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Management Advisor
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January 2012

What's News!

Restaurant Costs to Rise!

Cost will increase for restaurants due to new regulations on Food Handler Card. Starting January 1, 2012 the person who takes your order at the hot dog stand needs to have training and a certificate before he can take your order and put the hot dogs in a bag for you.

The law now mandates that food handlers take food safety training courses and pass a test with at least 70 percent score. The law defines food handlers as anyone "involved in the preparation, service or storage of food."

"The course costs $19 and workers must pay the cost themselves."

That definition could include cooks, waiters, bussers, bartenders, expediters, hosts, beverage pourers, chefs, prep-cooks, supervisors and managers.

Chefs and managers who have taken more rigorous food safety courses and passed certification do not need the card.

The lady who seats you needs to take the classes, pass the test and get a card. The course costs $19 and the law says that the workers must pay the cost themselves. Most employers will find a way to reimburse them. [PE]

Providing Family Leave Benefits

An employer covered by the California Family Rights Act (CFRA) is not required to pay an eligible employee during a CFRA leave, except when the employee elects, or the employer requires, the employee to use any accrued vacation time or other accumulated paid leave other than accrued sick leave.

However, if CFRA leave is for the employee's own serious health condition, the employee may elect or the employer may require the employee to use any accrued vacation time or other accumulated paid leave, including any accrued sick leave.

"This obligation commences on the date leave first begins . . ."

Additionally, the employee may elect to use accrued sick leave for any other reason mutually agreed to by the employer. If the employer provides health benefits under any group health plan, the employer has an obligation to continue providing such benefits during an employee's CFRA leave.

This obligation commences on the date leave first begins and continues for the duration of the leave(s), up to a maximum of 12 work weeks in a 12-month period. The employee can be required to make his or her share of the premium contribution. Accrual of seniority and other benefits continue during the leave. [PE]

Cal/OSHA Form 300 Enclosed!

President's Report
~Dave Miller~

Labor Law Seminar

On Thursday, January 19th, from 10 am till 11:30 am, we will be presenting the first of our 2012 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.

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.

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]

"All-in-1" Poster for 2012!

We are proud to present the new 2012 California / Federal "All-in-1" Poster. Extra copies are available at our office.

Remember, You're not done when you get the "All-in-1" Poster up. You still need to make sure you have the Industrial Welfare Commission's (IWC) order for your business posted. Check out the ***Find Your Wage Order*** box in the center of the poster for details on your firm's wage order. [PE]

Earned Income Tax Credit

The Annual Federal Earned Income Tax Credit Notification (EITC) season is upon us. Employers are required to notify their employees about the availability of the EITC.

Written notification must be provided to employees in person or by mail. Notification must be provided within one week before or after, or at the same time, that you provide an annual wage summary, including, a Form W-2 or a Form 1099.

The EITC Notice can be downloaded at our Website on our **Forms** page or the **What's New Page:**

http://www.pacifcemployers.com

Whenever a man has cast a longing eye on offices, a rottenness begins in his conduct. -Thomas Jefferson (1743-1826)

Recent Developments

Unqualified Employee = No Accommodation

In Johnson v. Board of Trustees, the Ninth Circuit elaborated on the limits of an employer's duty to accommodate a disabled employee. Trish Johnson was a special education teacher in Idaho with a history of depression and bipolar disease. Johnson's position required a state teaching certificate, which in turn required certified teachers to meet a minimum level of continuing education credits in a five year period.

When her contract came up for renewal in the fall of 2007, Johnson had not completed the continuing education requirements because she suffered a major depressive episode over the summer, so she petitioned the school board to seek provisional authorization from the state to allow her to teach temporarily without a license. The Board denied her request because 1) she had five years to obtain the credits and 2) the Board only petitioned the state when there was no certified teacher available to fill a position. A certified teacher was available and was hired.

"..NO DUTY TO ACCOMMODATE ... EFFORTS TO MEET THE JOB SKILLS REQUIREMENT.."

Johnson brought suit for disability discrimination, a suit summarily dismissed by the trial court. On review by the Ninth Circuit, the Court agreed that Johnson's claim should be dismissed. The Court held that in order to prevail on a claim for disability discrimination or failure to accommodate, the plaintiff must establish that she was a "qualified individual with a disability." To establish this, the plaintiff must show that she 1) has the experience, education and skills required by the job and 2) can perform the essential functions of the job, with or without a reasonable accommodation.

The Board argued that Johnson failed to establish that she met the requirements of the job, and there was therefore no need to accommodate her disability. Johnson countered that because she could have obtained her teaching certificate with an accommodation of additional time, the Board was required to accommodate her ability to obtain her teaching certificate.

The Court disagreed, and held that there is no duty to accommodate an employee's efforts to meet the job skills requirement. By way of a straightforward example, the Court noted that under the EEOC guidelines, a law firm that requires incoming attorneys to be members of the bar need not accommodate a visually impaired attorney who fails to pass the bar exam. On the other hand, the firm is required to provide a reasonable accommodation to a visually impaired – but otherwise qualified – bar member. Simply summarized, guidance by the EEOC "explicitly disclaims any requirement of providing reasonable accommodation to disabled individuals who fail to meet the job prerequisites on their own."

Since the job requirement itself was neither discriminatory nor had a disparate impact on disabled individuals, the district court's ruling was allowed to stand. [PE]

Requiring HS Diploma May Violate ADA

The Equal Employment Opportunity Commission (EEOC) has issued an "Informal Discussion Letter" regarding whether a job qualification standard requiring that an employee have a high school diploma is a violation of the Americans with Disabilities Act (ADA). "Informal Discussion Letters" are written by EEOC staff in the Office of Legal Counsel and they do not constitute official opinions of the EEOC.

"..CANNOT OBTAIN A HIGH SCHOOL DIPLOMA DUE TO A LEARNING DISABILITY."

They are provided by the EEOC in an effort to respond to inquiries from members of the public. In this case, the EEOC received an inquiry, as noted above, regarding whether an employer is in violation of the ADA by requiring that an individual seeking employment have a high school diploma as part of a job qualification standard.

The letter points out that some individuals cannot obtain a high school diploma due to a learning disability, and therefore cannot obtain jobs requiring a high school diploma. The letter also advises that pursuant to the ADA, "a qualification standard, test, or other selection criterion, such as a high school diploma requirement, that screens out an individual or a class of individuals on the basis of a disability must be job related for the position in question and consistent with business necessity.

A qualification standard is job related and consistent with business necessity if it accurately measures the ability to perform the job's essential functions (i.e. its fundamental duties). Even where a challenged qualification standard, test, or other selection criterion is job related and consistent with business necessity, if it screens out an individual on the basis of disability, an employer must also demonstrate that the standard or criterion cannot be met, and the job cannot be performed, with a reasonable accommodation…Thus, if an employer adopts a high school diploma requirement for a job, and that requirement "screens out" an individual who is unable to graduate because of a learning disability that meets the ADA's definition of "disability," the employer may not apply the standard unless it can demonstrate that the diploma requirement is job related and consistent with business necessity.

The employer will not be able to make this showing, for example, if the functions in question can easily be performed by someone who does not have a diploma. Even if the diploma requirement is job related and consistent with business necessity, the employer may still have to determine whether a particular applicant whose learning disability prevents him from meeting it can perform the essential functions of the job, with or without a reasonable accommodation." [PE]

Waste Connections Plans Move To Texas

Another California firm is leaving California. Taking with it 150 jobs and $100 million circulating in the Sacramento area. They are going where they are wanted, Texas.

"Waste Connections chief executive officer Ron Mittelstaedt said the company's planned move to Texas "offers our employees an attractive, lower cost, and more centrally located community well serviced by two major airports." Most of the company's corporate employees in Folsom are expected to make the move.

"...THE COMPANY SEES CALIFORNIA AS A POOR PLACE TO DO BUSINESS."

The Sacramento region's largest publicly traded company, Waste Connections, is moving its headquarters to Texas, the company recently announced.

This fall, Waste Connections chairman and chief executive officer Ron Mittelstaedt admitted the company was considering a move — in part because the company sees California as a poor place to do business." [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 Jan 25th, registration at 7:30am — Seminar 8:00 to 10:00am, at the Lamp Liter, Visalia.

1-25-11, 4-25-11, 7-25-11 and 10-24-11.

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

Human Resources Question with Candice Weaver

The Month's Best Question

Independent Contractors

Q: ***"What is the danger of classifying someone as a 1099 employee?"***

A: Using independent contractors can be risky, and remains an age-old concern in general. It determines whether an employer must pay and withhold federal income tax, Social Security and Medicare taxes and federal unemployment tax (FUTA)—and possibly incur state and local tax obligations!

A worker generally is considered an employee for federal tax purposes if the employer has the right to control and direct the worker regarding the job assigned and related performance. Other factors include whether the work is substantial, regular or continuous, and whether the services performed may require someone to comply with the employer's general policies.

The IRS uses the following three categories of factors—formerly known as the 20-factor test—to determine if a worker is an employee or an independent contractor:

- **Behavioral:** Does the business or household control or have the right to control what the worker does and how the worker does his or her job? Facts that indicate whether a payer has a right to direct and control include instructions. Generally, an employee is told when to work; where to work; how to work; what tools or equipment to use; what workers to hire; what workers to assist with the work; where to purchase supplies and services; what work must be performed by specified individual; and what order or sequence to follow. An employee may be trained to perform services in a particular manner.
- **Financial:** Does the payer control the business aspects of the worker's job? Facts that indicate whether a payer has a right to control the aspects of the worker's job include the extent to which the worker has unreimbursed expenses, the extent of the worker's investment, the extent to which the worker makes services available to the relevant market, how the business or household pays the worker and the extent to which the worker can realize a profit or loss.
- **Type of Relationship:** Are there written contracts or employee-type benefits? Will the relationship continue? Is the work performed by the worker a key aspect of the business? Some facts that indicate the nature of the relationship are written contracts describing the relationship the parties intended to create, demands for full-time work, whether the worker is provided with employee-type benefits, the permanency of the relationship and how integral the services are to the principal activity.

All three categories should be considered to classify a worker as an employee or as an independent contractor. No bright-line test or "set" number of factors must be satisfied to determine if the worker is an employee or an independent contractor, and no single factor stands alone in making the determination. [PE]

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.

2012 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 19th, 2012, 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 16th, 2012, 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 15th, 2012, 10 - 11:30am

♦ **Safety Programs -** Understanding Cal/OSHA's Written Safety Program. Reviewing the IIPP or SB 198 requirements for your business.
Thursday, April 19th, 2012, 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 17th, 2012, 10 - 11:30am

♦ **Wage & Hour and Exempt Status -** Overtime, wage considerations and exemptions.
Thursday, June 21st, 2012, 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 19th, 2012, 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 20th, 2012, 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 18th, 2012, 10 - 11:30am

♦ **Discipline & Termination -** The steps to take before termination. Managing a progressive correction, punishment and termination program.
Thursday, November 15th, 2012, 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*.
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NLRB Avoids a Battle on Boeing

Over the past two years the Democrat-dominated NLRB has been under white hot scrutiny for a variety of reasons including the views of its members, its handling of social media issues, its controversial rulemaking initiatives, and its recent reversal of past decisions. In addition, NLRB critics have zeroed in on the enforcement efforts of the NLRB's Acting General Counsel, Lafe Solomon and, in particular, his efforts to prosecute Boeing for its allegedly unlawful decision to build a plant in South Carolina.

Mr. Solomon and the Board may have received a brief reprieve from the criticism directed against them by virtue of recently concluded contract negotiations between Boeing and the Machinists union. As a result of negotiations which resulted in job security protections for Machinist-represented Boeing employees in Washington, the Union agreed to withdraw its charge against Boeing. As a result, and not surprisingly, Mr. Solomon agreed to honor the Union's request, thus effectively closing the NLRB's case against Boeing. [PE]

NLRB Approves Rule For Quicker Elections

In a party-line vote, the National Labor Relations Board ("NLRB") approved a scaled-back measure to streamline the union election process, which will likely allow employees to unionize more quickly. The approved resolution, which still must receive a final vote before becoming a rule, was a fairly-tempered proposal compared to the sweeping changes put forward in the Federal Register this summer.

The text of the rule has yet to be finalized, but one of the more noteworthy changes is the elimination of pre-election appeals to the NLRB which would streamline the voting process. Also, the proposal limits the issues that can be argued before a pre-election hearing officer. Originally, the proposed rule required employers to provide the voter list within two days of filing the petition. That proposal was dropped, however, from the approved measure. The current seven-working-day rule is still in effect.

The NLRB's sole Republican, Brian Hayes, had toyed with the idea of resigning from the NLRB, which would have prevented the panel from having a quorum and therefore stopped it from voting on the measure.

In the end though, Hayes said he did not want to be "obstructionist." Hayes said the "net effect" of the new rule will be a condensed time period between petition to the NLRB and an election, a time period "in which many are deprived of the opportunity for a meaningful discussion on collective bargaining." [PE]

Dr. Pepper to Pay LA Discrimination Claims

A federal jury has ordered Dr. Pepper Snapple Group Inc. to pay $18.3 million to six people who sued a Los Angeles bottling subsidiary alleging age discrimination.

The suit was filed in March 2009 on behalf of six workers over the age of 50 who said they were reassigned to do physically harder work in an effort to injure them or get them to quit.

Plaintiffs' attorney Michael Baltaxe said Saturday that the reassignments left some of the six medically unable to work after suffering knee problems, hernias, and other injuries.

Each of the employees had worked for the soft drink and juice company for at least 20 years. Eight jurors unanimously found in favor of the plaintiffs. [PE]