Pacific Employers
MANAGEMENT ADVISOR
48 Years of Excellence!
October 2012

What's News!

Millions For A Few Minutes Each Day

Affiliated Computers Services, Inc. ("ACS"), a company owned by Xerox, has agreed to settle a wage and hour dispute with call center employees for $4.5 million. The call center workers claim that ACS failed to record and pay them for their time spent logging onto their computers each day. The employees allege that ACS' failure to record this time resulted in them being denied their regular pay as well as overtime pay. The case is entitled *Bell v. Affiliated Computer Services* and was filed in the District of Oregon.

At first glance, the Bell settlement is mind-boggling considering that the time spent turning on a computer likely only takes a few minutes each day and does not seem like "work." However, there has been a significant amount of litigation on this issue over the past year, and in many instances, these cases have resulted in large settlements.

Employers defending these off the clock cases have principally relied on the de minimis exception set forth in the federal regulations. This exception provides that " insubstantial or insignificant periods of time outside scheduled working hours may be disregarded in recording time." However, the de minimis exception is only applicable where the work involved is for such a short duration that it cannot be precisely recorded for payroll purposes.

The courts have refused to issue a standard amount of time that would automatically qualify as de minimis. Rather, the United States Supreme Court and several circuit courts of appeal have determined that periods of time ranging from 7 to 10 minutes is considered de minimis. The federal regulations, however, provide a more conservative view of de minimis work - - less than 5 minutes each day.

Employers can expect more off the clock cases dealing with "preparatory" work duties, such as turning on a computer at the beginning of each shift, in the near future. Employers should review their time recording policies in an effort to avoid potential liability. More importantly, employers should carefully scrutinize what, if any, pre-shift or post-shift activities their employees may be engaging in, as those activities may later be claimed to be "work." [PE]

2013 Vacation Calendar Enclosed!

President's Report
~Dave Miller~

Leaflet Violates NLRA

In Tesco PLC d/b/a Fresh & Easy Neighborhood Market, Inc., a recent 2-1 decision, the National Labor Relations Board ruled that a grocery store violated the National Labor Relations Act when it required its employees to distribute $5 store coupons to customers with an apology for union protest activity near its front entrance and information countering the union's claims. In reaching its conclusion, the Board applied precedent from the union election context to the organizing scenario at issue in the case.

The issues in the case arose when the union presented the employer, an operator of a chain of grocery stores, with a petition allegedly signed by a majority of employees, stating that the employees wanted to be recognized by the union. The employer declined to voluntarily recognize the union.

The union did not file a petition for a secret ballot election. Rather, the union began distributing leaflets near the employer's front entrance stating, in part, "[d]espite repeated requests from workers, Fresh & Easy has never recognized a union of their workers – instead choosing to fight their employees as they try to form a union." Customers were upset by the union protest activity and complained to store management.

In response, the employer prepared a customer flyer that contained a $5 store coupon and read, in part:

The protesters are not our employees and have been hired by the United Food & Commercial Workers (UFCW) union.

The UFCW wants fresh&easy [sic] to unionize.

We've told the UFCW this is a decision only our employees can make. They have not made this choice.

We offer good pay as well as comprehensive, affordable benefits to all our employees.

We take pride in being a great place to work.

Employees were instructed to personally hand the coupons to customers or stick them in the customers' bags, as they did with other store flyers. Two employees complained about having to distribute the flyer, one of whom claimed the flyer was "lying to customers." The union filed an unfair labor practice charge, alleging that the employer violated Section 8(a)(1) of the Act by requiring that employees distribute the coupon flyer to customers.

The Board disagreed with an Administrative Law Judge's determination that the flyer "did not express a position on unionization." The Board ruled that the company's actions violated Section 8(a)(1) because "employees reasonably would have perceived the flyer to be a component of the [employer's] campaign against union representation." The Board also noted that two employees protested distributing the coupon flyer, which confirmed the Board's conclusion that it was campaign material. In addition, the Board found that the flyer contained misrepresentations, most notably the statement that employees had not chosen to unionize.

The Board concluded that the petition allegedly signed by a majority of employees was evidence ipso facto that employees had authorized the union to represent them. [PE]

"Few things are more irritating than when someone who is wrong is also very effective in making his point." -- Mark Twain

Recent Developments

Death Of The Lockout?

Previously an employer could "lock out" its employees to force a union to accept its economic demands, provided it has bargained in good faith, the contract has expired, and the requisite notices have been given under Section 8(d) of the NLRA. This is just the other side of the coin on which heads is "strike." Right? Wrong.

In *Dresser-Rand Company, 358 NLRB No. 97 (Aug. 6, 2012)*, a majority of the NLRB decided that the employer violated the NLRA by locking out its employees despite the presence of all of the factors listed above – good faith bargaining, etc. The majority reasoned that the employer's commission of unfair labor practices after the lockout, despite the employer's apparent goal of achieving its bargaining demands, demonstrated that the lockout probably was motivated by union animus when the employer locked out the strikers – and some crossovers, which the majority found the employer specifically included in the lockout for fear of a finding of union animus.

> . . . ANY LOCKOUT WILL BE SUBJECTED TO A NEW VERSION OF "STRICT SCRUTINY."

There should be no mistake about the importance of the decision: Chairman Pearce and Member Griffin, over the dissent of what has become Member Hayes' one-man Greek chorus, have served notice that any lockout will be subjected to a new version of "strict scrutiny": any employer aggressive enough to lock out its employees probably did not like the union much anyway and there must have been animus involved.

With current day unions' reluctance to strike, this may mean that protracted bargaining stalemates will be the new order, and while economic warfare is after all warfare, it is unlikely that the drafters of the Wagner Act thought that they were enabling WWI-style trench warfare in the Nation's workplaces, and that collective bargaining agreements would be treaties of exhaustion. [PE]

Whistleblower Protection

OSHA issued its Final Rule implementing the whistleblower provisions of the Surface Transportation Assistance Act (STAA).

As a result of the 9/11 Commission Act Amendments, the whistleblower protections of the STAA were expanded to reach beyond safety to include security issues.

The STAA protections now make it unlawful to retaliate because an employee:

- has filed (or is believed to have filed or is about to file) a complaint regarding a violation of commercial motor vehicle[CMV] safety or security laws or regulations; or
- refuses to operate a vehicle in violation of regulations, standards, or orders related to CMV security; or.
- refuses to operate a vehicle because he or she has a reasonable apprehension of serious injury to himself or herself or the public due to the vehicle's hazardous security condition; or
- accurately reports hours of duty; or
- cooperates with federal or local investigators regarding CMV safety or security;
- or provides information to federal or local regulatory or law enforcement agency about any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with CMV transportation.

> " . .STAA AUTHORIZE AWARDS OF PUNITIVE DAMAGES UP TO $250,000 . . "

The OSHA Final Rule spells out how OSHA will handle and investigate whistleblower complaints. The OSHA Final Rule provides a useful guide for employers in the trucking industry and specifies that OSHA will provide the complainant or his/her representative with a copy of the employer's response to the whistleblower complaint, redacting confidential information as necessary. The complainant will also receive a copy of materials that OSHA provides to the employer.

Employers can expect that more of these whistleblower actions will be filed, particularly because the amendments to the STAA authorize awards of punitive damages up to $250,000. [PE]

Speculation In Trade Secret Claim

The California Court of Appeal recently affirmed an award of over $400,000 in attorneys' fees in favor of a group of ex-employees in a trade secret misappropriation lawsuit filed by their former employer, finding that the lawsuit was filed in bad faith. This decision highlights the importance of considering carefully whether to bring a misappropriation claim where there is little or no evidence of actual misappropriation. *SASCO v. Rosendin Electric, Inc.*

California's prohibition on noncompete agreements often frustrates employers who are unable to use such agreements to stop employees from joining the ranks of a competitor. As an alternative, an employer who suspects an ex-employee is disclosing confidential company secrets to a competitor may be tempted to file a trade secret misappropriation claim. However, the recent ruling in *Rosendin* demonstrates the importance of having evidence to support the employer's suspicion before filing such a lawsuit.

In this case, SASCO sued three of its former managers and their new employer, Rosendin Electric, Inc. (collectively "Rosendin"), all of whom are licensed electrical contractors, claiming the ex-employees were the reason SASCO lost out on a bid for a multi-million dollar project. SASCO's lawsuit alleged that its ex-employees stole trade secret information (including SASCO's unique estimating and job cost systems) and gave that information to Rosendin.

After several discovery battles, Rosendin filed a motion for summary judgment, but SASCO voluntarily dismissed the action instead of responding to the motion. Roesendin then sought an award of attorneys' fees against SASCO, arguing that SASCO brought the claim in bad faith. Rosendin supported its motion with the deposition testimony of SASCO's chief executive officer who admitted that he did not have any actual evidence that the ex-employees took any documents. Rosendin also presented the ex-employees' declarations stating that they did not steal any of SASCO's trade secrets and a declaration from a manager on the project stating that Rosendin got the bid because it was the lowest eligible bidder.

The decision in Rosendin illustrates the difference between run-of-the-mill employment lawsuits where a plaintiff faces virtually no consequences for prosecuting a meritless claim and trade secret misappropriation lawsuits in which the plaintiff must have some evidence supporting its allegations or risk being subject to a significant attorneys' fee award. Quite simply, in a misappropriation of trade secret lawsuit, speculation of trade secret theft is not enough. [PE]

Human Resources Question with Candice Weaver

The Month's Best Question

WARN Notice Wave-Off

Q: ***"On January 1, 2013, if Washington DC does not get the budget mess sorted out and we hit the "Fiscal Cliff," sequestration will be implemented. This will affect the defense industry in a major way. As a supplier of hardware to the Defense Department, we will be without work. Since we are covered by the WARN Act, do we give our 60 Day notice to all employees that might be affected this November 1st?"***

A: The Law clearly says "Yes," however, notices of massive layoffs across the US several days before the Presidential Election could be a game changer.

The coinciding action of tax increases and spending cuts that will activate on Jan. 1, 2013, unless Congress and the White House take some action to either delay or change them, sequestration of funds will be implemented. Which will hit the defense industry right between the eyes.

The Worker Adjustment and Retraining Notification Act (WARN Act), is a 1988 law that requires federal contractors to tell employees at least 60 days in advance of potential large-scale layoffs. If the funds are subject to sequestration on January 1, 2013, it would create a November 1st filing deadline and put the filing right in front of the November 6th, 2012 Presidential Election.

Well, what do you know, last week the Department of Labor (DOL) issued "guidance" on its website that this law doesn't need to be followed for the purposes of the looming January 1 budget sequester.

… "Questions have recently been raised as to whether the WARN Act requires Federal contractors—including, in particular, contractors of the Department of Defense (DOD)—whose contracts may be terminated or reduced in the event of sequestration on January 2, 2013, to provide WARN Act notices 60 days before that date to their workers employed under government contracts funded from sequestrable accounts. The answer to this question is "no." …

In addition, the preamble states that "it is not appropriate for an employer to provide blanket notice to workers." Id. at 16058. Thus, in cases where it may be difficult to identify the worker who will actually lose his/her job because of the elimination of a particular position, the regulations provide that notice must be given to the worker who holds that position at the time notice is provided. 20 CFR 639.6(b)." …

Usually the DOL are all over companies, urging them to file so that they can be prepared to help anyone displaced. Unless of course, it might mean a few votes lost by the Administration. [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
Guest Seminar
DATE CHANGED TO Oct 11th

♦ **Protect Yourself From ADA Predators - Guest Speaker Seminar - Thursday, October 11th, 2012, 10 - 11:30am --** Employers need to be aware of the access rules for employees and the public as they build, remodel, update and hire. Our speaker has been through it all.

♦ **Discipline & Termination - Thursday, November 15th, 2012, 10 - 11:30am --** The steps to take before termination. Managing a progressive correction, punishment and termination program.

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.

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 October 24th, 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 $45
Certificate – Forms – Guides – Full Breakfast
Future Training on 1-23-13, 4-23-13, 7-24-13, 10-23-13

2013 Vacation Calendar Enclosed!

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California Court Rejects NLRB Opinion

The California Court of Appeal has ruled that when an arbitration agreement is neither "unconscionable nor in violation of public policy," the employee must arbitrate the individual wage and hour claims against the employer.

This affirmed an order compelling arbitration in a class action for California Labor Code violations. *Nelsen v. Legacy Partners Residential, Inc.,* Significantly, the Court rejected the employee's reliance on the National Labor Relations Board's *D.R. Horton, Inc.,* 357 NLRB No. 184 (2012).

The Board ruled in *D.R. Horton* that class action waivers in employment arbitration agreements violated the National Labor Relations Act. The Court noted there was no indication in the case before it that the plaintiff was covered by the NLRA. In any event, the Court was not inclined to follow the NLRB decision, declaring it not binding and that it went beyond the scope of the NLRB's expertise.

This decision is a positive development for employers using employee arbitration agreements. Moreover, the Court provided a well-reasoned critique of *D.R. Horton.* Nevertheless, arbitration agreements, including those with class action waivers, remain subject to challenge in California and in other forums, including before the NLRB. At present, the NLRB appears committed to enforcing *D.R. Horton* and striking down class action waivers in arbitration agreements under its jurisdiction. Employers should consult with counsel when reviewing the enforceability of arbitration agreements. [PE]

Deducting For Meal Breaks Can Be Costly

Automatic deductions, where the employer's timekeeping system assumes and deducts for a 30-minute meal break, have proved to be a fruitful target for plaintiffs. During the past 10 years, over 40,000 lawsuits have been filed under the federal Fair Labor Standards Act (FLSA), and the trend shows no signs of easing. Filings increased by 10% in 2010. There has been a similar flood of lawsuits under state and local laws.

This wage-and-hour litigation has become almost a "cottage industry" for plaintiffs' lawyers seeking high-dollar, high-profile cases. These cases are becoming increasingly common not only because they usually involve numerous employees, but because the law allows prevailing employees to recover liquidated (or double) damages, plus attorneys' fees.

These cases are also unique and troublesome because, unlike most employment litigation, the employer's intentions are irrelevant. In other words, even a logical, well-intentioned policy does not prevent liability when a technical violation occurs.

Within the broad classification of so-called "off the clock" FLSA cases, missed meal-and-break period allegations are increasingly common. These allegations can be even more costly because the allegedly unpaid work time often pushes the employee's compensable time to more than 40 hours in a week, thus into a higher overtime pay rate. Fortunately, it is also relatively easy to reduce or even eliminate exposure in these cases. [PE]

Continue to Use the Current Form I-9

Employers must continue to use the current Form I-9 for Employment Eligibility Verification -- Until further notice, employers should continue using the Form I-9 currently available on the forms section of http://www.uscis.gov. This form should continue to be used even though the OMB control number expiration date is August 31, 2012. USCIS will provide updated information about the new version of the Form I-9 as it becomes available.

Employers must complete Form I-9 for all newly-hired employees to verify their identity and authorization to work in the United States. [PE]