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May 2015

WHAT'S NEWS!

CA Supreme Court Upholds Arbitrator

The California Supreme Court issued a recent decision on whether courts may vacate (toss out) an arbitration award in which the arbitrator applied the "honest belief" defense to uphold the employer's termination of an employee for engaging in outside employment in violation of company policy while on an approved leave of absence under the California Family Rights Act (CFRA).

In 2004, Power Toyota Cerritos hired Avery Richey as an at-will employee. Richey was required to sign an arbitration agreement as a condition of hire, and the dealership's employee manual provided that outside work while on approved leave was prohibited.

In February 2008, Richey opened a local seafood restaurant while working full-time at Power Toyota. On March 10, he injured his back while moving furniture at his home. On March 21, he requested leave based on his physician's certification that he was medically unable to work. Power Toyota granted his medical leave and extended it on several occasions.

On April 11, a supervisor sent Richey a letter stating that employees weren't allowed to pursue outside employment while on leave and that he should call if he had any questions. Richey ignored the letter because he believed the policy didn't apply to him since he hadn't accepted employment with another company but rather was working as the owner of his own business.

Power Toyota was informed that Richey was working at his restaurant while on leave. In response, the company sent an employee to observe the restaurant on April 18. The employee saw Richey sweeping, bending over, and hanging a sign using a hammer. Richey admitted that he handled orders and answered the phone at the restaurant while on leave, but he claimed those tasks were consistent with the limited light duties his doctor authorized.

Power Toyota fired Richey on May 1, 2008, for engaging in outside employment while on a leave of absence in violation of company policy.

Richey sued Power Toyota, alleging claims under California's Fair Employment and Housing Act (FEHA) and the CFRA. The employer asked the trial court to compel him to arbitrate his claims in accordance with the arbitration agreement he had signed at the beginning of his employment. The trial court granted its request.

The arbitrator conducted an 11-day arbitration hearing. He rejected each of Richey's claims. With regard to the CFRA claims, the arbitrator framed the legal issue as "whether the law provides a protective shell over [Richey] that bars his termination until he is cleared to return to work by his physician, or does the law allow an employer to let an employee go, while on approved leave, for other non-discriminatory reasons?"

The arbitrator found that although the employee manual was "poorly written," "there was a general understanding at Power Toyota that outside employment was against company policy and others had been terminated for violating this rule." He concluded that "case law . . . allows Power Toyota to terminate Richey if it has an 'honest' belief that he is abusing his medical leave and/or is not telling the company the truth about his outside employment." [PE]

Heat Illness Poster Enclosed!

President's Report
~Dave Miller~

Quickie Elections!

With private-sector union membership rates at historic lows, organized labor has received a boost from the National Labor Relations Board ("NLRB" or the "Board") that is expected to help union organizers win more union representation elections. Employers and employees have considerable cause for concern.

The NLRB rule, also known as the "quickie election" rule or the "ambush election" rule, eliminates pre-election evidentiary hearings and requests for review and defers decision on virtually all issues relating to appropriateness of units and voter eligibility now decided at the pre-election stage. The new rule also expands the personal information relating to employees which employers are required to disclose to unions in voter eligibility lists known as "Excelsior lists." Specifically, the Board will require that both telephone numbers, including mobile phone numbers, and email addresses, if available, be included along with employees' names and addresses. In addition, the NLRB will require that the employer disclose the employee's work location, shift, and classification.

The effect of the rule could be significant. In union organizing drives, organizers often conduct their activities underground and employers have no hint of organizing activity until the union files its petition at the NLRB. Under the NLRB's current process, the median campaign time of 38 days is a relatively short period which generally helps unions.

The NLRB's election statistics show that, under current rules, unions won well over 60% of certification elections in the 2008-2013 period. By shortening the time between petition and election, the NLRB proposal will certainly increase organized labor's win rate.

Employers should consider proactive measures to prepare for a higher risk of organizing, including proactive human resources practices, the cultivation of a positive workplace culture, regular supervisor training in employee relations, and communication to employees regarding how a union in the workplace can affect them. Effective communications with employees to cement the relationship between employees and the employer and build employee trust also will be essential. [PE]

I believe there are more instances of the abridgment of the rights of the people by the gradual and silent encroachments of those in power than by violent and sudden usurpations.- James Madison

Recent Developments

CFRA Regulations Provides Some Clarity

The California Fair Employment and Housing Council (FEHC) has issued amended regulations clarifying the California Family Rights Act (CFRA). The amendments will go into effect on July 1, 2015, and are intended to clarify previously confusing rules and adopt regulations that more closely parallel the federal Family and Medical Leave Act (FMLA).

"LEAVE . . . COUNTS TOWARD THE 12-MONTH . . "

Like the FMLA, the CFRA only applies to employers who employ 50 or more employees within a 75-mile radius. Eligible employees are those who have been employed for at least 12 months and at least 1,250 hours during the preceding 12-month period. The regulations now provide further instructions on how to determine if there are 50 or more employees within a 75-mile radius. Specifically, for employees with no fixed worksite (e.g., employees who work from home), their worksite is the site: (i) to which they are assigned as their home base, (ii) from which their work is assigned, or (iii) to which they report.

Further, the regulations also clarify that an employee who was not eligible for CFRA leave at the start of a leave, because the employee had not been employed for at least 12 months, **may become eligible for protected CFRA leave while on leave, because leave to which an employee is otherwise entitled counts toward the 12-month service requirement.** In such instances, the employer should designate only the portion of the leave in which the employee has met the 12-month service requirement as CFRA leave.

The new regulations also provide guidance on when a business is considered a joint employer. It provides that the determination of joint employer status is to be viewed by looking at all of the circumstances based on the economic realities of the situation. Where a joint employment relationship does exist, the employee should be counted by both employers when determining CFRA eligibility for the employer's employees.

While always implied, the CFRA regulations now expressly state that an employee who fraudulently uses CFRA leave is not protected by the job restoration or health benefits provisions. Employers should keep in mind, however, that the burden lies with the employer to prove that the CFRA leave was used or obtained fraudulently. [PE]

Oakland Minimum Wage Increases by 36%

Oakland is the latest in a growing number of California cities seeing a jump in its minimum wage, with that base wage rising from the statewide minimum of $9 an hour to $12.25 — a 36 percent increase.

San Francisco's minimum wage was also increased at the ballot box last November, with Proposition J raising the wage to $11.05 an hour as of last Jan. 1 and to $12.25 on May 1. The minimum pay rate in the city is slated to hit $15 in 2018.

San Jose voters kicked off the trend toward increased minimum wages in the Bay Area by passing Measure D in 2012. That proposal, written and promoted by students at San Jose State, increased the city's minimum wage to $10 (it's currently $10.30).

The city of Berkeley raised its minimum wage to $10 last October and is set to increase it to $12.53 by the end of this year. And the Emeryville City Council is looking into hiking its minimum wage to nearly $14 by year's end.

In Oakland, the minimum wage is now set to rise each Jan. 1 by an amount corresponding to the federal Consumer Price Index (CPI).

In San Diego a minimum wage increase will be phased in over a three-year period. In January 2015, the minimum wage will increase to $9.75; in January 2016 it will increase to $10.50; and in January 2017 it will increase to $11.50. Thereafter, the minimum wage will increase on an annual basis as determined by a CPI. [PE]

Judge Rejects Overreaching Allegation

Employers (and thus courts) continue to be confronted with private litigation and DOL rulemaking seeking to expand the scope of wage-and-hour liabilities, such as expanding the definition of employee, seeking to narrow the scope of a longstanding exemption or expanding the definition of what constitutes compensable work.

". . .THEY HAVE NO CLAIM TO PAYMENT FOR THAT TIME."

Rejecting a claim based on the latter theory, Judge Andrew J. Guilford of the Central District of California required pleading of a direct connection between alleged activity and an employee's job before proceeding to the discovery phase. *Nikmanesh, et al. v. Wal-Mart Stores Inc. et al.*

In Nikmanesh, Plaintiff, a long-term pharmacist for Wal-Mart, claimed time spent taking the APHA Immunication Certification Training Course was compensable work under the wage-and-hour laws. Rejecting this claim (though with leave to re-plead), Judge Guilford noted that Plaintiff had failed to tie the taking of the course to any requirement of or direction from his employer. Further, the Court observed:

> *". . . it would be absurd to say that an employer must pay for any and all activities 'directly related' to its employees' jobs without considering the employer's conduct. Many employees undoubtedly spend hours of personal time educating themselves on things 'directly related' to their jobs so they might be better, more marketable employees. A scientist might read journals for personal growth. A computer programmer might learn a new programming language. A teacher might attend a seminar. Without more, they have no claim to payment for that time."*

The United States Department of Labor has promulgated its own interpretation regarding the compensability of training time, through regulations and the applicable Fact Sheet. 29 C.F.R. § 785.29; USDOL Fact Sheet #22. Employers regularly must analyze all activities required of or permitted to be performed by their employees and assess whether such activities are compensable. [PE]

Human Resources Question with Candice Weaver

The Month's Best Question

What Can't I Ask?

Q: "I told my supervisor that I didn't want him telling others how much money he makes. He said I couldn't ask him to do that. What am I not allowed to tell employees?"

A: It is important to note it would be bad management to ask an employee to keep their pay details confidential because doing so runs afoul of California law.

Five areas of employee compensation or off-work conduct that cannot be regulated by an employer under California law:

- Employers cannot prohibit employees from discussing or disclosing their wages, or for refusing to agree not to disclose their wages. Labor Code Sections 232(a) and (b).
- Employers cannot require that an employee refrain from disclosing information about the employer's working conditions, or require an employee to sign an agreement that restricts the employee from discussing their working conditions. Labor Code Section 232.5.
- Employers may not refuse to hire, or demote, suspend, or discharge an employee for engaging in lawful conduct occurring during nonworking hours away from the employer's premises. Labor Code Section 96(k).
- Employers cannot adopt any rule preventing an employee from engaging in political activity of the employee's choice. Labor Code Sections 1101 and 1102.
- Employers cannot prevent employees from disclosing information to a government or law enforcement agency when the employee believes the information involves a violation of a state or federal statute or regulation, which would include laws enacted for the protection of corporate shareholders, investors, employees, and the general public. Labor Code Section 1102.5. [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

Pacific Employers hosts 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.

2015 Topic Schedule

♦ **Family Leave -** Federal & California Family Medical Leave, California's Pregnancy Leave, Disability Leave, Sick Leave, Workers' Compensation, etc.; Making sense of them.
Thursday, May 21st, 2015, 10 - 11:30am

♦ **Wage & Hour and Exempt Status -** Overtime, wage considerations and exemptions.
Thursday, June 18th, 2015, 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 16th, 2015, 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 17th, 2015, 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 15th, 2015, 10 - 11:30am

♦ **Discipline & Termination -** The steps to take before termination. Managing a progressive correction, punishment and termination program.
Thursday, November 19th, 2015, 10 - 11:30am

There is No Seminar in December

Sexual Harassment & Abusive Conduct Training

Visalia Chamber of Commerce & Pacific Employers, will host a Supervisors' Sexual Harassment & Abusive Conduct Prevention Training Seminar & Workshop with a continental breakfast on July 22nd, registration at 7:30am Seminar 8:00 to 10:00am, at the Lamp Liter, Visalia.

RSVP Visalia Chamber - 734-5876
PE & Chamber Members $35 - Non-members $50
Certificate – Forms – Guides – Full Breakfast
Future 2015 Training date: 10-21-15

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Lumbermens Is Shut Down in PEO/Staffing Tax Scandal

$100 Million in unpaid payroll taxes for PEO / Staffing Co. Corporate Resource Services (Nasdaq: CRRS), a New York-based staffing company with considerable business in California, is in financial straights after its professional employer organization (PEO) TS Employment failed to remit state and federal payroll taxes. The company owes the IRS $95.2 million in unpaid payroll taxes and another half-million to the California Employment Development Department. The PEO and staffing company share common ownership.

In California Compline has preliminarily identified nearly 300 clients. It apparently operates as Tri-State Employer Services, Tri-State Staffing, and TriOddessy PEO. There are additional names we are still confirming. Cancellation notices are going out en masse giving employers 30 days.

The cancelation notices, overall, total roughly 800 customers. The totals represented approximately $400 million in annual gross revenues for the company. A larger batch of 1,300 termination notices quickly followed that covered another $270 million in gross revenue. In California, Compline reports some 500 clients are affected.

Robert Cassera who owns approximately 80% of CRS' common stock also owns TS Employment. TS processed the entire payroll for the staffing firm and PEO and their clients. The company covers some 30,000 workers nationwide with payrolls totaling approximately $60 million a month, but indications are that the bulk this business is in California. [PE]

Wisconsin Becomes 25th "Right to Work" State

Wisconsin became the 25th state to pass right to work legislation applicable to private sector employers. Most private employers are covered by the National Labor Relations Act ("NLRA"), which originally permitted collective bargaining agreements to provide for the termination of any employee who failed to join or at least pay representational fees to the union. While these "union security clauses" remain lawful in now half of the states, the 1947 Taft-Hartley amendments to the NLRA gave states the ability to enact laws giving workers the "right to work" without becoming a union member or paying union dues, which is what the Wisconsin bill does. The bill would also make it a crime punishable by up to nine months in jail to require private sector workers who are not union members to pay dues after the bill becomes effective.

Advocates of right to work legislation argue that it is unfair to force workers who do not want to join a union to pay dues, which are frequently used for political purposes they personally oppose. Advocates further argue that right to work laws promote economic growth and figures from the Department of Labor and the Bureau of Economic Analysis appear to support this contention.

In 2012, Indiana and Michigan passed right to work laws, and why unions hate them is evident from the Michigan experience. In 2013, the first full year under the state's right to work law, Michigan saw one of the sharpest dips in year-to-year union membership, declining from 16.3% to 14.5%. [PE]

Prima Facie Retaliation Claim

Courts increasingly scrutinize the "protected activity" prong of a plaintiff's prima facie retaliation claim under Title VII of the Civil Rights Act of 1964 and other, similar anti-discrimination laws.

The Fifth Circuit ruled that a plaintiff had not engaged in protected activity by reporting one "Heil Hitler" comment because "no reasonable person would believe that the single 'Heil Hitler' incident" constituted a hostile work environment, actionable under Title VII. *Satterwhite v. City of Houston, No. 14-20240,*

Therefore, the plaintiff could not establish a prima facie case of retaliation. The court noted that it has "rejected numerous Title VII claims based on isolated incidents of non-extreme conduct as insufficient as a matter of law." Importantly as well, the court recognized that the fact that such a comment violated the employer's policy does not mean that it rises to the level of an unlawful employment practice as defined by law. [PE]

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