v. Orange Coast Memorial Medical Center*, affirming the Court of Appeal ruling that voluntary meal period waivers are permissible for healthcare employees who work long shifts, even if they work more than 12 hours.

By allowing healthcare employees to waive one of their two meal periods, the Gerard decision preserves a choice for employees who work 12-hour shifts. They continue to have the flexibility to work shifts that span 12 ½ hours with one 30-minute meal period or shifts that span 13 hours and include two 30-minute meal periods.

This case was hard fought throughout California courts for 10 years, but it also involved novel legislative action. Notably, it was the only wage-hour victory for an employer before the California Supreme Court in 2018. [PE]

9th Circuit Finds in Favor of Employer

In *Carlson v. Charter Communication, LLC*, the Ninth Circuit affirmed the dismissal of a lawsuit brought by an employee who alleged discrimination under the Montana Medical Marijuana Act (MMA) because he was discharged for testing positive for marijuana use.

The plaintiff, a medical marijuana cardholder under Montana state law, tested positive for THC (a cannabinoid) after an accident in a company-owned vehicle. His employer, a federal contractor required to comply with the DFWA, terminated his employment because the positive test result violated its employment policy.

The Ninth Circuit court covers courts in the western United States including California. [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

Recinded Resignation!

Q: "What are the options to consider when an employee revokes a resignation?"

A: When an employee attempts to "rescind a resignation," is not required to accept the rescission.

Indeed, if this is a less-than-stellar employee, the employer may be happy to have the individual resign.

Get It in Writing

An issue can come up when a resignation is verbal, and then the employee rescinds it.

For this reason, it is best to have employees put their resignation in writing. An email is sufficient to prove the resignation happened, in the event the employee contends they never really resigned.

If the employee does not put the resignation in writing, it's advisable for the employer to accept the resignation immediately and in writing to acknowledge and confirm that the employer is acting on the wishes of the employee.

Indeed, the employer should start a search for a new employee to show that the employer has acted on the resignation notice. Starting the search usually helps with the employee contending that he/she did not put the resignation in writing and establishes that the employer relied on notice from the employee.

Other Scenarios

Another scenario that occurs around resignations is when an employee gives a lengthy resignation notice, and the employer prefers to cut ties immediately.

If an employee provides 30 days' notice and the employer decides today is the last day, the resignation becomes a termination and the individual is eligible for unemployment benefits.

Alternatively, if an employee gives notice and the employer decides today is the last day, but the employer pays the person through the notice period, then the resignation stays a resignation.

When paying an employee his/her final paycheck, be it resignation or termination, do not mail that check unless the employee directs you to do so in writing. [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 April 24th, registration at 7:30am Seminar 8:00 to 10:00am, at the Lamp Liter, Visalia.

Future 2019 Supervisor training dates 4-24-19, 7-24-19 and 10-23-19

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

For SB 1343 compliance for employers with 5 or more employees, Pacific Employers will also be providing training to **supervisors and non-supervisor employees** at the Wyndham Visalia, 9000 Airport Drive, Visalia on the following 2019 dates: February 28th, March 28th, April 25th, May 23rd and June 27th. Call us at 559 733-4256

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

♦ **Labor Law Update -** The courts and legislature are constantly "Changing the Rules." Learn about the recent changes to both the California and U.S. laws that affect employers of all types and sizes.
Thursday, February 21st, 2019, 10am - 11:30am

♦ **Employee Policies -** Every employer needs guidelines and rules. We examine planning considerations, what rules to establish and what to omit.
Thursday, March 21st, 2019, 10am - 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 18th, 2019, 10 - 11:30am

♦ **Safety Programs -** Understanding Cal/OSHA's Written Safety Program. Reviewing the IIPP or SB 198 requirements for your business.
Thursday, May 16th, 2019, 10 - 11:30am

♦ **Family Leave -** Fed & CA Family Medical Leave, California's Pregtnancy Leave, Disability Leave, Sick Leave, Workers' Comp, etc.; Making sense of them.
Thursday, June 20th, 2019, 10am - 11:30am

♦ **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

♦ **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 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