Pacific Employers
Management Advisor
Celebrating 46 Years!
January 2010

What's New!

Noncompetition Policies Prohibited

An appellate case issued in November 2009, reinforces California's prohibition on noncompetition and nonsolicitation agreements. California Business and Professions Code section 16600 is clear in its simplicity, stating, *"Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."* It is believed this extends to matters companies classify as trade secrets, with limited exceptions.

After some employees left one company to work for a competitor, the two rival biotech companies went to court over the provisions of an employment contract that barred the employees from freely working for a competitor. The court explained, "The agreements each contained a covenant not to compete which provided that for 18 months after termination of employment the employee would 'not render services, directly or indirectly, to any CONFLICTING ORGANIZATION' in which such services 'could enhance the use or marketability of a CONFLICTING PRODUCT by application of CONFIDENTIAL INFORMATION' to which the employee 'shall have had access during employment.'" The agreements also prohibited employees from soliciting business from the company's clients or customers for 18 months after termination from employment. *Dowell v. Biosense Webster, Inc.*

The new employer and the new employees sued to stop the original employer from enforcing the noncompetition and nonsolicitation agreements. The original employer filed an unfair competition cross complaint and sought to enjoin the new employer from using or disclosing confidential information gained from its former employees.

The Court of Appeal for the Second Appellate District struck down the noncompetition and nonsolicitation agreements and even went so far as to cast doubt on any viable trade secret exception.

The appellate court declined to resolve the issue of whether such a trade secret exception exists, but made it clear it doubted the "viability of the common law trade secret exception to covenants not to compete."

Employers Should:

- Not restrict employees' ability to work after they leave your employment through non-competition clauses

Rewrite agreements limiting employees from disclosing information to a future employer by narrowly tailored to the protection of trade secrets. [PE]

Cal/OSHA Form 300 Enclosed!

President's Report
~Dave Miller~

Labor Law Seminar

On Thursday, January 21st, from 10 am till 11:30 am, we will be presenting the first of our 2010 monthly seminars. The topic will be the annual Labor Law Update. Read more about the topic and location on page 3. [PE]

Form 300 Rules

California employers in high hazard industries with 10 or more employees are required to comply with Cal/OSHA's enclosed Form 300 recordkeeping standard. With this issue we supply you with the Form 300; on its reverse side we include the Summary, which is the part of the form that you actually are required to post.

Employers are required to complete both OSHA Form 300 Log of Work-Related Injuries and Illnesses and OSHA Form 300-A Summary of Work-Related Injuries and Illnesses, however, only the latter, the Form 300-A, is required to be posted in the workplace.

The reason you post only the Summary is that it does not have the privacy concerns of the Form 300 and the former Log 200.

You must post the Summary only, not the Log, by February 1st of the year following the year covered by the form and keep it posted until April 30th of that year. [PE]

Good Practices for 2010

Below we provide a list of Good Practices for the coming year:

- **Take Sex Harassment Rules Seriously** — Major court decisions and the state law (AB 1825) create substantial complexity regarding sex harassment rules, and is not to be ignored.
- **Review "Salary-exempt" Positions** — Overtime penalties are substantial for misclassified personnel.
- **Employee Clockouts For Meal Periods** — With little hope for reform, protect yourself with proof of meal periods.
- **Get On-duty Meal Agreements Signed** — If employees must work at meals, get agreements signed.
- **Review Pre- & Post-Duty Responsibilities** — Putting on uniforms, and washing up, may be working time.
- **Consider Everyone As A Protected Class Employee** — Everyone is a victim, begin from that premise.
- **Learn The "Interactive Process"** — Always get more information on how you can accommodate.
- **Bring Handbooks Up To Date** — The laws change, your policies need to change with the law.
- **Create/Review Sales Commission Contracts** — You're the author, so poor language will be construed against you, make sure they protect you. [PE]

Great thoughts reduced to practice become great acts. -William Hazlitt

Recent Developments

Exempt Employee Deductions

The California Division of Labor Standards Enforcement (DLSE) recently issued a new opinion letter that represents a change in prior DLSE policy regarding whether or not employers can deduct partial-day absences from exempt employees' leave banks if the absence is less than four hours.

In response to an employer's question, the DLSE said that, under California law, employers are not prohibited from deducting increments smaller than four hours from the vacation/PTO or sick leave banks of exempt employees.

"But employers should be cautious . . ."

The DLSE mentioned the California Supreme Court's 2005 decision in Conley v. PG&E, when the court ruled that partial day absences of four hours or more could be deducted from an exempt employee's vacation/PTO bank without violating California law. The DLSE said that the court's ruling didn't expressly rule out deductions for absences of less than four hours.

But employers should be cautious about following this DLSE's opinion letter for two reasons: California courts are not bound to follow DLSE opinion letters. If there's a lawsuit, the court can take a position contrary to the DLSE.

The DLSE's interpretation of the Conley decision is based on the fact that the court didn't expressly say that only absences of four hours or more could be deducted from vacation/PTO banks of exempt employees. But if the DLSE's interpretation is incorrect, employers are still on the hook for not following the law.

The DLSE also noted that no deduction can be made from an exempt employee's pay for a partial-day absence. [PE]

CA Supreme Court Reduces Awards

In a win for employers, the California Supreme Court agreed with the appellate court that the original punitive award was unconstitutionally excessive, and it spelled out the reasons why the employer escaped greater liability. *Roby v. McKesson Corp.*

A case where an employee was harassed, discriminated against and wrongfully terminated based on her medical condition and related disability made its way to the California Supreme Court. In the original trial, the jury found in favor of the employee, and awarded her substantial compensatory and punitive damages against both her employer and the supervisor that harassed her. The appellate court reversed part of that judgment on the first appeal, ordering the trial court to reduce the compensatory and punitive damages against the employer and the California Supreme Court agreed.

". . determined the awards to be "hopelessly ambiguous."

The Supreme Court took the case for review and ultimately disagreed that there was insufficient evidence to establish harassment. In trying to determine whether the appellate court erred in concluding that the noneconomic damages awards were all related to her termination and therefore overlapped one another, the Supreme Court gave up and determined the awards to be "hopelessly ambiguous." The Court seemed set to order a new trial, but Roby, rather than face a new trial, agreed to concede that the damages overlapped. Her concession allowed the appellate court's determination on that point to remain uncontested. As a result, the employer saved having to pay a significant chunk of the original compensatory damages award. The Court directed a modification of the jury award to provide for a single harassment award of $500,000 against both the employer and supervisor.

In reversing the lower court's determination that there was insufficient evidence to establish harassment, the Supreme Court agreed with Roby that the appellate court should "not have excluded personnel management actions as evidence in support of her harassment claim." The Supreme Court noted that while the terms "discriminate" and "harass" appear in separate provisions of the FEHA, "in some cases the hostile message that constitutes the harassment is conveyed through official employment actions, and therefore evidence that would otherwise be associated with a discrimination claim can form the basis of a harassment claim." Nothing prevents a plaintiff from taking a "two for one" approach and using the same evidence to support both harassment and discrimination claims.

The Supreme Court also struck down most of the punitive awards. Thanks to the due process clause of the Fourteenth Amendment, there's a limit to state court punitive awards. The Supreme Court explained the rationale for this limit is that someone who commits a wrong must have fair notice "not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." In this case, the Supreme Court took into account the low level of culpability on the part of the employer and found that, given the facts of the case, the punitive damages could be no greater than the compensatory damages (i.e., a 1-to-1 ratio).

What saved the employer in this case is that most of the blame rested with the supervisor, and unlike the supervisor, the corporation itself did not engage in repeated misconduct. The Court explained there was no evidence that the supervisor's "actions toward Roby were the product of a corporate culture that encouraged similar supervisional conduct. Rather, they appear to be the isolated actions of a single supervisor, combined with the one-time failure on the part of the employer…to take prompt responsive action when these events came to its attention."

Employers Should:

- Have clear anti-harassment and anti-discrimination policies and communicate them to all employees
- Train all employees – especially supervisors and managers – to recognize and avoid harassing or discriminatory behavior in the workplace
- Promptly and thoroughly investigate all claims of workplace harassment or discrimination and take immediate and appropriate corrective action

When on notice that an employee's medical condition might be affecting their performance, engage in the interactive process to determine whether a reasonable accommodation is appropriate, and recognize that such a reasonable accommodation might merit adjusting the application of a corporate policy (such as one on attendance) to the disabled employee. [PE]

Cal/OSHA Form 300 Enclosed!

Human Resources Question with Candice Weaver

The Month's Best Question

Reading Employee Email Unlawful?

Q: ***"I have heard that it is unlawful to view employee's emails on our company computers, can this be true?***

A: You may have seen a recent *Wall Street Journal* article on recent court decisions finding that employees have a right to privacy in e-mails transmitted on personal e-mail accounts accessed on company computers. Importantly, under these and similar decisions, the employees would not have had such a right to privacy had their employers maintained a well-drafted technology use policy. Therefore, it is important that employers draft, disseminate and enforce workplace technology use policies to defeat employees' claims that personal e-mails on company computers, including communications with attorneys, are protected by a right to privacy. A well-drafted technology use policy should provide that:

- the company's e-mail system is to be used for business purposes, with only incidental personal use permitted;
- all information contained, sent or received on the company's computer systems (including, where applicable, company-issued mobile devices, text and instant messaging systems, social networks and message boards) is the property of the company;
- the employees have no right to or expectation of privacy with respect to any such information; and
- the company reserves the right to access, review and disclose any such information.

This policy should appear in the company's employee handbook and/or be disseminated separately. Also, employees should sign a form acknowledging that they have received, read and understood the policy and agree to its terms. Further, management should maintain dialogue with their personnel specialists and information technology staff to ensure prompt, proper and efficient enforcement of the policy. As this recent trend of court decisions provide increasing protections for employees who use company technology, prudence dictates that technology use policies be reviewed carefully with labor consultants. [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 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 Beakfast

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.

2010 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 21st, 2010, 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 18th, 2010, 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 18th, 2010, 10 - 11:30am

♦ **Safety Programs -** Understanding Cal/OSHA's Written Safety Program. Reviewing the IIPP or SB 198 requirements for your business.
Thursday, April 15th, 2010, 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 20th, 2010, 10 - 11:30am

♦ **Wage & Hour and Exempt Status -** Overtime, wage considerations and exemptions.
Thursday, June 17th, 2010, 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 15th, 2010, 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 16th, 2010, 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 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

Cal/OSHA Form 300 Enclosed!

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

PRSRT STD
U.S. Postage
PAID
VISALIA, CA
Permit # 441

Return Service Requested

Pacific Employers
Management Advisor
Celebrating 46 Years!

2008 Chamber Visalia of Commerce Small Business of the Year

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

Contractors to Notify Employees of NLRA Rights

President Obama has signed an Executive Order that signifies a significant shift in labor policy. He rescinded a previous Executive Order signed by former President Bush. That Executive Order had required contractors to post a "Beck" notification informing workers that they did not have to join a union or pay union dues to keep their job. Under the new Order, federal contractors and subcontractors are required to post a notice informing workers of their rights to organize and bargain collectively under the National Labor Relations Act ("NLRA").

Once the proposed regulations are finalized, DOL will publish a poster that contractors must post in a conspicuous place at their facilities. DOL anticipates that final regulations and the required poster will be published in the June 2010 edition of the Federal Register. [PE]

Fantasy Football Creates Real Trouble

Fantasy sports leagues are fighting back after a report that Fidelity Investments recently fired four workers for playing fantasy football on the job.

The Star-Telegram reported that Cameron Pettigrew, a manager at Fidelity's Westlake office in Texas, told the newspaper that he and three other employees had been fired by Fidelity for participating in the fantasy sports.

A Fidelity spokeswoman said Pettigrew had worked for the company from 2007 until October 21 this year, but she declined to comment on the newspaper report. "We have policies in place that address a variety of professional conduct standards for our employees," she said.

Chicago outplacement firm Challenger Gray & Christmas Inc has estimated that during the National Football League's 2008 season, workers playing fantasy football cost U.S. employers some $615 million per week in lost productivity. [PE]

President Extends COBRA Subsidy

On December 21, 2009, President Obama signed legislation extending the COBRA premium subsidy originally established under the American Recovery and Reinvestment Act of 2009 ("ARRA").

Under the ARRA, only individuals who were involuntarily terminated and who lost group health insurance coverage before December 31, 2009 were eligible to receive the subsidy. Moreover, the subsidy was only available for nine months of coverage.

The new legislation extends federal COBRA health coverage cost subsidies for 6 additional months for a total of 15 months of subsidized coverage. The extension applies to those COBRA beneficiaries whose nine-month premium subsidy under the ARRA had expired. The legislation also extends the qualifying event deadline to February 28, 2010.

In addition, the legislation gives beneficiaries whose subsidy expired and who didn't continue to pay the full unsubsidized premium the opportunity to receive retroactive subsidized coverage.

This legislation requires employers to notify current and future COBRA beneficiaries of the new 15-month premium subsidy [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