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Weekly Employment Brief

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Determining Employee Pay During Rolling Blackouts

In this time of continuous Stage Three power emergencies, it is important that California employers understand their salary obligations when a rolling blackout affects their facility. Exempt workers who report to work on a regularly scheduled workday are entitled to a full day's pay, even if a rolling blackout prevents them from working a full day, and even if the employer sends them home early. Unless an employer has a separate internal policy, California law only requires employers to pay non-exempt workers for the time actually spent at work. If a rolling blackout strikes one hour into a non-exempt worker's shift, and the employer keeps the employee at the facility waiting out the blackout, the employee must be paid for that waiting time. However, if non-exempt workers are sent home they need only be paid for that one-hour of work. The failure of public utilities to supply electricity constitutes one of the rare exceptions to California law's minimum "reporting pay" requirements. In addition, the employer can ask that workers return when the blackout is over, without compensating them for the second commute.

Labor Department Sues Contractor For Failure To Respond To EO Survey

For the first time ever, the Department of Labor has sued a company for not completing an Equal Opportunity (EO) Survey. The company failed to return the survey within the required 30-day period. When the agency notified the company of its failure to complete the survey, the company requested an exemption because its sales to the Federal government did not reach the statutory threshold. However, the company mistakenly believed that the threshold was $500,000, when in fact it was $50,000. The company promised to look into the matter, but never got back to the agency. The Labor Department indicated that more suits against other contractors who failed to return the surveys may be forthcoming.

Jury May Infer Discrimination From Falsity Of Employer's Explanation

The U.S. Court of Appeals for the Fifth Circuit recently overturned a summary judgment ruling against a black librarian who claimed that a city's decision to hire a white candidate for a supervisory position instead of promoting her was based on race (*Blow v. City of San Antonio* (1/8/01)). The city claimed that the position was filled before the plaintiff submitted her application. The court found, however, that a jury could find the employer's reason to be pretextual based on other evidence. Specifically, plaintiff's supervisor initially concealed the job opening from her and discouraged her from applying until after the job was filled. The court held that the plaintiff's initial showing of discrimination, combined with the evidence that the city's proffered non-discriminatory reason was false, may allow a jury to infer discrimination.

Update: Union Activity Surrounding Dot-Coms

Amazon.com recently announced the lay-off of 1,300 workers. However, union organizers are urging laid-off workers not to sign the company's separation agreement just yet. Organizers distributed fliers informing employees that the agreement may place broad limitations on their rights to sue the company for discrimination or harassment. Organizers are seeking to have Amazon.com provide a clear, non-

legal explanation of the agreement's provisions. In a separate development, union organizers at Etown.com withdrew its remaining unfair labor practice charge against the company. This move clears the way for the first union election at a dot-com.

Employees Who Have Not Exhausted Paid Sick Leave Are Still Entitled To Protections Of The FMLA

The U.S. Court of Appeals for the Eleventh Circuit recently held that whether an employee is entitled to receive paid sick leave under an employer's policy is irrelevant to the employee's right to FMLA protection. (*Strickland v. Water Works and Sewer Board of Birmingham* (1/22/01)). The district court had held that the worker could not obtain relief under the FMLA because, at the time of his discharge, he had not exhausted the paid sick leave provided by his employer. The Court of Appeals recognized that the language of the FMLA and the regulations was confusing, but held that Congress could not have intended to permit employers to evade the FMLA by providing their employees with paid sick leave benefits. Accordingly, regardless of whether employees have any available sick leave, it is clear they are still eligible for all the entitlements of the FMLA, albeit without pay.