



ACCNJ LEGAL & INSURANCE UPDATE

Construction Groups Sue Federal Government to Roll Back Updates to Davis-Bacon Act

The Associated General Contractors of America (“AGC”) filed suit in federal court seeking to block several provisions of the recent update to the Davis-Bacon Act (“Davis-Bacon”). The lawsuit, filed on November 7th in the U.S. District Court for the Northern District of Texas, argues the Biden administration is attempting to expand the construction wage law to cover workers in manufacturing facilities that produce building and infrastructure components and delivery truck drivers while retroactively imposing these measures on already executed contracts that don’t specifically require Davis-Bacon wage rates.

Historically, coverage under the law was specifically limited only to “mechanics and laborers employed directly upon the site of the work.” The AGC’s lawsuit notes the administration’s attempt to apply the law to material suppliers operated by contractors or subcontractors represents an illegal attempt by the executive branch to exercise legislative power. Additionally, they note the recent changes impermissibly expand coverage to delivery truck drivers when they spend an undefined, “not de minimis” amount of time on a jobsite and attempt to retroactively impose Davis-Bacon rules on qualifying contracts that omitted the inclusion of the law’s requirements.

In short, the AGC is seeking to have the court order the administration to roll back its efforts to expand Davis-Bacon requirements to categories of work excluded in the initial legislation and prevent the administration from retroactively imposing Davis-Bacon requirements on executed contracts which did not include the provisions. While the court reviews the AGC’s petition, ACCNJ staff will continue to closely monitor how the court reacts and alert membership on potential impacts.

NLRB Expands Joint Employer Definition

Back in October, the National Labor Relations Board (“NLRB”) issued its long-awaited Final Rule updating the standard for determining when multiple employers, including construction companies, are considered joint employers under the National Labor Relations Act (“NLRA”). The Final Rule rescinds and replaces the 2020 rule on the joint employer standard issued by the Trump-era Board, and in doing so, provides that an entity is a joint employer of another employer’s employees if the two share or codetermine the employees’ “essential terms and conditions of employment.”

The Final Rule defines the “essential terms and conditions of employment” as:

1. Wages, benefits, and other compensation.
2. Hours of work and scheduling.

3. The assignment of duties to be performed.
4. Supervision of workers' performance.
5. Work rules and directions governing the manner, means, and methods of the performance of duties and the grounds for discipline.
6. The tenure of employment, including hiring and discharge.
7. Working conditions related to the workers' safety and health.

Notably, the Rule broadly defines to “share and codetermine” to include not only the direct exercise of control but also (a) indirect exercise of control and (b) mere possession of the authority to control (directly or indirectly) even if such authority is unexercised.

Contractor Implications

The expanded joint employer definition could have considerable implications in a contractor-subcontractor context. If a general contractor is deemed to be the joint employer of a subcontractor's employees, it could be:

- pulled into disputes between the subcontractor and a union, without protections from secondary boycotts—like reserved gates—normally accorded to neutral third parties; and
- held jointly responsible for unfair labor practices conducted by the subcontractor.

Legal Challenges

The AGC has opposed the updated definition, claiming the expanded definition unlawfully makes it easier for the NLRB to declare a company is the joint employer of another company's workers by establishing “an arbitrary and uncertain standard that threatens indeterminacy in business and labor relations across major industry sectors, including construction.” On November 9th, the AGC joined with the U.S. Chamber of Commerce and others in a business coalition lawsuit challenging the NLRB's Final Rule, arguing the agency exceeded its authority under the NLRA and acted arbitrarily and capriciously in violation of the Administrative Procedures Act.

The Final Rule was originally slated to go into effect on December 26th, however, the NLRB recently extended the effective date to February 26, 2024, to facilitate resolution of legal challenges. ACCNJ will continue to observe how the Rule may be impacted by these challenges and provide updates accordingly.

ACCNJ Urges the Cannabis Regulatory Commission to Release Standards for Workplace Impairment Recognition Expert Certification

When Governor Murphy signed the Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (the “Act”) into law in February 2021, the role of Workplace Impairment Recognition Expert (“WIRE”) was created to “detect and identify an employee's usage of, or impairment from, a cannabis item or other intoxicating substance.” Further, the Act called on the New Jersey Cannabis Regulatory Commission (“Commission”) to develop standards for WIRE certification that would provide employers with guidelines for detecting an employee's impairment while on the job.

As it stands, New Jersey employers are prohibited from taking an adverse employment action against an employee solely on the basis of a positive drug test. In September 2022, the Commission released their Guidance on “Workplace Impairment,” intended to serve as “interim guidance” until the Commission formulates and approves standards for WIRE certifications. According to the Guidance, “a [drug] test combined with evidence-based documentation of physical signs or other evidence of impairment during an employee's prescribed work hours may be sufficient to support an adverse employment action.” While the Commission's Guidance makes several recommendations for procedures employers can implement to detect potential impairment, it has been nearly three years since the Act was signed into law, and the Commission has yet to develop criteria for WIRE certification, leaving employers left in the dark and forced to fend for themselves on a topic they have little to no experience or expertise.

To address this issue, ACCNJ recently sent a letter to the Commission seeking

information regarding the status of WIRE certification standards and stressing the importance of ensuring a drug-free workplace. The letter pointed out the ambiguities in the Commission's interim guidance and explained how the recommendations made therein were likely to have little to no practical effect. ACCNJ staff will continue to follow up until the Commission provides employers with comprehensive standards that help ensure the safety of their workforce and the surrounding public.

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