

## WHAT'S NEWS!

### 2013 - NEW LAWS - NOW A WEBINAR!

**C**alifornia's Labor laws are highly complex, ever changing and impact virtually every California employer. Because of the impact, we have chosen to do something NEW; -- A Webinar!

#### NEW THIS YEAR! A LABOR LAW WEBINAR

**Pacific Employers** has partnered with **California Employers Association** to offer our members a Webinar to kick off the new year.

If you were unable to attend our Labor Law Seminar, take heart, we are offering a Webinar entitled "What's New For 2013?" on Wednesday, February 13th, 12:00 PM- 1:30 PM.

**Join us to learn about the new laws, court decisions, and regulations** the federal and state government expect employers to know in the new year. We will cover the important changes in the laws that will affect all California employers.

Because of the hard costs involved in presenting the Webinar, there is a charge. Cost for the Webinar and emailed materials for our members is \$45.

If you wish to assure a place on the Webinar, sign up soon. Webinar instructions and handouts will be emailed to registered attendees prior to the event.

You may sign up on-line at <http://www.employers.org/webinars/2013-labor-law-update-webinar> -- or go to the flyer on our website's Seminar page and click "HERE" on the flyer.

And for those of you who are looking for Continuing Education Credits, This course is approved for 1.5 hours of HRCI Credit.

*The use of this seal is not an endorsement by the HR Certification Institute of the quality of the program. It means that this program has met the HR Certification Institute's criteria to be pre-approved for recertification.*



#### MANY NEW LAWS & RULES INCLUDE:

##### WRITTEN COMMISSION AGREEMENTS

All employers who pay employees who work in California by commission must have written commission contracts.

##### SALARIES FOR NON-EXEMPT EMPLOYEES

AB 2103 amends section 515 of the Labor Code to state that payment of a fixed salary to a non-exempt employee is not legal.

##### INSPECTION OF PERSONNEL RECORDS

New legislation greatly expands the rights of employee and former employees to demand copies of their personnel files.

##### PENALTIES FOR WAGE STATEMENT VIOLATIONS

Employers are required to provide specified information to employees on a wage statement each time wages are paid. Failure in any item is defined as an "injury," to the employee that violates the law. [PE]

## 2013 Labor Law Update Webinar Flyer Enclosed!

## President's Report

~Dave Miller~

### Invalid NLRB Decisions

**A**n unanimous panel of the D.C. Circuit Court of Appeals has just ruled that the President's non-recess recess appointments are illegal and an abuse of executive power. (See page 2)

The ruling hopefully invalidates dozens of NLRB decisions since the illegal recess appointments were made. A similar mess occurred in 2010 when the Supreme Court ruled in *New Process Steel v. NLRB* that some 600 decisions made by the NLRB without a three-member quorum were invalid. [PE]



### UNION MEMBERSHIP FALLS TO 70-YEAR LOW

**T**he nation's unions lost 400,000 members in 2012 as the percentage of U.S. workers represented by a labor union fell to 11.3 percent, its lowest level since the 1930s - declining by 0.5 percent over the last year.

Michigan accounted for about 10 percent of the nation's loss of unionized workers as the Wolverine State fell to the seventh most-unionized state, from fifth in 2011.

The Bureau of Labor Statistics said the biggest hit was in public sector unions, where many states and cities have cut back on their unionized workforce.

Among public sector workers, 35.9 percent are in a union - down from 37.0 percent in 2011, as the public sector shed nearly 250,000 union workers.

The public sector union rate is more than five times higher than that of private-sector workers. In the private sector, 6.6 percent are unionized, down from 6.9 percent in 2011. Union membership fell in 34 states. [PE]

### Form W-2 ACA Rules

**T**he Affordable Care Act (aka Obamacare) now requires employers to report the cost of coverage under an employer-sponsored group health plan. Under the ACA regulations, employers filing 250 or more 2012 Forms W-2's are required to include the value of employer-provided health coverage provided to employees in January 2013 on the W-2. This reporting requirement is for informational purposes only.

Reporting health care coverage cost on the Form W-2 does not mean that the coverage is taxable. It is still excludable from an employee's income. [PE]

The world is in greater peril from those who tolerate or encourage evil than from those who actually commit it. - Albert Einstein

## Recent Developments

### Obamacare Compliance Program Requirements for Nursing Facilities

**U**nder the Patient Protection and Affordable Care Act of 2010 (PPACA), also known as Obamacare, all nursing facilities and skilled nursing facilities must have a compliance and ethics program that contains certain statutorily-required elements by March 23, 2013. The program must be effective in preventing and detecting criminal, civil, and administrative violations under PPACA and in promoting quality of care.

#### "CONSISTENT ENFORCEMENT OF STANDARDS THROUGH DISCIPLINARY ACTION;"

The PPACA requires the following eight program elements or components:

- Compliance standards and procedures to be followed by employees and agents;
- "High-level personnel" designated to oversee compliance with "sufficient resources and authority" to assure compliance;
- Discretionary authority not given to individuals the organization knows or should know have a "propensity to engage in criminal, civil, and administrative violations";
- Effective communication of the standards and procedures to all employees and agents;
- Adoption of monitoring, auditing and reporting systems that include anti-retaliation protections for employees who report offenses;
- Consistent enforcement of standards through disciplinary action;
- Reasonable responses to reported offenses and steps to prevent further similar offenses, if an offense is detected; and
- Periodic reviews of the program to identify necessary changes or modifications.

Department of Health and Human Services (DHHS) Office of the Inspector General has made designing, implementing, and maintaining an effective compliance program a best practice for nursing facilities since 2000. PPACA has made such compliance programs mandatory.

All nursing facilities and skilled nursing facilities should consider reviewing their existing compliance and ethics programs to ensure that they include the required statutory elements.. [PE]

### Reporting New Employees And Independent Contractors

**T**here is a requirement for California employers, and out-of-state employers with employees in California, to report the hiring of new employees working in California to the California Employment Development Department's (EDD) New Employee registry. These reporting requirements were designed to assist the state in locating parents who are delinquent in their child support payments and to assist in the early detection and recovery of Unemployment Insurance benefit overpayments.

There will be a slight change to employers' reporting requirements beginning in 2013. The change specifies that individuals who are rehired by an employer after 60 days or more absence are to be considered as new hires and reported in the same way as individuals who have never worked for the business.

#### THE CONTEXT

California employers have long been required to notify the EDD of newly hired employees within 20 days of their start date. This report can be made either: 1) online at the EDD's website; 2) by means of the Report of New Employee(s) form (DE 34); or 3) by submitting a copy of the employee's Form W-4 (including the employer account number and the date the employee began work). Paper reports are to be sent to Employment Development Department, P.O. Box 997016, MIC 96, West Sacramento, CA 95799-7016. These reports can also be submitted by facsimile to: (916) 319-4400.

There has also been a long-standing requirement to report the hiring of independent contractors. Any business that is required to file federal Form 1099-MISC for services performed by an independent contractor must report the hiring of independent contractors. This requirement does not include the engagement of an independent contractor who is a corporation, general partnership, limited liability partnership, or limited liability company.

Independent contractor information must be reported to the EDD within 20 days of either making payments totaling \$600 or more for services performed or entering into a contract for \$600 or more for services performed, whichever is earlier. If this threshold is met the hiring entity is required to report in each calendar year but only once in each calendar year.

With the exception of the requirement of reporting rehired employees, these provisions are not new, but we want to remind clients of their continuing obligations. [PE]

### Court Rules Obama Recess Appointments Unconstitutional

**A** federal appeals court ruled that President Barack Obama violated the Constitution when he bypassed the Senate to fill vacancies on a labor-relations panel.

The U.S. Court of Appeals for the D.C. Circuit said Mr. Obama didn't have the power to make recess appointments last year to the National Labor Relations Board. Mr. Obama claims he acted properly because the Senate was away for the holidays. But the court said the Senate technically stayed in session when lawmakers gavelled in and out every few days for so-called pro forma sessions.

GOP lawmakers used the tactic specifically to prevent Mr. Obama from using his recess power to fill vacancies in an agency they claimed was too pro-union. The Obama administration is expected to appeal the decision to the Supreme Court. [PE]

### Sexual Harassment Prevention Training

**V**isalia Chamber of Commerce and Pacific Employers, will jointly host a state mandated Supervisors' Sexual Harassment Prevention Training Seminar & Workshop with a continental breakfast on April 23<sup>rd</sup>, registration at 7:30am 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  
Future 2013 Trainings on 7-24-13, 10-23-13



## Human Resources Question with Candice Weaver

### THE MONTH'S BEST QUESTION

#### Confused by Meal Period Rules

**Q:** "I have to give meal periods, but employees don't have to take them! What does this really mean?"

**A:** Of the many court decisions this year affecting employers, perhaps none impact as many employers as the California Supreme Court's meal period directive in *Brinker Restaurant Corp. v. Superior Court*.

Before *Brinker*, California employers were relegated to policing and disciplining employees to ensure they took at least one, 30-minute nonworking meal period and, if employers did not, they stood to risk class-action and single-plaintiff litigation over regular wages, overtime wages, wage premium (an extra hour of pay for each meal period lost), interest and attorneys' fees.

By contrast, *Brinker* ruled that an employer's obligation is to relieve its employees of all duty, with employees then at liberty to use the meal period for whatever purpose, but the employer need not ensure that no work is done during the meal period. Likewise, an employee may not capitalize on premium pay by intentionally working through provided meal periods, and an employer may not "impede or discourage" a full, uninterrupted meal period. Finally, the court held that an employer must provide a reasonable opportunity to take meal periods of at least 30 uninterrupted minutes, within the proper time frame, and relieve employees of all duties.

While this case is welcome news, employee claims may still surface. For example, some employees may contend that they were impeded or discouraged from taking lunch or leaving their work area, thus triggering premium pay.

Some employees may habitually decline to take a meal period to try to consume "regular rate" working time midday and assure that some overtime is worked, forcing the employer to pay overtime rates for those hours.

Consequently, some employers may still prefer to require by their own policies that meal periods are actually taken, rather than made available. [PE]

## NO-COST EMPLOYMENT SEMINARS

The Tulare-Kings Builders Exchange and Pacific Employers host 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.

*These mid-morning seminars include refreshments and handouts.*

### 2013 Topic Schedule

◆ **Employee Policies** - Employers needs guidelines and rules. We examine planning considerations, for your handbook on what rules to establish and what to omit.

**Thursday, February 21<sup>st</sup>, 2013, 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, March 21<sup>st</sup>, 2013, 10 - 11:30am**

◆ **Safety Programs** - Understanding Cal/OSHA's Written Safety Program. Reviewing the IIPP or SB 198 requirements for your business.

**Thursday, April 18<sup>th</sup>, 2013, 10 - 11:30am**

◆ **Family Leave** - Federal & California Family Medical Leave, California's Pregnancy Leave, Disability Leave, Sick Leave, Workers' Compensation, etc.; Making sense of them.

**Thursday, May 16<sup>th</sup>, 2013, 10 - 11:30am**

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

**Thursday, June 20<sup>th</sup>, 2013, 10 - 11:30am**

◆ **Hiring & Maintaining "At-Will"** - Planning to hire? Putting to work? We discuss maintaining "At-Will" to protect you from the "For-Cause" Trap!

**Thursday, July 18<sup>th</sup>, 2013, 10 - 11:30am**

### There is No Seminar in August

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

**Thursday, September 19<sup>th</sup>, 2013, 10 - 11:30am**

◆ **We have established a strategic partnership with California Employers Association.** Our Guest Speaker Seminar will feature **Kim Parker, Executive Vice President, Sacramento office, and Craig Strong, Regional Director of the Madera office.**

**Thursday, October 17<sup>th</sup>, 2013, 10 - 11:30am**

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

**Thursday, November 21<sup>st</sup>, 2013, 10 - 11:30am**

There is No Seminar in December



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## Tulare Kmart Wins 'Suitable Seating' Lawsuit

**Tulare Kmart recently won a federal lawsuit**, which questioned whether cashiers should be provided with chairs. Kmart is not liable for failing to provide its cashiers in central California with "suitable" seats, a federal judge ruled after a one-week bench trial.

Lisa Garvey sued the store's owner, Sears Holding Management, in April 2011, and the case later morphed into a federal class action against Kmart. Garvey alleged the big-box store violated California's wage order since Labor Code Section 1198 and Section 14(A) of Industrial Welfare Commission Wage Order 7-2001 provide that: *"All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats."*

A federal judge refused to order summary judgment against Kmart in April 2012, concluding that the wage order did not require employees to affirmatively request a seat. The decision also found that the wage order did apply to Kmart cashiers, and that there was a genuine issue as to whether Kmart cashier work reasonably permitted seats.

Though Garvey had sought to represent 5,600 cashiers from 100 Kmart stores in California, the court narrowed that number to 71 cashiers from the Tulare location where Garvey worked.

Tulare, with a population of 59,278 in 2010, is located in the heart of the state's central valley.

This fall, the court found that Kmart failed to preserve and produce relevant evidence on cashiers' use of checkout registers. There was no sanction specified, however.

Kmart competitors faced similar claims over the last year, but Garvey's was the first to go to trial.

"At issue in this class action are the seven 'front-end' cashier stands located at the front of the Tulare store," Alsup wrote. "The checkout stands in question resemble checkout stands all of us have seen in modern times."

Noting California's wage order, Alsup said that neither the Industrial Welfare Commission nor the California Labor Commissioner "has previously interpreted Section 14 as it might apply to the case in hand."

The proposed addition of stools to the stands could present an "obstacle course," "inevitably lead to stumbles" and "be unsafe," the decision states.

Redesigning the stands as proposed by class counsel "would be an unhappy match" between a floor mat and the legs of the stool, Alsup added.

"In sum, this order rejects the proposed modification by class counsel as too unsafe, too inefficient, and too inconvenient to customers and cashiers," according to the 23-page findings of fact and conclusions of law. "Adoption of the proposed modifications would unreasonably interfere with Kmart's legitimate interest in providing quick and efficient customer service so as to compete with other big box stores."

Though Alsup said lean-stools "seem to be the only possible candidate for seating that plausibly would be consistent with the job requirements," he refused to approve or order them. "Before even requiring such seating, the court would insist on hearing the views of cashiers, the ergonomics experts, safety experts, and Kmart management," Alsup wrote. "This would have to be in a trial involving a different class." The case will be appealed. [PE]

## California Supreme Court Endorses Favoritism For Union Trespassers

**California has enacted special labor laws that make it nearly impossible for employers to obtain injunctions against union trespass.** This content-based favoritism for one form of speech raises constitutional questions, as federal courts have recognized.

On December 27, 2012, however, in *Ralphs Grocery Co. v. United Food & Commercial Workers Union Local 8*, the California Supreme Court upheld these laws against constitutional challenge. In doing so the court reversed a sensible 2010 decision by the Court of Appeal, which had struck down the laws on the basis that they, in giving unions the right to picket on privately owned walkways fronting retail store entrances, were unconstitutionally favoring labor speech over non-labor speech. [PE]