

JULY 2001

NCPA

NORTH COUNTY PERSONNEL ASSOCIATION

San Diego

### *Coming in August!*

*Low cost – High return Benefits for  
Your Employees!*

*At the Windmill Restaurant in  
Carlsbad*

*Wednesday, August 8th, from 11:30  
a.m to 1:00 p.m*

*See you there!*

#### **New Members Access Password**

User Name: Member  
Password: Jobs

#### **BYLAWS REVISION READY**

Earlier this year, the Board formed a Bylaws Committee to review and revise NCPA's bylaws. The Committee (Dave Kulchin, Dennis McDade & Lou Storrow) has completed its work, and the resulting bylaws have been approved by the Board. They will be posted on the NCPA website ([www.ncpasd.org](http://www.ncpasd.org)) and submitted to the members for a vote at the August 8 meeting. If you cannot access them on the web, call or email Renee Huston, Secretary, for a copy.

#### **Upcoming Events**

August 8<sup>th</sup> ~ Low Cost-High Return  
Benefit For Your Employees!  
Sept 12<sup>th</sup> ~ How To Work With Baby  
Boomers and Generation Xers!

### **JULY MEETING**

\$20 Member / \$25 Non-Member

Wednesday July 11<sup>th</sup>  
Grand Pacific Hotel, Carlsbad

5:00 p.m - 7:00 p.m.  
RSVP: (760) 438-1809 ext. 104 (No later than Friday 7/6/01)

#### *IT'S NCPA NETWORKING TIME AGAIN!*

Here's an opportunity to meet people, exchange business cards, eat, laugh, and enjoy the evening with NCPA members and friends.

On Wednesday, July 11, instead of our usual lunch meeting, we are having our summer social. From 5:00 p.m. to about 7:00 p.m., in the Grand Terrace Garden at the Grand Pacific Resort, enchanted by views of the ocean and sunset, we'll enjoy the music of Esteban and Kristina, and relish a Karl Strauss buffet. Invite a friend, bring a significant other, take the spouse out for a change, and enjoy an NCPA evening.

Make your reservation now by calling Mardi at  
(760) 438-1809, ext. 104.

### **President's Pen**

*by John Vermeren*

Stacey James, Craig Schloss, and Lou Storrow did such a great job updating us on 2001 Legal Issues at the June meeting.

Stacey dropped a bombshell by sharing an update letter from the California Labor Commissioner which clarified that when an exempt employee works for part of one day in a week they must not only be paid for the entire week but now they must be paid for the entire MONTH. Often the best solution is to look closely at your Sick Pay Policy. As you would expect there are exceptions and Stacey said to call her for specifics.

Lou shared a few "Memos from Hell". What do you do when your boss asks "We fired a clerk last fall after she didn't show up for a month. It turns out she was in rehab and she wants her job back now. She says she is clean now and we had no right to fire her once she went into rehab. Do we have to?" Call Lou for an answer. Did you know Lou is the host of KOCT's Lawyer on the Line?

Craig spoke about situations where an employee can demand a co-worker be allowed to attend a meeting they suspect will be disciplinary in nature.

It brings to mind how quickly things change in HR and how important it is to be "In the Loop" so that you hear about these changes. It really points out the benefits of an organization like NCPA.

I think the greatest benefit of a HR Association is providing an opportunity to learn from other professional's experience/mistakes. A HR Professional wears so many hats that it is impossible to be an expert in all the different facets. Our best-attended lunches are those dealing with the pitfalls of everyday job challenges. I was told once that working in HR is like practicing law without a license. The June Legal Update Lunch was such a great success that John Caspole is putting together a 2-hour follow-up seminar on the same topic. Stay tuned for exact time and place but maybe pencil-in the couple of hours just before our August meeting.

## Somthing New

by Louis A Storrow

The DLSE has released a letter dated May 30, 2001 from Miles Locker, Chief Counsel to labor Commissioner to Richard Simmons, labor attorney, concerning the DLSE's interpretation of the "salary basis" rules for California overtime exemptions.

An opinion letter is not law, and is not binding on any court, but it is the agency's explanation of the regulations it is charged with enforcing and, unless a court says otherwise, it will govern the agency's enforcement policy. An agency opinion letter is generally given a lot of weight in court, so it may be that much of the reasoning in this particular letter will be adopted when a court addresses these issues.

### Monthly Salary Basis for Exempt Executive, Administrative and Professional Employees in California

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Compensation on a "salary basis" is required for most federal exemptions under the Fair Labor Standards Act. When the legislature passed AB 60 here in California in 2000, it added a "salary" requirement to state law for the three major exemptions.

Section 515 of the Labor Code now says that an exempt employee must be paid a "monthly salary" equivalent to two times the minimum wage for regular full time employment. The DLSE now takes position that since the law talks about a "monthly" salary, the exempt employee's salary cannot be reduced during that month, or the exemption will be lost. Under the federal Fair Labor Standards Act, if an employee works part of the week, he or she is paid for the whole week. The DLSE says that goes for the whole month in California.

#### Effect Of Failing The Salary Test

Failing the salary test means losing the exemption, but it's not clear at this time whether that means for the month in which it is lost or for a longer period. The letter doesn't address that issue, except to point out that if the DLSE determines that the employer never intended to make the employee truly exempt, it could lose the exemption for that employee for any time within the statute of limitations – up to three years or even four under some circumstances.

#### Practical Impact On CA Employers

If an employer plans a plant shutdown or temporary layoff, it cannot dock exempt employees if layoff is for less than a full month. If the employer closes for a month, it can lay off the employee for that month, but not for less. However, exempt employees can voluntarily take vacation time during that period, or in the case of a known slow period, like the end of the year, the company can demand that employees schedule their vacation time during that period, if it's properly included in a policy handbook.

However – and this is a trap for the unwary

– in most circumstances, employers cannot force exempt employees to take time off and use vacation time to make up their salary.

#### Jury Duty

If an exempt employee works at all during the month – say, 3 hours on May 3rd – he or she must be paid for the whole month or the exemption may be lost. The same goes for military leave and leave to appear as a witness in court.

If jury duty or other leave lasts over a month, the employer can dock the salary in full month increments.

#### Sickness, Disability, Injury

Usually the employer can't deduct for less than a month's absence. However, if the employer has a sick leave plan that pays full salary for employees who are out sick, injured or on disability, and the employee has used up his or her sick leave, the employer can deduct for whole days the employee misses for additional illness or injury.

#### Can Still Fire or Discipline

Employers can still discipline or fire an employee for excessive absence or lateness – particularly if the employee is not getting the job done. But the employer who docks pay from employees in violation of these rules may end up owing the employee for overtime.

#### Vacation Time

Earned vacation time is protected in California. Once it is earned, it can't be taken away, and according to the DLSE, the employer can use it to cover salary in full day increments only. For example, if an employee wants to take half a day off, sick leave can be used to cover it, but not accrued vacation time. This is a departure from federal rules (discussed by the 9th Circuit Court of Appeals as recently as April) that allow employers to deduct from an employee's banked leave and vacation time for partial day absences.

#### Safety Rule Violations

The FLSA allows an employer to dock an exempt employee as a penalty when the employee has violated major safety rules in the workplace. It's considered an exception to the salary rule. But the DLSE says that's not part of California law, so California employers can't take advantage of that rule.

#### Failure to Pay

The DLSE made it clear that the employer does not have any obligation to pay on a salary basis – if the employer fails to do so, the employee does not have the right to demand the lost pay unless a contract provides for it. The only consequence of failure to meet the salary rules is the loss of the overtime exemption for that employee.

Also, if the employer makes a mistake – failing to pay full salary because of an error made in good faith – the exemption can be saved if the employer promises in writing to pay full salary in the future.

#### Family Rights ACT and Medical Leave Act

Both the California Family Rights Act (CFRA) and the federal Family Medical Leave Act (FMLA) allow for the use of vacation time in partial day amounts, to accommodate an employee who needs that time off under those specific laws, which only apply to larger companies. The DLSE agrees that the exception continues to apply to the California salary rules.

#### Bonus Pay

The DLSE agrees with federal rules that the payment of a bonus or other amount for extra hours worked will not result in a lost exemption. The agency doesn't want to discourage employers from paying more than they have to.

#### Change Coming?

The Industrial Welfare Commission (IWC), the state agency charged with creating and maintaining the Wage Orders, has agreed to look into this issue, and could issue new regulations that either support or change the position of the DLSE. But until that happens or a court rules otherwise, the prudent employer will consider the May 30 letter a statement of California overtime rules.

Louis A. Storrow, Esq., NCPA Resource Chair

*This article is provided for informational purposes only. It cannot be relied on as legal advice, which must be based on specific facts and situations.*

# Legislative Update

by William Peartree

SB1128 - This bill would provide that determination of who is an employee will be governed by a specific ruling by the California Supreme Court, and that a determination that a person is an employee should only be made if required by that ruling and if the goals of the Unemployment Insurance Code would be met by imposing the risk of unemployment directly on that person.

Status: pending 3rd reading

AB1025 - This bill would require employers to provide a reasonable amount of unpaid break time to employees desiring to express milk. The break time would be required to run concurrently, if possible, with any break time already provided. Employers would also be required to provide the use of a room, or other location, other than a toilet stall, in close proximity to the employees' work area.

This bill would exempt an employer from its requirements if the employer's operations would be unduly disrupted by providing break time to employees desiring to express milk.

Status: Pending Senate & Industrial Relations

AB1015 - This bill would make it an unlawful employment practice to engage in specified employment discrimination in violation of this existing employment law or based upon a person's lawful exercise of specified rights of membership in, or to organize, a labor organization or based upon the person's exercise of lawful political activities or speech occurring outside hours of employment and without unauthorized use of employer equipment or other property. The bill would provide that it does not apply to a state or local law enforcement agency.

Status: Pending

AB486 - Existing law requires 5 of the 7 members of the Workers' Compensation Appeals Board to be attorneys and that all 7 members be selected with due consideration of their judicial temperament and abilities.

## Benefit Tip of the Month

By William Peartree

### *Is Your Company's IPS in Place?*

Every qualified retirement program [401(k) plans, profit sharing plans, defined benefit plans] is operated by fiduciaries -- generally, executives or officers of the organization sponsoring the program. Fiduciaries are responsible for operating the plan solely for the benefit of plan participants and beneficiaries, and can be sued by participants, beneficiaries and the Department of Labor for not adequately fulfilling their fiduciary responsibilities. In any potential litigation under the Employee Retirement Income Security Act of 1974 (ERISA, the federal law governing the operation of retirement plans), that asserts a breach of fiduciary duty, plan fiduciaries will be held to the

This bill would require that at least one of the 7 board members be from organized labor.

Status: In Senate for June hearing

AB276 - Existing law specifies that all persons have the right to be free of violence or intimidation by threat of violence against their persons or property because of their race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute or because another person perceives them to have one or more of these characteristics.

This bill would extend to 2 years the time within which a complaint may be filed for an unlawful practice under the act that is a violation of the above-described right to be free of violence or intimidation or threats of violence. The bill would also extend to 2 years the period within which an accusation may be issued by the director upon a complaint alleging a violation of this type.

Status: Pending Senate Committee hearing

"prudent expert" standard (i.e., the fiduciary's conduct of the plan's affairs will be deemed to be negligent if the fiduciary's performance is not at the same standard as would have been provided by a retirement plan expert).

In selecting vendors for their plans, there are two primary pitfalls facing plan fiduciaries:

- poor or inadequately documented selection of investment management providers; and
- lack of appropriate distinction between a vendor's administrative service pricing and capabilities, and their investment management pricing and capabilities.

One key ingredient that should be a part of every qualified retirement is an Investment Policy Statement (IPS). The purpose of an IPS is to create a written document of the guidelines and standards that are utilized in the selection of the plan's Investment Alternatives and to provide a basis for the periodic evaluation of the performance of these Investment Alternatives. These standards guide the selection and retention of the plan's Investment Alternatives, but are not the only factors that may be considered.

Generally, this IPS shall:

- State a general investment philosophy for the plan
- Outline the general guidelines for-
  - the prudent and objective selection of diverse Investment Alternatives
  - the periodic monitoring and evaluation of the performance of such Investment Alternatives
  - the process for adding and removing Investment Alternatives

If your company currently sponsors a qualified retirement, check to make sure there is an IPS in place. If there is not an IPS in place, contact your advisor and ask them to assist you in establishing one for your plan. For a sample IPS send an e-mail to [peartree@cbsrs.com](mailto:peartree@cbsrs.com)

William Peartree is a Partner with Corporate Benefit Solutions, LLC

**South County Personnel Association**

Date: 2nd Thursday of the month  
 Time: 11:30 am - 1:00 pm  
 Place: San Diego Country Club  
 88 L Street - Chula Vista CA  
 Cost: \$15 Members/\$20 Non-members  
 RSVP: 619-687-7412

**ASTD - San Diego Chapter**

[www.astsandiego.com](http://www.astsandiego.com)  
 Date: 4th Wednesday of the month  
 Time: 11:30 am - 1:00 pm  
 Place: Handlery Hotel  
 950 Hotel Circle North  
 Cost: \$25/\$35 Pre-Registered  
 \$30/\$40 After Deadline  
 RSVP: 858-581-2783

**East County Personnel Association**

[www.sdshrm.org](http://www.sdshrm.org)  
 Date: 3rd Thursday of the month  
 Time: 11:30 am - 1:00 pm  
 Place: The Brigantine Restaurant  
 9350 Fuerte Drive, La Mesa, CA  
 RSVP: 858-587-7568

**Society for Human Resource Management**

Date: 3rd Wednesday of the month  
 Time: 11:30 am - Registration / 12:00 pm Lunch  
 Cost: \$25/\$40 - Pre-Registered  
 RSVP: 619-589-0111

**Membership has its privileges!**

Free Admission to the July 11th Summer Party!

This annual event is the perfect opportunity to network and make new friends. Why not bring your friends and let them share in the fun? Your admission is free if your friend becomes a member. Everyone is a winner!

NCPA 2001 Membership Directories will be available at the party if you haven't received your copy. It's bigger and better than ever and a wonderful resource.

Please call Mardi Montague at 760-438-1809 ext. 119 for any membership questions.

Also, visit our website at [www.ncpasd.org](http://www.ncpasd.org).

*Check out our web site! [www.ncpasd.org](http://www.ncpasd.org)*

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