

JUNE 2010

NEWS AND EVENTS OF INTEREST
 to SmithAmundsen clients.

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Listen Up Federal Contractors and Subcontractors... One More Mandatory Poster to Post Informing Employees of Their Rights Under the National Labor Relations Act (NLRA)

By Jeffrey A. Risch and Christina Lopez-Nutzman

The U.S. Department of Labor (DOL) recently published a rule requiring Federal contractors and subcontractors to post a prescribed notice at their work places that list employee's rights under the NLRA, which governs the right of employees to join a union, to engage in specified protected concerted activity with or without a union, and to refrain from all such activity. The poster also provides examples of unlawful employer and union conduct that interferes with those rights and indicates how employees can contact the National Labor Relations Board, the Federal agency that enforces those rights with complaints.

This rule follows President Obama's January 2009 Executive Order 13496 advancing the Administration's goals of promoting economy and efficiency of Federal government procurement by ensuring that workers employed in the private sector and engaged in activity related to the performance of Federal government contracts are informed of their rights to form, join, or assist a union and bargain collectively with their employer. The Executive Order also advances that knowledge of such basic statutory rights and promotes stable labor-management relations, thus reducing the costs to Federal government.

The poster may be downloaded from the Department of Labor's Web site onto one 11x17 page or two 11x8.5 pages. To download the posters, visit:
www.dol.gov/olms/regs/compliance/employeeerightsposter11x17_final.pdf
www.dol.gov/olms/regs/compliance/employeeerightsposter2page_final.pdf

The poster must be posted in the work place, but employers should note that if they routinely post notices for employees on a Web site, they must also use an electronic posting in addition to the physical poster. The posters should be posted in a conspicuous area to ensure visibility to employees.

Federal contracts and subcontracts will also contain language explaining the requirements of such postings.

Should a Federal contractor or subcontractor fail to comply, the Office of Federal Contract Compliance Programs (OFCCP) will enforce the posting of the poster as well as inclusion in federal contracts and subcontracts of language explaining the requirement. If the OFCCP is unable to secure cooperation or conciliate a settlement, it would refer the matter to the DOL's Office of Labor Management

Standards (OLMS). John Lund, Deputy Assistant Secretary for the OLMS was quoted as stating that the intention is not to impose penalties on employers for failing to comply but rather to ensure that employees are informed of their rights. Despite this purported intention, there are serious penalties that may be imposed, such as suspension of a Federal contract or the debarring of Federal contractors from future Federal contracts.

To avoid penalties, we encourage Federal contractors or subcontractors to quickly take steps to comply with the new posting requirements.

If you have questions regarding the National Labor Relations Act, please contact Jeffrey Risch at 630.569.0079 or via email at jrisch@salawus.com or Christina Lopez-Nutzman at 312.894.3371 or via email cnutzman@salawus.com.

Don't Believe the Hype! ERISA Remains a Very Unfavorable Law for Employees to Sue Under

By Rebecca L. Dobbs

The Employee Retirement Income Security Act (ERISA) is the primary federal law governing employer sponsored benefit plans. Surprisingly, ERISA does not allow for many types of forms of relief. For example, a plaintiff is generally not entitled to demand a jury trial with an ERISA action. A plaintiff is not necessarily going to be able to seek pre-judgment interest or back-pay as a remedy to his or her ERISA claim. ERISA also does not allow for extra-contractual or punitive damages. Finally, in ERISA actions (aside from those of a multiemployer plan suing for contributions) attorneys' fees are not automatically awarded – even to a prevailing party. Rather, a court is required to take a multitude of factors under consideration to determine if attorneys' fees are appropriate to award under §1132(g)(1) of the Act. Due to these limitations, many plaintiff-side ERISA attorneys express frustration that ERISA allows for a wrong without a remedy

On May 24, 2010, the Supreme Court issued an opinion in *Hardt v. Reliance Standard Life Insurance Co.* In that decision, the Supreme Court clarified a split amongst various federal judicial circuits by holding that §1132(g)(1) of the Act does not require a party to obtain a judgment in their favor in order to receive an award of attorneys' fees. For those who are not familiar with ERISA, this can sound like an alarming decision. However, such alarm is far from necessary.

In its decision, the Supreme Court merely clarified that rather than be a “prevailing party,” the party seeking attorneys' fees has to show they have had “some degree of success on the merits” before a court can consider awarding attorneys fees. Keep in mind, the party will still need to show the other factors required in order to justify a reasonable

award of attorneys' fees. Additionally, the Court clarified that a party is not considered to have “some degree of success on the merits” where it is a mere “trivial” success or a “purely procedural victory.”

In the case before it, Reliance had denied Ms. Hardt long-term disability benefits. The Supreme Court ruled that, when she was before the District Court, Ms. Hardt had such a degree of success that would possibly entitle her to attorneys' fees. After all, Ms. Hardt had been able to persuade the District Court to find that the plan administrator did not comply with ERISA guidelines and thus denied her of the review she was entitled to under the law. The District Court had remanded Ms. Hardt's case to Reliance to reconsider, at the same time warning Reliance that it was required to consider all of the evidence, and if it did not, judgment would be entered in favor of Ms. Hardt.

In other words, the argument made by Reliance asserting that Ms. Hardt was not the “prevailing party” would appear to most non-attorneys as merely a play on words. The Supreme Court held that a party does not technically have to be awarded a judgment in their favor in order for a reviewing court to determine that an award of attorneys' fees is appropriate. However, the appropriateness for an award of attorneys' fees under an ERISA claim will continue to take into consideration multiple other factors and an award of attorneys' fees will not be automatically provided. Additionally, the Supreme Court decision does not change case precedent in the 7th Circuit, in which Illinois sits.

If you have any questions about this or any other employee benefit related matter, please contact Rebecca Dobbs at 630.587.7928 or via email at rdobbs@salawus.com.

U.S. Supreme Court Hears Arguments in Important Employment Privacy Case

By Jon D. Hoag

The United States Supreme Court heard oral arguments in the *City of Ontario v. Quon* case, moving the Court closer to issuing an important decision about the parameters on workplace privacy rights.

Jeff Quon was a Police Sergeant for the City of Ontario, California. As a member of the SWAT team, Quon received a pager capable of sending text messages. The City's contract with Arch Wireless had a 25,000-character limit per month, per device, before overage charges applied. A number of officers exceeded the 25,000-character monthly limit. The Police Chief eventually ordered review of the text transcripts for the two officers with the highest overage – Quon was one of those

officers. The wireless company voluntarily provided the City with a copy of the transcripts. The transcript review revealed sexually explicit messages from Quon to his wife, his girlfriend, and another officer.

Notwithstanding that Quon had previously signed a statement acknowledging that he had no expectation of privacy in using City owned computers or other devices, Quon sued alleging an unlawful search in violation of the Fourth Amendment. Quon stated that his Lieutenant told the officers that they could use the devices to send personal text messages as long as the officers paid the overage fees. The lower court ruled for the City, but the 9th Circuit Court

Court Approves OSHA's New Rule Allowing Per-Employee Violations

By Jon D. Hoag

On April 16, 2010, the United States Court of Appeals for the District of Columbia confirmed that OSHA had authority to issue its final rule related to per-employee violations. The final rule was issued on December 12, 2008 with the stated purpose of clarifying that the personal protective equipment (PPE) and training requirements impose a compliance duty to each and every employee covered by the Act. The final rule added 29 C.F.R. § 1910.9, which states that an employer's failure to provide PPEs or proper training may be considered a separate violation for each affected employee.

The rule came in response to the Occupational Safety and Health Review Commission's decision in *Erik K. Ho, 2003 WL 22232014 (O.S.H.R.C.), aff'd partly on other grounds, Chao v. Occupational Safety & Health Review Comm'n*, 401 F.3d 355 (5th Cir. 2005). In that case, Ho hired eleven workers to renovate a building containing asbestos, but failed to train them or provide respirators. Ho was cited for eleven violations of the respirator standard. The Commission rejected the employee-by-employee citations and held that two violations occurred (i.e. one for failing to train and one for failing to provide respirators). The Commission stated that the Secretary had the authority to set forth standards which prescribe individual units of prosecution or penalty units, but the Secretary had not promulgated such a regulation.

After the Secretary did promulgate such a rule, three trade associations challenged whether the Secretary did indeed have authority to set forth "units-of-prosecution." The United States Court of Appeals for the District of Columbia answered in the affirmative.

The frightening part of OSHA's new rule is that it does not clarify that the per-employee penalty system is supposed to be reserved for **flagrant** violations. During the rulemaking process, a number of organizations attempted to point out that OSHA's Field Operations Manual only contemplates multiple citations when the employer's behavior is egregious or willful and the rule should include such a reference. Nonetheless, the final rule does not contain any qualifying language. In light of this decision, it appears the new rule is not susceptible to court challenges. Therefore, we expect OSHA to move forward with issuing per-employee violations for noncompliance with PPE or training requirements. Companies should act now to reduce their risk under OSHA's more punitive standard.

If you have questions about this or any labor or employment matter, please contact Jon Hoag at 630.587.7914 or via email at jhoag@salawus.com.

DOL Amends Child Labor Rules for Non-Agricultural Work

By Jon D. Hoag

The U.S. Department of Labor (DOL) recently updated its child labor rules. The rules were originally proposed in 2007, and since that time, the Department has been studying changes in the American workplace and the impact on young workers. Labor Secretary Hilda Solis described the regulations as a "common sense approach to keeping young workers safe from harm."

The regulations recognize that the "health, well-being, and educational opportunities of 14- and 15-year-olds who are academically oriented are not placed at risk by participation" in bona fide work-study programs. Accordingly, the Department relaxed some of the regulations to give students more opportunity to work during hours when a school is open. The regulations also provide greater flexibility to allow 14- and 15-year-olds to engage in work of an "intellectual or artistically creative nature," such as singing, computer programming, software writing, teaching, etc. when the work does not involve any power-driven machines other than standard office equipment. The Department indicated that the work must be related to fields such as music, writing, acting, and the graphic arts, and that tattooing

and body piercing would not qualify as an artistically creative endeavor.

The regulations specifically prohibit 14- and 15-year-old children from engaging in door-to-door (or "street") sales. The regulations clarify that they are not applicable to participation in fundraising for charities (e.g. Girl Scout cookie sales, team candy sales, etc.). The regulations outline other jobs and machinery that are expressly off limits from being performed by 14- and 15-year-old children because the Department has deemed them to be hazardous. Finally, the Department confirmed that employers are to use the workweek it has established for overtime purposes when calculating the maximum hour requirements for 14- and 15-year-old employees.

Secretary Solis stated that with the completion of these updates, the Department will now focus on strengthening the rules for children working in agriculture.

If you have questions about this or any labor or employment matter, please contact Jon Hoag at 630.587.7914 or via email at jhoag@salawus.com.

H-1B Cap Gap Relief

By Jacqui Lentini McCullough

In April, the U.S. Citizenship and Immigration Services (“USCIS”) reminded employers that some foreign national employees may qualify for Cap Gap relief. H-1B Cap Gap Relief pertains to F-1 students with pending or approved H-1B petitions, including a request for a change of status from F-1 to H-1B, with an employment start date of October 1, 2010, under the Fiscal Year (FY) 2011 H-1B cap. Current regulations allow F-1 students with pending H-1B petitions to remain in F-1 status during the time frame when a F-1 student’s work authorization would have otherwise expired, and up to the start of their approved H-1B employment beginning on October 1, 2010. F-1 students with Optional Practical Training (OPT) that expired on or after April 1, 2010 have employment authorization automatically extended until October 1, 2010, and an approval or denial of the H-1B petition.

F-1 students in this situation should contact their university’s Designated School Official (DSO) to have an updated Form I-20 issued to reflect the cap gap relief, and continued employment eligibility to submit to employers. The Form I-20 is the only document a student will have to show proof of continuing status and OPT, if applicable. The student must show proof of the H-1B petition filing to the DSO.

F-1 students may *not* travel internationally during a cap gap extension period and return to the U.S. in valid F-1 status. Instead, the student will need to apply for an H-1B visa at a consular post

abroad prior to returning to the U.S. Since the H-1B petition will most likely have an October 1, 2010 start date, the student should be prepared to adjust travel plans accordingly. In this situation, entering the U.S. after applying for a H-1B visa stamp could occur *no earlier* than September 22, 2010.

If a student’s change of status petition to H-1B is denied or not selected for approval, the student will have the standard sixty (60) day grace period from the date of the rejection notice or the end date of OPT, whichever is later, to depart the U.S.

H-1B Cap Gap relief should not be confused with a STEM OPT extension. F-1 students who receive degrees in designated STEM majors in science, technology, engineering, and mathematics included on the STEM Designated Degree Program List, who are employed by employers enrolled in E-Verify, and who have received an initial grant of post-completion OPT related to such a degree, may apply for a seventeen (17) month extension of such authorization. Additional information regarding STEM OPT and the approved STEM Designated Degree Program List can be found at www.ice.gov/sevis. Additionally, USCIS has confirmed that if a H-1B petition is denied or withdrawn, an F-1 student may still apply for STEM OPT within ten (10) days of the withdrawal or denial if eligible.

For additional information regarding the H-1B cap, or any other immigration related issue, please contact Jacqueline Lentini McCullough at 630.262.1435 or via email at jlentini@salawus.com.



CALENDAR OF EVENTS 2010

JUNE/JULY

WAGE HOUR REVOLUTION: IS YOUR BUSINESS READY? Presenter: Jeffrey Risch

Per the U.S. DOL’s Official Press Release, Solis’ announcement marked the beginning of the “We Can Help” nationwide campaign. The effort, which is being spearheaded by the department’s Wage and Hour Division, will push employees towards the U.S. Department of Labor. The campaign places a special focus on reaching employees in such industries as construction, janitorial work, hotel/motel services, food services and home health care. It also will address such topics as rights in the workplace and how to file a complaint with the Wage and Hour Division to recover wages owed. Similarly, the Illinois Department of Labor is in full force pursuing employers for wage/hour violations throughout Illinois. The government’s new crackdown on employers is coming at a time when employee wage/hour lawsuits and the dreaded Class Action are at an all time high. Employers of all shapes, sizes, backgrounds and industries must prepare for this growing onslaught of wage/hour enforcement and litigation.

UNDERSTANDING THE IMPACT OF HEALTH CARE REFORM Presenter: Carmel Cosgrave and Rebecca Dobbs

After months of debate, Congress pushed through the most significant health care reform legislation since the creation of the Medicare program in the 1960s. Register now and learn what this legislation means for you. This is an opportunity for employers to assess best-practice programs and begin relationships with key partners. This seminar is designed to give you the information you need to move forward in addressing the high costs associated with health care and to give you some insight into the health care movement and what it means for employers.

■ Date: June 29th (Chicago, IL)
July 8, 2010 (Springfield, IL)

■ Time: 8:30 am - 1:00 pm

■ For additional information and to register, please click [here](#).

■ Date: July 9, 2010 (Naperville, IL)

■ Time: 8:30 am to 4:30 pm

■ For additional information and to register, please click [here](#).