Pacific Employers
Management Advisor
47 Years of Excellence!
August 2011

What's News!

Providing Benefits For Employees Who Quit

The EDD has amended its regulations relating to eligibility for benefits where the employee has quit due to compelling family reasons. The amendment appears to broaden coverage for these individuals.

Unemployment benefits are generally granted to employees who are involuntarily terminated. A voluntary resignation generally disqualifies the individual from receiving unemployment benefits. However, there are some exceptions to this general rule. One exception applies where the individual quit due to compelling family reasons.

The regulations relating to this exception have been changed. Sections 1256-9 and 1256-10 of the California Code of Regulations (CCR), Title 22, had provided that an individual who voluntarily leaves his or her employment due to a compelling need to attend to the health, care, or welfare of the individual's family member, left work with good cause, provided reasonable steps were taken to preserve his or her employment, and no reasonable, alternative care is available.

The new regulations remove the last phrase. Individuals will no longer be disqualified if reasonable, alternative care was available. For example, if the employee leaves to take care of his seriously ill mother, he can qualify for unemployment benefits, even if he could have afforded to hire a caretaker or perhaps arranged for another relative to take responsibility.

The new regulations also add a "disability" element to the compelling reasons to quit for the care of a family member. The regulations now read that the employee has compelling reasons to quit where:

(1) The claimant knows or reasonably believes that a member of the claimant's family is seriously ill or disabled, physically or mentally, or a family member is in danger of death.

(2) The claimant knows or reasonably believes that a member of the claimant's family is seriously ill or disabled so as to require the claimant to make a change of residence for that person's care or welfare and making it impossible or impractical for the claimant to commute to work

This change may allow for coverage where the family member is not ill, yet suffers from a physical or mental disability.

According to documents published in connection with the new regulation, the amendments were made in order to qualify California's unemployment insurance program for additional federal subsidies.

The revisions in the regulations will likely increase payment of claims under these circumstances. In 2009, the Department conducted 2 million UC eligibility determination interview appointments. Approximately 24,000 (or one percent of the total determinations) involved claimants who voluntarily left work due to domestic circumstances. Leaving employment due to domestic reasons may involve a variety of situations; such as domestic violence abuse, to care for an ill or disabled family member, to follow or join a spouse or domestic partner to a new location, or to attend to childcare concerns. [PE]

Employment Application Enclosed!

President's Report
~Dave Miller~

Gov. Brown Vetoes Card Check Bill

Governor Jerry Brown vetoed a widely watched piece of farm-labor legislation: SB 104, the farmworker "card-check" bill.

The bill would have changed how agricultural union elections are held. Instead of voting by secret ballot on whether to join a union, as provided under current law, workers would express their preference by "card check"—in essence, by submitting a petition accompanied by individual authorization cards. The cards could be filled out anywhere—on the job or at home.

The United Farm Workers backed the bill, introduced by Senate President pro tem Darrell Steinberg, a Sacramento Democrat. Steinberg, the UFW, and their allies say the change was necessary because farm employers have intimidated workers voting in secret elections held at job sites. Opponents of the bill, which predictably include agriculture interests, say the card-check system would make workers vulnerable to coercion from unions.

UFW supporters had been camped out at the Capitol all week, holding a fast and vigil to try to persuade the governor to sign the bill. Some had traveled hundreds of miles to be there, and according to KQED Sacramento Bureau Chief John Myers, they were angry and dejected when the word came that Brown had vetoed SB 104.

UFW President Arturo Rodriguez was on the scene. He engaged in a long, testy cellphone conversation with the governor.

Rodriguez told Myers, "You know, we've looked at all different kinds of ways, we've studied and researched how to improve the lives of farmworkers, how to protect their lives, and we believe they need the option of what SB 104 offers."

Regarding Brown, Rodriguez said: "We're very disappointed, we're frustrated, that the governor decided to side with the powerful agribusiness industry, which is a 36 billion dollar industry, as opposed to siding with farmworkers."

In his veto message, Brown recalled his own role in negotiating and signing the state's 1975 Agricultural Labor Relations Act during his first term as governor.

Brown said he remains committed to farm worker interests and will work with the union, legislators, and unspecified other parties—presumably agricultural interests—on a new bill to update the farm labor law. [PE]

"Don't judge each day by the harvest you reap but by the seeds you plant." - Robert Louis Stevenson

Recent Developments

Verizon Settles $20 Million Lawsuit

Verizon Communications Inc. has agreed to pay $20 million to resolve a nationwide class disability discrimination lawsuit involving the company's "no fault" attendance plans, the Equal Employment Opportunity Commission reports.

The case is the largest disability discrimination settlement in a single lawsuit in EEOC history, according to the federal agency.

The EEOC charged that New York City-based Verizon violated the Americans with Disabilities Act when 24 Verizon subsidiaries unlawfully denied reasonable accommodations to hundreds of unionized employees and disciplined and/or fired them under its "no fault" attendance plans.

"... INSTEAD OF PROVIDING REASONABLE ACCOMMODATIONS ..."

If an employee accumulated a designated number of "chargeable absences" under Verizon's attendance plans, the worker was put on a disciplinary step that could result in more serious consequences, the EEOC said.

The EEOC charged that instead of providing reasonable accommodations for employees with disabilities, it disciplined or terminated them.

"An inflexible leave policy may deny workers with disabilities a reasonable accommodation to which they're entitled by law—with devastating effects," EEOC chair Jacqueline Berrien said in a written statement.

Also in a statement, Verizon said it agreed to settle the complaint "solely because it is in the best interest of our company, our employees and our customers to avoid the disruption, delay and expense of protracted litigation.

"In addition, this settlement, which applies only to union-represented wireline employees, provides Verizon with clearer guidance from the EEOC regarding when it may be appropriate to provide additional leave as a reasonable accommodation under the Americans with Disabilities Act. This was previously lacking and was a significant factor in Verizon agreeing to settle the matter." According to a Verizon spokesperson, wireline employees install, maintain and repair landline phone services.

"... NO COURT HAS EVER FOUND THAT VERIZON VIOLATED THE ADA ..."

Verizon said it complies with all employment laws, "and in fact has not in this case conceded any violation of those laws. In addition, no court has ever found that Verizon violated the ADA or any other law in the manner alleged by the EEOC. Verizon believes it has accommodated employees with fairness to all, consistent with a company that has a long-standing public record recognized by many third parties—for commitment to and support of people with disabilities. In fact, Verizon's leave-of-absence and accommodation policies continue to far exceed what is required by law." [PE]

Professional Overtime Exemption Revitalized

In 2009, companies who classified certain unlicensed accountants, engineers and other professions as exempt from overtime under the California Learned Professional Exemption were dealt a broadside by a federal District Court when it held that unlicensed accountants were categorically ineligible for the Learned Professional Exemption. The decision lead to numerous employers reevaluating the Learned Professional Exemption involving certain positions and it likely triggered significant exempt status litigation in California.

On June 15, 2011, the Ninth Circuit reversed, in part, and remanded the lower court's controversial decision and breathed new life into the California Learned Professional Exemption. (*Campbell v. PricewaterhouseCoopers LLP, 9th Cir., No. 09-16370, 6/15/11*)

The case involves approximately two-thousand unlicensed junior accountants at PricewaterhouseCoopers LLP. The court found that unlicensed accountants were not categorically barred from being classified as exempt from overtime based on the Learned Professional Exemption. The Court held that the employer could present evidence to establish the exemption to a jury.

"... REMANDED TO THE JURY CERTAIN IMPORTANT QUESTIONS ..."

Although not likely to receive as much attention, the Ninth Circuit also remanded to the jury certain important questions regarding the Administrative Exemption. For example, the jury must review whether the audit work performed by the junior accountants could be classified as work of "substantial importance" to the management of the clients' operations. The issue of whether work is of a "substantial importance" under the Administrative Exemption is a critical element under the exemption which many employers struggle with interpreting. As a result, employers may also receive additional help in clarifying a problematic area under the Administrative Exemption.

The Court noted:

> *While we recognize Plaintiffs are on the low end of PwC's hierarchy, we see no authority that would bar their audit work from meeting this test as a matter of law. The former federal regulations incorporated by the administrative exemption include several examples of administratively exempt white collar employees, including tax consultants, wage-rate analysts, analytical statisticians, claim agents, and "many others." In contrast, the examples of nonexempt employees are predominately clerical—bookkeepers, secretaries, messengers, and other "clerks of various kinds." Whether Plaintiffs are more comparable to the former category or the latter will depend on how the jury resolves the numerous factual disputes discussed above . . .*

This case represents a well timed victory for employers with the end of the story still to be written by the jury which has the job to deliberate the factual issues in the case. Contact Pacific Employers with any questions you may have regarding your circumstances. [PE]

NLRB Rule Changes Could Help Unions Organize

The National Labor Relations Board issued proposed changes to federal rules that would make it easier for work forces to unionize. The proposals are causing some discomfort in the business sector, while unions are touting them as a major win for them.

The NLRB's rule changes, announced June 21, deal with procedures related to the handling of secret-ballot elections for workers who want to pick a union to represent them. The proposed rule changes still must go through a 60-day period during which the public can comment before they can be approved.

The changes are said to reduce unnecessary litigation, streamline pre- and post-election procedures and facilitate the use of electronic communications and document filing.

For example, election petitions, notices and voter lists currently cannot be transmitted electronically. The new rules would make that OK. Another proposed change would eliminate pre-election requests for reviews, speeding up the process for elections to take place. [PE]

Employment Application Enclosed!

Human Resources Question with Candice Weaver

The Month's Best Question

NLRB Gives Employees More Rights To Complain

Q: ***"We have no union at our company but are concerned that the National Labor Relations Board (NLRB) has made rules that allow our employees to use Social Websites and Web services to slander our company?"***

A: **While** employers who operate workplaces without labor unions think that they are unaffected by the pronouncements of the NLRB, they should think again. In a series of recent cases, the NLRB's general counsel has taken the position that employee activity on social-media sites like Facebook and Twitter can trigger certain rights under federal labor law for even nonunion employees.

Section 7 of the National Labor Relations Act (NLRA) grants employees the right to "engage in...concerted activities for the purpose of collective bargaining or other mutual aid or protection." (emphasis added). This broad statutory language leaves room for subjective interpretation, and, over the years, the courts and the NLRB have refined the standard for what conduct is considered "concerted."

Recent Cases Expand the Concept of Concerted Activity

For example, in May, the NLRB issued a complaint alleging that a BMW dealership outside Chicago violated the rights of a nonunion car salesman who used his Facebook page to complain about the quality of the food his employer had served at a sales event, complete with photos of the offensive hot dogs and water bottles. The dealership fired him for his posting, which was accessible to his fellow salesmen.

Because the salesman's comment on the hot dogs and water also mentioned his fear of the negative effects that such meager fare could have on his commissions, the general counsel found that his comment qualified as "protected concerted activity" under § 7 of the National Labor Relations Act (NLRA), which confers on workers the right, among others, to engage in "concerted activities for the purpose of ... mutual aid or protection." Many employers would be surprised to learn that, under settled law, conversations among workers concerning their compensation is "protected activity" under federal labor law, and the NLRB has for many years been of the view that company policy prohibiting employees from discussing their compensation with one another violates their § 7 rights. See *Double Eagle Hotel & Casino, 341 NLRB 112 (2004)*. Building on that precedent, the labor board in the 21st century has ruled that employers violate federal law if they discipline employees for making Web site statements concerning the terms and conditions of their employment. See *Valley Hospital Medical Center, 351 NLRB 1250, 1252-54 (2007)*

Employers that want to avoid such express affirmative assertions about protected activity by employees should draft policies that in context and when read as a whole cannot be "reasonably construed" as interfering with employees' rights to discuss with one another their pay and their gripes about their working conditions.

If you need help in this arena contact the staff at Pacific Employers. [PE]

No-Cost Employment Seminars

The Small Business Development Center and Pacific Employers host this Free Seminar Series at the Tulare-Kings Builders Exchange on the corner of Lover's Lane and Tulare Avenue in Visalia, CA. RSVP to Pacific Employers at 733-4256 or the SBDC, at 625-3051 or fax your confirmation to 625-3053.

The mid-morning seminars include refreshments and handouts.

2011 Topic Schedule

There is No Seminar in August

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

Thursday, September 15th, 2011, 10 - 11:30am

♦ **Guest Speaker Seminar - Attorney Anthony P. Raimondo of McCormick, Barstow, Sheppard, Wayte & Carruth will be our Guest Speaker who** will bring you a timely discussion of current labor relations issues of interest to all employer.

Thursday, October 20th, 2011, 10 - 11:30am

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

Thursday, November 17th, 2011, 10 - 11:30am

There is 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.*

Call 733-4256 or 1-800-331-2592.

Want Breaking News by E-Mail?
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Court Weighs In on Meaning of Split Shifts

California requires that extra compensation be paid to employees who are required to work "split shifts," generally referring to daily work shifts that are separated by several hours of non-work time.

In *Securitas Security Services v. Superior Court (Holland),* a group of employees brought a class action against their employer, alleging the employer failed to pay them required split shift premiums.

The alleged split shift? Working consecutive overnight shifts starting in the evening and ending in the morning. The employer defined its workday to begin at midnight each day and the employees therefore argued that by ending one shift in the morning and starting another in the evening of the same day, they were working "split shifts" and had to be compensated accordingly.

The court appropriately rejected the plaintiffs' tortured interpretation of a split shift and held that split shift pay need not be paid in such circumstances involving consecutive overnight shifts. [PE]

California Extends OT to Non-Residents

In a decision with disturbing implications for employers that send employees on temporary assignments to California, the California Supreme Court held in Sullivan v. Oracle Corp. that California's overtime law applies to the employees of a California-based employer when they work full days or weeks in California, even though the employees reside and regularly work in other states. [PE]

IRS Mileage Rate Increases

Effective July 1, 2011, employers who use the IRS rate to reimburse employees for business mileage must pay 55.5 cents per mile. This is the maximum payable to employees before it becomes taxable wages. [PE]

Supreme Court Reverses Wal-Mart Case

The United States Supreme Court handed down its decision in Dukes v. Wal-Mart, holding that discrimination claims on behalf of some 1.5 million female Wal-Mart employees could not properly be pursued as a class action.

The case challenges Wal-Mart's promotion and pay practices. Pay and promotion decisions are generally committed to the discretion of local managers, whom the plaintiffs claim exercise that discretion in a manner that favors male employees.

Lower courts certified the case as a class action, and the Supreme Court has now reversed the Ninth Circuit's ruling and found that class treatment was not appropriate.

The Court explained that in discrimination cases, this generally requires a showing of a discriminatory policy or practice of discrimination, e.g. use of a biased testing procedure. The Court held that there was no such evidence of a company wide policy or practice of discrimination on the part of Wal-Mart.

Instead, the evidence showed that Wal-Mart allowed local managers to exercise subjective discretion over pay and promotions, which is the exact opposite of a uniform policy or practice. [PE]

Sexual Harassment Prevention Training

Visalia Chamber of Commerce and Pacific Employers, will jointly host a state mandated Supervisors' Sexual Harassment Prevention Training Seminar & Workshop with a continental breakfast on Wednesday, *October 27th*, registration at 7:30 am. Seminar 8:00 to 10:00 am, at the Lamp Liter, Visalia.

RSVP Visalia Chamber - 734-5876 – $25
Certificate – Forms – Guides – Full Breakfast