Pacific Employers
Management Advisor
48 Years of Excellence!
November 2012

What's News!

NLRB On Employee Access To The Workplace

The National Labor Relations Board (the Board) is continuing its crusade against "off-duty access rules," most recently in *Marriott International, Inc., 359 N.L.R.B. 8*. The Board's recent decision makes it more difficult for employers—union or non-union—to control off-duty employee access to the workplace.

Almost 40 years ago, the Board addressed the validity of off-duty employee access policies in *Tri-County Medical Center,* 222 NLRB 1089 (1976). In *Tri-County*, the Board established a three part test for determining the validity of a rule restricting off-duty employee access to an employer's operations. A rule restricting off-duty employee access is valid only if it: (1) limits access solely with respect to the interior of the premises or other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the premises for any purpose and not just to those employees engaging in union activity.

At issue in *Marriott International* were two employee access policies which were promulgated, revised, and maintained by Marriott. The first policy restricted off duty access to work areas by employees without prior management approval (Access Rule). The original Access Rule restricted off duty access to "interior areas," but excluded from the policy non-work areas such as Marriott's parking lot. The revised rule, however, more broadly restricted access to Marriott's "property."

The second policy restricted employees' use of the hotel's facilities during nonworking hours absent management approval (Use Rule). The original Use Rule restricted access to "guest facilities." The revised Use Rule, however, restricted employee access to specific facilities such as resident floors, rooms, elevators, and public restaurants. It also restricted employee access to any "property outlet."

The Board found both versions of these policies unlawful for related reasons: The revised Access Rule and both versions of the Use Rule were found to be unlawful because they could reasonably be construed as restricting employee access to non-work areas, thus running afoul of Tri County's threshold requirement.

Both versions of the Use and Access Rule were found to be invalid because they impermissibly gave management unlimited discretion to determine which employees could access its facilities and for what purpose. Thus, the rules were not a "uniform prohibition of access" and ran afoul of *Tri County's* third requirement.

Both versions of the Use and Access Rule were found to be unlawful because reasonable employees could conclude that the nature of the activity for which they seek access would have to be disclosed to management. Consequently, this "compelled disclosure" would have a "chilling effect" on the willingness of employees to engage in "protected concerted activity" (i.e., the right for employees to act together to try to improve their pay and working conditions or fix job-related problems).

The Board appears to suggest that a "narrow, extremely specific" access rule could pass muster. It did not, however, provide specific guidance. As a result, employers are now faced with four choices: (1) prohibit all off-duty access; (2) attempt to revise an existing policy; (3) roll the dice with an existing policy; or (4) move forward with no access policy whatsoever. Employers should review these options and consult with their HR consultants to discuss an appropriate course of action. [PE]

Employee Attendance Form Enclosed!

President's Report
~Dave Miller~

Attendance Record - 2013 Poster

Attendance Record -- This month Pacific Employers supplies you with the new "2013 Attendance Record." Its purpose is to provide a way to keep track of an employee's annual attendance on a single sheet. A shorthand guide for keeping track of absences, injuries, leaves of absence, sick days, vacations, etc., will be included on the form. If you need additional copies, please contact our office or visit the forms page of our website to download as a PDF.

December 2012 - Instead of our monthly "*Management Advisor"* you will receive the updated, 2013 version of the Pacific Employers' "All-in-1" Poster which includes the required federal and state postings for most businesses.

January 2013 - Our Labor Law Update Seminar will be held on Thursday, January 17th, 2013, 10 - 11:30am. Learn about the recent changes to both the California and U.S. laws that affect your business and employees. [PE]

Employee Time Off To Vote

As Election Day approaches, remember that California has a requirement that employees be given time off to vote, often with pay, subject to the individual's hours of work and the times when the polls are open. Employers are required to post notices in advance of an election, advising employees of their rights. Violation of this statue is a misdemeanor punishable by fine. If you have posted the Pacific Employers "All-in-1" Poster, you are in compliance.

If an employee does not have sufficient time outside of working hours to vote, the employer must provide enough time off that when added to time available outside of working hours, the employee will be able to vote.

Unless otherwise agreed, the time off must be at the beginning or end of a shift, whichever allows the most free time to vote and the least time off from work. Employees who three working days before the election have reason to believe that time off will be necessary, must give the employer notice two business days before the election. Up to two hours off must be paid. Employers must post, in a conspicuous place, a notice setting forth these provisions no less than ten days before the election. ***Cal. Elec. Code §§ 14000-14001.*** [PE]

"The problem with socialism is that eventually you run out of other people's money to spend." Margaret Thatcher

Recent Developments

CA Passes Social Media Laws

California Governor Brown signed two laws that will provide social media protections in California. Effective January 1, 2013, California Assembly Bill 1844 ("AB 1844") prohibits employers from demanding user names and passwords from employees and job applicants and Senate Bill 1349 ("SB 1349") makes it illegal for colleges and universities to demand social media user names and passwords from students, prospective students and student groups.

"..LAW ALSO INCLUDES THREE EXCEPTIONS:.."

AB 1844 prohibits employers from requiring or requesting an employee or job applicant to disclose a user name or password for the purpose:

- of accessing personal social media;
- to access personal social media in the presence of the employer; or
- to divulge any personal social media.

This new California law also includes three exceptions:

1. Employers still have the right to request an employee to divulge social media reasonably believed to be relevant to an investigation of allegations of employee misconduct or employee violation of applicable laws and regulations;
2. Employers may require or request username, password, or other method for the purpose of accessing an employer-issued electronic device; and
3. Employers may still terminate or take adverse action against employees if otherwise permitted by law.

Opponents of this law argue that the law will limit an employer's ability to regulate their workplace or identify workplace harassment. Financial firms are concerned that the law conflicts with FINRA regulations and the duty of security firms to supervise, record, and maintain their employees' business communications. Additionally, the exception that permits employers to request usernames and passwords on employer-issued electronic devices ignores the reality of social media and raises possibilities for litigation. Social media is not divided into personal vs. work-related. What about a personal Facebook account password that was accessed on an employer-issued device? Who has the right to the password of a work-related blog that is maintained by an employee at home? Can an employer request passwords for social media accounts that are both personal and work-related? This law leaves these issues unresolved.

AB 1844 prohibits an employer from discharging, disciplining, threatening to discharge or discipline, or otherwise retaliating against an employee or applicant for not complying with a request or demand by the employer that violates this law. However, AB 1844 has no "teeth" behind it: the law specifically states that the Labor Commissioner is not required to investigate or determine any violation of this act. Additionally the law does not create a private right of action for employees and potential employees. Therefore, the remedies an employee or job applicant may recover under this law are limited.

Despite these drawbacks, proponents of the law hope that it will shield California businesses from plaintiffs who claim that businesses have a legal duty to monitor employees' and prospective employees' social media accounts.

While SB 1349 and AB 1844 appear to be drafted to focus on Facebook and other social media accounts, the broad definition of social media could be problematic for employers. Both laws contain a very comprehensive definition of social media: "an electronic service or account, or electronic content, including, but not limited to, videos, still photographs, blogs, video blogs, podcasts, instant and text messages, email, online services or accounts, or Internet Web site profiles or locations." This definition seems to imply both content on the Internet and stored in local storage devices.

For California employers, the two social media laws will require another review of social media policies to ensure compliance. California's social media laws represent a continuing trend in the social media world to protect employees' passwords. Over a dozen states have introduced similar bills this year and members of Congress proposed federal legislation including the Password Protection Act (PPA) and the Social Networking Online Protection Act (SNOPA) with the same goals of social media privacy. [PE]

CA Supreme Court To Hear Harassment Claim Against Franchisor

The California Supreme Court agreed on October 10 to hear *Patterson v. Domino's Pizza, LLC*, a sexual harassment case in which the court will decide whether a franchisor can be held liable for the acts of an employee of one of its franchisees

"... FRANCHISORS COULD BE VULNERABLE ..."

The case comes before the court after an appeals court found that Domino's exerted enough control over the employees of Sui Juris, its franchisee, for it to be potentially liable for sexual harassment.

If the high court affirms the appellate court's decision, franchisors could be vulnerable to a broader range of liability than they currently face. [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 January 23rd, 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 $45
Certificate – Forms – Guides – Full Breakfast
Future 2013 Trainings on 4-23-13, 7-24-13, 10-23-13

Human Resources Question with Candice Weaver

The Month's Best Question

DOL Test for Classifying Interns as Unpaid

Q: ***"We would like to have an unpaid intern go to work for us. What are the rules for having an unpaid intern work for us?"***

A: Unpaid internships can be mutually beneficial for students and employers: students receive invaluable workplace experience and employers benefit from the opportunity to begin training the next generation of talent.

However, you must be aware of the distinction between paid and unpaid internships.

Internships in the for-profit, private sector will most often be viewed as employment by the Federal Department of Labor (DOL), unless the test described below is met. Interns who qualify as employees rather than trainees, typically must be paid at least the minimum wage and overtime compensation for hours worked over 8 in a workday and 40 in a workweek.

According to the DOL, however, if all of the following six factors are met, an employment relationship does not exist between an intern and the company that sponsors the participant.

The DOL test for classifying interns as unpaid workers is described below.

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training that would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the activities of the intern, and on occasion its operations may actually be impeded;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

If no employment relationship exists, the participants are not subject to the federal Fair Labor Standards Act.

These distinctions regarding internships can be hard to wade through unless your employees are trained in how to distinguish the nuances and abide by the various employment laws. [PE]

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.

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.

Last 2012 Seminar

♦ **Discipline & Termination -** The steps to take before termination. Managing a progressive correction, punishment and termination program.
Thursday, November 15th, 2012, 10 - 11:30am

No Seminar in December

2013 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, January 17th, 2013, 10 - 11:30am

♦ **Employee Policies -** Every employer needs guidelines and rules. We examine planning considerations, what rules to establish and what to omit.
Thursday, February 21st, 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 21st, 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 18th, 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 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

♦ **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, 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

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ADR Pilot Program For Whistleblower

Recently, the Occupational Safety and Health Administration announced that it will begin offering early resolution and mediation instead of investigations in two OSHA regions, which include California, to address complaints filed with the agency's Whistleblower Protection Program. OSHA is charged with enforcing the whistleblower provisions in 22 separate statutes, including the Dodd-Frank Wall Street Reform and Consumer Protection Act, Sarbanes-Oxley Act (SOX), Affordable Care Act, and the Occupational Safety and Health Act. OSHA reports that it receives approximately 2,500 whistleblower complaints each year.

The voluntary alternative dispute resolution (ADR) pilot program will be tested for one year for whistleblower complaints filed with the Chicago office (covering Illinois, Indiana, Michigan, Minnesota, Wisconsin, and Ohio) and the San Francisco office (covering Arizona, California, Hawaii and Nevada, as well as various Pacific Islands including the commonwealth of the Northern Mariana Islands, Guam and American Samoa).

When a whistleblower complaint is filed with OSHA in one of the pilot regions, the parties will be notified of their ADR options and may work with an OSHA regional ADR coordinator to use these methods. The agency is offering early resolution and mediation as two voluntary ADR options.

Early ADR could help companies avoid costly and public investigations by OHSA. [PE]

IRS Penalty Relief Expires

The IRS has given employers until December 31, 2012 to correct a problem frequently found in severance agreements and other similar arrangements. If not corrected by that date, it could be much more expensive to correct the problem. In this article, we discuss the problem and how to fix it.

Employers often pay severance to terminating employees in exchange for a non-compete agreement, a non-solicitation agreement, or to settle potential claims. Sometimes the severance is a lump sum amount paid shortly after the employee's departure. Sometimes severance is paid in installments over several months, perhaps to encourage continuing good behavior. Most employers are not willing to pay severance unless they have some protection from litigation. So, employers typically ask terminating employees to release all claims that they may have against the employer in exchange for the severance.

Anytime a payment of deferred compensation is contingent upon the employee signing a release, or some other agreement such as a noncompete, the employee has some ability to manipulate the timing of the payment, and perhaps even the year in which the payment will be made. The IRS says that this ability to manipulate the payment timing violates Code Section 409A, and could cause the employee to owe substantial penalty taxes. [PE]

Employee Sued Over "Rants & Raves"

Bank's defamation action against former employee was properly dismissed in *Summit Bank v. Rogers, 206 Cal. App. 4th 669 (2012)*

Summit Bank sued its former employee Robert Rogers for posting allegedly defamatory statements about the bank in the "Rants and Raves" section of Craigslist. In response to the bank's lawsuit, Rogers filed an anti-SLAPP motion to strike the complaint on the ground that the suit was brought for the illegitimate purpose of chilling Rogers's right to speak freely about the bank.

The trial court denied Rogers's motion, but the Court of Appeal reversed, holding that Rogers had met his burden of showing that the bank's defamation action arose from an act in furtherance of his constitutional right of free speech in connection with an "issue of public interest" and that the bank had failed to satisfy its burden of showing a probability of success on the merits. [PE]