Pacific Employers
Management Advisor
46 Years of Excellence!
August 2010

What's New!

Court Allows Picketing Injunctions

A ruling this week by a California Court of Appeal will enable California employers and commercial property owners to keep unions off their property and to distance themselves from union demonstrations. This new decision is *Ralphs Grocery Company v. United Food And Commercial Workers Union Local 8.*

Ralphs Grocery is an important victory for California employers because it rejects the common union argument that most commercial property essentially amounts to a public meeting place to which unions have a legally protected state law right of access including a right to engage in free speech there.

According to the court, even "larger retail developments," with "amenities provided by those centers, including their restaurants, theaters, and community events" are not public forums because they typically serve the private commercial interests of their owners and occupants and the invitation they make to the public is to enter the property for the sole purpose of buying their goods and services.

"... also overturns two state statutes ..."

Because of the private nature of these properties, a union has no legal right to enter the premises or to engage in free speech there. Further, because of its private character, the party who owns or controls that property is free to pick and choose between the expressive activities it will permit there and the speech that it will ban from the property.

Ralphs Grocery also overturns two state statutes that have long served as insurmountable obstacles to obtaining injunctions against union trespass. According to the court, both statutes, C.C.P. §527.3 and Labor Code§1138.1, are unconstitutional because they give greater legal protection to labor-related speech than other types of speech and because they compel private property owners to provide access to their property for demonstrations with which they may disagree. Accordingly, neither statute may be used to block a property owner's or employer's request for injunctive relief from union trespass.

"... could easily end up before the U.S. Supreme Court ..."

Finally, *Ralphs Grocery* is worthy of note because it presents a clear standard for courts to follow when asked to enjoin a union's threatened or continuing trespass. Under this decision, a continuing trespass is, for the purposes of injunctive relief, an unlawful act. A property owner or employer need not prove any wrongdoing other than a trespass by a union. Further, according to the *Ralphs* court, a continuing trespass is legally sufficient proof of the irreparable harm necessary for obtaining injunctive relief because the resulting injury though real, is often beyond any method of reliable proof or estimation.

Whether *Ralphs Grocery* will be appealed to California's Supreme Court remains to be seen. Indeed, given the federal constitutional issues presented by the case, it could easily end up before the U.S. Supreme Court. For the present, however, it gives employers and commercial property owners faced with union trespass a welcome leg up for keeping unions off their private property and getting unwanted property incursions enjoined. [PE]

Governor Vetoes 8 Hour Overtime for Agriculture! *see below*

President's Report
~Dave Miller~

Gov. Vetoes Farm O/T Bill!

Gov. Arnold Schwarzenegger vetoed a bill that would have given more overtime pay to farmworkers, saying it would overturn long-standing rules and create "additional burdens on California businesses."

The legislation was a top priority for Sen. Dean Florez, D-Shafter, who in a statement accused the governor of missing a chance to "wipe a 70-year-old shame off the books of California."

California is the only state in the nation that provides overtime for farmworkers after 10 hours a day or 60 hours a week. Senate Bill 1121 would have granted overtime after eight hours.

Grower organizations lobbied hard against the bill, fearing they'd lose a competitive advantage to growers in other states that don't require any overtime. Farmers also said the bill could mean less pay for farmworkers, because growers might cut back their hours instead of paying more.

"We were as anxious as anybody to get his decision, and we are very pleased that he decided to veto this bill," said Ryan Jacobsen, executive director of the Fresno County Farm Bureau.

Schwarzenegger noted that California is the "most progressive state in the nation" by allowing overtime after 10 hours.

"This measure, while well-intended, will not improve the lives of California's agricultural workers and instead will result in additional burdens on California businesses, increased unemployment and lower wages," he said.

Florez had the support of United Farm Workers union leaders, whose last-minute appeal to Schwarzenegger included hand-delivering the bill to his office and kneeling and praying for his signature last week, along with Florez and a Catholic priest.

The governor "has decided not to end this vestige of a caste system of farm labor that treats California farmworkers as if they are not important workers or important human beings," UFW President Arturo Rodriguez said in a statement.

Weeks earlier, however, UFW spokeswoman Maria Machuca told The Fresno Bee that members had mixed feelings on the issue, with some fearing reduced hours if it passed.

California in 1941 concurred with a 1938 federal law that exempted farmworkers from normal overtime rules. Farmers say the rule is needed because of factors such as weather and seasonal growing patterns that sometimes force workers to labor 60 hours one week but just 20 the next. [PE]

"How many legs does a dog have if you call the tail a leg? Four. Calling a tail a leg doesn't make it a leg." - Abraham Lincoln

Recent Developments

Ninth Circuit Hits Employer in Independent Contractor Case

Continuing the recent trend in questioning the propriety of classifying workers as independent contractors instead of employees, the Ninth Circuit reversed an employer's victory on this issue in *Narayan v. EGL, Inc.* EGL, headquartered and incorporated in Texas, contracts with hundreds of persons and is the employer of hundreds of employees worldwide. EGL enters into contracts with persons intended to be independent contractors (ICs).

The ICs lease vehicles and acknowledge that they will act as independent contractors to provide delivery services for EGL. Each IC acknowledged that he or she was not an employee, and that he or she would "exercise independent discretion and judgment to determine the method, manner and means of performance of its contractual obligations." And, by contract, the ICs agreed that the contracts were to be enforced under Texas law. Nonetheless, a number of such California-based persons sued EGL claiming that they were employees and entitled to overtime pay, reimbursement of expenses, off-duty meal periods and other employment related claims.

"The Ninth Circuit reversed the District Court's decision . . ."

The District Court for the Northern District of California found that the plaintiffs' claims did not have merit and granted summary judgment in favor of EGL. The District Court not only held that Texas law applied and that under Texas law, the plaintiffs could not be considered to be employees, but also held that the same result would follow under California law. Unfortunately for EGL, the District Court did not make any factual analysis to support the alternative finding and conclusion.

The Ninth Circuit reversed the District Court's decision and held that the plaintiffs' claims arose under California's regulatory scheme and were governed by California law. Thus, the issue was whether under California's labor laws (not Texas law), the plaintiffs were employees or independent contractors. And, despite the trial court's express finding that the plaintiffs would be considered to be independent contractors in California, the Ninth Circuit disagreed and found a triable issue of fact on this question.

In analyzing the independent contractor classification question, the Ninth Circuit created a shifting burden test not unlike discrimination cases finding that once a plaintiff established a prima facie case that he or she was an employee that the burden shifts to the employer to prove that the person was an independent contractor. In this case, the Ninth Circuit concluded that the contract acknowledging independent contractor status was but one element in the employee/IC equation and that there were sufficient indicia of employment in this case to defeat summary judgment. The Ninth Circuit further opined that summary judgment would rarely be appropriate in cases where employers claim that the plaintiffs were independent contractors, based on the numerous factors that must be considered in making the determination.

What should you do in light of *Narayan* and other recent court decisions and enforcement efforts focused on improper independent contractor classification? If you have any doubt as to the status of a particular independent contractor, you may contact the Pacific Employers staff for review. [PE]

Obama Signs Jobless Benefits Extension

Just hours after Congress passed an $18 billion bill to restore unemployment benefits for the long-term unemployed, President Barack Obama made it the law of the land.

The measure comes as welcome relief to hundreds of thousands of people who lost out on the additional weeks of compensation after exhausting their state-paid benefits. They now will be able to reapply for long-term unemployment benefits and receive those checks retroactively under the legislation.

The bill also restores full Medicaid payments to doctors who were threatened by a 21 percent cut and refloats the flood insurance program.

". . gives unemployed people a 65 percent subsidy on health care premiums. . ."

Several other popular programs had also expired, including federal flood insurance, higher Medicare payment rates for doctors and generous health insurance subsidies for people who have lost their jobs.

The situation became more urgent when Medicare announced that it would start paying doctors' claims at a 21 percent lower rate. That won't be necessary now.

This measure provides up to 99 weekly unemployment checks averaging $335 to people whose 26 weeks of state-paid benefits have run out. It's a temporary extension that gives House and Senate Democrats time to iron out a measure to fund the program through the end of the year.

Most news reports say the bill also extends a program created under last year's economic stimulus bill that gives unemployed people a 65 percent subsidy on health care premiums under COBRA and Cal/COBRA. [PE]

IRS Audits For Independent Contractors

About 6,000 companies nationwide are being selected at random for a Payroll Tax Audit. The audits will focus on whether companies are paying all of their required employment taxes that fund Social Security and Medicare. The Internal Revenue Service wants to know how many companies are misclassifying employees as independent contractors and failing to pay taxes on fringe benefits. The initiative is expected to last for three years.

". . . companies underpay approximately $14 billion annually. . ."

The IRS believes it will find many firms in violation of regulations concerning how workers are to be classified for payroll tax purposes, as there is a clear incentive to classify employees as independent contractors. Companies are required to pay half of their employees' 12.4 percent Social Security and 2.9 percent Medicare tax. However, if the employee is classified as an independent contractor, the company does not pay these taxes

The IRS estimates that companies underpay approximately $14 billion annually by misclassifying employees as independent contractors. The economic recession will most likely increase the pressure on companies to avoid these payroll taxes. A failure to pay penalty is commonly assessed in these situations, which can be costly, at up to 25 percent of the unpaid tax liability.

In addition to imposing civil penalties, if the IRS believes that fraud was involved in the payroll tax violation, it will refer the case to the Criminal Investigation Division for investigation.

The rules relating to whether a particular individual is an employee or an independent contractor are complex and confusing. If you have questions regarding the status of a particular independent contractor, you may contact the Pacific Employers staff for review. [PE]

Governor Vetoes 8 Hour Overtime for Agriculture! *see page 1*

Human Resources Question with Candice Weaver

The Month's Best Question

Employee Must Request Accommodation

Q: ***"An employee who injured his shoulder at home came back to our shop and told me that his doctor told him that his injury was substantial and that the recovery, if ever, would take a very long time. He said he was going to move on, go back to school and look at getting ready for a different occupation.***

That was several months ago. This week he showed up and demanded his job back. I told him that he had quit and that I had hired a replacement after he left.

Today he called and said he had a lawyer who is going to sue me if I did not accommodate him. What's the story?"

A: While many employers have been sued in recent years for failing to accommodate an employee's injury by engaging in the Interactive Process, a recent ruling favors your situation. They found that an employee must request accommodation in order to trigger an obligation on the part of the employer to enter into the interactive process.

The "Interactive Process" is an ongoing dialog with the employee's caregiver concerning his accommodation needs. The problem for employers is that once it begins, only the employee can terminate the process, never the employer.

It was the California 4th District Court of Appeals that reversed a 6 figure award for employment discrimination in a FEHA claim arising from a work related injury to a water treatment plant worker who was unable to return to her usual and customary job.

The Court ruled the applicant failed to provide any indication to the employer over an 18 month period of time, during which she was participating in vocational rehabilitation, of an interest in returning to work with the employer.

In *Milan v City of Holtville,* Tanya Milan sustained a spinal injury resulting in a two level fusion with metal plate implant. A year after the injury, the City claims administrator notified Ms. Milan the medical evidence indicated she was not able to return to her job and vocational rehabilitation benefits were offered and accepted by applicant.

Milan claimed that she attempted to dispute the determination that she could not return to her job but the record does not indicate how she did so. She also did participate in vocational rehabilitation benefits and obtained training for a new occupation in real estate.

Milan concedes she did not make any effort to contact her employer about wanting to return to work. [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, along with 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.

2010 Topic Schedule

There is No Seminar in August

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

Thursday, September 16th, 2010, 10 - 11:30am

♦ **Workplace Security will be the topic for our 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 21st, 2010, 10 - 11:30am

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

Thursday, November 18th, 2010, 10 - 11:30am

There is No Seminar in December

Want Breaking News by E-Mail?
Just send a note to
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Governor Vetoes 8 Hour Overtime for Agriculture!

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Sears Settles EEOC Age Suit

A Corpus Christi Sears store will pay more than $30,000 and furnish other relief to settle an age discrimination lawsuit filed by the U.S. Equal Employment Opportunity Commission (EEOC), the agency announced today.

The EEOC's lawsuit, filed in U.S. District Court for the Southern District of Texas, Corpus Christi Division (Civil Action No. 2:09-cv-00253), alleged that Sears #1217, located at 1305 Airline Road, refused to hire a then 61-year-old applicant into an entry-level loss prevention/asset protection position despite his qualifications and 27 years of investigative experience. Such alleged conduct violates the Age Discrimination in Employment Act (ADEA). The EEOC filed suit after first attempting to reach a voluntary settlement. [PE]

FedEx Reaches Agreement with MA AG

Massachusetts Attorney General announced that her office has recovered more than $3 million for workers in a settlement with FedEx Ground, which misclassified drivers as independent contractors, resulting in underpayment to Massachusetts in payroll taxes, worker's compensation and unemployment insurance.

Under terms of the settlement, FedEx Ground, which denies liability, has agreed to pay more than $3 million, including the significant underpayments, back to Massachusetts' general fund. Money will also go to the 13 drivers named in the original citation. [PE]

Supreme Court Rules on Mandatory Arbitration

The U.S. Supreme Court reversed a 9th Circuit Court of Appeals ruling, holding 5-4 that where an arbitration agreement delegates to an arbitrator authority to determine the enforceability of the agreement, only a specific challenge to the delegation provision itself may be resolved by a court. However, a challenge to the enforceability of the agreement as a whole (e.g., that it is "unconscionable") must be resolved by the arbitrator.

Companies that want their disputes resolved in arbitration versus court should include delegation provisions in their arbitration agreements to ensure that questions relating to the enforcement or validity of the arbitration agreement will be resolved by arbitrators. [PE]

Still Waiting for EEOC GINA Final Rule

It has now been a year since the EEOC issued its Notice of Proposed Rulemaking interpreting the Genetic Information Non-Discrimination Act, which took effect in November 2009.

Although the EEOC promised a final rule before the effective date of the GINA, we are still waiting. [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 Oct 27th, 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