Neel, Hooper & Banes, P.C.

Counsel Leaders Trust

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CH-CH-CH-CHANGES …

Anytime we have a new administration, there are changes to labor and employment law. And this administration is no exception. So here are some of the changes that are already here or we expect to be coming soon to a business near you. And let us introduce you to a whole new world of alphabet soup laws and acts.

Oops … Not So Fast! We warned you last year that E-Verify was scheduled to take effect on January 15, 2009, but it has been postponed. As you remember, the E-Verify program would require federal contractors to use the government's E-Verify system for checking the eligibility of their employees to work in the U.S. It provides an internet-based means for employers to compare the names and social security numbers of newly hired employees against government databases. The rule has been delayed until May 21, giving the new administration an opportunity to review it. Watch this space for updates!

Lilly Ledbetter Fair Pay Act of 2009. The Act was signed into law on January 29, 2009. The law was prompted by the Supreme Court decision which held that the 180-day time limit for filing an equal-pay lawsuit begins at the date the pay was agreed upon, not at the date of the most recent paycheck. This new law allows the 180-day clock to start running again every time a new paycheck is issued.

Given this new law, there are several steps your company should take now to minimize the risk of liability for equal-pay lawsuits. Please call us to discuss these steps!

UNION NEWS

Employee Free Choice Act (EFCA). If it passes in its current form, the EFCA will make sweeping changes to the National Labor Relations Act (NLRA), making it much easier for unions to organize new members. There are three primary changes of which you need to be aware:

1) The EFCA will eliminate secret ballot elections. Currently, unions wishing to represent workers first have to obtain signatures from 30% of workers and then the National Labor Relations Board (NLRB) oversees a secret-ballot vote to certify the union. The process allows the union and employer to make their case. The union is certified if a majority of workers vote in favor. EFCA would change this process to automatically certify unions without a secret-ballot vote if 50% plus one sign union cards in the first step.

2) The EFCA will limit timelines for collective bargaining. The bill includes a provision for mandatory first contract arbitration. This means that arbitration between a union and an employer is mandatory for the first contract once a union is certified if a voluntary agreement cannot be reached. This could lead to an increase in labor disputes.

3) The EFCA will increase employer penalties for unfair labor practices. For example, the Act would provide for liquidated damages of three times back pay if employers were found to have unlawfully terminated pro-union employees. The EFCA also would impose a $20,000 penalty upon employers for each employer violation of the

proposed legislation if the NLRB or a court deems the violation willful or repetitive.

To avoid union organization, employers need to immediately review their employment practices and implement basic union-free strategies.

THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009

On February 17, 2009, President Obama signed the American Recovery and Reinvestment Act of 2009 (ARRA) into law, the so-called "Stimulus Package." Here are just a few areas in which the ARRA will have an impact on employers:

Changes to COBRA. Employers need to pay attention so they are not caught off guard…this means you! Basically, the new provisions provide for a 65% employer-paid subsidy for COBRA premiums for nine (9) months. There is a 60-day implementation window for employers, during which time we should be getting a model notice from the Treasury Department explaining to participants the impact of the Act and how they may be eligible for the subsidy. We suspect there will also be additional guidance coming from the IRS and Department of Labor on implementation of the subsidy and its impact on taxes. While we are waiting further instruction, here are some questions employers should ponder:

1) Who Will Be Responsible for Preparing and Sending Notices? Make sure you communicate with your service providers as to who will take responsibility for preparing and issuing the notices. It might be the insurance company, the third-party administrator, a benefits broker or an outside COBRA administrator. It may also be that you or the plan sponsor takes on the response-bility. But be sure you have confirmation who will be preparing and sending the notices so when the 60-day window closes, the notices have been sent.

2) Who Is Getting the Notices? It is important to remember that the subsidy applies to those who had an ***involuntary*** loss of coverage between September 1, 2008, through December 31, 2009. Even though not all will necessarily qualify for the subsidy, they all get the notice.

3) How Much does COBRA Coverage Cost? In case you don't know…find out what your plan was charging for continuation premiums from September 2008 through the present plan year. It is impossible for a company to evaluate the actual financial impact of the 65% subsidy requirement without first knowing what the underlying cost will be. Employers will be reimbursed for their costs to cover the 9 months of premiums, but we suspect the reimbursement will take time… so be prepared for this expense.

Are we having fun yet? Call us if you have any questions.

Zoom, Zoom, Zoom … Transit Benefits for Employees. This is actually a fairly simple change. The ARRA will temporarily increase the amount of benefit that companies can provide to their employees for transportation costs.

Beginning March 1, 2009, and continuing through December 31, 2010, employers can (1) fund certain employee commuting expenses themselves and get a corresponding tax deduction, or (2) allow their employees to fund their own expenses tax-free, through a qualified transportation fringe benefits plan. Currently the transit exclusion, which covers things like vanpools and mass transit passes, is $120 per month and the parking exclusion is $230 per month. The new benefit would allow the vanpools and mass transit passes exclusion to increase up to the $230 per month level if employers choose to do so.

Employers are not required to change their plans to provide that the two benefits are equal. It appears to be voluntary. Employers who have these plans may use a company-paid arrangement, or a pre-tax salary reduction arrangement. The bicycle commuter benefit appears to remain unchanged. Employers may also reduce the parking threshold to $120. Or, they may set the limits to any point below or at the maximum exclusion allowed. Remember, however, all qualified fringes are optional.

But Wait There's More! How Does the ARRA Impact Government Contracts? Let us count the billions and billions of ways!

The President promises a wide-reaching stimulus in several areas of the economy under the ARRA. Part I of the law is the portion with which business concerns—particularly those that pursue and perform government contracts—will be interested.

Part I – Public Investment

In reviewing this bill, what strikes one most is that the moneys are allocated in the **billions** of dollars for various sectors of the economy! Clearly, the following areas are the largest beneficiaries of the moneys contained in the ARRA: (1) $16.8 billion for "energy efficiency and renewable energy" and $11 billion for creating a "bigger, better, and smarter electric grid;" (2) $150 billion for public infrastructure, including over $15 billion to the for high speed and passenger rail projects and $27.5 billion for highways, dams and bridges; and (3) $12 billion to support additional scientific research in certain health areas. Some of the particulars are as follows:

- $2 billion for state and local law enforcement, including grants to assist southern border protection;
- Nearly $8 billion to the Department of Defense (DOD) and over $4 billion to the Corps of Engineers to fund operations;
- $1 billion to the Department of the Interior for "water and related resources";
- $2 billion to the Department of Energy (DOE) for the manufacturing of advanced batteries;
- $4.5 billion to DOE to modernize the electric grid;
- $3.4 billion for DOE fossil energy research and development;
- $5.1 billion for DOD environmental cleanup;
- $5.5 billion to the General Services Administration's (GSA) federal building fund;
- $300 million to GSA to purchase improved fuel economy cars for the federal fleet;
- $420 million to the Department of Homeland Security (DHS) for design and construction of land border ports of entry;
- $1 billion to DHS's Transportation Security Administration for checked baggage explosive detection systems;
- $700 million to the Department of the Interior for upgrades and construction on public lands and national parks;
- $600 million to the Environmental Protection Agency for the Superfund Remedial program;
- $8.2 billion to the National Institutes of Health to support research into specified public health concerns;
- $27.5 billion for highway, port and rail infrastructure investment;
- $8 billion for intercity high speed rail; and
- $6.9 billion for public METRO projects.

Hey, a billion here and a billion there, and pretty soon you're talking real money!

General Provisions. The funds appropriated under the ARRA are generally available for obligation on government contracts until September 10, 2010. Contractors and sub-contractors employed under contracts using ARRA money must pay "prevailing wages" as determined by the Department of Labor. Contact us for assistance.

Perhaps the most controversial provision in the ARRA, however, is the requirement in Section 1605, the "Buy American" provision. This provision requires that only iron, steel, and manufactured goods produced in the U.S. are to be used for projects for the construction, alteration, maintenance, or repair of public buildings and public works funded by funds appropriated by the ARRA. These requirements can be waived only by the head of a federal agency under three circumstances:

1) Where it is in the public interest to waive the requirement;
2) If the iron, steel, and manufactured goods are not produced in the U.S. in sufficient and reasonably available quantities and of satisfactory quality; or
3) If inclusion of the iron, steel, and manufactured goods produced in the U.S. will increase the cost of the overall project by more than 25 percent.

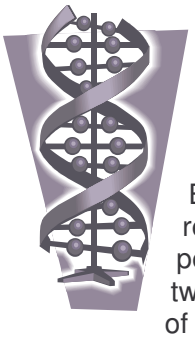
Section 1605 also includes a statement clarifying that the section will be applied in a manner consistent with U.S. obligations under international agreements.

United States Annex A details that, at the federal and state level, the GPA does not apply to either set asides on behalf of small and minority businesses or programs promoting the development of distressed areas (*e.g.*, HUBZONE concerns). It also does not apply to supplies and services less than $133,000. Because war materials are also exempt pursuant to Article XXIII of the GPA, several categories purchased by DOD are also listed as generally exempt in United States Annex One. Moreover, United States Annex III to the GPA specifically states that al "transportation services," all "telecommunications and utilities," all "research and development," all "printing services" for state and local entities, and all "services purchased in support of military forces overseas' are exempt from GPA coverage.

As for state and local projects, grants to states from funds appropriated to either the Transportation Security Administration or to any "mass transit and highway projects" are specifically exempted from the GPA (Annex 1 and 2) as well as NAFTA. Accordingly, those grants should not be encumbered by any U.S. obligation under those trade agreements and the Buy America requirement should apply.

In addition, the 25 percent cost differential waiver is a steep increase from the "Buy American Act," which allows the use of a foreign product if the same U.S. product exceeds the foreign price by only six (6) percent or more. This should make waivers exceedingly difficult.

EEOC/TITLE VII



EEOC and Genetic Information. On May 21, 2008, President Bush signed the Genetic Information Non-discrimination Act of 2008 (GINA). On March 2, 2009, the EEOC published its proposed regulations. The public comment period closes May 1, 2009. GINA has two parts. Title I will amend portions of ERISA and the IRS and addresses the use of genetic information in health insurance. Title II, which is set to go into effect on November 21, 2009, will do the following:

1) prohibit employers from discriminating on the basis of genetic information; and
2) prohibit employers from intentionally acquiring genetic information from employees or applicants; and
3) impose strict confidentiality requirements on genetic information.

Title II will apply to both public and private employers with 15 or more employees. The statute includes a detailed description of what constitutes genetic information. It should be noted there are presently **no exceptions to the prohibitions on use of genetic information**. Now listen carefully…covered entities may not use genetic information in making employment decisions under any circumstances!

At this point there are still several terms and phrases that are unclear, so be sure to seek our advice for particulars on implementation.

Meanwhile Back at the Ranch … Or Should We Say Back at the Courthouse … Employment Issues Continue to Crop Up

Independent Contractor or Employee … Clear as Mud! Or a Case Where You Really Can Have It Both Ways! It's not always easy to tell if someone is an employee or an independent contractor. Looking at some of the "tests" put out by the IRS or the Texas Workforce Commission does not make it any easier. In a recent Fair Labor Standards Act (FLSA) case several managers or "sales leaders" sued their employer for overtime pay. The Fifth Circuit looked at key facts to determine that sales leaders who recruited and managed sales reps for insurance policies were employees, not independent contractors. The court primarily examined the amount of control the company exercised over these sales leaders.

The key factors were: the sales leaders made very little investment in their independent businesses; they worked exclusively for one company; their profit was largely controlled by the company because it controlled their territories, products, prices and sales leads; the sales leaders required no special skills and the company controlled the hiring, firing assignment and promotion of each sales leader's sales subordinate. Additionally, the company prohibited the sales leaders from being involved in or owning other businesses while working for the company and most of the sales leaders had long term employment relationship with the company. So the fact that they were found to be employees is not much of a surprise.

However, the court did go on to make a rather odd ruling on part of the case. It seems that one of the sales leaders had previously been sued for sexual harassment under the Texas state labor code. In the course of that proceeding, he had claimed to be an independent contractor and therefore immune to the provisions of the TCHRA. However, under this new claim, he flip-flopped and decided to call himself an employee. The court allowed this because it said the test of employee status under the FLSA is broader than the test of employee status under employment discrimination statutes.

More Misclassification … To the Tune of $14.4 Million! And what an off-key tune that is! This case has been dragging on for nearly ten years in California against FedEx. Drivers sued claiming they were improperly classified as independent contractors. A referee recently appointed by the state Superior Court awarded current and former drivers about $14.4 million in reimbursed job-related expenses and interest for things like fuel, vehicle maintenance costs, liability, rental of package scanners and uniform rental and maintenance. This award is about $9 million more than the trial court originally awarded in 2005 when it found the drivers were illegally classified as independent contractors. And there's more bad news …there are approximately 60 other misclassification cases pending covering 40 states and nearly 27,000 former and current drivers…Yikes!

Memo to managers: Double-check those requirements before automatically classifying workers as independent contractors or as exempt from overtime. When it's a good call, it is very good. But when it's wrong…it's HORRIBLE!

What's in a name or a job title? Apparently, not much if the job duties don't support it. A construction company classified all its "Team Leaders" as exempt, using the administrative exemption. But the Houston court did not agree that the title alone was enough to prevent the employees from being entitled to overtime. Furthermore, these employees rarely worked alone as a superintendent or foreman on the construction projects and the company could not prove that the employees' primary duty was the performance of non-manual work related to the general business. These Team Leaders did have some involvement with personnel decisions, but the court considered them isolated activities that did not establish they were qualified for the administrative exemption.

Arbitration Issues. We know that the Texas Supreme Court has generally endorsed arbitration to resolve employment issues. But in a recent case, the court said it would not accept just any ol' arbitration agreement. In looking at arbitration agreements, the court considers anything unconscionable to the extent it waives the employee's statutory rights. Given this, are there limits on what an employer can include in a mandatory arbitration agreement? The short answer is yes.

For example, some limits can be viewed as against public policy and therefore invalid; in this case, an employee claimed the employer retaliated against him because he had filed a Workers' Compensation claim. Under workers' comp claims an employee might be entitled to reinstatement and/or punitive damages. However, the employer's arbitration clause forbids these remedies. The court found any waiver of rights under the Texas Workers' Compensation was against public policy.

There are some limits in an arbitration agreement that may or may not be invalid, depending the circumstances of the case. In this instance the court reviewed the enforceability of cost splitting requirements and limits to discovery. If a cost sharing provision might prevent an employee's access to a hearing it could be considered invalid. Likewise, if discovery limits are so strident as to impede effective prosecution of rights they could be unconscionable. However the court held that the arbitrator was in the best position to decide if cost splitting arrangements or limits to discovery are unenforceable in a particular case.

And finally, if parts of an arbitration agreement are invalid, it is likely those portions are severable and the rest of the agreement can still be valid.

RECENT DEVELOPMENT IN GOVERNMENT CONTRACTS LAW

DOD's Small Disadvantaged Business Program Struck Down as Unconstitutional. On February 26, 2009, the Western District Court of San Antonio struck down as unconstitutional, Section 1207 of the National Defense Authorization Act of 1987 which allowed the U.S. Department of Defense ("DOD") to preferentially select (within limits) contract bids submitted by small businesses owned by socially and economically disadvantaged individuals ("SDB's"). The holding may also ultimately affect Small Business Administration ("SBA") or the Department of Transportation ("DOT") programs.

This could cause problems for similar SDB programs administered by the SBA and the DOT, depending on what evidence Congress relied

upon when it enacted those programs. But the story is not over yet. The government still has the option of appealing this decision in the hopes of having it modified or reversed completely. Also the applicability of the *Rothe* case to other situations may be in doubt. In addition to these legal issues, Congress could also take steps to correct the problems identified in *Rothe.* Of course, all discussions about the future impact of *Rothe* are simply speculation at this point. Thus, for any company that wants to participate in any SDB or HUBZone program, or that currently participates in such programs, the *Rothe* case and its consequences should be monitored carefully.

For help or for more information, give us a call and watch this space for updates!

SELECTED PROTEST DECISIONS OF INTEREST

Government Review Does Not Prevent Conflict of Interest. A protest was sustained due to an organizational conflict of interest (OCI) and subsequent failure by the agency to have a plan that avoided the OCI. GAO ruled that an agency's reliance on an existing process making it responsible for all final decisions is insufficient where a contractor not only proposes the designs but also reviews them under a separate contract with the same agency.

"Rule of Two" Applies to Task Orders. GAO ruled that the small business set aside "rule of two" requirement (*i.e.,* requiring a set-aside for small business if two responsible small businesses can perform the requirement) applies to task and delivery orders among multiple contract holders. While good for small businessesthere are still questions about this Decision.

Offeror Loses Contract for Failure to Follow Trade Policies. Protest sustained where a vendor whose quotation identified products that were not compliant with the Trade Agreements Act (TAA) and the agency failed to follow the evaluation procedures for TAA procurements. Given the Buy American provisions contained in the ARRA (Stimulus), this provides much needed emphasis that these policies must be followed.

We Know You Want More Protection in A War Zone, But No. GAO ruled that the Agency reasonably determined that KBR, Inc.'s proposal was unacceptable, and reasonably excluded the proposal from the task order competition. The proposal was too ambiguous with regard to its acceptance of the level of force protection the Army stated it would provide.

Union Organizational Activity Since Our Last Newsletter. Six petitions for certification were filed by unions and three petition for decertification was filed by management. Of the three elections held, management won two.

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The Quarterly Update is a newsletter providing recent items of interest to our clients in the various areas of employment law. While the Update is to alert you to potential new problem areas or changes in the law, it is not to be considered legal advice or a legal opinion. Such can only be given after careful consideration of the facts unique to any situation. The contents of this newsletter are copyrighted and may not be used without express written consent of Neel, Hooper & Banes, P.C.

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