Pacific Employers
MANAGEMENT ADVISOR
50 Years of Excellence!
August 2014

WHAT'S NEWS!

High Court Lets Hobby Lobby, Others Opt Out Of Contraception Coverage Under ACA

The U.S. Supreme Court reviewed the Affordable Care Act (ACA) again this term and has held, in Burwell v. Hobby Lobby Stores, Inc. that the ACA's contraceptive mandate violates the Religious Freedom Restoration Act of 1993 as it is applied to "closely held corporations." According to the Court's 5-4 opinion, the mandate "substantially burdens the exercise of religion."

The Court reasoned that the owners of closely held corporations do have a conscience and have a right to exercise it. PE]

NLRB Recess Appointments Nullified

The Supreme Court issued its much anticipated decision in *NLRB v. Noel Canning*, regarding the President's authority to avoid the Senate's confirmation procedure by granting recess appointments to fill vacant positions. The decision specifically involved the legitimacy of the President's recess appointment of Terence Flynn, Sharon Block, and Richard Griffin to be Members of the National Labor Relations Board. A unanimous Court found that those appointments were beyond the President's authority and, therefore, unconstitutional.

As a result of the Court's decision, NLRB decisions in which Block, Griffin, or Flynn participated will most likely be invalidated and will need to be reconsidered by the current Board, which already has a considerable backlog of pending cases and is devoting substantial efforts to issue the "quickie" election regulations. Among the decisions that the NLRB will have to revisit are those involving highly controversial issues such an employer's ability to issue reasonable rules regarding employee behavior at work or to limit access to its facilities by off-duty employees; an employer's obligation to continue dues deduction after expiration of the collective bargaining agreement; the duty to bargain discipline during first contract negotiations; confidentiality instructions to employees during employer investigations; and an employer's obligation to provide a union with documents previously considered confidential.

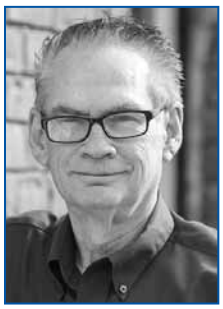
In addition to the case decisions that now may be invalidated, any administrative actions in which Block, Flynn, or Griffin participated may also be invalid — including the appointments of Regional Directors and Administrative Law Judges. As a result, many decisions issued by these Regional Directors or Administrative Law Judges also may be invalid.

The total fallout from this important decision will not be known for some time and we will continue to monitor and advise you of recent developments. To be sure, however, no matter how extensive the repercussions ultimately extend, the decision is a tremendous victory for employers. PE]

"If the people let government decide what foods they eat and what medicines they take, their bodies will soon be in as sorry a state as are the souls of those who live under tyranny."
-- Thomas Jefferson (1743-1826),

Record Retention Chart Enclosed!

President's Report
~Dave Miller~



OCTOBER GUEST SPEAKER!

We recently featured an article regarding *Tiri v. Lucky Chances, Inc.* in which the CA Court of Appeal held that the trial court erred in even reaching the issue of whether the agreement was unconscionable because the arbitration agreement included a provision expressly delegating to the arbitrator, authority to determine issues of enforceability of the agreement.

Our Guest Speaker for the October Seminar will be Tyler M. Paetkau, of Hartnett, Smith & Paetkau, the attorney responsible for representing ***Tiri v. Lucky Chances, Inc.*** in their dramatic reversal of the lower court's decision.

Mr. Paetkau will focus on arbitration developments (having just won the *Tiri v. Lucky Chances* arbitration decision in the First District Court of Appeal), but will be happy to address any or all important labor and employment law developments affecting California and Central Valley employers. (of which there are many!)

We recommend arbitration agreements, and our October seminar can help you look carefully at the provisions in your arbitration agreement. [PE]

PRE-ACA HEALTH COVERAGE EXTENDED!

Governor Edmund G. Brown Jr. has signed California Chamber of Commerce-supported legislation that will help small employers control their health care costs.

SB 1446 (DeSaulnier; D-Concord, Chapter 84) allows small employers that renewed their health coverage in 2013 to extend their pre-Affordable Care Act (ACA) health care policies through December 31, 2015.

In March 2014, President Barack Obama announced that, with state authorization, small businesses would be allowed to continue renewing pre-ACA health coverage through 2016, and for those plans to remain in force until fall 2017.

The change to California law allows small employers in California to take advantage of the first year of the extension announced by the President.

The extended transitional period will give small employers more time to prepare to bear the costs associated with plans that fully comply with the ACA, minimizing the potentially negative impacts this new burden could have on the continuing economic recovery. [PE]

Recent Developments

Sampling Plan Sinks OT Class Action

Calling "seriously flawed" a lower court's trial management plan which used sampling evidence to prove class liability and damages under California law, the California Supreme Court has vacated a $15-million judgment against the employer for overtime pay and remanded the case for a new trial on both liability and damages. *Duran v. U.S. Bank National Ass'n*

The Court stated that statistical proof cannot be relied on to bar the presentation of valid defenses to either liability or damages, even if the alternative would require adjudication of a defense on an individual level. If the trial proceeds with a statistical model, a defendant accused of misclassification must be given a chance to impeach that model or otherwise show that its liability is reduced because some plaintiffs were properly classified.

Background

In this class action case, approximately 260 employees of U.S. Bank ("USB") alleged they were misclassified as exempt from the right to overtime. At the trial court level, 21 plaintiffs were selected as representative of the class and the class was certified.

USB challenged the trial court's certification on two grounds. First, USB argued that taking a statistical sampling to represent all of the people in the class was unfair because USB believed that at least one-third of the people in the class were not misclassified; and even if legitimate, the statistical methodology was unsound. Second, USB argued that on the issue of liability, it had the right to present a defense to each and every claimant on hours worked and whether they were exempt.

Based on testimony from the small sample group, the trial court found the entire class had been misclassified. The court then extrapolated the average amount of unpaid overtime reported by the sample group to the class as a whole, resulting in a verdict of approximately $15 million and an average recovery of over $57,000 per person.

"... COURT'S RELIANCE ON ... SAMPLING CLEARLY DENIED USB DUE PROCESS."

The Court of Appeal, while falling short of saying that a court could never use sampling to establish liability in a wage and hour class action case, agreed with USB. It held that in the circumstances presented, the trial court's reliance on representative sampling to determine liability clearly denied USB due process. The Court of Appeal concluded the trial court had abused its discretion in denying USB's motion to de-certify the class. Even if certification had once appeared appropriate, it should have become apparent that individual issues predominated so as to render class treatment impossible. In addition to reversing the trial court's judgment, the Court of Appeal ordered the class decertified.

Supreme Court Decision

The high court unanimously agreed with the Court of Appeal. The Supreme Court emphasized, "We have encouraged trial courts to be 'procedurally innovative' in managing class actions....We have remained open to the appropriate use of representative testimony, sampling, or other procedures employing statistical methodology. However, the trial plan here was seriously flawed. First, without following a valid statistical model developed by experts, the court improperly extrapolated liability findings from a small, skewed sample group to the entire class. Second, in pursuing this extrapolation, the court adamantly refused to admit relevant evidence relating to [class members] outside the sample group. These rulings significantly impaired USB's ability to present a defense."

While the Supreme Court did not provide any bright-line rules on the use of statistical sampling, it strongly criticized the trial court's trial management plan, giving employers an idea of the types of trial procedures that should raise red flags. [PE]

No Waiver of Right to Arbitration

An employer that petitioned to compel arbitration one year after the employee filed his employment-related complaint did not waive its right to arbitrate the complaint, the California Court of Appeal has ruled, confirming the burden of proving a party waived its right to arbitration is a heavy one. *Gloster v. Sonic Automotive, Inc.*

The Court found the employer consistently communicated to the employee's counsel and the court that the dispute should be arbitrated, and the delay, in large measure, was caused by the employee's inclusion of multiple defendants in the lawsuit. It found significant that the employer filed its petition to compel arbitration shortly after the trial court resolved issues related to the other defendants, and the employee was not prejudiced by the delay. The Court reversed the order denying arbitration.

Background

While working for **Melody Toyota, Sean Gloster** signed several agreements requiring him to arbitrate all disputes with Melody.

In 2011, Gloster filed an employment-related lawsuit against Melody, Melody's parent corporation, and others. Melody filed an answer asserting as an affirmative defense that Gloster was required to arbitrate his claims. Melody took the same position at case management conferences and in communications with Gloster's counsel. Melody responded to Gloster's discovery requests, but did not seek any discovery from Gloster.

In January 2012, the trial court resolved issues related to other defendants. Shortly thereafter, Melody filed a petition to compel arbitration. The trial court denied the motion, finding Melody had waived its right to arbitration by participating in the litigation for over one year and that Gloster was prejudiced as a result of the delay.

Applicable Law

California law requires close judicial scrutiny of waiver claims. When determining whether a waiver has occurred, California courts may consider the following factors, among others: whether the party's actions are inconsistent with the right to arbitrate; whether "the litigation machinery has been substantially invoked"; and whether the delay "affected, misled, or prejudiced" the opposing party. Courts will not find prejudice where the party opposing arbitration shows only that it incurred court costs and legal expenses.

No Waiver Found

Gloster argued that Melody waived its right to arbitrate because it waited over one year before filing its motion to compel and that he was prejudiced because he incurred legal expenses and experienced anxiety as a result of the litigation. The appellate court rejected these arguments.

The Court said Melody did not take any actions inconsistent with its position that the case should be arbitrated. Melody asserted arbitration as an affirmative defense, raised the issues consistently at case management conferences and in communications with Gloster's counsel, and did not serve any discovery requests, although it responded to Gloster's discovery requests. Melody promptly filed its motion to compel arbitration after the trial court resolved issues related to the other parties in the case. Further, it was not unreasonable for Melody to wait until the trial court decided issues related to the other parties as their resolution simplified the case.

In addition, the Court found Gloster failed to show he was prejudiced as a result of the delay. The "delay alone" was insufficient to establish a waiver, particularly since Gloster's inclusion of numerous parties largely caused the delay. Similarly, the Court noted, "Gloster's claim of prejudice was based on the legal expenses he incurred, which were largely the result of his own efforts" at discovery and his addition of other parties to the lawsuit. Thus, these expenses did not constitute prejudice to Gloster. Further, the Court stated it was "unaware of any decision holding that anxiety constitutes prejudice for these purposes." Accordingly, the Court reversed the order denying Melody's petition to compel arbitration. [PE]

Human Resources Question with Candice Weaver

The Month's Best Question

Wage Change Review

Q: ***"I have heard that California has just changed the Wage Order for our business. How has it been changed and what is the effect? Also, are there other wage related issues that I should be checking? "***

A: The California Department of Industrial Relations (DIR) recently updated all 17 industry Wage Orders to reflect the increase in minimum wage to $9 an hour on July 1, 2014.

The revised industry Wage Orders also reflect the updated meal and lodging credit amounts. Don't forget to separately post the updated Wage Order specific to your industry—in your workplace where employees can easily read it—starting July 1, 2014. Download the Wage Order from our Forms Page on our website at *http://pacificemployers.com/forms.htm*

Review base salary for all exempt employees. In order to qualify as an exempt employee, which is an employee who is not entitled to receive overtime for work performed over eight hours in one day or 40 hours in one week, the employee must be paid an equivalent of two times minimum wage. Before the minimum wage increased in July 2014, this amount was $33,280 annual salary. With the minimum wage increase to $9 per hour, this amount increases to $37,440 annual salary, and when the minimum wage increases to $10 per hour, an exempt employee will need to be paid $41,600 annually.

Review compliance with the Wage Theft Protection Act Notice. Since 2012 every California employer has been required to provide written notices to new employees regarding certain information about their jobs, including their wage rate. The good news is that employers will not have to re-issue new wage notices to employees as a result of the increase of minimum wage as long as the new minimum wage rate is shown on the pay stub (itemized wage statement) with the next payment of wages.

Review timekeeping system and policies. With the higher minimum wage rate, there is more potential exposure from wage and hour lawsuits alleging off the clock work or unpaid minimum wage. Companies should remind employees of policies that prohibit off the clock work and about complaint procedures available should anyone ask the employee to work off the clock or should the employee not receive all minimum wages.

Review wage agreements with employees. Ensure that all agreements with the employees comply with the law. Under California law, employees cannot agree to work for less than the state minimum wage. This waiver cannot be done through a collective bargaining agreement. All agreements to do so are void under the law.

Review classification of independent contractors. A company that uses independent contractors should review the classification to ensure that it can withstand scrutiny from a court, Department of Labor, Labor Commissioner, or the EDD. As employers already face large penalties for misclassifying independent contractors, the potential exposure for unpaid minimum wages as a result of a misclassification will also increase as discussed above. [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 October 22nd, registration at 7:30am with the Seminar 8:00 to 10:00am, at the Lamp Liter, Visalia.

RSVP Visalia Chamber - 734-5876
PE & Chamber Members $35 - Non-members $50
Certificate – Forms – Guides – Full Breakfast

No-Cost Employment Seminars

Pacific Employers hosts this Seminar Series at the Builders Exchange at 1223 S. Lover's Lane at Tulare Avenue, Visalia, CA. RSVP to Pacific Employers at 733-4256.

- Our Next 2014 Seminars -

There is No Seminar in August

♦ **Forms & Posters -** as well as Contracts, Signs, Handouts, Fliers - Just what paperwork does an Employer need?
Thursday, September 18th, 2014, 10 - 11:30am

♦ **Guest Speaker Seminar -** Our Guest Speaker for the October Seminar will be **Tyler M. Paetkau, of Hartnett, Smith & Paetkau,** the attorney responsible for representing *Tiri v. Lucky Chances, Inc.* winning the decision that permits an arbitration agreement which included a provision expressly delegating to the arbitrator, authority to determine issues of enforceability of the agreement.

Thursday, October 16th, 2014, 10 - 11:30am

♦ **Discipline & Termination -** The steps to take before termination. Managing a progressive correction, punishment and termination program.
Thursday, November 20th, 2014, 10 - 11:30am

There is No Seminar in December

Seminar Topic Talk with Dawn

Forms & Posters
Contracts, Signs, Handouts, Fliers

Years ago Pacific Employers was queried on what posters an employer must post. The best way to answer the question turned out to be by way of a seminar that covered the topic. But as usual, the administrative agencies and good employment practice have dictated a host of other forms, fliers, handouts, etc.

During the seminar you will get an opportunity to go through the poster requirements to understand the need as well as the possible penalties and other liabilities of failure to post. We will have the newest posters, including the new CA Minimum Wage poster. We will also review the new hire forms.

We will have many of the flyers, handouts, posters and forms at the September seminar. Coffee and bagels will be ready and we look forward to seeing you on Thursday, September 18th. [PE]

Record Retention Chart Enclosed!

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Terminated Because of Wheelchair?

The Equal Employment Opportunity Commission (EEOC) has charged in a lawsuit that Orion Energy Systems, Inc. terminated an employee because of his disability, a mobility impairment.

In its lawsuit, the EEOC contends that Orion fired Scott Conant after he experienced a disabling condition that substantially limited his ability to walk and required that he use a wheel-chair. According to the EEOC, Conant's termination allegedly followed his request for accommodations to allow him to enter and exit the Orion workplace, such as an automatic door opener. Orion never installed a door opener while Conant worked at the company. [PE]

Franchisor Liability for FEHA Violation?

The California Supreme Court has now heard argument on whether a franchisor can be vicariously liable for violation of the Fair Employment and Housing Act (FEHA) by a franchisee.

The lawsuit involves a minor, Taylor Patterson, who worked for Sui Juris, LLC, a Domino's Pizza franchisee. Patterson filed suit under the FEHA alleging sexual harassment by her supervisor. She sued Sui Juris, LLC and Domino's Pizza.

Domino's filed a summary judgment motion arguing that the franchisee was an independent contractor pursuant to the franchise agreement, and that Domino's was thus not the employer. Citing the franchisee agreement, the trial court agreed and dismissed the action against Domino's. On appeal to the California Court of Appeal, 2nd District, the court reversed, holding that a "franchisee may be found to be an agent of the franchisor even where the franchise agreement states it is an independent contractor" if the franchisor has "substantial control" over the local operations of the franchisee.

In this case, Patterson argued evidence of such control included: (1) Domino's extensive local management control over Sui Juris; (2) Domino's control over employee conduct and discipline; and, (3) Domino's influence over which Sui Juris employees should be terminated, including suggestions that the accused harasser should be terminated. The Supreme Court's decision in this case could have far-reaching implications for franchisor liability. [PE]

CA Labor Commissioner's New Website

California Labor Commissioner aims to reach broad range of workers with new website. On April 30, 2014, California Labor Commissioner Julie Su launched a new website called Wage Theft Is a Crime.

The website aims to educate workers in low-wage industries such as agriculture, hospitality, and construction about their rights as workers.

The website explains workers' rights, without legal jargon, on the issues of the minimum wage, overtime compensation, meal and rest breaks, the prevailing wage on public works, pay notices, paydays, paystubs, bounced paychecks, deductions, reimbursements, reporting time pay, final wages, and retaliation.

The site also explains how to gather facts when planning to report a problem to the Labor Commissioner's office and how to file complaints, such as wage claims and labor law violations. The California Department of Industrial Relations also launched a Spanish-language version of the website called ***Robo de Sueldo es un Crimen***. [PE]