

***Third Thursday* –Crowell & Moring’s Labor & Employment Update**

March 19, 2015

The webinar will begin shortly. You will not hear any audio until we begin. Please stand by.

Today's Presenters



Tom Gies



Angela Styles



Trina Fairley-Barlow

Guest Speaker

Molly Conway

- Majority Labor and Pensions Counsel
- Senate Committee on Health, Education Labor and Pensions

Today's Discussion

- The New Congress – Overview
- E.O. 13673 – Fair Pay and Safe Workplaces
- NLRB Representation Election Procedures
- EEOC and Corporate Wellness Programs
- NLRB “Joint Employer” Litigation
- ACA – Employer Mandate

The New Congress

- National Labor Relations Board (NLRB) Oversight and Reform
- Equal Employment Opportunity Commission (EEOC) Oversight and Reform
- President's Executive Orders
- Congressional Tools

E.O. 13673 – Fair Pay and Safe Workplaces

- Executive Order
 - Key Provisions
 - Time lines
- Summary of What the Order May Mean for Federal Contractors

E.O. 13673

- Sets the stage for the FAR Council and agencies to prepare and issue guidance and regulations to implement substantive provisions.
- Potentially creating several new obligations for contractors and subcontractors doing business with the Federal government.
- Including ...

E.O. 13673

Prior to Award.

- Contractors bidding on procurement contracts in excess of \$500,000 required to “represent, to the best of the [their] knowledge and belief, whether there has been any administrative merits determination, arbitral award or decision, or civil judgment” rendered against the contractor within the preceding 3-year period for violations of a slew of labor laws (including the FLSA, Service Contract Act, Davis-Bacon, ADA, ADEA, FMLA, NLRA, OSHA, Title VII of the Civil Rights Act and others, as well as equivalent State laws).
- This information factored into the CO’s responsibility determination (i.e., “whether an offeror is a responsible source that has a satisfactory record of integrity and business ethics”).
- Contractors required to disclose similar information for *subcontractors* on subcontracts (other than COTS items) valued over \$500,000.
- Contractors required to include provisions in their subcontracts requiring *subcontractors* to disclose and update such information

E.O. 13673

Post Award.

- During contract performance, contractors performing work on covered contracts and subcontracts required to provide updated information every 6 months.
- Information brought to the attention of the CO or the Labor Compliance Advisor may result in Government action
 - “includ[ing] agreements requiring appropriate remedial measures, compliance assistance, and resolving issues to avoid further violations, as well as remedies such as decisions not to exercise an option on a contract, contract termination, or referral to the agency suspending and debaring official.”

E.O. 13673

Labor Compliance Advisors.

- Federal agencies required to designate a senior agency official to be a “Labor Compliance Advisor”
- LCA tasked with facilitating contractor compliance with labor laws, which includes
 - “helping agency officials determine the appropriate response to address violations of the requirements of the labor laws” and
 - “coordinat[ing] assistance for agency contractors seeking help in addressing and preventing labor violations”
 - but also includes “as appropriate” sending information to agency suspending and debarring officials.

E.O. 13673

- Effective dates of new requirements will be driven by regulations and guidance issued by the FAR Council and several other agencies (primarily the DOL).
- White House “Fact Sheet” indicates that implementation will occur “on new contracts in stages, on a prioritized basis, during 2016.”

NLRB “Ambush Election” Rules

Significant Procedural Changes

- Electronic Filing
- Shorter timelines
- Limits on pre-election hearings
- Earlier submission of *Excelsior* List
- Statement of Position Requirements

NLRB “Ambush Election” Rules

Managing in the “Permanent Campaign” Environment

- Wage/benefit comparisons
- Attitude surveys
- Early warning systems
- Training
- Policy review

EEOC and Wellness Programs

- Background
 - Wellness programs require employees to complete a health risk assessment
 - May include/require biometric screening
 - Include financial incentives/penalties relating to participation or meeting program bench marks

EEOC and Wellness Programs

- Overlapping laws create uncertainty
 - ADA
 - GINA
 - HIPAA
 - ACA

EEOC and Wellness Programs

- Recent EEOC cases attacking wellness plans create further uncertainty:
 - *EEOC v. Orion Energy Systems* (W.D. Wisc. Aug. 20, 2014)
 - *EEOC v. Flambeau, Inc.* (W.D. Wisc. Sept. 30, 2014)
 - *EEOC v. Honeywell* (D. Minn. Oct. 27, 2014)

EEOC and Wellness Programs

- A Potential Fix?
 - EEOC wellness plan proposed regulations were promised in February 2015, but not delivered
 - H.R. 1189/S. 620
 - Purpose and Goals
 - Fix confusion created by EEOC's recent lawsuits
 - Clarify that employers are permitted to offer wellness plans that are tied to a financial reward
 - Allow spouses to participate in wellness plans
 - Create option for employee participation in alternative wellness programs

EEOC and Wellness Programs

- What employers should do now?
 - No definitive answers
 - Options:
 - Stay the course
 - Eliminate all surcharges and rewards
 - Only provide rewards
 - Divorce rewards from premiums entirely

NLRB – Joint Employer Rules

- Traditional test
 - Joint employers must share control over matters such as hiring, firing, discipline, supervision and direction of employees
 - Control must be “direct and immediate”
 - “Limited and routine” control insufficient

NLRB - Joint Employer Rules

- *Browning Ferris*
 - Teamsters' election petition for employees of both BFI and a contractor in a single unit
 - Contractor employs 240 people on a cost-plus contract.
 - Contractor has authority to hire, fire. Etc.
 - Contractor sets wages
 - Contractor has both onsite managers and HR

Why Browning-Ferris Matters

- Expand potential joint-employer liability to cover numerous contracting arrangements
- Loss of secondary boycott protections
- Overrule the *Malbaff* doctrine
- Signals potential reversal of rules requiring consent of employees in various types of co-employment situations

NLRB – Joint Employer Rules

- *McDonald's* cases
 - Complaints allege that McDonald's and its franchisees violated the rights of workers by taking actions against them for participating in protests.
 - General Counsel contends that McDonald's should also be held liable on the *indirect* control McDonald's exercises over the franchisees' operations.
 - General Counsel claims that treating McDonald's as a joint employer promotes meaningful collective bargaining

ACA – Employer Mandate

- “Employer-Mandate” Explained
 - Employers with at least 100 “full-time” employees must provide healthcare meeting ACA standards to full-time employees or pay a penalty – Effective 1/1/15
 - Employers with between 50 and 100 “full-time” employees must provide healthcare to full-time employees meeting ACA standards or pay a penalty beginning in 2016.

ACA - Employer Mandate

- The Debate
 - Definition of “full-time” under the ACA = 30 hours per week; inconsistent with other generally accepted definitions of full-time
 - Employer groups argue that the definition hurts small business growth and creates an incentive for employers to reduce employees hours

ACA – Employer Mandate

- HELP Committee Hearing held on 1/22/15
- Proposed Legislation (H.R. 30/S. 30) in both Houses to change definition of “full-time” from 30 hours to 40 hours.
- Other attacks on the definition of “full-time”
 - Emergency service volunteers
 - Veterans covered by Tri-Care or other comparable insurance

Medical Marijuana

- S 836 - Senators Booker, Gillibrand and Paul
 - Permits states to legalize marijuana at least for medical purposes
 - Changes the Controlled Substances Act classification of marijuana
 - Protects financial institutions in the industry
 - Changes Veterans Authority procedures

Selected Authorities and References

Statutes

- Controlled Substances Act, 21 U.S.C. 812(b)-(c).
- Drug-Free Workplace Act of 1988, 41 U.S.C. 81

Regulations

- NLRB Final Rules on Representation Case Procedures

http://www.ofr.gov/OFRUpload/OFRData/2014-28777_P1.pdf

Selected Authorities and References

Case Law

- *Coats v. Dish Network*, 303 P.3d 147 (Colo. App. 2013)
- *Ross v. RagingWire Telecommunications, Inc.*, 174 P.3d 200 (Cal. 2008).
- *Laerco Transportation*, 269 NLRB 324 (1984)
- *Purple Communications, Inc.*, 361 NLRB No. 126 (Dec. 11, 2014).

Selected Authorities and References

- *Oakwood Care Center*, 343 NLRB 659 (2004)
- *Greenhoot, Inc.*, 205 NLRB 250 (1973)
- *Lee Hospital*, 300 NLRB 947 (1990)
- Plumbers Local 447 (Malbaff), 172 NLRB 128 (1968)

Selected Authorities and References

Other

- C&M client alert on *McDonald's* NLRB action
<http://www.crowell.com/NewsEvents/All/NLRB-Sues-McDonalds-Signaling-a-Seismic-Shift-in-the-Joint-Employer-Doctrine>
- NLRB Fact Sheet <http://www.nlr.gov/news-outreach/fact-sheets/nlr-representation-case-procedures-fact-sheet>
- C&M webinar on NLRB enforcement initiatives:
<http://www.crowell.com/files/Third-Thursday-Presentation-December-2014.pdf>

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