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FEDERAL LAW

Weeks Marine, Inc.: On April 29, 2015, the Administrative Review Board (ARB) issued its decision in *Weeks Marine*. In that decision, the ARB held that under the Davis Bacon Act, the union contractor was required to reimburse its employee for out of town lodging. The employer otherwise complied with Davis Bacon by paying the appropriate prevailing wage rates. According to the ARB, shifting costs to the employees impermissibly drove the employees' pay below the prevailing wage rates set on the project. In the past several weeks, Mn/DOT has been auditing contractors for failure to pay employees lodging on out of town projects and has indicated that it will follow the *Weeks Marine* decision.

New SBC Template: In the December 2014 notice of proposed rulemaking, the Department of Labor, Health, and Human Services, and the Treasury proposed changes to the Summary of Benefits Coverage (SBC) well as a new SBC template and associated documents. The Department of Labor is looking to reduce the size of the SBC format that employers and insurers use to notify employees on the basics of health plan information. Due to employers' and insurers' concerns of likely compliance failure violations, the DOL announced that the template will be finalized by January 2016 and will apply to coverage that would renew or begin on the first of the first plan year that begins on or after January 1, 2017.

OSHA Revised Poster: The Occupational Safety and Health Administration unveiled a new version of its "Job Safety and Health – It's The Law!" poster. The latest edition has many text changes, including new and deleted language. OSHA says on its website, "Employers do not need to replace previous versions of the poster."

EEOC Must Not Be Quick To Sue: In *Mach Mining v. EEOC*, the U.S. Supreme Court unanimously ruled that the Equal Employment Opportunity Commission must at least try to resolve complaints before filing lawsuits at companies it accuses of discrimination. In this case, the EEOC issued just two letters to the employer and then filed a lawsuit in federal court.

EEOC's Wellness Incentive: In April 2015, EEOC issued a proposed regulation on wellness incentive as they relate to the Americans with Disabilities Act (ADA). The basics of the proposal include the following:

- Wellness Programs that include disability-related inquires or medical examinations, **"voluntary"** means that:
    - Employees are not required to participate,
    - Employees are not denied coverage for failure to participate, and
    - Employees are not subjected to any adverse employment action, retaliation, intimidation, or coercion for failure to participate.

- Wellness Programs that includes disability-related inquiries or medical examinations **and is part of a group health plan**, the employer must provide a notice that clearly explains:
    - What medical information will be obtained,
    - Who will receive the medical information,
    - How the medical information will be used,
    - The restriction on its disclosure, and
    - The methods that will be used to prevent improper disclosure of the medical information.
- Programs must be reasonably designed to promote health or prevent disease.
- Reasonable accommodations must be provided for all wellness programs.
- Maximum allowable incentive for participation in a wellness program or for achieving certain health outcomes is 30% of the total cost of employee-only coverage. (only applies to wellness programs that require disability-related inquiries or medical examination in order to earn an incentive)
- HIPPA permits a 50% incentive limit for wellness programs that prevent or reduce tobacco use. However, if disability-related inquiries or medical examinations are used for the wellness program then the 30% limitation applies.
- Employers may only receive medical information obtained by wellness programs in aggregate form except as needed to administer the health plan.

Easier to Correct Mistakes for Elective Deferrals in 401(k)s: The IRS announced changes that make it significantly easier to correct employee deferral mistakes, known as elective deferrals. A employer is not required to make a correction for the missed elective deferrals if the 401(k) has automatic enrollment and it either (1) does not automatically enroll employees in accordance with the terms of the plan or (2) does not implement an employee's affirmative election so long as the employee is enrolled in the plan within 9-1/2 months following the end of the plan year of the failure. The employer must still make a correction equal to the matching contribution on the missed elective deferrals. For plans that do not have automatic enrollment, the employer does not have to make a contribution for the missed elective deferral if the elective deferral failure occurs for less than three months.

DOL Issues New Interpretive Guidance Regarding Independent Contractor Misclassification: On July 15, 2015, the Wage and Hour Division of the U.S. Department of Labor (DOL) issued guidance on determining whether a worker is an independent contractor or an employee under the Fair Labor Standards Act (FLSA). Independent contractor misclassification has been an ongoing enforcement priority of the DOL. The DOL guidance centers on the "economic realities" test to determine employee status, which focuses on whether a worker is economically dependent on the employer or in business for him or herself, and includes consideration of the following factors:

- the extent to which the work performed is an integral part of the employer's business;
- the worker's opportunity for profit or loss depending on his or her managerial skill;
- the extent of the relative investments of the employer and the worker;
- whether the work performed requires special skill and initiative;
- the permanency of the relationship; and
- the degree of control exercised or retained by the employer.

While the guidance is neither law nor a rule, it is nonetheless significant because it strongly indicates that misclassification continues to be an enforcement priority for the agency, and cements the DOL's view that far too many workers are currently being misclassified.

WISCONSIN

Right to Work Legislation: In March, Wisconsin became the nation's 25th right-to-work state by passing a law providing that workers cannot be forced to join labor unions, or pay union dues, to keep a job. The law effectively means that mandatory union membership and dues are banned at privately owned businesses, and went into effect immediately.

Continued Employment Constitutes Valid Consideration for Non-Compete Agreements: In *Runzheimer Intern., Ltd. v. Friedlen*, the Wisconsin Supreme Court held that the promise of an employer not to discharge an employee in exchange for signing a non-compete agreement provided sufficient consideration for the agreement to be enforceable. Friedlen had worked for Runzheimer for more than fifteen years when Runzheimer required all of its employees, to sign restrictive covenants. Runzheimer gave Friedlen two weeks to review the covenant, after which Friedlen was required to sign it or be fired. Friedlen chose to sign the covenant and continued to work for Runzheimer for more than two years before being terminated. Friedlen then sought employment at a competitor, and Runzheimer sued. Friedlen argued that a promise of continued employment does not alter the situation of either the employer or employee, and that a restrictive covenant lacks lawful consideration unless the employer offers the employee something in addition to promising continued employment. The Wisconsin Supreme Court disagreed, holding that an employer's forbearance in exercising its right to terminate an at-will employee constitutes lawful consideration for signing a restrictive covenant. The Court acknowledged the possibility that an employer could terminate an employee's employment shortly after having the employee sign a restrictive covenant, but stated that the employee would then be protected by other contract formation principles such as fraudulent inducement or good faith and fair dealing, so that the restrictive covenant could not be enforced.

Prevailing Wage Repealed for Local Government Projects: Wisconsin's prevailing wage laws were partially repealed as part of the passage of Wisconsin's budget bill in July. The budget amendment repeals prevailing wage requirements for local governments and require the federal prevailing wage — rather than one set by the state — to be used for state-funded projects. Local governments are not be able to pass their own prevailing wage requirements going forward, but the changes are set to take effect in January 2017 in order to give contractors time to prepare.

If you want to learn more about how these and other new laws and cases might affect your own business, please call Tom Revnew at Seaton, Peters & Revnew at (952) 921-4622.