Pacific Employers
MANAGEMENT ADVISOR
47 Years of Excellence!
July 2011

# WHAT'S NEW!

## GARMENT MANUFACTURERS - CAR WASHES MUST REGISTER

If you do garment manufacturing work in California, you need to register with the California Labor Commissioner or you could face heavy fines.

California law requires California garment manufacturers and contractors to register with the Labor Commissioner. The registration requirement applies not only to persons who directly employ garment workers, but also to those persons who contract with others to have that work done.

In a recent case, a firm that does a limited amount of embroidery on apparel was cited by the California Division of Labor Standards Enforcement ("DLSE") when it made an unannounced site visit and fined $75,000 for failing to register as a garment manufacturer. A "Garment Manufacturer" is one who engages in any "sewing, cutting, making, processing, repairing, finishing, assembling" any apparel or accessories that are designed or intended to be worn by any individual for sale or resale.

California companies that employ only apparel designers and not garment workers, are not covered by the law.

Car Washes are also under the same type of regulation and have been the subject of close scrutiny in the Central Valley of California. Assembly Bill 1688, the "Car Wash Worker Law," requires carwashes to register with the state and to document their payroll, and workers may file wage and/or retaliation claims with the Labor Commissioner when their employers violate employment laws. The law was extended in 2007 when SB 1468 was passed. The Carwash Worker Law has been a cash cow for the state, generating over $10.6 million in fines to carwash owners who have violated laws in the two years following the extension, nearly $6 million of which came from fines for non-registration. [PE]

## SSA To Renew Issuance Of No-Match Letters

Employers be warned! The Social Security Administration (SSA) recently announced that it will resume sending employers decentralized correspondence (DECOR), commonly known as No-Match letters, beginning in April 2011, for tax year 2010. They will not send letters held for tax years 2007-2009. You may recall that the Department of Homeland Security was sued over a proposed regulation regarding No- Match letters and SSA suspended sending out such letters in response to the litigation.

No-Match letters are sent to employers, employees and self-employed workers to inform them of discrepancies between their name and SSA records so that earnings are correctly listed.

Have a No-Match letter "Plan of Action" in place to respond to any No-Match letters. Your response would be an item the Department of Homeland Security, Immigration and Customs Enforcement would ask to see in a Form I-9 audit or worksite enforcement operation. [PE]

## *Prevailing Wage & Harassment Flyer Enclosed!*

# President's Report
## ~Dave Miller~

### PUBLIC WORKS WORKSHOP

**What Every Contractor should know** about staying in compliance with California Prevailing Wage Laws and the Davis Bacon Act.

In this workshop, we will offer step-by-step guidelines for contractors and their personnel to understand and comply with the Davis Bacon Act and the California State Prevailing Wage as well as the intricacies of special holidays, travel and subsistence pay, new apprenticeship regulations fringe benefits and staying in compliance. *See the enclosed flyer for more info.*

At the ***Tulare & Kings Counties Builders Exchange*** 1223 S. Lovers Lane, Visalia CA 93292 on July 15, 2011- from 8:00 a.m. to Noon -- Cost: $30.00 (Lunch Included) [PE]

### OWNER & FOREMAN GO TO JAIL IN WORKER'S DEATH

**The owner and the foreman of a roofing company have each been sentenced to one year jail** terms because they did not put fall protection measures in place that would have prevented a 39 year old employee from falling to his death from a four-story apartment building in San Francisco.

The Cal/OSHA investigation into the details of the employee's death also determined that none of the roofing crew were wearing fall protection gear and there were no barriers or scaffolds in place to provide fall protection. Investigators also found that workers on the job had received no safety training and the company had no safety policies.

San Francisco District Attorney George Gascon explained his decision to prosecute the two individuals as follows: "The prosecution and conviction of these two defendants whose blatant disregard for their worker's safety resulted in his untimely and preventable death sends a loud and clear message to anyone doing business in our city."

California Labor Code Section 6425 authorizes significant penalties for employers' managers, as well as supervisors, who have responsibility for the direction, management, control or custody of others where there is a willful violation of any occupational safety or health standard or order which results in the death of any employee. For a first violation the statute authorizes a penalty of a one year jail sentence in county jail as well as a fine of up to $100,000. These same penalties also apply in non-fatal accidents where there is permanent or prolonged impairment of any employee that was caused by a willful violation of occupational safety or health standards. [PE]

"Concentrated power has always been the enemy of liberty." - Ronald Reagan

# Recent Developments

## Job Seekers Quit After 5 Months

**Jobless Americans who dropped out of the workforce** typically searched for work for five months before ultimately giving up last year.

The amount of time the unemployed spent hunting for jobs rose sharply last year. Those out of work tended to search for about 20 weeks before quitting in 2010, compared to 8.5 weeks in 2007, according to a recent Labor Department report. The report studied how long unemployed workers took to either find a new job or quit looking.

Labor-force participation, the share of Americans who are working or looking for jobs, has fallen to its lowest percentage since the mid-1980s. That's partly because people have grown discouraged about their ability to find jobs and have given up looking. With those workers on the sidelines, the unemployment rate has been lower than it otherwise would be.

The official unemployment rate hit 9.1% in May. Including all of those who had part-time jobs but wanted to work full-time as well as those who want to work but had given up searching, the rate was 15.8%.

"... THE GOVERNMENT COULD END UP SUPPORTING THEM FOR THE REST OF THEIR LIVES."

While sidelined workers can keep the jobless rate lower, they weigh on the economy in other ways. The nation loses their output — from the goods or services they would provide in their jobs as well as the spending that would come from their paychecks. And, if they move onto programs such as Social Security disability, the government could end up supporting them for the rest of their lives.

Those lucky enough to finally land a job last year found they had to spend more time searching. Job seekers took a median of more than 10 weeks to find new positions last year. That's up from five weeks in 2007 before the recession began.

And, in what's likely to create a more persistent problem for the U.S. labor market, the odds of finding a job steadily decreased the longer someone was out of work. Some 30% of Americans who had been out of work for less than five weeks found new jobs last year.

Those odds deteriorated for the long-term unemployed. Of those who had been unemployed for more than six months, slightly more than 10% found new jobs. Nearly 19% dropped out of the workforce.

The problem endures this year: As of May, 6.2 million had been out of work for more than six months and more than 4 million haven't worked in more than a year. [PE]

## UPS Wins on Exemptions

**UPS won a wage cases involving alleged misclassification of employees** in a new and favorable published case. In *Taylor v. United Parcel Service, Inc.*, a California Court of Appeal rejected a UPS supervisor's claims that he was improperly classified as an exempt employee and should have instead been paid overtime and ensured meal and rest breaks.

"... EMPLOYEE QUALIFIED FOR BOTH ... EXEMPTIONS ..."

The court held, as a matter of law, that the employee qualified for both the administrative and executive exemptions from overtime laws. The court further held that the employee did not have sufficient evidence to support his claims to even warrant a trial on the issues.

The *Taylor* case contains a lot of good language on issues pertinent to the administrative and executive exemptions, including issues surrounding authority to hire and fire (as pertains to the executive exemption) and the administrative/production worker dichotomy (as pertains to the administrative exemption). Notably, the court rejected a strict application of the administrative/production worker dichotomy as a bar to a finding of administratively exempt status.

Although the *Taylor* case is a positive decision for California employers on exempt/non-exempt issues, employers are still cautioned to carefully review their exempt classifications because the wage and hour lawsuits are both plentiful and expensive. [PE]

## High Court Clears Way For Arbitration Clauses

**In its recent decision in AT&T Mobility LLC v. Concepcion, the United States Supreme Court** upheld the enforceability of arbitration clauses that disallowed classwide arbitration, striking down a California rule barring such provisions. This ruling at once reaffirms the enforceability of contractual arbitration provisions in general and opens the door for employers to shield themselves (at least for the time being) from class actions asserting, for example, wage and hour claims.

The plaintiffs in this case, the Concepcions, had entered into a service contract with AT&T which included an arbitration clause requiring customers to bring breach of contract claims only in their "individual capacity" and not as members of a class. When the Concepcions attempted to join a class action against AT&T, complaining of alleged false advertising, the company moved to compel arbitration per the terms of the contract.

"... STATE RULE STOOD "AS AN OBSTACLE ..."

The federal trial and appellate courts, however, refused to require the Concepcions to arbitrate their claims as individual complainants, applying a California rule deeming "unconscionable" certain kinds of arbitration provisions that waive an individual's right to join a class action. The Supreme Court reversed, holding that the state rule stood "as an obstacle" to the Federal Arbitration Act and impeded the "liberal federal policy favoring arbitration."

Although the issue addressed by the Court arose in connection with a consumer contract, the Court's decision is more broadly applicable, including to employment agreements containing provisions requiring the arbitration of work-related disputes. [PE]

## One Year of Leave Insufficient?

**Employers need to be aware that the EEOC has begun aggressively litigating against employers with maximum leave policies,** asserting that they violate the ADA.

The EEOC has filed more than a half-dozen nationwide lawsuits in this arena and in two cases, there were significant settlements. In September 2009, the EEOC reached a $6.2 million settlement against **Sears, Roebuck & Co.**

While EEOC regulations make it clear that there is a duty to "modify workplace policies" as a reasonable accommodation, there is inconsistant guidance as to exactly what this means or requires. In the Sears case, the EEOC claimed the retailer's policy of terminating employees on leave due to workers' compensation injuries in excess of the company's one-year maximum leave period violated the ADA. Earlier this year, a $3.2 million consent decree was reached in EEOC v. Supervalu, Inc., No. 09-5637 (N.D. Ill.), a case where the EEOC again challenged the employer's one-year maximum leave policy. [PE]

***Prevailing Wage & Harassment Flyer Enclosed!***

## Human Resources Question with Candice Weaver

## The Month's Best Question

### Exempt Commissioned Sales

**Q:** ***"Can an employee be considered a commissioned employee if they receive a flat amount per sale?"***

**A: The California Second Appellate District recently issued an opinion that favorably expanded the definition of "commission wages" for employers** who exempt their sales force from overtime requirements under the commissioned salesperson exemption. In *Areso v. CarMax, Inc.*, the Court held that **CarMax's** commission plan that pays its salespeople a uniform payment for each used car sold (in addition to other components not at issue in the opinion) qualifies as "commission wages" for purposes of the commissioned salesperson exemption.

The case was brought by an employee, Areso, alleging misclassification and failure to pay overtime wages because her employer's commission plan did not qualify as "commission wages" under Labor Code Section 204.1, which requires commissions to be "based proportionately on the amount or value" of the sale of the employer's property or services.

The trial court granted CarMax's motion for summary adjudication, finding CarMax's compensation arrangement is a "performance-based incentive system and thus fairly understood to be a commission structure" based on the statutory language that commissions may be based on the "amount" rather than "value" of vehicles sold, construing "amount" to mean the number of vehicles sold.

To qualify for the commissioned salesperson exemption, the employee: (1) must be involved principally in selling a product or service (not making a product or rendering a service); and (2) the amount of their compensation must be based proportionately on the amount or value of the product or service. However, the *Areso* Court distinguished this case from other cases where the employer's commission plan was held not to constitute commission wages because those cases interpreted whether the commissions were based on the "value" of the product or service.

For example, commissions that were based in part on winning sales contests did not qualify as commission wages. The Court noted no other court has construed the word "amount" in the statute, and that CarMax's payment of a flat dollar figure for each vehicle sold satisfies the statutory requirement because the commissions are paid based on the "amount" or number of vehicles sold. Further, paying a uniform fee for each vehicle is "proportionate" because it is a one-to-one proportion where the "compensation will rise and fall in direct proportion to the number of vehicles sold."

This case is a good development for employers who classify their sales employees as exempt commissioned salespeople and compensate them with commission plans that may have various components, including a "flat fee" component. As this is a new interpretation and development, it remains to be seen whether other courts will follow the *Areso* Court's lead. [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*

♦ **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 21st, 2011, 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 15th, 2011, 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 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.

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*Prevailing Wage & Harassment Flyer Enclosed!*

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## Union's 16-Foot Rat Balloon "Permissible"

**In September 2010, the National Labor Relations Board** (Board) decided in *Carpenters & Joiners of America* that union members lawfully held a 16-foot long banner near two medical centers and a restaurant to protest construction contractors that the union claimed paid substandard wages and benefits.

On May 26, 2011 the Board relied on its "bannering" decision to determine that a union's use of a stationary 16-foot tall rat balloon in front of a hospital did not violate the National Labor Relations Act. The Board's decision further defines (and expands) the scope of permissible conduct under the Act's secondary boycott provision.

In *Sheet Metal Workers Local 15,* the union, in an effort to persuade a hospital to stop using a non-union contractor, staged a mock funeral in front of the hospital, displayed placard-like leaflets at vehicle entrances and placed a rat balloon (which was approximately 16 feet tall) about 100 feet from the hospital's front door. After the mock funeral was determined to be lawful, the Board, relying on its earlier "bannering" decision, found no confrontational element with the union's other activities because the displays were stationary and located a sufficient distance from the hospital's vehicle and building entrances. As a result, the Board concluded that the rat balloon and leaflet display did not constitute picketing and was not unlawfully coercive. Rather, the Board characterized the union's use of the rat balloon as "symbolic speech" subject to constitutional protections under the First Amendment. [PE]

## Supreme Court Allows AZ E-Verify Law

**The U.S. Supreme Court upheld (5-3 vote) an Arizona law** mandating all employers in that state to use E-Verify. The law also revokes business licenses for employers who knowingly hire unauthorized workers.

E-Verify is an Internet-based employment verification system administered by DHS. Under federal law, use of the system is voluntary except for certain federal contractors. The Supreme Court , however, held that "[t]he fact that the Federal Government may require the use of E-Verify in only limited circumstances says nothing about what the States may do." According to the Supreme Court, only DHS is precluded from mandating the use of E-Verify.

Further, the Supreme Court noted that the "consequences of not using E-Verify under the Arizona law are the same as the consequences of not using the system under federal law. In both instances, the only result is that the employer forfeits the otherwise available rebuttable presumption that it complied with the law."

The Supreme Court specifically noted that the Arizona law had since been amended to include other consequences of failing to use E-Verify, but because the suit was brought prior to that amendment, those consequences were not before the Court. Therefore, the Court's reasoning leaves open the possibility that if other consequences were imposed by state law, it might think differently. [PE]

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

## 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, *July 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