

Open Shop Committee Web Meeting

May 18, 2015

LEGAL UPDATE

DEPARTMENT OF LABOR (DOL)

- **Davis-Bacon**

- On May 15, AGC staff had its latest meeting with high-level officials at DOL's Wage and Hour Division (WHD) who handle Davis-Bacon wage determinations (WDs) to discuss AGC member and chapter concerns and to work together toward improving bad WDs and the system for setting WDs. Learned:
 - WHD is working on improving its IT for WDs. Has a new IT professional on detail from another agency who is visiting each WHD regional office to observe procedures. Finding lack of consistency. WHD wants to change that and make process more consistent across regions. (This may or may not be advantageous to AGC members.)
 - WHD is working with General Services Administration to improve WDOL.gov, the online resource for WDs.
 - WHD is looking to train its staff to better understand construction crafts. Looking for ideas.
 - WHD is moving toward prioritizing which areas to survey for new WDs based on need – e.g., where WDs are too old or otherwise problematic and where covered construction is planned. Looking for suggestions within the next couple weeks.
- On April 29, the WHD's Administrative Review Board issued a decision in the *Weeks Marine* case on lodging expenses of employees working out of town for extended periods requiring them to live away from home near the jobsite.
 - Held that contractor must pay for lodging unless (1) the lodging was primarily for the benefit and convenience of the employees rather than the company, and (2) either the company regularly furnishes such lodging to all of its employees or such lodging is customarily furnished by other employers in the same type of business.
 - Also held that, when contractor is obligated to pay for lodging, it must pay for *actual cost* of lodging. To avoid unlimited reimbursement, employer has options. E.g., directly provide reasonable lodging or identify reasonable housing for reimbursement.
 - AGC considering supporting appeal if contractor appeals.
- Some key WHD staff have recently changed: (1) Tim Helm, who's been the lead Davis-Bacon enforcer for decades and a valued contact for AGC, has retired and has not yet been replaced; (2) Thomas Peat, formerly WHD Mid-West Regional Wage Specialist, has become Branch Chief of Construction Wage Determinations.

- **Revised Overtime Regulations**

- Proposed rule implementing Presidential Memorandum expected very soon. Already at Office of Management and Budget (OMB) for review.

- Will likely raise salary level for exemption and quantify the primary duties tests.
- AGC keeping close eye on this and participating in a broad coalition effort.
- **Fair Pay and Safe Workplaces Executive Order**
 - A.k.a. “Blacklisting.” Requires disclosure of labor and employment law violations from past 3 years before receiving federal contract over \$500,000, and updating every six months, with broad flow-down requirement. Also (1) requires federal contractors to provide certain pay information to employees and independent contractors; and (2) limits rights of federal contractors to require arbitration of employment-related disputes.
 - Draft guidance from DOL and a proposed regulation from the Federal Acquisition Regulatory (“FAR”) Council implementing the Executive Order are expected very soon. Been on review at OMB since early March.
 - AGC is participating in a coalition and already in discussions with other employer groups about possible joint comments and possible joint litigation.

NATIONAL LABOR RELATIONS BOARD (NLRB)

- **Employer Rules**
 - On March 18, NLRB general counsel issued a Report Concerning Employer Rules reviewing the NLRB’s current views on what employee handbook and similar personnel policies could be deemed to violate the National Labor Relations Act.
 - The report addresses the legality of employer rules on:
 - Confidentiality;
 - Employee conduct;
 - Third-party communications;
 - Restricting, banning or protecting the use of company logos, copyrights and trademarks;
 - Restricting photography and recordings, and related equipment;
 - Restricting employees from leaving work; and
 - Conflicts-of-interest.
- **Representation-Case Procedures**
 - A.k.a. “Quickie Election” or “Ambush Election” Rule. Took effect on schedule on April 14. Expedites union-representation case procedures likely to advantage of organized labor.
 - Congress passed a resolution under the Congressional Review Act to invalidate the rule, but Pres. Obama signed a memorandum of disapproval of the resolution on March 31, effectively vetoing it.
 - In January, legal challenge brought by two AGC-supported employer organizations – U.S. Chamber of Commerce and Coalition for a Democratic Workplace – and other interested parties. In April, the case was consolidated with another case brought by construction company Baker DC and some of its employees. Waiting for decision.