

WHAT'S NEW!

NEW LABOR BOSS - NEW CARD CHECK!

During the AFL-CIO's convention in Pittsburgh it enthroned a new president. Democrats are now rushing to pay the union's new president, **Rich Trumka**, tribute by reviving Big Labor's top legislative priority, the "card check" legislation.

Senator Arlen Specter was first with a revised "Card Check" bill. When Mr. Specter was a Republican many weeks ago, he opposed rigging the rules to ease unionization and reverse a decades-long free fall in membership. Now, as a Democrat, he needs labor to keep his seat in next year's Pennsylvania Senate Democratic primary. Mr. Specter is nothing if not adaptable, and he gave the misnamed Employee Free Choice Act enthusiastic support and claimed a breakthrough to pass the bill "before the year is up."

The revised bill has the same goals as the old "card check" by slightly different means. It drops the provision to end the secret-ballot in union elections. In place of automatic unionization on signed union cards, the new proposal is for an election within a week of a minority of employees petitioning for a union. This shotgun vote is intended to deny employees the kind of educated choice that comes with a proper discussion of the merits of unionization informed by both management and labor.

The new "card check" rules also give unions access to the workplace and meetings between employers and employees before a vote to unionize.

An equally problematic binding arbitration provision stays in. This idea would let a federal arbitrator impose a contract if the employer and a newly organized union aren't able to agree within three months. In other words, a government-sponsored agent would decide what salaries and benefits management will have to pay its employees. Throw in the expanded access to company property, and this so-called compromise bill may be worse than the original.

Mr. Specter suggested that moderate Democrats who have opposed "card check" such as Nebraska's Ben Nelson and Arkansas' Blanche Lincoln would now vote to stop what is certain to be a Republican filibuster attempt. However, Senator Lincoln's office said "her position has not changed." Mr. Nelson's office says he "doesn't have much to say" until a bill actually comes before the Senate.

Sixty votes are needed to make this long-held dream of the labor chieftans come true. That won't be easy. But Mr. Specter's latest flip and President Obama's repeated support for "card check" are noteworthy reminders that after health-care reform, the Democrats have other big outstanding debts to their left, which they intend to settle. [PE]

2010 Vacation Calendar Enclosed!

President's Report

~Dave Miller~

Guest Speaker on Change & Conflict



Vicki Stasch, M.S. will present "Change And Conflict During Downsizing Or Restructuring." Vicki has provided services to businesses since 1982.

Vicki's mission is clearly helping people, businesses and service organizations develop productive work environments, effective leadership and customer focused teams. This free seminar will be held October 15th at the Tulare-Kings Builders Exchange, 1223 South Lovers Lane in Visalia. RSVP to Pacific Employers at 733-4256 or the SBDC, at 625-3051 or fax your confirmation to 625-3053.

Vacation Calendar

Enclosed in this edition of the Management Advisor is a 2010 Vacation Schedule Planner that provides the opportunity to visually and graphically display their employees' vacation choices. If you need additional copies, please contact our office or just stop by!

ATTENDANCE RECORD

Next month Pacific Employers will supply you with a new "2010 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.

EMAIL NEWSLETTER

From once to a dozen times a month, Pacific Employers sends out email newsletters that have information on breaking news, events and a few good jokes. Send a note to us at peinfo@pacificemployers.com and tell us you want "Breaking News by E-Mail."

PACIFIC EMPLOYERS RETIREMENT PLAN SEMINAR

On October 22nd, Douglas Ruby of Woodbury Financial and E. Thomas Foster Jr. of The Hartford and J.D. Carlson of Plan Design Consultants, Inc. will discuss current day Retirement Plans for small business owners.

The discussion will focus on understanding hidden fees and the Fiduciary Responsibility that Plan Sponsors face. Held at the Visalia Marriott, 9-11am; 300 South Court Visalia, Ca. See article on page 3 for RSVP info. [PE]

Nearly all men can stand adversity, but if you want to test a man's character, give him power. - Abraham Lincoln

Recent Developments

Judge Tosses \$15M Sex-Harass Award

A Queens, NY judge tossed out a record \$15 million jury award won by a Flushing Hospital nurse who said she endured years of sexual harassment by a top-ranking doctor.

"IT IS TEETERING ON FINANCIAL RUIN,"

Justice Timothy Flaherty cited the nonprofit hospital's crumbling finances in concluding the jury was inflamed more by "*passion than reason. It is teetering on financial ruin,*" and the verdict would "*further imperil the very survival of the institution.*"

During the trial this year, nurse Janet Bianco, 55, alleged Dr. Miller subjected her and other nurses to unwanted come-ons and touching and attacked her in 2001. Flaherty gave Bianco the option of retrying the case if she doesn't choose to accept a \$750,000 settlement. Her lawyer said she will appeal and blasted the judge. [PE]

Jury Awards \$6.7M in Fatal Accident

A central Illinois jury has decided Archer Daniels Midland Co. should pay the family of a 26-year-old man \$6.74 million after he died at one of the agribusiness company's plants in 2007.

The judgment in the March 24, 2007, death of Francisco Moreno Garcia was entered Friday in Macon County Court in Decatur. Attorney Donald Shapiro, who represented Garcia's family, says Garcia worked for a St. Louis company and was insulating pipes at an ADM facility when he was sprayed with steam and hot water. Garcia was burned over 90 percent of his body.

Decatur-based ADM says it is reviewing the jury's decision. [PE]

Commutes Not Paid

An automotive employee was not entitled to compensation under the Fair Labor Standards Act or California law for commuting time and time spent on preliminary activities, the federal appeals court in San Francisco held in a class action case. However, the question of the compensability of employees' post-shift activity of transmitting required daily data is remanded to the district court for trial. *Rutti v. Lojack Corp.*

Mike Rutti, an automotive technician, worked for **Lojack Corp.** installing and repairing vehicle recovery systems. Because technicians perform most of their duties at the clients' locations, Lojack required them to use a company-owned vehicle to travel to clients' sites. Technicians also were required to keep their cell phones on while driving the vehicles. They were prohibited from carrying passengers in company vehicles and from using the vehicles for personal business.

Rutti was paid on an hourly basis beginning when he arrived at his first job and ending when he completed his final job, but not for any commuting time. Rutti also performed various preliminary and post-shift activities. For example, before he left for his first job of the day, he spent time receiving assignments, mapping routes, prioritizing jobs, and completing paperwork. In the evening, he had to upload data regarding his installations from a portable data terminal ("PDT") provided by the employer. He would connect the PDT to a modem provided by the employer, transmit the data and ensure that the transmission was successful. Rutti claimed it often took more than one attempt to complete a transmission.

Rutti, on behalf of himself and all technicians employed by the employer, sued the employer under the FLSA and California law to recover compensation for commuting time and time spent in alleged preliminary and post-shift activities. The district court granted the employer's motion for summary judgment, holding that the commuting time was not compensable. It also held the alleged preliminary and post-shift activities were not compensable

because either they were not integral to Rutti's principal activities or they consumed only a de minimis amount of time. Rutti appealed.

Rutti first argued that he was entitled to compensation for commuting time because his use of the employer's vehicle was a condition of employment. The appellate court observed that under the federal Employee Commuting Flexibility Act ("ECFA"), the use of an employer's vehicle to commute is not compensable, even if it is a condition of employment. The ECFA provides that, where the use of the vehicle "is subject to an agreement on the part of the employer and the employee," it is not part of the employee's principal activities and thus not compensable. The Court determined that the "agreement" required by the ECFA may be a condition of employment, since "there was no suggestion that the agreement could not be a condition of employment. Further, the most logical place to record an agreement between an employee and an employer concerning the use of an employer's vehicle is in the employee's employment contract." Accordingly, the Court concluded that Rutti was not entitled to compensation for his commuting time.

Rutti then argued that, because the employer placed restrictions on his use of the vehicle, the commuting time was compensable. The Court found this unsupported by the ECFA. Further, other courts addressing this issue have held that commuting is not compensable unless the employees show that they perform "additional legally cognizable work" while driving, the Court noted. Because Rutti could not demonstrate this, his claim failed.

Rutti also contended that, even if the commuting time was not compensable under federal law, it was compensable under California law, because he was under the employer's control while commuting. The Court rejected this argument, finding the various restrictions imposed on the use of the vehicle did not amount to putting Rutti under the employer's control during his commute.

The Court then examined whether Rutti's preliminary and post-shift activities were compensable. In general, such activities are compensable if they are an "integral and indispensable part of the principal activities for which covered workmen are employed," the Court explained. When making this determination, courts will examine whether the activities are "principal activities," performed as part of employees' regular work in the ordinary course of the employer's business. However, even if certain activities are "principal activities," the obligation to pay is moderated by the "de minimis rule." The rule recognizes "the practical administrative difficulty of recording small amounts of time for payroll purposes." Further, in determining whether otherwise compensable time is de minimis, courts may consider the aggregate amount of the time spent and the regularity of the work.

Applying this standard, the Court determined that some of Rutti's preliminary activities were related to his commute and, thus, not compensable, and the rest were de minimis. However, the Court found the time spent in the evening making PDT transmissions could be compensable. The evidence indicated that the PDT transmissions were an important part of Rutti's job and that the time spent in making the transmissions, including the time needed to confirm transmissions and, if necessary, to resend, was not de minimis. Evidence suggests that transmissions took approximately 15 minutes each day. This was over an hour each week, the Court noted, and "for many employees, this is a significant amount of time and money." Thus, the Court reversed the grant of summary judgment on this issue and remanded the matter for trial.

This case confirms that commuting time generally is not compensable, even if employees commute in company-owned vehicles and the employer imposes restrictions on the use of those vehicles. Employers are reminded, however, they may be liable for compensation when employees must perform work-related tasks outside of the normal work days. Even if employers consider the work de minimis (and not compensable), such tasks, in the aggregate, may require a significant amount of time that turns out to be compensable. [PE]

2010 Vacation Calendar Enclosed!



Human Resources Question with Candice Weaver

THE MONTH'S BEST QUESTION

Swine Flu Planning

Q: "We are being told to "Plan" for Swine Flu this season. What should we do?"

A: Employers may have to deal with Swine Flu again, especially issues like employee absences and staffers who are afraid of getting sick.

Employers with staffers staying home because they or their children are sick need to figure out how the work will get done despite the flu. Employers should also think about prevention, whether that means making it easy for workers to get flu shots or keeping the workplace more sanitary. And they also need to be sure they keep employees' health matters private even if co-workers want to know who's got the flu.

The federal government has warned small companies to be prepared to work with fewer staffers this fall and has published "Planning for 2009 H1N1 Influenza: A Preparedness Guide for Small Business." The guide is available online at <http://www.flu.gov/professional/business/smallbiz.html>.

There is also information for businesses from the Centers for Disease Control and Prevention at <http://www.cdc.gov/h1n1flu/business/toolkit>

Keeping a supply of strategically placed hand sanitizers and tissues can help the spread of the flu. Frequent cleaning of surfaces that many people come into contact with, such as handrails, is also a good idea.

Owners might want to take some cues from managers in the health care business. Jamie Anderson, vice president of health care for Constant Care Management, a Dallas-based operator of Alzheimer's assisted living facilities, said surfaces like handrails are being disinfected several times a day instead of once a day before the flu outbreak last spring. Encourage employees to get flu shots, but be aware that you generally cannot require an employee to get a shot.

It is critical for companies to plan now for multiple employee absences and be sure that staffers are able to substitute for one another when someone is out sick.

Employees should be cross-trained so that when a worker is sick, it's OK for them to stay home. It is against state and federal laws, including the Americans with Disability Act, to reveal health information about individual employees but not a violation to advise that Swine Flu has been found in the workplace.

Companies that don't have written sick leave policies should be formulating them now. The staff at Pacific Employers can help you draft a comprehensive plan. [PE]

2009 Retirement Plan Workshop

Pacific Employers has invited Douglas Ruby of Woodbury Financial, E. Thomas Foster Jr. of The Hartford and J.D. Carlson of Plan Design Consultants, Inc. to discuss current day Retirement Plans for small business owners. The discussion will focus on understanding hidden fees and the Fiduciary Responsibility that Plan Sponsors face.

E. Thomas Foster Jr. is an ERISA attorney, Tom is the National Spokesperson for The Hartford's Corporate Retirement Plans. Tuesday, 10/22/09 9-11am, Visalia Marriott, 300 South Court Visalia, Ca.

RSVP by calling Nancy Archibald at (650) 341-3322 or online at www.plandesign.com/workshop

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 21st, registration at 7:30am — Seminar 8:00 to 10:00am, at the Lamp Liter, Visalia.

RSVP Visalia Chamber - 734-5876 – \$25 Certificate – Forms – Guides – Full Breakfast

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.

2009 Topic Schedule

◆ Vicki Stasch is our Guest Speaker — Speaking on "Change and Conflict during downsizing or restructuring." Vicki Stasch, M.S. has provided services to businesses since 1982.

She offers the following: *Training, Coaching and Related Services, Leadership Training, One-One Personal and Leadership Coaching, Communication and Team Building, Strategic Planning, Facilitation of Team and Community Meetings, and Conflict Management.*

Thursday, Oct 15th, 2009, 10am - 11:30am

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

Thursday, Nov. 19th, 2009, 10am - 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 an unlimited dinner for two at the Vintage Press.
Call 733-4256 or Toll Free 800 331-2592.

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Articles in this Newsletter have been extracted from a variety of technical sources and are presented solely as matters of general interest to employers. They are not intended to serve as legal opinions, and should not be deemed a substitute for the advice of proper counsel in appropriate situations.

Notre Dame Sues For \$29,000 Oops!

A woman who worked catering events for the University of Notre Dame says it was her lucky day when the school tipped her \$29,000 in her check. But now the university is suing to get back the money she says she's already spent.

Sara Gaspar of Granger says in court documents filed this week that she "thought finally something wonderful had happened" in her life when the school paid her a \$29,387 tip on April 17. She said in court documents that she called the school's catering department three times about the payment, but didn't hear back until she received a threatening call from the school in June.

Gaspar says by that point, she had spent the money on a new car and bills.

Notre Dame contends Gaspar should have been paid only \$29.87, but was overpaid because of a typing error. The school says in a lawsuit filed Aug. 27 in St. Joseph Circuit Court in South Bend that Gaspar did not notify the school about the error, and instead spent the money knowing it wasn't hers." [PE]

UNLIMITED CONSULTATION?

A benefit of Pacific Employers' Membership is unlimited, direct, phone consultation on labor, safety or personnel questions on the Pacific Employers' Helpline at (559) 733-4256 or Toll Free (800) 331-2592

Council Urges Better Prep for Flu Outbreak

The Labor Department should train senior managers to respond to an H1N1 flu outbreak, and encourage agencies to write guidelines explaining when employees can use personal protective gear such as face masks, according to an advisory council of federal employees.

Those are two of more than two dozen recommendations by the Federal Advisory Council on Occupational Safety and Health. Few of the recommendations lay out specific actions for agencies; instead, most of them encourage Labor Secretary Hilda Solis to coordinate with other federal agencies. The council sent a report Tuesday detailing the recommendations to Solis, who is responsible for implementing the recommendations. [PE]

Union returning to AFL-CIO

One of the unions that left the AFL-CIO in a bitter dispute that split the labor movement four years ago is coming back to the labor federation.

The union of hotel, restaurant and clothing workers known as UNITE HERE is bringing its 265,000 members back a day after Richard Trumka became the newest AFL-CIO president.

UNITE HERE president John Wilhelm made the announcement on the final day of the federation's convention.

UNITE HERE and several other unions departed in 2005 after claiming there was too much emphasis on politics and not enough on organizing new members. Led by Service Employees International Union president Andy Stern, the breakaway unions formed the rival Change to Win federation.

Some of the other unions that left, including the Laborers and Food Workers unions, have also been in discussions to return. Labor leaders want to set aside their differences and work together so unions can take advantage of the most favorable political climate organized labor has seen in decades. [PE]