Pacific Employers
Management Advisor
46 Years of Excellence!
September 2010

What's New!

Judge Bars Q's About Immigration Status

A federal district court in Portland has prevented an employer's attorney from questioning Hispanic farm workers about their immigration status, employment history and, in one woman's case, her sexual history**.**

In June 2009, the U.S. Equal Employment Opportunity Commission sued WillametteTree Wholesale, Inc. of Molalla, alleging that workers were sexually harassed and threatened in retaliation for reporting the harassment. The EEOC also charged that one farm worker was raped by her supervisor. The EEOC sought a protective order in response to requests by Willamette Tree's lawyers for certain information.

In an order issued last week, U.S. Magistrate Judge Paul Papak of U.S. District Court for the District of Oregon, specifically prohibited the company's attorneys from asking questions concerning the alleged rape victim's immigration status, whether she has ever used another name, her prior sexual history and her reasons for not contacting police after the sexual assaults. It also bars discovery of the immigration status for all workers participating in the case.

The court stated that "the public interest would be far better served" if discrimination claims were presented by immigrants regardless of their status. *EEOC v. Willamette Tree Wholesale, Inc.* [PE]

Supreme Court Rejects "Stray Remark"

In *Reid v. Google,* the California Supreme Court considered two questions related to a ruling on summary judgment in an age discrimination case: (1) whether a party's evidentiary objections at summary judgment are preserved on appeal if the trial court does not expressly rule on the objections; and (2) whether California should adopt the "stray remarks" doctrine, which, in employment discrimination cases, deems potentially discriminatory statements by **non-decision makers** or decision makers outside of a decisional process, "stray" and thus irrelevant and insufficient to defeat summary judgment.

The Court answered the first question in the affirmative, finding that once a party has timely filed or raised objections prior to or at the hearing on summary judgment, those objections are preserved for appeal. The Court answered the second question in the negative, refusing to adopt the stray remarks doctrine for California state courts.

Reid was hired by Google at age 52 and worked at Google for less than two years before he was terminated. In his first and only performance review given by the decision-maker who hired him, Reid received praise. The review, however, also contained the following comment: "Adapting to the Google culture is the primary task for the first year here. . . . Right or wrong, Google is simply different: Younger contributors, inexperienced first line managers, and the super fast pace are just a few examples of the environment." [PE]

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President's Report
~Dave Miller~

ADA Again - Counter Too High

Chipotle Mexican Grill Inc violated a U.S. disability law by making the walls between customers and food-preparation counters in its restaurants too high, a federal appeals court ruled on Monday.

A panel of the U.S. Ninth Circuit Court of Appeals said the 45-inch walls violated the Americans with Disabilities Act because Chipotle did not provide disabled customers with an experience "equivalent" to what non-disabled customers enjoy in being able to watch employees assemble burritos and tacos.

It also said the district court properly rejected Chipotle's argument that because the area where customers pay is just 34 inches high, the set-up complied with a disability act requirement that "a portion of the main counter" or an "auxiliary counter" have a maximum height of 36 inches.

The wall prevents customers in wheelchairs "from having the experience of non-disabled customers of fully participating in the selection and preparation of their order," Judge Daniel Friedman wrote for the panel. "The presence of the wall in the two restaurants significantly reduced Antoninetti's ability to enjoy the 'Chipotle experience.'"

It is unclear how many of Denver-based Chipotle's roughly 1,000 restaurants have high dividing walls.

Chipotle spokesman Chris Arnold said in an email that the company has retrofitted its California restaurants with a new counter design, and incorporated that design in new restaurants and all "major updates" of existing restaurants.

"It's a huge success for people with disabilities," said Amy Vandeveld, the lawyer for Antoninetti, in an interview. "Chipotle could have designed the counters in the first instance without the barriers but didn't because it was aesthetically inconsistent. I can't think of anything it can do to provide access to people in wheelchairs, short of lowering the wall."

The appeals court returned the case to the district court to consider injunctive relief. It also vacated Antoninetti's $136,538 award for attorney's fees, one-fourth of what he requested, and ordered the district court to set a new amount based on his now greater success on the merits. The case is *Antoninetti v. Chipotle Mexican Grill Inc.* [PE]

Will someone please explain to me why employers are compelled by law to demand proof of citizenship, while law enforcement officers (police) are forbidden by law to request it.
Mel VanderBrug, Bloomfield Twp., Mich.

Recent Developments

Ninth Circuit Consolidates IC Tests

The Ninth Circuit has held that an insurance agent cannot sue for sex discrimination under Title VII because she is an independent contractor, not an employee. In doing so, the Ninth Circuit clarified the appropriate test to determine employee status under federal law. *Murray v. Principal Financial Group, Inc.*

Patricia Murray is a "career agent" for Principal Financial Group and sued Principal for sex discrimination under Title VII of the federal Civil Rights Act of 1964, alleging that Principal favored her male counterparts. Only employees (and not independent contractors) are entitled to relief under Title VII. The district court determined that Murray is an independent contractor, not an employee of Principal, and granted summary judgment in Principal's favor. Murray appealed.

Circuit Judge Schroeder wrote the opinion for the court and stated "The plaintiff in this case, and other Principal career agents sell Principal products that include a wide range of financial products and services, including annuities, disability income, 401(k) plans, and insurance. The only issue before us is whether Murray is an "employee" within the meaning of that statute, or whether she should be regarded as an independent contractor. Murray is entitled to the protections of Title VII only if she is an employee."

> "The factors relevant to this inquiry, . . ."

The Court found, "Thus, when determining whether an individual is an independent contractor or an employee for purposes of Title VII, a court should evaluate "the hiring party's right to control the manner and means by which the product is accomplished." The factors relevant to this inquiry, as identified by the Supreme Court, are:

[1] the skill required;

[2] the source of the instrumentalities and tools;

[3] the location of the work;

[4] the duration of the relationship between the parties;

[5] whether the hiring party has the right to assign additional projects to the hired party;

[6] the extent of the hired party's discretion over when and how long to work;

[7] the method of payment;

[8] the hired party's role in hiring and paying assistants;

[9] whether the work is part of the regular business of the hiring party;

[10] whether the hiring party is in business;

[11] the provision of employee benefits; and

[12] the tax treatment of the hired party."

The Court recognized several factors strongly favor classifying Murray as an independent contractor because she is free to operate her business as she sees fit without day-to-day intrusions.

Murray also decides when and where to work, and in fact maintains her own office, where she pays rent. She schedules her own time off, and is not entitled to vacation or sick days. Also like other independent contractors, Murray is paid on commission only, reports herself as self-employed to the IRS, and sells products other than those offered by Principal in limited circumstances. [PE]

IC's Qualify for HIRE Act Exemption!

The IRS has updated the HIRE Act frequently asked questions section (FAQs) on its webpage to address additional issues relating to the HIRE Act's payroll tax exemption. It also has added new FAQs relating to the new hire retention credit (a business credit of up to $1,000 for retaining certain employees hired in 2010). The FAQs address a number of topics, the more significant of which are discussed below.

Self-Employed Individuals

One of the requirements for an individual to be a "qualified employee" for purposes of the HIRE Act is that he or she must not have been employed for more than 40 hours during the 60-day period ending on the date he or she is hired. The IRS guidance clarifies that a self-employed individual is not "employed" for purposes of this requirement. Accordingly, an employer will be eligible for the payroll tax exemption under the HIRE Act, if it hires a self-employed individual, assuming the requirements listed above are met.

> ". . qualify for the payroll tax exemption by hiring the independent contractor."

Before hiring such an individual, however, the employer should review whether it correctly classified the individual as an independent contractor. The IRS might take the position that the individual should have been classified as an employee, and not an independent contractor, when he or she first began providing services.

To be a qualified employee, an individual must be hired after Feb. 3, 2010, and before Jan. 1, 2011. If the independent contractor rendered services to the employer before Feb. 4, 2010, and the IRS classifies the independent contractor as an employee, the individual will not be a qualified employee because he or she would have begun employment with the employer before Feb. 4, 2010. [PE]

Fitness-For-Duty Exam Okay for "Volatile" Behavior

The Americans with Disabilities Act allows an employer to require an employee to undergo a Fitness For Duty Examination (FFDE) when health problems have had a substantial or injurious impact on an employee's job performance. Such examination must be job-related and consistent with business necessity.

The 9th U.S. Circuit Court of Appeals has held – as an issue of first impression for that Court - that an employer also can require an employee to undergo such exam as a "preemptive" measure against potential dangerous or harmful conduct, especially when the employee is engaged in dangerous work.

> ". . ADA does not require an employer to wait . . ."

The Ninth Circuit found that the ADA's directive that a medical exam be "job-related and consistent with business necessity" was quite high, but that the ADA does not require an employer to wait until a perceived threat becomes real or to allow questionable behavior to result in injuries before sending an employee for an FFDE, particularly when the employee is engaged in dangerous work.

In interpreting "business necessity," the Court said that it should not be confused with mere expediency, and that using medical exams to harass employees or to "fish" for non-work-related medical issues could, in fact, violate the ADA. *Brownfield v. City of Yakima* [PE]

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Human Resources Question with Candice Weaver

The Month's Best Question

Prop 8 Struck Down

Q: ***"On August 4, 2010, Judge Vaughn R. Walker, Chief Judge of the U.S. District Court in San Francisco, held that California's Proposition 8 is unconstitutional. Perry et. al. v. Schwarzenegger et. al. What are the practical implications of this ruling to California businesses owners?"***

A: The decision has been appealed and may be stayed. In that situation there will be no direct impact for employers because same sex couples were, and still are, able to register as "domestic partners," a legal status that provides virtually all the same rights, responsibilities and protections available to opposite-sex, married couples.

If there is no stay on this ruling, and same-sex weddings are allowed to proceed pending appeal, the impact on employers will concern benefits and entitlements granted to spouses in situations where the affected employees are not also registered domestic partners.

Employers will have to provide equal treatment to employees who have opposite-sex and same-sex married spouses as well as registered domestic partners.

The next question will be whether an employer must offer benefits to employees with same-sex spouses. The Employee Retirement Income Security Act of 1974 (ERISA) generally preempts state laws affecting employee benefits, including, for example, self-insured or self-funded employee health and welfare plans. Accordingly, employers who have chosen to limit spousal benefits to traditional opposite-sex spouses under ERISA-covered plans have been allowed to do so, even where state law recognizes same-sex marriages.

There are limits to ERISA's preemption of state law, however. ERISA does not preempt state laws governing insurance. Moreover, employee benefit plans maintained by a governmental or church employer normally fall outside the scope of ERISA entirely. For those benefits that are not governed by ERISA, state and local laws will not be preempted, and employers will be subject to state and local coverage requirements.

Employers will be required to recognize same-sex marriages with respect to state leave laws. For example, the California Family Rights Act's family and medical leave provisions allow an employee to take up to 12 weeks of unpaid leave for an employee to care for a spouse, or the child of a spouse, who has a serious health condition. This would extend the benefits of this law to same-sex "spouses." In addition, employees with same-sex spouses would also be entitled to Paid Family Leave (PFL) benefits of up to six weeks of wage replacement payments for a permitted leave.

Employment discrimination on the basis of sexual orientation and marital status has long been prohibited under California's Fair Employment and Housing Act. The marriage decision does not change or expand those protections, however it allows employees in newly recognized same-sex marriages to assert a claim for "marital status" discrimination. [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

The Tulare-Kings Builders Exchange, along with 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

♦ **Forms & Posters -** as well as Contracts, Signs, Handouts, Fliers - Just what paperwork does an Employer need?

Thursday, September 16th, 2010, 10 - 11:30am

♦ **Workplace Security will be the topic for our Guest Speaker Seminar - Our guest experts will look at the protection of employees, clients and the workplace as well as equipment and money.**

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

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2008 Chamber Visalia of Commerce Small Business of the Year

Articles in this Newsletter have been extracted from a variety of technical sources and are presented solely as matters of general interest to employers. They are not intended to serve as legal opinions, and should not be deemed a substitute for the advice of proper counsel in appropriate situations.

Outrageous Public Sector Salaries

In a move designed to address public scrutiny on what many believe are excessive salaries paid to certain local government officials, California Controller John Chiang has announced that he will require cities and counties to report to him the salaries of elected officials and public employees for publication on his website.

This move stems from a pay scandal in Bell, California. The City reportedly spent $1.6 million annually on just three city employees, and nearly $100,000 for each part-time City Councilmember. The Controller also has ordered an audit of Bell's finances.

Starting in November, the information will be posted on the Controller's website. The Controller asserts, "A single website with accessible information will make sure that excessive pay is no longer able to escape public scrutiny and accountability." [PE]

7-Eleven Pays $10K for Disclosing Medical Data

7-Eleven of Hawaii will pay $10,000 and furnish other relief to settle an appeal and underlying federal disability discrimination lawsuit, the U.S. Equal Employment Opportunity Commission (EEOC) announced. EEOC had charged that 7-Eleven failed to keep a former employee's medical information confidential by disclosing the information to a prospective employer, which is a violation of the Americans with Disabilities Act (ADA), and which caused the prospective employer to rescind a job offer. [PE]

Outside Sales Deemed Nonexempt Employees

In a recent decision, the federal Second Circuit Court of Appeals decided that outside pharmaceutical sales representatives were nonexempt employees, and therefore were entitled to overtime and subject to other nonexempt requirements. The court found that:

(a) these sales representatives did not qualify under the outside salesperson exemption because they did not actually "sell" pharmaceutical products to anyone, including the physicians they called on, and

(b) they did not qualify under the administrative exemption to the overtime laws because they did not exercise the requisite level of discretion and independent judgment. [PE]

Unenforceable Non-Compete Agreements

A California Court of Appeal has recently held that a subsequent employer can be liable for wrongful termination in violation of public policy for firing a new employee when her prior employer attempted to enforce an unenforceable non-compete agreement. [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 Oct 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 Breakfast