Employer Advisory Council of Orange County, Inc.

The Advisor

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A Publication of the Employer Advisory Council of Orange County in partnership with the Employment Development Department, State of California

2010 CEAC Legislative Report

by
Bruce Matlock, Esq. • EAC-OC Hotline

This is the latest Legislative Update for 2010. For additional information regarding legislation you can go to www. leginfo.ca.gov. Bills that have passed their house of origin and moved to the other house will go to the Governor after the 3rd reading. Please do not rely on this report as legal advice, because it isn't. If you need more detailed information, you should contact your local attorney, or give me a call. Also, please let me know if I missed any legislation.

Brinker and Brinkley:

We are still waiting for the California Supreme Court to rule on these cases. In both, lower courts ruled that employers need only provide meal periods to employees. We should have a decision any day now.

Pending Legislation

SB 810: Resurrected from last year, would create a single payer health plan for California. Passed Senate in Assembly.

AB1881: Doubles the penalties for not paying minimum wage. Passed Assembly in Senate for 3rd reading.

AB 2187: Makes willful failure to pay wages due a misdemeanor, punishable by 6 months in jail. Applies to individuals acting on behalf of an employer. Passed Assembly, in Senate Appropriations.

AB 2340: Mandates 3-day unpaid bereavement leave. Passed Assembly, in Senate Appropriations.

SB 1370: Requires commission agreements to be in writing. Passed Senate in Assembly for 3rd reading.

SB 1304: Would require private employers to give up to 30 days paid leave for employees who donate organs and 5 days of paid leave for bone marrow donations. Passed Senate in Assembly for 3rd reading.

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A Special EAC Event?

The Board of the EAC recognizes that its programs are a critical part of the services offered to members. The Board is currently formulating its slate of programs to be offered next year, and is considering offering one extended program, featuring two to three break out rooms and multiple speakers on a variety of topics. This type of program would (1) allow individual attendees to select the break out topics that most meet their needs, or (2) allow your company to gain a wider breadth of knowledge by sending multiple participants to cover the wider range of topics available for discussion. If you have interest in such a format or suggestions for topics, your input is welcomed and in fact needed. Please email Barbara Bivens at eac@bivenssurfside.net. We will also make an announcement and solicit comments at upcoming programs.

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President's Message . . .

by Stewart Lerner

It is hard to believe that we have already reached the mid-point of the year. Six of our ten programs have been presented and have consistently received high ratings from our members in attendance. Once again, our sincere thanks to Robert Orozco, our hard working Program Chair.

In addition, our new venue in South County seems to be working well for those members residing in the southern portion of the county. From all reports, the new caterer is doing a great job.

But that is this year and planning is already underway for calendar year 2011. In June, we held our annual planning conference and have developed a preliminary schedule for next year with ten new and exciting programs on the drawing board.

Like every other organization, we have been affected by the recession and will be making some changes to deal with the reduced revenues of the past two years. However, we pledge to continue providing you with quality programs in venues with good food and ambiance.

On behalf of our Board, I wish to thank you once again for your ongoing support to our organization. We look forward to completing a great year in 2010 and to yet another exciting year in 2011.

Legislative Report . . . *from Page 1*

SB 222: Introduced last year, but could still be resurrected. Would have increased UIB taxes on employers. It is likely that some attempt will be made to increase employer UIB taxes this year.

AB 2468: Allows employers who meet certain criteria for accommodating lactating mothers to advertise as a “Breast Feeding Mother Friendly” employer. In Appropriations, hearing 7/15.

AB 2364: Provides that fleeing from Domestic Violence is “good cause” to quit and still receive UIB. Passed Assembly. In Senate Appropriations.

AB482: Prohibits employers from using credit reports when evaluating applicants for employment except in limited situations. It is currently in the Senate Labor Committee. Hearing cancelled. No action pending.

SB 807: Changes State law to conform to the lower court decisions on Brinker and Brinkley. No action pending.

AB 2424: Relaxes the rules for final pay. Would allow final payment to be made within 24 hours of termination excluding weekends and holidays. Would allow mailing of final pay to employees last known home address. Hearing canceled at authors request. No action pending.

AB 2727: Restricts an employer’s ability to deny employment due to criminal convictions. Such a denial could only be made where 1) there is a direct relationship between the crime and employment or 2) granting employment would create an unreasonable risk of injury to property or safety. Assembly Appropriations. No action pending.

SB 1182: Reduces penalties for certain Labor Code violations for employees with less than 15 employees. No action pending.

SBx8 70: Modifies meal period rules. Would only require employers to provide meal periods before 6 hours of work. Changes one hour pay for missed meal periods to a penalty not wages. That would reduce the statue of limitations to one year from three years. Proposed as urgency legislation that would take effect immediately after passage.

No action pending.

SB 1335: Would clarify that individual employees may choose to work a 4-10 schedule without overtime. **Failed committee.**

Change in “The Advisor”

As our members are well aware, employment laws and regulations change consistently and sometimes dramatically. The Board of the EAC regularly reviews its membership benefits to ensure they meet its members’ needs. To better ensure that developments reach members in a timely manner, the EAC will provide more “ALERTS” as issues come up. As a result, *The Advisor* will be published three times per year, rather than four times.

Ninth Circuit Applies California Law Despite Choice-Of-Law Clause in Independent Contractor Agreement

by
Sheppard Mulllin

In *Narayan v. EGL, Inc.*, the employer, EGL, Inc. (“EGL”), is a global transportation company that provides “air and ocean freight forwarding, customs brokerage, [and] local pickup and delivery service.” EGL is incorporated and headquartered in Texas, but it operates through a network of over 400 facilities in 100 countries. The case was brought by three drivers who were engaged to provide freight pick-up and delivery services for EGL in California. All three drivers had entered into “Leased Equipment and Independent Contractor Services Agreements” (the “Agreements”) with EGL that were employer-drafted pre-printed form contracts. The Agreements contained acknowledgments by the drivers that they were independent contractors and choice-of-law clauses providing that the Agreements shall be interpreted in accordance with Texas law.

The drivers sued claiming that EGL had violated provisions of the California Labor Code by failing to pay overtime wages, business expenses and meal compensation and unlawfully taking deductions from their wages. EGL argued that the drivers were independent contractors, not employees. EGL also argued that the issue of whether the drivers are independent contractors or employees must be decided under Texas law pursuant to the choice-of-law clause in the Agreements.

The Ninth Circuit held that California law applied, despite the contract terms. Because the case involves claims for benefits under the California Labor Code, the Court found that the claims do not arise out of the Agreements or involve the interpre-

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California's Supreme Court Limits the Reach of State Kin Care Law

by

Daniel J. Cravens, Esq. and Sage Fahimi, Esq., Littler Mendelson

California's kin care law, Labor Code section 233, requires that any employer who provides sick leave for employees shall permit an employee to use a portion of his or her sick leave to care for a covered relative. The statute defines "sick leave" as "accrued increments of compensated leave." In its recent decision in *McCarther v. Pacific Telesis Group*, Opinion No. S164692 (Feb. 18, 2010), the California Supreme Court unanimously overturned a court of appeal decision and held that California's kin care statute applies only to traditional sick leave policies where an employee accrues a measurable, banked amount of sick leave over the course of a year. Employers providing unlimited sick leave need not provide employees with paid kin care leave.

Factual and Procedural Background

In McCarther, the companies provided their employees an indefinite number of paid sick days pursuant to a collective bargaining agreement. Employees were entitled to receive paid sick leave every time they missed work for their own illness up to a maximum of five days in any seven-day period. The paid sick leave policy provided an indefinite amount of leave in that it did not utilize a bank of accrued sick leave nor limit the total number of days that an employee could miss work with pay.

The employers also implemented an attendance management policy that counted employees' sick days as an "occurrence" that could lead to discipline unless the absence fell within certain designated types of protected leave, including Family and Medical Leave Act (FMLA) leave and workers' compensation leave.

The plaintiffs in the case were absent to care for ill family members. The employees were not paid for these days, nor were they disciplined for the absences. The companies argued that the kin care provisions in Labor Code section 233 only applied to traditional sick leave policies where an employee accrues a fixed number of sick days over the course of a year and not where employees are allowed an indefinite number of sick days. The trial court granted summary judgment in favor of the companies.

The California Court of Appeal reversed the trial court's grant of summary judgment, holding that the companies' sickness absence policy constituted sick leave within the meaning of section 233; and further held that section 234 did not preclude the company from disciplining employees for taking leave pursuant to section 233 to care for ill relatives in the same manner the employers disciplined employees for taking leave for their own illnesses or injuries.

The California Supreme Court's Analysis

Section 233 Applies Only Where Sick Leave Is Accrued in Ascertainable Increments

Section 233 provides that employees are entitled to utilize as kin care "an amount not less than the sick leave that would be accrued during six months." As the amount of kin care leave to which an employee is entitled under the statute is directly related to the amount of sick leave available to the employee, the court reasoned that section 233 could not apply where the amount of sick leave to which an employee was entitled could not be ascertained.

The policy at issue in McCarther allowed employees to take five paid sick days in any seven-day period with the result that an employee could take an indefinite and practically unlimited amount of paid sick leave in any given six-month period. As it was impossible to calculate the precise amount of paid sick leave to which the companies' employees were entitled, the court concluded that section 233 could not apply and held that employers who choose to provide their employees with an indefinite amount of sick leave can lawfully do so and need not provide kin care pursuant to Labor Code section 233. As discussed below it also appears that employers who choose to have such a paid sick leave policy are also not restricted by Labor Code section 234.

Attendance Policies

California Labor Code section 234 prohibits an employer from disciplining an employee for using kin care

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Kin Care Law *. . . from Page 4*

leave under section 233 or otherwise treats the kin care as something that could lead to discipline.

Many California employers have attendance control policies that lawfully impose discipline on employees for excessive use of the sick leave. It was assumed that kin care absences are protected leave that must be excluded from these attendance polices in the same manner as California Family Rights Act (CFRA) and FMLA leaves.

The appellate court appeared to contradict this conventional wisdom, implying that an employer could include kin care absences in its attendance policies as long as it imposes the same penalties or discipline for kin care absences as it does for the regular use of sick leave. However, the California Supreme Court reversed the court of appeals' decision in its entirety without reaching this holding leaving the issue of whether kin care absences could be included in absence control policies unsettled.

Practical Implications

The California Supreme Court clarified that employers are not required to provide sick leave.[1] However, if an employer elects to do so, and does so in the form of an accrual-based system, kin care leave must also be provided. Employers providing traditional accrual-based sick leave should continue to treat kin care as a protected leave that must be excluded from their attendance policies in the same manner as CFRA and FMLA leave.

Employers who choose to provide their employees with uncapped sick leave can safely do so and need not provide kin care pursuant to Labor Code section 233 and appear not to be restricted by Labor Code section 234.

[1] Congress is currently considering passage of the Healthy Families Act, H.R. 2460, which would require certain employers to provide paid sick leave. Such a bill would have far reaching implications, including guaranteeing all employees at least some kin care leave. San Francisco's administrative code requires certain employers to provide paid sick leave to employees working in the city.

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A Request from Small Business California

Although a member of the EAC, you may be unaware that Advisory Councils operate throughout California and in partnership with other organizations.

One such EAC partner, Small Business California, has recently contacted the California Employer's Advisory Council President, Laura Harris, to ask for assistance.

Small Business California is investigating an avenue for helping to finance battery vehicles like the GM's "Volt" which can travel 40 miles on electricity before switching over to a gas-powered generator. To assist in this investigation, Small Business California has asked if our members would be willing to answer the following questions:

1. Does your firm utilize employees using their own vehicles for company business?
2. If so, how many of your employees drive more than 3,000 miles per year for your business based on the expense vouchers your firm provides for them?

For those who would like to respond, please forward your answers to the two questions directly to Laura Harris at lharris@rivcoeda.org

Lerner Lines

by

Stewart Lerner

It's July and the temperatures are finally beginning to act like it is SUMMER! In light of that, we will leave our normal format and cover some important seasonal health and safety issues. Before we do, however, there is one very important U.S. Supreme Court decision that is worthy of discussion.

On June 17th, the Court issued its opinion on whether a public-sector employer violated an employee's privacy rights when it reviewed personal text messages that he sent and received on his employer-owned pager. The Court held that the City of Ontario met two important standards in inspecting the text messages – (1) it was conducted for a legitimate work-related purpose, and (2) it was reasonable in its scope.

In summary, the Court held that even if an employee had a reasonable expectation of privacy, the employer would not be in violation as long as the search was found to be reasonable under the circumstances. The Court did caution, however, that each case is decided on its own facts, and employers should avoid drawing broad generalizations from this decision.

Now to our summer issues! The advent of summer brings with it safety concerns about dealing with heat. Many different industries such as those involved in construction, agriculture, landscaping, manufacturing and warehousing must include in their Injury and Illness Protection Program (IIPP) an element addressing Heat Illness Protection. If you are an employer in an affected industry, please be aware that Heat Illness was the #2 cited violation cited by the Division of Occupational Safety and Health in 2008 and jumped 85% from the previous year.

Another issue that is somewhat seasonal in nature is Dress Code. As temperatures rise, the summer heat may get the better of employee judgment and you may be faced with employees coming to work dressed to go to the beach rather than to their jobs. Your best defense to this type of situation is a well-written dress code policy.

Now is a good time to draft a policy if one is not currently in place or to review a previous one. In so doing, you should ensure that it is in line with your area and industry and reflects your ideas about business or business/casual attire. You should also spell out how your will deal with revealing or inappropriate attire as well as such things as tattoos and body piercings. It is also very important to review your guidelines with your supervisors so that they can enforce them on a consistent basis. Dress Code is truly an area where some good advance preparation can save you problems down the road.

In a health related issue over which you have much less control, a recent survey by CareerBuilder.com found that a very high percentage of employees were gaining weight. Their survey polled roughly 4,800 workers at least 18 years of age who were employed at non-government jobs. The poll found that 44% of the workers reported putting on weight. Twenty-eight percent said they had gained more than 10 pounds and twelve percent said their gain was more than 20 pounds. Women were more susceptible with 50% gaining weight compared with 39% of men.

What caused the gains? The reasons included job stress, eating out, snacking, and simply sitting at their desks for most of the day.

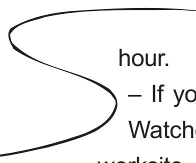
Want to help? Here are some practices you might want to consider:

– If you provide periodic lunches for employees, include some healthier choices than pizza.

– Discourage customers and employees from bringing candies and sweets to the office for special occasions and holidays.

– Use Edible Fruits for gifts instead of sweets.

– Encourage exercise programs during the lunch hour.



– If you are a large enough employer, promote Weight Watchers or Overeaters Anonymous meetings at your worksite.

In a final area related to health and safety, a number of doctors are discussing the dangers of talking or texting while driving and equating this practice with drinking alcohol or being under the influence of drugs while driving. One doctor quoted in the *New England Journal of Medicine* said that statistics show 28 percent of all U.S. accidents are caused by cell phone use while driving, and one study showed that talking and driving created a four-time greater risk than undistracted driving.

I cannot end this issue without giving you an update on another "heat" related issue, this one involving a former Citibank employee described as "Too Hot." You may recall from our June issue that Debrahlee Lorenzana, an attractive banker, claimed she was forced out of her job because her male co-workers found her figure "too distracting." At that time, she was pursuing her grievance in private arbitration pursuant to an agreement that she signed with the employer.

In late June, however, she filed a complaint with New York's Division of Human Rights charging that she was fired because she reported sexual harassment at the hands of male co-workers. In addition to this action, she is also at odds with her current employer, JPMorgan Chase, where she works as a personal banker.

She claims that her new boss threatened disciplinary action against her if she went ahead with morning television interviews. Her attorney said he confirmed with Chase's legal department and verified that she had been warned against further media appearances because her anti-Citi statements "publicly soiled the financial services industry and were a violation of Chase's code of conduct." This is a story that will just not go away!

New Federal Safety and Health Act Legislation Proposed

by
Thomas Benjamin Huggett, Esq.; Llyse Schuman, Esq.; and Jennifer Mora, of Littler Mendelson

Combining the Massey Energy Upper Big Branch mine accident in West Virginia, the Tesoro Refinery explosion in Washington, and the Kleen Energy explosion in Connecticut (but without mentioning the BP Deepwater Horizons tragedy), on June 29, 2010, members of the U.S. Senate and House of Representatives released new draft legislation to amend both the Mine Safety and Health Act and the Occupational Safety and Health Act. Moving quickly, the bill was introduced into the U.S. House of Representatives Committee on Education and Labor as H.R. 5663 on July 1, and a hearing was scheduled and held on Tuesday, July 13. Solicitor of Labor M. Patricia Smith, Assistant Secretary of Labor for Mine Safety and Health Joseph A. Main, and Assistant Secretary of Labor for Occupational Safety and Health Dr. David Michaels all testified in favor of the changes in the Miner Safety and Health Act of 2010 legislation. The General Counsel of the AFL-CIO, the President of the United Mine Workers of America, a Professor of Mine Engineering, and a miner also testified in favor of the changes. Two industry lobbying groups testified against various aspects of the legislation. At the hearing, Chairman Miller stated that he would continue to move the bill quickly and intended to rename it in honor of the Late Senator Robert Byrd.

This combined legislation picks up where the Mine Improvement and New Emergency Response Act of 2006 left off and includes major provisions of the previously proposed Protecting America's Workers Act (PAWA), draft legislation that has been pending in Congress since at least 2007. As a result of the national emphasis surrounding these tragedies and the continuing issues in the Gulf of Mexico, along with the quick action and hearing in the House of Representatives, employers should pay careful attention to this legislation as there may be enough political interest to get it passed in this election year or in a lame duck session of Congress following the November elections. Even if the legislation is not passed, it clearly reflects a continued emphasis on safety and health that employers should consider in their planning.

Occupational Safety and Health Act Revisions

Although the focus and initiation of this legislation is mine safety accidents, the last 30 pages of the legislation incorporate many of the provisions of the previously introduced Protecting America's Workers Act of 2009 (S. 1580 & H.R. 2067), which included proposed amendments to the Occupational Safety and Health Act ("OSH Act"). The OSH Act has not been significantly changed since its enactment in 1971. The following is a summary of the most significant proposed changes to the OSH Act.

Penalty Increases

- Increase maximum civil penalties for "Willful" and "Repeat" violations from $70,000 to $120,000.
  - Add an additional increase of up to $250,000 (but not less than $50,000) for Willful or Repeat violations that cause a fatality.
  - Specifically incorporate consideration of State Plan citation history into determination of Repeat violations.
- Increase maximum civil penalties for "Serious" and "Other-than-Serious" violations from $7,000 to $12,000.
  - Add an additional increase of up to $50,000 (but not less than $20,000, with a small employer exception) for Serious violations that cause a fatality.
- Increases civil penalties for failure to abate violations to $12,000 per day.
  - In addition, based on the obligation to abate pending contest (discussed below), failure to abate penalties can begin to accrue even before the citation becomes a final order.
- Add interest to penalties starting from the date of contest such that, even though the citations have not been adjudicated, interest begins accruing.

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Criminal Enforcement

- Make felony criminal charges available for an employer's "knowing" violation of an Occupational Safety and Health Administration (OSHA) standard, rule or order that results in a worker's death or serious bodily harm.
- Redefine employer to include any "officer or director," thereby making prison sentences of up to 10 years applicable to individuals.
- Increase criminal penalties up to $1,000,000 for a violation that results in a worker's death or serious bodily harm.

Mandatory Abatement

- Require employers, upon receipt of a citation, to abate the alleged violation pursuant to the deadline unilaterally established by OSHA. In so doing, abatement would be required before the alleged violation was proved to be a violation in fact.
- Establish a process for a Motion to Stay abatement wherein the employer would have to meet the preliminary injunction standard of proving "substantial likelihood of success" in defeating the citation.
- Mandate that hearings on Motions to Stay abatement be heard within 15 days of the issuance of a citation, and any appeal thereof be heard within 30 days.

Expansion of Whistleblower Provisions

- Expand whistleblower protections to cover:
  – Report of an injury, illness or unsafe condition to the employer, any agent of the employer, a safety and health committee, or employee safety and health representative; and
  – Refusal to perform work if there is a reasonable apprehension of injury or impairment to the employee or other employees.
- Extend the time for filing whistleblower complaints from 30 days to 180 days after the alleged retaliation, and any repeat thereof.
- Require OSHA to issue an initial determination within 90 days.
- Require OSHA to issue a remedial order if the agency finds merit to the complaint. Remedies may include compensatory and consequential damages, and immediate reinstatement, all before a hearing to establish the actual merits of the allegation, and without stay pending such hearing or appeal therefrom.
- Require the Department of Labor Administrative Law Judge hearing the appeal to issue a decision within 90 days of the appeal, and for any appeal thereof, require the Department of Labor Administrative Review Board to issue a decision within 90 days of the appeal.
- Establish an employee right to bring a lawsuit in federal court if the time deadlines for issuance of a decision are not met. All that the employee is required to prove is that the alleged protected activity was a "contributing factor" to the retaliation, and then the burden is on the employer to prove that the action would have been taken regardless.
- Prohibit requiring arbitration of whistleblower claims.
- Allow employees to choose whether to file a complaint with either a state plan administrator or federal OSHA.

Establish Victims' Rights Provisions

- Create a statutory right for a victim or representative to meet with OSHA during an inspection, receive copies of citations and reports, and be informed of contests.
- Create a statutory right for a victim or representative to meet with OSHA prior to any settlement, and to appear at the hearing of any contested citation and make a statement.
- Establish the position of "Family Liaison" at each OSHA Area Office.

Provisions of PAWA That Were Not Included

Several provisions of the PAWA, which has lingered in Congress for more than two years, are not included in these latest proposed amendments to the OSH Act. The amendments:

- do not expand coverage to public sector employees of state and local governments;
- do not include a requirement for posting whistleblower rights;
- do not specifically preclude policies or programs discouraging injury and illness reporting;
- do not require pay for employee time spent on OSHA inspections;

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Independent Contractor . . . from Page 3

tation of the Agreements. Instead, liability depends on the definition of the term "employee" under the California Labor Code. As a result, the Court held that "California law should apply to define the boundaries of liability under [the California regulatory] scheme."

Applying California law, the Ninth Circuit found that the acknowledgment of independent contractor status by the drivers "is simply not significant under California's test of employment." Instead, under California law, a multi-factor test is applied by the trier of fact to determine whether an employer-employee relationship exists. Upon reviewing the multi-factor test, the Court noted that several indicia of an employment relationship existed, but held that the ultimate determination of whether such a relationship existed is reserved for the trier of fact. As a result, the case was sent back for a trial.

The lesson from this case is that employers cannot rely on choice-of-law provisions contained in their independent contractor agreements in order to avoid the requirements of the California Labor Code. The determination of whether an individual is an independent contractor or an employee is a question which arises under the California Labor Code itself and, therefore, it is outside the scope of a contract between the individual and an employer. Accordingly, California's multi-factor test for employment will apply to determine whether an employer-employee relationship exists for purposes of claims under the California Labor Code. Furthermore, this case also reinforces the point that the existence of an express acknowledgment of an independent contractor relationship is not controlling under California law. In other words, an employer cannot circumvent the multi-factor employment test by adding a declaration of independent contractor status to its agreements.

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Safety and Health Act. . . from Page 8

- do not require accident scene preservation for fatalities and significant injuries;
- do not prohibit unclassified violation settlements; and
- do not include union or employee representative rights to contest citations for inadequate penalties or classification.

Employer Response and Preparation

Although it is unclear what the final amendments to the Occupational and Mine Safety and Health Acts will include (if passed), the legislative proposal indicates that the changes would be substantial. Given the momentum behind passing this sweeping overhaul of mine safety law, employers and mine operators should understand the implications of the legislation and how best to prepare for it.

Although Congressional Republicans have complained about the rush on the legislation, and the lack of bi-partisan input, they are not able to stop its consideration, at least in the House. Without the intervention of business-minded Congressional Democrats who recognize that the legislation creates an unduly adversarial system that will likely result in significant expenditure of both business and agency resources on litigation – litigation that will not directly address safety and health concerns – the legislation may be considered this fall or in a lame duck session of Congress. Employers subject to OSHA's jurisdiction and mine operators should contact their representatives, industry associations, and lobbyists to discuss the most effective means of expressing their opinion on this legislation.

Employers should reduce their OSHA exposure by clearly defining internal procedures for reporting and responding to safety concerns, so as to formalize and minimize the impact of any alleged whistleblower activity. Employers should also continue safety and health programs and training. Where questions regarding compliance exist, employers should carefully consider conducting privileged audits and seeking appropriate legal advice to ensure they are following the law.

Mine operators certainly can prepare for the future by continuing to train supervisors and employees on safe practices in the mine, responding to employee concerns about unsafe conditions, and seeking to avoid MSHA's "pattern of violations" process. Even so, mine operators should recognize that training, communications, human resources, and operations may have to be significantly altered to conform to the proposed legislative changes. Along with these changes, mine operators should also recognize that the proposed regulations would significantly strengthen MSHA's investigative and enforcement tools and the penalties for safety violations. Should this legislation become law, operators should undertake a comprehensive review of their safety and health policies and practices.

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E-Z FORM 2010 Workshops

General Workshops

5 Per Year • 1 Location per Workshop

The General Workshops are open to all members, nonmembers and guests. They are normally held on the third Thursday of each **ODD** month at the Hyatt Regency, 11999 Harbor Blvd, Garden Grove, CA. The only exceptions are July and December, when no workshops are held. Reservations can be made in advance, at a discounted rate, or for each specific workshop individually.

September 16 – Wage & Hour Issues

November 18 – Hot Tips from the HR Hotline

Certificate Workshops

5 Per Year • 2 Locations per Workshop

August 19 & 24 – Web Abuse & Privacy Issues in Workplace

October 21 & 26 – Workers' Compensation Updates

Please note that when there are two dates, this indicates the same workshop in two different locations.

Questions?

Please call Barbara Bivens at the EAC office at 714-846-2510 or email info@eacorangecounty.com

These programs have been approved for 2.75 recertification credit hours through the HR Certification Institute. For more information about certification or recertification, please visit the HR Certification Institute home page at www.hrci.org. The use of this seal is not an endorsement by HRCI of the quality of the program. It means that this program has met HRCI's criteria to be pre-approved for recertification credit.

Registration Form

Location: Please check date and location on above.

Times: 7:15 to 8:00 am: check-in and breakfast • 8:00 to 11:30 am: Workshop with a 15-minute break

Costs: $65 per workshop per person; for non-members $85 per workshop per person

Registrant Name ______________________________

Company ______________________________

Contact Phone ______________ **Contact Email** ______________

Pay by Check: EAC-OC, 16033 Bolsa Chica Rd. #104-615, Huntington Beach, CA 92649

Pay by FAX: 714-844-4779 **Pay by Email:** info@eacorangecounty.com

Credit Card Information: ______________________________

Name on Card ______________ Authorized Signature______________

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Billing Zip Code ______________

AN INVITATION TO JOIN EAC-OC

The Employer's Cost-effective Approach to Business and Human Resource Solutions

- A hotline service for answers to employer-employee questions staffed by a labor/employment attorney. Monthly frequently asked Q & A are posted on the EAC website "Members Only"
- A newsletter, *The Advisor*, plus emailed "ALERTS" with current, pertinent information
- Member discount on workshop fees – $85 per person, discounted for members to $65 per person
- Forum to network with other professionals in the human resources field
- Website with current information, plus a "Members Only" section with more resources
- Annual updates of forms and policies to all renewing members

The Employer Advisory Council of Orange County, Inc. is a non-profit corporation whose membership is comprised of approximately 500 companies in the Orange County area. EAC is a partner with the Employment Development Department.

PURPOSE

- Employer education and training on topics such as:
  - o Employment Trends o Labor Law o Legislation o Workers' Compensation
- To help employers stay in compliance with the law through the Management Hotline
- To act as advisors to the Employment Development Department and help promote services they provide to the employer

MEMBERSHIP APPLICATION

You may also sign up online at www.eacorangecounty.com

Complete this form and fax it to 714.844-4779 OR email to info@eacorangecounty.com OR just call the Association Office 714.846.2510. EAC-OC accepts cash, check as well as Visa, MasterCard and American Express. EAC-OC, 16033 Bolsa Chica Street #104-615, Huntington Beach, CA 92649.

Company____

Contact Name_____________________________________Title__________________________________

Street ____ City _______________ Zip _____________

Phone (_____)_______________Email: ____________________@ _______ Fax (____) _______________
Number of employees ______ Industry ________________________________# of years in business _____
Amt: $95.00 Method of payment __Check enclosed __MasterCard __Visa __America Express
Dues are paid annually in January. Your second year dues will be pro-rated based on the month you join and you will receive an invoice in November so you can pay either this year or next year. Please keep EAC in mind when you are budgeting your educational expenses. It's a good deal!!

Name on Card__________________________________ Card #_________________________________
Expiration date_______________ Last 3 numbers on back of card ________ #4 numbers AX _________
Card Billing Address____
City____ State_________ Zip________________
Signature____
Your Company is the Member. You may add up to three people from your company that you would like EAC to contact with meeting information. Please add their names, titles and emails to this application.

Employees May Be Liable For Violating ADA Based on Vague and Overbroad Medical Questionnaires

by
Sheppard Mulllin

In *Scott v. Napolitano*, a California federal district court recently provided guidance on how employers may draft medical examination questionnaires that comply with the Americans With Disabilities Act ("ADA"). The plaintiff, a security officer, sued his employer for violation of the ADA, disability discrimination, and retaliation after he was suspended and then terminated for refusing to respond to the employer's medical questionnaire. The plaintiff claimed that the questions he refused to answer were impermissible disability-related inquiries that ran afoul of the ADA. The plaintiff and the employer filed motions for summary judgment.

The court noted that under the ADA, an employer may make inquiries into the ability of an employee to perform job-related functions so long as the inquiry is consistent with business necessity. The court determined that the questions on the employer's exam were overbroad in time and scope, and were not narrowly tailored to assessing whether the plaintiff could perform the essential functions as a security officer. The questionnaire sought general information about illnesses, mental conditions, and other impairments, including:

- Have you ever been treated for a mental condition?
- Have you ever had any illness, injury, or other condition (including learning disability, attention deficit disorder, etc.) other than those already noted?
- Have you ever consulted or been treated by clinics, physicians, healers, or other practitioners within the past years for other than minor illness?
- Have you or do you currently experience any of the following: psychiatric/psychological consult, episodes of depression, periods of nervousness?
- List all medication (prescription and non-prescription) you are currently taking with dosage and frequency, and reason below.

The court found that the questions were not limited in time, and would include for example, childhood phobias or long-resolved eating disorders. The questions were also deemed overbroad and ambiguous because they did not define terms such as "disability," "nervousness," or "depression," and did not attempt to distinguish between job-related and non-job related impairments. The court concluded that the employer could not satisfy its burden of establishing that the inquiries were no broader or more intrusive than necessary to accomplish its goal of ensuring that the plaintiff could safely perform his job. Thus, the court granted the plaintiff's motion for summary judgment as to his claim for violation of the ADA.

The plaintiff also claimed that the employer discriminated against him on the basis of a perceived disability by suspending and then terminating his employment after he refused to answer the medical questionnaire. In granting summary judgment for the defendant on this claim, the court noted that the fact an employer questions whether an individual can perform a specific job does not mean that the employer regards the individual as disabled. The plaintiff also asserted a retaliation claim against based on these same facts. The court found there was a triable issue as to whether the employer suspended and terminated the employee for failing to respond to the impermissible medical inquiry, which would be unlawful, or if it terminated him based on his failure to release his medical records to the company physician, which the court indicated would be lawful.

This case serves as a warning to employers that they may be liable for violation of the ADA based on vague and overbroad language in their medical examination inquiries. To comply with the ADA, an employer's medical questionnaire must be narrowly tailored, and limited in time and scope, to evaluate whether the employee can perform the essential job functions.

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Supreme Court Upholds Narrow Review of Arbitration Awards

by
Ron Novotny

On April 26, 2010, the California Supreme Court issued its long-awaited opinion in *Pearson Dental Supplies v. Superior Court*, in which it addressed the extent to which the courts will review arbitration decisions of employment claims brought under the state Fair Employment and Housing Act (FEHA).

Historically, the courts have held that arbitration awards cannot be vacated even when they are based on clear errors of law. The *Pearson* Court generally upheld this principle, except when the error of law deprives the individual of a hearing on the merits of an unwaivable statutory claim, such as a claim of employment discrimination under the Fair Employment and Housing Act.

Pearson involved a janitor named Luis Turcios who was terminated by his employer in January 2006 at the age of 67. He filed a timely administrative charge of age discrimination with the California Department of Fair Employment & Housing (DFEH) several months later, and then filed a lawsuit against his employer in October 2006. Approximately five months after Turcios filed his lawsuit, the employer filed a motion to compel Turcios to arbitrate his claim under an agreement Turcios signed with his employer providing for binding arbitration of any employment disputes. The trial court granted the employer's motion.

The dispute was thereafter submitted to an arbitrator, who dismissed Turcios' claim because it was not submitted to arbitration within one year from the date of Turcios' termination in accordance with the parties' arbitration agreement. Turcios challenged the arbitrator's decision in the superior court. The superior court vacated the arbitrator's decision on the ground that it was legally erroneous because the arbitrator failed to deduct the time the case was pending in court from the computation of the one-year time period for seeking arbitration. This result was clearly required by the California Arbitration Act (California Code of Civil Procedure section 1280, *et seq.*), which expressly "tolled" or "stopped" the limitations period under the arbitration agreement from running during the time the case was pending in court. Accordingly, because Turcios had filed his civil suit within a year of his discharge, the court ruled that his claim should not have been denied by the arbitrator on the ground that it was untimely.

This case was ultimately appealed to the California Supreme Court. The Supreme Court agreed that a legal error had been committed, but grappled with the issue of whether that error afforded grounds to overturn the award under the extremely narrow grounds stated in the state arbitration statute. Those grounds, specified in the California Arbitration Act, include:

(a) procurement of the award by fraud, corruption, or other undue means,
(b) corruption by the arbitrator,
(c) arbitrator misconduct substantially prejudicing the rights of a party, or
(d) action in "excess of their powers" that "cannot be corrected without affecting the merits of the controversy."

The Supreme Court concluded that this last ground for vacating the award applied in *Pearson*, and that the arbitrator exceeded his powers by issuing a legally erroneous award which denied Turcios the right to receive a hearing on his employment discrimination claim before either a court or an arbitrator. In doing so, the Supreme Court found that a court can vacate an arbitrator's decision if the decision is based on a legal error that effectively bars an employee from having a claim for violations of' "unwaivable statutory rights" decided on the merits.

The Supreme Court reaffirmed, however, that the merits of an arbitration award either on questions of fact or law cannot be reviewed except as provided by the California Arbitration Act. Therefore, if an arbitration award simply miscites the law or facts, or reaches an erroneous legal conclusion after a hearing is afforded to the parties by the arbitrator, the *Pearson* case would not support an attack on such an award. This is essentially good news for employers who adopt arbitration agreements for the purpose of obtaining a final decision without the protracted jury trials and appeals involved in civil proceedings. However, it is also a good reminder of how little can be done to challenge an adverse award when one is issued, which is one of the main disadvantages of private arbitration.

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EDD Employment Development Department State of California

2010 Honor a Hero - Hire a Vet Job Fair Recap

by

Abner Ivora and Stephan Traktman, EDD

The EDD's Veterans Program held its annual 2010 "Honor a Hero-Hire a Vet" on May 26, 2010. The Job Fair was again a success for the local veteran population and for employers in Orange County. Of the approximate 600 job seekers, about 360 were veterans with 49 employers and vendors in attendance. Surveys of job seekers and employers reflect that a strong majority were satisfied or very satisfied with the event.

Steve Traktman, Veteran's Representative, expressed that "Once again we had generous contributions from Sam's Club and the Orange County EAC." He elaborated that the Sam's Club cash contribution helped offset some of the EDD's expenses, but the EAC contribution assisted our veterans directly with a quality portfolio and pen for each veteran. These items were greatly appreciated by the veterans and had an immediate impact on their ability to look prepared and professional. In addition, the leftover product is being used on a daily basis with veterans who come in for assistance from our EDD Veterans Program staff. Listed below is a breakdown of the numbers contributing to the fair's success:

JOB FAIR NAME: Orange County HAHHAV May 26, 2010	**TOTAL**
JOB SEEKERS	
Number of Non-Veterans	**252**
Number of Veterans	**361**
TOTAL JOB SEEKERS	613
VENDORS NUMBERS BY CATEGORY:	
Employers :	**34**
Resource Vendors (Include List):	
Community Colleges	**1**
Vocational Schools	**5**
University Campuses	**1**
Apprenticeship Programs	**1**
Medical	**0**
Misc.	**7**
TOTAL VENDORS	49

We received a total of 34 of 49 surveys from employers/schools/misc attendees with the following results:

16 very satisfied (32.6%)
18 satisfied (36.7%)
0 dissatisfied (00.0%)
15 unknown (30.6%)

We received a total of 135 job seeker surveys with the following results:

49 very satisfied (36.3%)
71 satisfied (52.6%)
15 not satisfied (11.1%)

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is provided with the understanding that the publisher is not engaged in rendering legal or other professional service. If legal advice or expert assistance is required, the service of a competent professional person should be sought.

EMPLOYMENT DEVELOPMENT DEPARTMENT (EDD)

Orange County Locations

OFFICE	ADDRESS	PHONE
Anaheim Job Service	2450 E. Lincoln Ave. Anaheim, CA 92806	714-518-2315
Anaheim Workforce Center	50 S. Anaheim Blvd. Anaheim, CA 92805	714-765-4350
Irvine One-Stop Center	125 Technology Drive #200 Irvine, CA 92618	949-341-8000
Westminster One-Stop Center	5405 Garden Grove Blvd. Westminster, CA 92863	714-241-4900
Santa Ana W.O.R.K. Center	1000 E. Santa Ana Blvd., Ste. 220 Santa Ana, CA 92701 (At the train station)	714-565-2610
Santa Ana Disability Insurance	P.O. Box 1466 Santa Ana, CA 92701	800-480-3287
Employment Tax Audit Area Office	2099 So St College Blvd., Ste. 401 Anaheim, CA 92816-6014	714-935-2920
EDD Labor Market Information	South County	949-341-8051
	North County	714-687-4816

The relationship between the California Employment Development Department (EDD) and the Employer Advisory Council (EAC) is defined as a partnership. “The partnership’s commitment to both the employer and the worker is to improve EDD services, increase cooperation and communication among EDD and the private sector, and to increase employer’s knowledge of EDD programs and services.”