Pacific Employers
Management Advisor
49 Years of Excellence!
May 2013

What's News!

Provide Individual FMLA Notices to Employees

Jacqueline Young worked for Wackenhut Corporation. Wackenhut met its general FMLA notice obligations in that it included in its employee handbook a notice to employees of their FMLA rights and also posted the DOL's FMLA poster.

However, when Young sought and took FMLA leave, she took all 12 weeks without having received from Wackenhut a Notice of Eligibility and Rights & Responsibilities and a Designation Notice. In Young's case, she exhausted her 12 weeks of FMLA leave, and when she failed to return after her leave expired, Wackenhut terminated her employment two weeks later. When Young filed an FMLA interference claim and later filed a motion for summary judgment, the court ruled in favor of Young. No jury needed. Automatic judgment was entered in favor of the plaintiff.

Why? The Court held that, per the FMLA regulations, the individual FMLA notices provided to the employee are absolute, and when they are not provided, the employee is prejudiced: "Plaintiff was not afforded the opportunity to make informed decisions about her leave, based on the lack of FMLA notice provided to her by her employer. Had she been appropriately apprised of her leave time, Plaintiff could have planned and structured her leave time differently. Thus, Plaintiff did suffer prejudice." According to the court (not to mention a clear read from the regulations), "individual notice" must be provided to the employee when he/she requests FMLA-related leave or when the employer acquires knowledge that an employee's leave may be for an FMLA qualifying reason. When the employer fails to do so, it suffers the consequences. *Young v. The Wackenhut Corporation* [PE]

Obama Resubmits Two NMB Incumbents

President Obama resubmitted his nominations for current National Mediation Board members Linda Puchala and Harry Hoglander to continue serving on the three-member Board. This would be the second term for Puchala and the fourth term for Hoglander, both Democrats.

The current terms for both Puchala and Hoglander have already expired, but they continue to serve in accordance with the Railway Labor Act. President Obama had previously nominated them in the 112 Congress, but the Senate did not act on the nominations before adjourning.

In January, President Obama nominated Nicholas Christopher Gaele, a Republican, to fill the third seat on the Board after Elizabeth Dougherty resigned in June 2012. Gaele is currently the director of oversight and investigations on the staff of Sen. Michael B. Enzi (R-Wyo.), the ranking committee member for the Senate's Committee on Health, Education, Labor, and Pensions. Gaele's nomination is still awaiting action by the Senate. [PE]

Heat Illness Poster Enclosed!

President's Report
~Dave Miller~

Heat Illness Regulations

With higher temperatures during the summer, you should keep in mind the California heat illness prevention regulations.

California's expanded heat illness regulations requiring employers in certain industries to (a) have a written procedure which sets forth how the employer will comply with these regulations and (b) provide heat illness prevention training to employees and supervisors.

The regulations have many requirements, including special requirements for when the temperature exceeds 85 and 95 degrees Fahrenheit. Among other things, employers must provide fresh water and employees must be allowed to rest in the shade to prevent overheating. The regulations apply to the following industries:

- Agriculture
- Construction
- Landscaping
- Oil and gas extraction, and
- Transportation or delivery of agricultural products, construction material or other heavy materials.

A Heat Illness Prevention Poster is enclosed. [PE]

New Effective Date for Form I-9

On March 8, 2013, U.S. Citizenship and Immigration Services (USCIS) announced the revised Employment Eligibility Verification, Form I-9, and published a notice in the Federal Register.

In the initial announcement, USCIS described when employers can no longer use prior versions of Form I-9. USCIS incorrectly described the effective date as being after May 7, 2013.

USCIS published a correction notice in the Federal Register. This notice corrects the error and clarifies that beginning May 7, 2013, employers may no longer use prior versions of the Form I-9.

The new form bears a revision date of 03/08/13.

According to USCIS, *"although employers should begin using the 03/08/13 dated form right away, older forms dated 02/02/09 and 08/07/09 will be accepted until May 7, 2013. Beginning May 7, 2013, only the 03/08/13 will be accepted. The revision date is on the lower left corner of the form."* [PE]

It is better to prevent crimes than to punish them. -Cesare Beccaria, philosopher and politician (1738-1794)

Recent Developments

Verbal Disclosure Of Private Facts Actionable

A California appellate court expanded the basis for a public disclosure of private facts claim in *Ignat v. Yum! Brands, Inc.*

Melissa Ignat worked in the real estate title department at Yum! Brands, Inc. – the parent company of fast food favorites such as KFC, Taco Bell, and Pizza Hut. She periodically missed work due to her bipolar disorder. During a medical leave that Ignat took to deal with the disorder, her supervisor told co-workers that Ignat was bipolar. Following this disclosure, Ignat's coworkers allegedly shunned and ostracized her. Yum! eventually terminated Ignat, and she sued for invasion of privacy based on public disclosure of private facts.

"..NO DISTINCTION BETWEEN VERBAL AND WRITTEN DISCLOSURE.."

The trial court dismissed the case on the ground that Ignat's cause of action required written disclosure of private facts, which did not occur. A California appellate court disagreed, quoting a 1950 case stating that verbal disclosure of a private matter "may be as rapid as the wagging tongue of gossip and as devastating as the printed page …." The court held that, in the modern era, there should be no distinction between verbal and written disclosure for purposes of a publication of private facts privacy claim; this distinction is "better suited to an era when the town crier was the principal purveyor of news." [PE]

Hospital Defeats Class Certification Of Meal And Rest Break Claims

Attempts to certify classes of employees in lawsuits against healthcare industry employers continues to be a growing trend. In yet another such case, *Alberts v. Aurora Behavioral Health Care,* a California judge denied class certification of more than 1,000 psychiatric hospital workers in a wage and hour lawsuit stemming from alleged missed meal and rest breaks. Unlike other cases we have reported recently, this case did not involve automatic deduction of meal periods, but the resulting claims are the same.

In this case, a putative class of 1,053 nurses and other patient care employees who worked at two Los Angeles-area psychiatric hospitals claimed that they were denied meal and rest breaks under California law, and sought certification of the class. The hospital's policy required employees to clock in and out for 30-minute meal periods, and directed them to submit a time adjustment form if they missed a meal period. Employees who missed their meal periods received one hour of pay, plus overtime pay, if warranted. The hospitals usually scheduled a break relief nurse to provide breaks, and had other methods of providing breaks when a relief nurse was not available.

Given these facts, the Los Angeles County Superior Court Judge denied class certification because there was too much variation among the employees and the facilities, and individual issues would predominate in a lawsuit. Even employees in the same units with the same supervisors provided conflicting testimony about whether or not they received breaks or pay for the missed breaks. Thus, the judge concluded that while there may have been "a few bad apples," the evidence did not establish that "the tree itself was bad." In addition, the judge concurred with other courts that the plaintiffs' "understaffing" theory – i.e., that employees were forced to miss breaks because of insufficient personnel – is not a theory that lends itself to class action treatment.

Although many employers have been successful in defeating class certification in a number of similar cases, pay-related class actions regarding missed meal and rest breaks is becoming all too common in the healthcare industry. [PE]

IRS IC Settlement Program

If you are concerned about the status of an independent contractor performing services for you, the Internal Revenue Service (IRS) recently expanded its Voluntary Classification Settlement Program, which permits employers a low-cost option (at least with respect to IRS liability) to treat workers as common law employees on a prospective basis.

First, in Announcement 2012-45, the IRS made the following permanent clarifications to the program: (1) employers are eligible even if they are under an IRS examination (provided that the employer or any member of its affiliated group is not under an employment tax audit), (2) employers are not eligible if they contest the worker classification in court, and (3) eliminated the requirement to extend the three-year statute of limitations period.

Second, in Announcement 2012-46, employers who file for the program by June 30, 2013, do not have to have file/furnish Form 1099-MISC for the workers for the prior three years. However, this temporary program imposes a higher fee – 25 percent (rather than 10 percent) of the employment tax liability, plus some penalties, and employers will need to file any unfiled Forms 1099 for the workers they are reclassifying.

Third, recent updates to the IRS website provide helpful guidance on the program, including a link to the application form (Form 8952) and a series of questions and answers, with an aim to increase the use of the program (and thereby help reduce the tax gap). [PE]

Piece Rate Earnings Cannot Be Averaged

Employers who pay fixed-fee "piece rates" to employees tied to the performance of one primary type of work, those employers now need to pay a separate hourly wage or salary for the performance of any other kinds of work that those employees perform. In other words, a commission or piece rate that is directly tied to only one type of work cannot be used to "cover" an entire range of services performed under California law, even if those services are indirectly related to the work that directly generates the commission or earns the piece rate.

In two recent opinions, CA law does not permit averaging piece rate or commission earnings over all hours worked to satisfy minimum wage requirements. Instead, employees must separately be paid at least minimum wage for time spent on activities that do not allow them to directly earn wages, in addition to any piece rate payments or commissions earned during the work period.

In *Gonzalez v. Downtown LA Motors, LP*, the court decide that an automobile dealership that compensates its service technicians on a "piece" or "flag rate" basis for repair work must also pay those technicians a separate hourly minimum wage for time spent doing other things such as: waiting, cleaning, attending meetings, reading repair bulletins, obtaining parts, picking up cars from other locations, and participating in online training. [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 July 24th, 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 10-23-13

Human Resources Question with Candice Weaver

The Month's Best Question

Human Trafficking Poster

Q: ***"What types of firms must post the new Human Trafficking Poster?"***

A: Human trafficking, the narcotics trade, and weapons smuggling all have one major thing in common: Their ill-gotten proceeds feed conflict, instability and repression worldwide. Out of all of these, human trafficking is perhaps the most devastating, enslaving nearly 21 million people and generating at least $32 billion of illicit profits every year.

Senate Bill 1193, passed last year, requires specified businesses and establishments to post an 8.5" x 11" notice.

The required posting provides important information on how to report suspected human trafficking and also provides victims of human trafficking with information on where to obtain help. The notice informs the public and victims of human trafficking of telephone hotline numbers and contains information about organizations that provide services to eliminate slavery and human trafficking.

The State of California Department of Justice (DOJ) developed the model notice that complies with the requirements of SB 1193.

California "is one of the nation's top four destination states for trafficking human beings," according to the DOJ. Human trafficking, as the DOJ states, is "a modern form of slavery. It involves controlling a person through force, fraud, or coercion to exploit the victim for forced labor, sexual exploitation or both."

Who Must Post a Public Notice:

1. On-sale general public premises licensees under the Alcoholic Beverage Control Act.
2. Adult or sexually oriented businesses, as defined in subdivision (a) of Section 318.5 of the Penal Code.
3. Primary airports, as defined in Section 47102(16) of Title 49 of the United States Code.
4. Intercity passenger rail or light rail stations
5. Bus stations.
6. Truck stops. For purposes of this section, "truck stop" means a privately owned and operated facility that provides food, fuel, shower or other sanitary facilities, and lawful overnight truck parking.
7. Emergency rooms within general acute care hospitals.
8. Urgent care centers.
9. Farm labor contractors, as defined in subdivision (b) of Section 1682 of the Labor Code.
10. Privately operated job recruitment centers.
11. Roadside rest areas.
12. Businesses or establishments that offer massage or bodywork services for compensation and are not described in paragraph (1) of subdivision (b) of Section 4612 of the Business and Professions Code.

The notice must be posted in English, Spanish and one other language that is the most widely spoken language in the county where the business is located (and for which translation is mandated by the Voting Rights Act). The Attorney General provided a list of counties in which a third language other than English and Spanish is the most widely spoken language and has also provided additional translations of the model notice. [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

♦ **Family Leave -** Federal & California Family Medical Leave, California's Pregnancy Leave, Disability Leave, Sick Leave, Workers' Compensation, etc.; Making sense of them.
Thursday, May 16th, 2013, 10 - 11:30am

♦ **Wage & Hour and Exempt Status -** Overtime, wage considerations and exemptions.
Thursday, June 20th, 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 18th, 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 19th, 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 17th, 2013, 10 - 11:30am

♦ **Discipline & Termination -** The steps to take before termination. Managing a progressive correction, punishment and termination program.
Thursday, November 21st, 2013, 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.

Heat Illness Poster Enclosed!

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$90K Settles Age Discrimination Lawsuit

Western Energy Services of Durango, Inc. (WESODI) has agreed to pay $90,000 and furnish other relief to settle an age discrimination lawsuit filed by the U.S. Equal Employment Opportunity Commission (EEOC).

According to the EEOC's lawsuit, two journeymen linemen electricians, Dennis Thomas (then age 61) and Eric Camron (then age 72), were referred for WESODI job openings in northern New Mexico by the IBEW local union in Albuquerque, but the company rejected the referrals because of the men's ages. In each instance, after the referrals were refused, two men in their mid-twenties were awarded the jobs. Camron and Thomas, as well as the local union's dispatcher, alleged that WESODI's line superintendent stated that he was rejecting the referrals because of their ages.

In addition to the monetary settlement, WESODI, has agreed to post its anti-discrimination policy, provide training about anti-discrimination laws to its employees and managers, and to make periodic reports to the EEOC.

The Age Discrimination in Employment Act of 1967 (ADEA) prohibits employment discrimination because of age. Employees and applicants 40 years of age and older are protected under the ADEA. [PE]

$35 Million in Back Wages!

Following an investigation by the U.S. Department of Labor's (DOL) Wage and Hour Division that found alleged violations of the federal Fair Labor Standards Act's (FLSA) overtime and record-keeping provisions, the commonwealth of Puerto Rico has agreed to pay $35,037,586 in back wages and interest to 4,490 current and former employees of the territory's Department of Corrections and Rehabilitation.

This is one of the largest settlements in the Wage and Hour Division's history. The FLSA requires that covered employees be paid at least the federal minimum wage of $7.25 for all hours worked, plus time and one-half their regular hourly rates, including commissions, bonuses and incentive pay, for hours worked beyond 40 per week.

In general, "hours worked" includes all time an employee must be on duty, or on the employer's premises or at any other prescribed place of work, from the beginning of the first principal work activity to the end of the last principal activity of the workday. Additionally, the law requires that accurate records of employees' wages, hours and other conditions of employment be maintained. [PE]

Boeing Code of Conduct OK!

In a rare victory for employers, the NLRB's Office of the General Counsel, Division of Advice ("Advice") recently opined that Boeing Company's Code of Conduct does not run afoul of the National Labor Relations Act. An Advice memorandum rejected a union's charge that Boeing's nearly decade-old Code of Conduct interferes with or restrains Section 7 activity by employees. The following language in the Code of Conduct was viewed as potentially problematic:

- Employees will not engage in conduct or activity that may raise questions as to the company's honesty, impartiality, reputation or otherwise cause embarrassment to the company.
- I will not engage in any activity that might create a conflict of interest for me or the company.
- I will follow all restrictions on use and disclosure of information. This includes following all requirements for protecting Boeing information and ensuring that non-Boeing proprietary information is used and disclosed only as authorized by the owner of the information or as otherwise permitted by law.

Advice ultimately concluded, however, that this language does not violate the NLRA, primarily because of the context in which the language is found. [PE]