Pacific Employers
Management Advisor
47 Years of Excellence!
October 2011

What's News!

When the Referee Tilts the Field

Our government has numerous administrative agencies to enforce the many laws made by the various legislative bodies. The National Labor Relations Board (NLRB) is in charge of most of the federal collective bargaining laws.

While they are dubbed a neutral agency that simply enforces the law, the preamble to the National Labor Relations Act actually says its purpose is "to promote collective bargaining." The NLRB's less than neutral position on unions was recently displayed when it recently issued its Final Rule requiring all employers that are covered by the National Labor Relations Act ("Act") to notify employees of their rights under the Act, effective November 14, 2011.

This Rule, issued just days before the end of NLRB Chairman Wilma Liebman's term, applies to both unionized and non-unionized employers. Federal contractors are already required to post a similar notice.

The required notice provides a comprehensive list of employee rights under the Act, including the right to act together to improve wages and working conditions, to form, join and assist a union, to bargain collectively with their employer, and to refrain from engaging in any of these activities. It also provides examples of unlawful employer and union conduct, and instructs employees how to contact the NLRB with questions or complaints.

The notice must be posted in all locations where employee notices typically are posted, including on a company's intranet or internet site if the company customarily posts personnel rules and policies on its intranet or internet.

Although the rule has no record-keeping or reporting requirements, the NLRB may treat any failure to post the notice as an independent unfair labor practice, and also use this failure to extend the six-month statute of limitations applicable to other unfair labor practice charges.

Employers can print a copy of the notice from our Web site. The NLRB will also make available foreign language versions of the notice, which are required at workplaces where at least 20% of employees are not English-proficient.

Please call or drop by our office should you have any questions or need assistance. Go to the Pacific Employers' website at *www.pacificemployers.com* and click on the "What's New!" link to find the NLRB Poster. [PE]

NLRB Poster Enclosed!

President's Report
~Dave Miller~

NLRB All The Time

Following President Ronald Reagan's firing of the air traffic controllers for an illegal strike, unions have been the underdog in most private business labor battles, while government has ceded control of labor matters to the unions.

But Chairman Wilma Liebman left the National Labor Relations Board (NLRB) on August 27, and employers will be dealing with the aftermath of her tenure for many years to come.

Under her leadership the NLRB has become less of a neutral administrative agency and more of an advocate for the unions.

She will also not soon be forgotten because of the three precedent-setting cases decided on the last business day of her term. All three decisions are game changers that promise to reshape the landscape of American labor law. And all three advance the cause of unions and promote labor organizing, largely at the expense of employee and employer rights.

In this issue of the Management Advisor we highlight in several articles the changes caused by these new case developments and consider their likely effect. [PE]

October Seminar

Guest Speaker Seminar - Attorney Anthony P. Raimondo of McCormick, Barstow, Sheppard, Wayte & Carruth will be our Speaker. He brings a timely discussion of current labor relations issues of interest to all employers.

While many changes in the laws have occurred over the last decade, these have also been accompanied by changes in interpretation and enforcement of these regulations.

Mr. Raimondo will address the employer's difficulty in determining what action to take when two laws or court decisions conflict.

A problem employers are presented with quite often is when an employee takes leave time from work and is unable to return from the leave on time because of continuing health problems. Under the Family Medical Leave Act, employers with 50 or more employees must provide employees with 12 weeks of leave.

What is the employer supposed to do when the Americans With Disabilities Act now says that allowing the employment to terminate at end of the leave is a violation of the law?

Join us on Thursday, October 20th, 2011, 10 - 11:30am at the Tulare Kings Builders Exchange, 1223 S. Lovers Lane, Visalia as we discuss these type of issues. [PE]

"The ultimate judge of your swing is the flight of the ball." - Ben Hogan

Recent Developments

NLRB Proposal Favors Unions

The NLRB (controlled by pro-union appointees) recently proposed new election rules that would make significant changes to the Board's longstanding election procedures. The proposed changes include:

- Pre-election hearings would be held (absent "special circumstances") seven days after the NLRB Regional Director served a "notice of hearing" on the employer. As a practical matter, a hearing will be set about a week after the union filed the petition for an election.
- No later than the date of the pre-election hearing (and perhaps earlier), the employer would be required to submit a written "statement of position" identifying all legal issues it intends to raise at the hearing.
- The "statement of position" would be required to include the "full names, work locations, shifts, and job classifications of all individuals" in the bargaining unit proposed by the union and, if the employer contested the appropriateness of the union's unit, the "full names, work locations, shifts, and job classifications of all employees in the most similar unit that the employer conceded was appropriate." This information generally would need to be provided in an electronic format.
- The employer would be required to provide the Regional Director with the home addresses, available phone numbers, and available e-mail addresses of all employees identified in the statement of position.
- The employer would risk waiving legal objections if it failed to prepare a timely "statement of position" containing all of the required information.
- The Regional Director would not consider any disputes affecting less than 20% of the bargaining unit before the election was held.
- Within two days after the Regional Director directed an election, the employer would be required to provide the Regional Director and the union with a list of the full names, addresses, available telephone numbers, available e-mail addresses, work locations, shifts and job classifications of all eligible voters. This list usually would need to be provided electronically. Under current law, unions only receive employees' names and addresses and employers have seven days to provide them after the direction of the election which can be several weeks after the union files the petition.

"Unions would have a huge advantage in these "quickie" elections."

If adopted, these changes would have very significant implications for employers who wish to remain union free. Union elections would be conducted very quickly, perhaps as little as ten days after a petition was filed instead of the usual 30 to 40 days. Unions would have a huge advantage in these "quickie" elections. Unions decide when to file a petition for an election and will only do so when they are well ahead. It takes time for employers to educate employees about the full implications of union representation and there are many legal issues involved in an election campaign. The new rules are designed to limit employers' time to consult counsel and to respond to misleading union claims that can cause employees to vote for union representation without fully understanding the facts.

The new rules could become effective as early as mid-September unless Congress acts to stop them. Under current political circumstances, congressional action to stop the new rules appears unlikely.

If the new rules become effective, it will be imperative for employers to detect union organizing campaigns at the earliest possible moment (before a petition is filed) and to respond immediately. Better still, employers should assess their vulnerability to union organizing and take appropriate measures before organizing begins. Employers should involve counsel as soon as possible to try to minimize the disadvantages caused by the new rules' extremely tight deadlines. [PE]

NLRB Blurs Line on Management Rights

In a case decided on August 11, the National Labor Relations Board affirmed an Administrative Law Judge's determination that an employer, the publisher of the Santa Barbara News-Press, committed numerous violations of the National Labor Relations Act. That was not remarkable. Coercive interrogations about union activity, surveillance of union activities, requiring the removal of union buttons and signs and terminating a supervisor for refusing to commit unfair labor practices clearly violate the Act and have done so for over half a century.

What was remarkable is that the Board decided an issue that was not required for the holding and, instead, appears to have gone out of its way unnecessarily to broadly define activity protected by the Act.

The case involved news reporters. The publisher of the newspaper issued several directives. The first limited the coverage of the arrest and sentencing of the paper's editorial page editor. The second prohibited reporters from including the home addresses of public figures (in this case, Rob Lowe) in news stories. Finally, the publisher limited what information about the paper could be disseminated by its reporters to other news media. The edicts resulted in a discharge, numerous resignations, a campaign to cause the cancellation of subscriptions, union organizing and, ultimately, an election which was won by the union.

The Board, in affirming the ALJ, held that the publisher's editorial controls and edicts impacted the journalistic integrity of the reporters. As a consequence, the Board said, the publisher's conduct interfered with the protected rights of the reporters. What moves the decision out of the outrageous category is that the actions taken by the publisher were so mixed with other unfair labor practices that it is hard to isolate what could otherwise have been a clear encroachment by the Board on management prerogatives. Despite the Board's protestations to the contrary, the fact remains that on some level it blurred the line between management's rights to run its business and employee protected activity. Whether the Board will use this case as support in the future for further limiting management authority is for another day.

A couple of other things make this case worthy of comment. First, the publisher's stated reasons for the actions against the employees were numerous and, to the ALJ, that multiplicity smacked of pretext. Had the publisher limited its reason for action to the management prerogative argument, the case would not have been so easy for the Board. As in civil rights litigation, cases can be lost because an early statement about why a certain action was taken turns out to be incorrect and pretextual. The lesson is that employers must be smart from the beginning and not rely on after-the-fact-lawyer-spin to win cases. The reason for the action must be formulated with the law and available proofs considered before the action is taken.

The second reason for reporting on this case is the Board's amendment to the remedy ordered by the ALJ. The amendment says a lot about the current Board's bias against employers.

In addition to the expected cease and desist, reinstatement, rescission of negative performance evaluations and make whole remedies, the ALJ ordered, again expectedly, that the employer must post a notice stating the rights of employees to engage in union activity, pledging no further violations of the Act and listing the actions it will take to remedy the prior unlawful conduct. The actions the ALJ required from the employer were severe and extensive, directly touching virtually every employee. There is no question that the entire workforce would know what and how the NLRB had concluded their employer violated their rights. No one working for the employer would have any question. No one working for the employer would be left in the dark. Nothing more was required. Nothing more was needed.

The Board, however, apparently thought there was something more that was needed – groveling.

The Board ordered that the remedy be amended to require a senior member of management to read the Board's complete Order to the assembled employees or to stand next to a Board agent as the Order is read. It is the Board's version of a "perp walk."

Since this kind of communication was not necessary in this case to communicate with few employees of a small employer, the only motive for the Board's action could be the demeaning of the employer.

Unfortunately, I suspect there will be more of this kind of anti-management retaliatory conduct by the Board in the future, as it continues to increase the ante for employers who are charged with violations of the Act. By raising the remedial stakes to an unconscionable level, does the Board feel that it will be able to coerce employers into settling cases of questionable merit or inconsequence, thereby aiding unions in their organizing efforts? If this is the motive, the Board is actively trying to subvert the law and process in favor of organized labor. [PE]

Human Resources Question with Candice Weaver

The Month's Best Question

Can An Employer Pay An Exempt Employee Extra Compensation?

Q: "My Company anticipates embarking on a big project this fall that will have extreme importance to the Company's future and require extra hours at the office. The Company wants to give a little extra pay to employees who work on this important project.

A number of these employees are classified as exempt. May the Company provide extra compensation to exempt employees for their work on this project?"

A: Yes. Exempt employees are not required to receive extra compensation for extra work, but the FLSA allows employers to provide extra pay and still maintain their employees' exempt status. Specifically, the FLSA regulations provide that an employer may provide an exempt employee with additional compensation so long as the employment arrangement also includes a guarantee of at least the minimum weekly-required amount or $455 paid on a salary basis.

Generally, in these types of situations, the risk facing employers is whether the format of the additional compensation will invalidate the salary basis requirement, resulting in a loss of the overtime exemption. The regulations provide limited examples of acceptable additional compensation that will not affect the salary basis qualification. If your Company chooses to pay exempt employees additional compensation for this extra work, one of the payment formats with the least risk of destroying the employees' exempt status would be that of a flat sum bonus. An employee's exempt status – already difficult to establish - might be even more difficult to prove if the employee is paid time-and-a-half for the extra hours, like a non-exempt employee. [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

♦ **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 employers.

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.

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

Want Breaking News by E-Mail?
Just send a note to
peinfo@pacificemployers.com
Tell us you want the News by E-Mail!

NLRB Poster Enclosed!

Pacific Employers
306 North Willis Street
Visalia , CA 93291
559 733-4256
(800) 331-2592
www.pacificemployers.com
email - peinfo@pacificemployers.com

VISALIA CA 93277

PRESORTED
STANDARD
U.S. POSTAGE
PAID
PERMIT NO. 520

Return Service Requested

Pacific Employers
Management Advisor
47 Years of Excellence!

2008
Visalia Chamber of Commerce
Small Business of the Year

10% of Employers Will Terminate Healthcare Coverage

Nearly one of every 10 midsized or big employers expects to stop offering health coverage to workers after insurance exchanges begin operating in 2014 as part of President Barack Obama's health care overhaul, according to a survey by a major benefits consultant.

Towers Watson also found in its July survey that another one in five companies are unsure about what they will do after 2014. Another big benefits consultant, Mercer, found in a June survey of large and smaller employers that 8 percent are either "likely" or "very likely" to end health benefits after the exchanges start.

The surveys, which involved more than 1,200 companies, suggest that some businesses feel they will be better off dropping health insurance coverage once the exchanges start, even though they could face fines and tax headaches. The percentage of companies that are already saying they expect to do this surprised some experts, and if they follow through, it could start a trend that chips away at employer-sponsored health coverage, a long-standing pillar of the nation's health system.

"If one employer does it, others likely will follow," said Paul Fronstin of the Employee Benefit Research Institute. "You would see this playing out over the course of years, not months."

Such a move could lead to more taxes for both companies and employees, since health benefits currently are not taxed, and companies could be fined for dropping coverage. It also would give their employees a steep compensation cut if they don't receive a pay raise, too.

Health and Human Services spokesman Richard Sorian said the administration expects to see a rise in employer-sponsored health insurance, not a decline.

Last year, the average annual health insurance premium for employer-sponsored family coverage was $13,770 per worker, with companies picking up most of that tab, according to the Kaiser Family Foundation and Health Research and Educational Trust. That cost has more than doubled since 2000. [PE]

No Back Pay To Undocumented Workers

In a recent decision, the National Labor Relations Board ("NLRB") ruled, in Mezonos Maven Bakery, Inc., that it did not have the authority to award back pay to undocumented workers, even where the employer violated federal immigration law by failing to ask for work authorization documents when it hired the workers

Relying on the Supreme Court of the United States' decision in ***Hoffman Plastic Compounds, Inc. v. NLRB,*** the NLRB held that the *Hoffman* decision foreclosed back pay for all undocumented workers, regardless of whether the workers had presented fraudulent documents to obtain their jobs. [PE]

NLRB Grants Use Of Company Email For Union Purposes

The NLRB found that union representatives may have a right to correspond with employees on their corporately purchased email accounts to solicit union activity. ***The Guard Publishing Co., d/b/a The Register-Guard***

The Register-Guard decision has been anticipated since the NLRB members were nominated by the current president. Its impact is clear. Employers may own the computers, email accounts and may be paying their employees to work, but the NLRB will zealously guard a union's "right" to email your employees, on your computer, on your email accounts and to be read while your employees are working on your time, to protest against you or organize your employees into their union.

The only theoretical way to prohibit this conduct is to insure that you have a communications system policy that prohibits no-job-related solicitations- and to enforce it consistently, which many employers find difficult if not impossible to accomplish. [PE]