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NLRB Chairman Liebman Walks Fine Line, But Tips Hand in the Process

By Jeffrey A. Risch

Although the vast majority of National Labor Relations Board (NLRB) decisions are unanimous, a small number of cases tend to be decided along political party lines. It is in this small percentage of cases where labor, management and employees have the most at stake. Because the NLRB has a great deal of discretion and autonomy when interpreting the National Labor Relations Act (NLRA), unions, employers, and employees can expect fundamental changes in labor law in the near future.

After recently meeting NLRB Chairman Wilma Liebman and hearing her describe her views on labor relations in the United States, this much is undoubtedly certain:

1. Those “pro-employer” decisions from the Bush-NLRB years are certainly on life-support (notably major decisions such as the ones in *Dana Corp.*, *Register-Guard*, *Harborside*, and *Oakwood Healthcare*) - Chairman Liebman’s disagreement over many key decisions rendered under the Bush-NLRB is clear and unmistakable;
2. The federal government’s crackdown on the misclassification of independent contractors will spill into the NLRA - Chairman Liebman clearly wants to expand the rights of workers to organize and participate in union bargaining;
3. The NLRA will be pulled, bent, and stretched to reflect an evolving/changing workplace - As Chairman Liebman explained, “*the NLRA is a living statute that should evolve with a changing workplace;*”
4. Agency rulemaking could become *the vehicle* to implement change in the NLRB’s practices, policies, and processes vs. case-by-case adjudication - Chairman Liebman is positioning the NLRB to engage in administrative rulemaking starting with a requirement that all employers be required to conspicuously post a mandatory NLRA workplace law poster to better educate workers of their rights; and
5. Union organizing in the private sector has declined rapidly and must be addressed through Labor Reform - per Chairman Liebman, “*the time is right for meaningful Labor Reform to address the decline in Representation Petitions, and EFCA (the Employee Free Choice Act) addresses this concern.*”

Chairman Liebman did identify a handful of other matters that are in the “pipeline” and may be adjudicated by a Liebman led NLRB in the near future. These matters involve the issues of:

1. Pre-recognition talks regarding proposed contract language; is it okay?
2. Back-pay awards in ULP matters to undocumented workers; should there be a distinction between when an employer knowingly hires an undocumented worker vs. unknowingly?
3. When is “Bannering” considered Picketing (with less protections) vs. Hand-Billing (with greater protections)?
4. Should the temporary worker be able to participate in a user-company’s collective bargaining process?

5. When is “job targeting” by unions unlawful or protected?

In light of the raging debate on healthcare reform, and because the current NLRB is comprised of only two members [the Chairman - a Democrat, and Peter C. Schaumber - a Republican], the NLRB will decide cases without controversy. In other words, the current NLRB must agree on decisions using current precedent or otherwise the case will be undecided until a third member to the Board is confirmed. Once the third member is confirmed and in place,

employers can expect monumental change in how they effectively manage labor relations in both the union and non-union workforce. In the meantime, Chairman Liebman is committed to implementing labor reform through administrative rulemaking and other avenues that do not require actual case adjudication.

Jeffrey Risch is Chair of SmithAmundsen's Labor & Employment Practice Group where he concentrates on representing management in virtually all areas of traditional labor and employment law. If you have any questions or would like additional information regarding this topic, please contact Jeffrey at jrisch@salawus.com or 630.569.0079/312.894.3302.

Additional Notification Requirements on Employers as a Result of Cobra Subsidy Extension

By Rebecca L. Dobbs

With the original version of the American Recovery and Reinvestment Act (ARRA), the first group of individuals was set to maximize the nine months of subsidized premium payments allotted to them as of November 30, 2009. As a holiday bonus to unemployed workers, the President and Congress extended the maximum amount of time an Assistance Eligible Individual (AEI) can collect the subsidy from nine (9) months to fifteen (15) months through the Department of Defense Appropriations Act for Fiscal Year 2010 (DOD Act).

In addition, while the original version of ARRA only included those individuals who were involuntarily terminated *and* had a loss of coverage on or before December 31, 2009, the DOD Act has extended the subsidy to those individuals who experience an involuntary termination on or before February 28, 2010. This is a notable change in that the DOD Act does not also require the loss of coverage to occur on or before February 28, 2010 and was likely designed to address concerns over ineligibility under the old legislation of those individuals who were involuntarily terminated on December 31, 2009 with a loss of coverage occurring on January 1, 2010.

Finally, as if employers have not been burdened enough by additional notification, reporting and record keeping requirements that arose under the ARRA, the DOD Act, and the COBRA subsidy extension includes new notice requirements upon employer/plan administrators. Following are highlights of the additional requirements under the DOD Act:

1. Those who were eligible for the ARRA COBRA subsidy on or after October 31, 2009 or who experience a qualifying event on or after that date should be provided with information

regarding the subsidy extension no later than February 17, 2010.

2. An employer/plan administrator should revise existing COBRA notices to include information about the subsidy extension for those individuals who experience qualifying events from now through February 28, 2010. These notices are to be provided in accordance with the general COBRA notification rules.
3. Individuals who were eligible for the ARRA COBRA subsidy but were dropped from coverage for failure to pay a COBRA premium or who paid the full premium after exhausting the subsidy need to be provided with information regarding the extension as well as the ability to make retroactive premium payments at the reduced subsidized rate. These notices must be provided by February 17, 2010. In addition, the legislation allows these individuals to pay the reduced rate for retroactive coverage by February 17, 2010 *or* within 30 days after the date of the notice of extension issued by the employer/plan administrator.
4. Those employees who paid the full amount of the premium after exhausting the subsidy will be able to receive a credit in the amount they have now overpaid as a result of the DOD Act extending the subsidy.

Employers also need to remain alert because yet another extension has been proposed in Congress. Currently being debated is additional legislation that would further extend the COBRA subsidy to June 30, 2010.

If you have any questions or would like additional information regarding this topic and preemptive steps you can take to protect your organization, please contact Rebecca Dobbs at 630.587.7928 or rdobbs@salawus.com.

Illinois Construction Update: IDOL Crushes Contractor for Purportedly Misclassifying Subcontractors as Independent Contractors

By Jeffrey A. Risch

In what is believed to be the largest assessment issued by the Illinois Department of Labor (IDOL) under Illinois' new Employee Classification Act (Act), a Chicago-area contractor has been penalized over \$325,000 for treating its workers as independent contractors rather than employees. IDOL recently issued its final determination and assessment under the Act against Elmwood Park, IL based Mega Builders Inc. *The determination faulted Mega Builders for failing to classify 18 workers as employees and for also "scheming" to evade its obligations under the Act by forcing workers to incorporate.*

Signed by former Governor Blagojevich, the Act was passed into law for the purpose of protecting workers who have been misclassified as independent contractors on construction related projects in Illinois. See 820 ILCS 185/1 et. seq. *Regardless of whether the construction project is public or private, any contractor who misclassifies any worker faces substantial monetary fines, penalties and other actions that would ultimately prevent the contractor from performing public works projects in Illinois.* More specifically, the IDOL has wide latitude in assessing civil penalties and other remedies against any contractor doing business in Illinois for purposes of enforcing the Act. Essentially, the Act provides that *individuals* performing services for construction contractors on or after January 1, 2008 are *presumed to be employees* of that contractor unless they meet the criteria specified in Section 10 of the Act. If a contractor has misclassified individuals as independent contractors, the IDOL *may* assess civil penalties and *may* seek other remedies provided for in the Act.

What is particularly noteworthy in the Mega Builders case was the IDOL's determination that the company *forced* workers to incorporate. Although the Act's coverage should not reach bona fide corporations or bona fide limited liability companies, the IDOL is sensitive to any schemes by contractors to simply force workers to form legal entities on paper but those alleged legal entities do not comport to the requirements of law. Many contractors are looking at the Act's Administrative Regulations, 56 Ill. Adm. Code 240.110, where the definition of an *individual performing services under the Act does not include a bona fide corporation or bona fide limited liability company.* Although bona fide Corps and LLC's should not be considered employees under the law, the question still remains... "What does BONA FIDE mean?"

In determining whether a corporation is bona fide for purposes of the Act, the IDOL will consider, among other factors, whether:

- the corporation is capitalized;
- the corporation has issued corporate stock;

- the corporation maintains a corporate bank account;
- there is an intermingling of corporate and personal accounts or funds
- the corporation holds itself out as a corporation;
- the corporation maintains corporate books and records, including corporate meeting minutes and files corporate tax returns that are current and complete; and
- Articles of Incorporation have been filed and the corporation is in good standing, in the case of Illinois corporations, with the Illinois Secretary of State or, in the case of foreign corporations, as directed by the laws of that jurisdiction.

In determining whether a limited liability company (LLC) is bona fide for purposes of the Act, the IDOL will consider, among other factors, whether:

- the LLC has assets;
- the LLC maintains a company bank account;
- there is an intermingling of company and personal accounts or funds;
- the LLC holds itself out as an LLC;
- the LLC makes necessary tax filings that are current and complete; and
- Articles of Organization have been filed and the LLC is in good standing, In the case of Illinois LLC's with the Illinois Secretary of State or, in the case of foreign LLC's, as directed by the laws of that jurisdiction.

Obviously, the IDOL considered these factors and ultimately concluded that Mega Builders' workers incorporated on paper alone but failed to act as bona fide corporations. Back in September of this year, SmithAmundsen LLC announced that several of our IDOL contacts were stating privately and publicly that efforts had been underway to aggressively pursue alleged violators. We explained that contractors who have yet to familiarize themselves with this new law - yet continue to "subcontract" construction related work to individuals, sole proprietors and/or partnerships - were more likely to face severe legal and financial hardship in the days, weeks and months to come. Well... the IDOL is certainly keeping its word.

Jeffrey Risch is Chair of SmithAmundsen's Labor & Employment Practice Group where he counsels contractors (including trucking companies) throughout the United States on their rights and obligations under the Illinois Employee Classification Act. If you have any questions or would like additional information regarding this topic, please contact Jeffrey at jrisch@salawus.com or 630.569.0079/ 312.894.3302.

Green Roof Installation - A Fight Between Two Unions

By Christina Lopez-Nutzman

Recently, the National Labor Relations Board (NLRB) resolved a turf war between the International Union of Operating Engineers, Local 150 (IUOE) and the United Union of Roofers, Water Proofers, and Allied Workers for the installation of green roofs. This NLRB decision will become more significant as green building expands in the upcoming years. Recently, there has been a greater push for green building because it has become a part of the government's economic recovery plan. While green roof installation is by no means a newcomer to the green building movement, it has been an area of dispute for the last 8-10 years among various unions seeking to dominate green roof installation.

In its November 27, 2009 decision, the NLRB held that landscapers employed by Paul F. Pedersen Co. represented by Local 150 of the IUOE and Local 703 of the International Brotherhood of Teamsters were entitled to perform green roof work at two Chicago public schools. In its ruling the NLRB rejected assigning the work to Local 11 of the Roofers Union which argued it had jurisdiction of green roof work. This dispute was resolved under Section 10(K) of the National Labor Relations Act which grants the NLRB with the authority to resolve jurisdictional disputes among unions.

In its decision the Board endorsed the practice of landscapers installing and maintaining green roofs primarily because they considered evidence that unionized landscapers had installed at least 119 roofs in the region in the last 7-8 years. The roofers union was not able to point to any substantial evidence that it was the area industry practice in unionized roofs to install such work.

As the green movement continues to evolve, this decision will have a significant impact on landscape contractors. This decision will provide clarity for landscape contractors bidding green roof work and assigning green roof installation to plants men, landscape helpers and installers represented by the Teamsters and the IUOE. The IUOE Local 150 and the Teamsters Local 703 believe that this decision will give Local 150 and Local 703 control over green roof work in certain jurisdictions while the roofers union believes the scope of the decision is limited thereby motivating the roofers to continue the battle for such work.

If you have any questions or would like additional information regarding this topic or any other employment law matter, please contact Christina Lopez-Nutzman at cnutzman@salawus.com or 312.894.3371.

National Labor Relations Board Update

By Christina Lopez-Nutzman

On December 1, 2009, the NLRB released yearly statistics regarding the NLRB's overall case intake for fiscal 2009. The report revealed an increase in unfair labor practice (ULP) filings and a decrease in representation case filings as compared to fiscal year 2008. The agency received a total of 22,941 ULP cases filed under the National Labor Relations Act in fiscal year 2009 compared to 22,501 in fiscal year 2008 which translates into a 1.95 percent increase in ULP filings.

On the Union organizing front the number of representation petitions filed continues to decline. The NLRB reported a 14.4 decrease in representation filings over the previous year's intake (2,912 filed in FY 2009 and 3,400 in FY 2008). As the rate of representation elections continues to decline, the win rate for unions has increased (according to separately released data by the NLRB analyzed by the BNA).

Also in the area of representation cases, the number of election petitions filed pursuant to an NLRB decision, *Dana Corp.*, 351 NLRB 434 (2007), has increased. In 2007, the NLRB ruled in *Dana Corp.* that any company agreeing to accept a union contract without going through the Board's secret ballot election, i.e. voluntary recognition, would be required to post a public notice for the purpose of allowing a rival union to seek to represent those employees or to allow employees to decertify (vote out) the union that was voluntarily recognized.

Two years after *Dana Corp.* reports show that employees and rival unions are utilizing this newly established notice requirement. In fiscal year 2009 the NLRB received 482 requests for *Dana Corp.* notices leading to 27 decertification petitions and 7 certification petitions by rival unions. Compared to fiscal year 2008 where 419 requests for Dana notices were made. The number of decertification petitions and representation petitions remained the same.

The number of complaints issued by the regional offices also only slightly increased with 1166 complaints issued in fiscal year 2009 and 1149 in fiscal year 2008. The success rate for the General Counsel in prosecuting these complaints has ranged from 78-90.8 percent in the last ten years. The NLRB reported 89.8 percent in fiscal year 2009.

Finally, for anyone who has lost a charge at the regional level it should be noted that the reversal rate of regional director decisions increased slightly from 0.9 percent in fiscal year 2008 to 1.5 percent in fiscal year 2009.

If you have any questions or would like additional information regarding this topic or any other employment law matter, and preemptive steps that you can take to protect and/or prepare your organization please contact Christina Lopez-Nutzman at cnutzman@salawus.com or 312.894.3371.

JANUARY

HOW TO DISCIPLINE AND DOCUMENT Presenter: Julie Proscia

This webinar is essential even if you supervise or manage even ONE employee. Documentation, or at least the right type of documentation, is vitally important in managing employees' performance and behavior and is sometimes a legal necessity when defending against litigation. However, in the heat of the moment it is often one of the first items that falls to the wayside or the "wrong" type of information is recorded. This webinar teaches the Human Resources Manager, Business Owner, and/or Supervisor:

- How and what to document to take the surprise out of the process;
- How to preserve and prevent future arguments; and
- How to counsel employees to improve their performance.

■ Date: January 6, 2010

■ Time: 9:00am - 10:00am

■ To register, please contact Emily Lempa at elempe@salawus.com or 630.587.7939.

LEAVE ABUSE/WORKERS COMPENSATION ADMINISTRATION Presenters: Jeff Risch & Gail Galante

Join us for this Valley Human Resources Association meeting on leave abuse and workers compensation administration.

■ Date: January 13, 2010

■ Location: Lincoln Inn, Batavia, IL

■ Time: 7:30 am - 10:00am

■ To register, please contact Emily Lempa at elempe@salawus.com or 630.587.7939.

UNEMPLOYMENT INSURANCE 101: ASSESSING AND RESPONDING TO CLAIMS FOR U.I. BENEFITS Presenters: Jeff Risch & Rebecca Dobbs

Attend this seminar and learn how to achieve prompt and cost-efficient resolutions to your employee benefit claims. You will get expert advice on how to evaluate different situations and determine if a former employee is eligible for unemployment insurance benefits. Learn how to address problems when they arise and navigate the legal and procedural process to achieve successful results in unemployment disputes.

■ Date: January 22, 2010

■ Location: Hoffman Estates, IL

■ Time: 8:00 am - 4:30 pm

■ To register, please [click here](#).

FEBRUARY

PREVAILING WAGE LAW Presenters: Jeff Risch

Prevailing wage is a mandatory component of many public works projects. Unfortunately, the law often raises more questions than it answers. What is the prevailing wage? What paperwork do I need? How can I avoid liability and complaints? What if I need help? This seminar will provide the guidance you need to avoid penalties and costly litigation. You'll learn the nuts and bolts of complying with prevailing wage law - minus the confusion and worries. Sign up now and get practical how-to's on surviving prevailing wage predicaments in your next project.

■ Time: 8:30 am - 4:30 pm

■ To register for the February 3, 2010 session in Chicago, IL, please [click here](#).

■ To register for the March 18, 2010 session in Hoffman Estates, IL, please [click here](#).

MARCH

EMPLOYEE ABUSE OF WORKERS' COMPENSATION, FMLA, AND OTHER SO-CALLED ENTITLEMENTS Presenters: Jeff Risch & Jeffrey Glass

Attorney Jeffrey Glass, an attorney in the firm's Rockford office, and Jeffrey Risch, an attorney in the firm's Chicago and St. Charles offices, will give a luncheon presentation for the Rockford Area Society for Human Resource Managers at NIU Rockford on March 16, 2010 regarding employee abuse of workplace "entitlements."

■ Date: March 16, 2010

■ Location: NIU Rockford, IL

■ Time: TBD

■ For more information, please contact Jeffrey Glass at jglass@salawus.com.