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Special Report for HR Professionals

March 15, 2013
Number 551

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WAGE AND HOUR RULES HAVE NOT GONE AWAY

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The U.S. Department of Labor, Wage and Hour Division has taken action against a high tech employer in the middle of Silicon Valley. Bloom Energy Corp., in Sunnyvale, California was ordered to pay \$31,922 in back wages and an equal amount in damages to 14 workers. It also had to pay \$6,160 in civil money penalties. So, what's so unusual?

Bloom Energy manufactures clean energy power generating systems and the company brought these 14 workers in from Mexico to refurbish power generators alongside U.S. workers. **These 14 people were paid in Mexican pesos the equivalent of \$2.66 per hour.** The *Fair Labor Standards Act (FLSA)* is the legal foundation for federal wage and hour requirements. It sets the federal minimum wage, provides for how overtime is to be paid, and protects against abusive child labor. Currently the federal minimum wage is \$7.25 per hour. Clearly, Bloom Energy Corp. was underpaying its 14 workers from Mexico. According to Susana Blanco, District Director, Wage and Hour Division in the DOL's San Francisco office, "The FLSA does not prohibit payment of wages in currencies other than the U.S. dollar as long as ... an employee was paid the equivalent of \$7.25 after the conversion is made." A Bloom spokesperson blamed the episode on "a breakdown in our internal processes" and called it "inconsistent with our culture and values."

"It is appalling that this was happening right in the heart of Silicon Valley, one of the wealthiest per capita areas in the U.S.," said Ruben Rosalez, regional administrator for the Wage and Hour Division in the West.

Incidentally, according to Erika Monterroza, Lead Public Information Officer for California's Department of Industrial Relations, California has no specific currency requirement. The state only requires payment of at least minimum wage at the state rate of US\$8.00 per hour "in cash, on demand, without discount."

Oh, and one more thing. The Wage and Hour Division prohibited Bloom Energy from shipping any of the product produced by these workers until all the violations had been resolved. That's more than inconvenient.

<http://www.dol.gov/whd/media/press/whdpressVB3.asp?pressdoc=Western/20130204.xml>

OFCCP CHANGES COMPENSATION AUDIT APPROACH

On February 26, 2013, the Office of Federal Contract Compliance Programs (OFCCP) issued Directive #307 rescinding its 2006 “Compensation Standards” and “Voluntary Guidelines” on compensation compliance. Patricia A. Shiu, OFCCP Director, said that the 2006 documents were too restricting for OFCCP’s purposes in identifying and correcting systemic compensation discrimination. She said the former rules placed “arbitrary barriers” to her agency’s work.

Shiu said, “...we are providing clear guidance for contractors to facilitate their success when it comes to providing equal opportunity to all of their workers.”

Under the new directive, a Compliance Officer shall:

- Conduct Preliminary Analysis of Summary Data (if necessary or appropriate)
- Conduct an Analysis of Individual Employee-Level Data
- Determine the Approach from a Range of Investigative and Analytical Tools
- Consider All Employment Practices that May Lead to Compensation Disparities
- Develop Pay Analysis Groups
- Investigate Systemic, Small Group and Individual Discrimination
- Review and Test Factors before Accepting the Factors for Analysis
- Conduct Onsite Investigation, Offsite Analysis, and Refinement of the Model

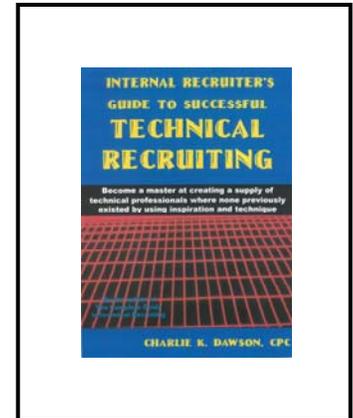
According to Ms. Shiu’s February 26, 2013 news release, she attributes these changes to the White House creation of the National Equal Pay Task Force and her commitment to “help close the pay gap for every worker who is unfairly shortchanged because of discrimination.” So far, the concept of equal pay for equal work found in the *Equal Pay Act of 1963* remains the law of the land. It says men and women must be paid equally when performing equal work. All efforts to expand that provision by addressing the “pay gap” have not been successful. Perhaps that is because of the strong debate about whether or not there actually is a pay gap. Since OFCCP has no authority to enforce the *Equal Pay Act*, Ms. Shiu is basing her agency’s actions on Title VII of the *Civil Rights Act of 1964*, saying that compensation is a condition of employment protected against discrimination based on race and/or sex.

Whatever else happens, federal contractors will need to spend more resources on documenting the legitimate business necessity and job related requirements for compensation decisions. Yes, THAT IS going to require more time and resources. Lots more. “The cost of being a federal contractor has gone up. Budget / bid accordingly,” said Patricia Shiu at her agency’s listening sessions held at various locations around the country. She is unreceptive to the idea that contractor burden has increased.

For the OFCCP news release go to:
<http://www.dol.gov/opa/media/press/ofccp/OFC CP20130305.htm>

Internal Recruiter's Guide to Successful Technical Recruiting

If you are an inside recruiter or technical placement expert who specializes in computer technology jobs, this is a reference you won't want to miss. It is something you will use daily to plan your business activities and guide you to stronger relationships and higher earnings.



<http://www.management-advantage.com/products/recruit2.htm>

POTPOURRI

■ 20 Changes to California Employment Laws in 2013

The California Chamber of Commerce has prepared a helpful graphic to show 20 changes that impact employer compliance issues beginning this year.

<http://calchamber.typepad.com/hrwatchdog/2013/01/new-rules-of-the-compliance-road-infographic.html> (If link is not working, copy both lines and paste the address into your browser.)

■ SHRM Finalizes Standard on Performance Management

The Society for Human Resource Management (SHRM) has worked with the American National Standards Institute (ANSI) to finalize standards on Performance Management. Employers now have some guidance on the activities that should be considered for any performance management system. Businesses are not required to adopt the standards. The standards offer a set of tools that can help any American business improve its employment system by adopting the standards.

[http://www.shrm.org/HRStandards/Documents/Performance%20Management%20ANS%20\(2012\).pdf](http://www.shrm.org/HRStandards/Documents/Performance%20Management%20ANS%20(2012).pdf) (If link is not working, copy both lines and paste the address into your browser.)

■ Job Accommodation Network Expands Ways to Access Its Services

The Job Accommodation Network (JAN) has added two new ways to contact its consultants for assistance with job accommodation inquiries. In addition to calling, emailing, using online chat, or using social networking tools to reach JAN services, users can now Text JAN at (304) 216-8189, or contact JAN via Skype at janconsultants.

<http://askjan.org/>



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CALIFORNIA PREGNANCY ACCOMMODATION MIGHT REQUIRE MORE THAN FOUR MONTHS' LEAVE

Since the California Department of Fair Employment and Housing (DFEH) published its regulations on disability accommodation late last year there has been a great deal of discussion about the need for leave that might exceed the Pregnancy Leave requirement in state law. In a February 21, 2013 opinion California's Court of Appeals¹ explained that an employee who exhausts all of her statutory pregnancy disability leave may still have a claim if the employer didn't consider her request for disability accommodation when she remained disabled at the end of that leave. Of course, the employer's size will play a role in the consideration of any accommodation, but under the new disability regulations, all employers must consider such requests if the employee presents them.

DFEH Regulations on Disability Discrimination

http://www.dfeh.ca.gov/res/docs/FEHC%20Disability%20Reqs/FEHC%20FINAL_DISABILITY_REGS_12-18-12%20_2_.pdf (If link is not working, copy both lines and paste the address into your browser.)

¹ Sanchez v. Swissport, Inc., 2013 WL 635266, February 21, 2013

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