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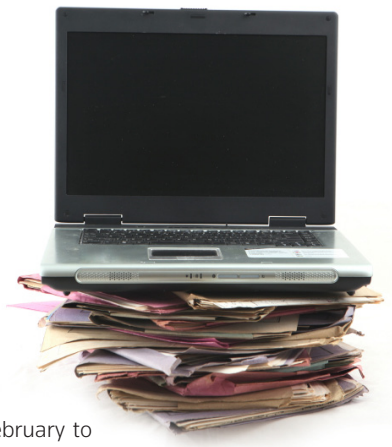
WHAT'S INSIDE

ARMS EXPORT CONTROL ACT

Unlawful export of military documents gets man 8 years in prison

A dual citizen of Iran and the United States has been sentenced to more than eight years in prison for sending to Iran military documents stolen from defense contractors.

United States v. Khazaee, No. 3:14-cr-00009, defendant sentenced (D. Conn. Oct. 23, 2015).



"Mozaffar Khazaee betrayed his defense contractor employers and the national security interests of the United States by stealing and attempting to send to Iran voluminous documents containing highly sensitive U.S. defense technology," U.S. Attorney Deirdre M. Daly of the District of Connecticut said in a statement. "U.S. companies are being relentlessly targeted by those who seek to steal our intellectual property, our trade secrets and our advanced defense technology, whether through a computer hack or cyberintrusion, or through an insider or rogue employee."

Khazaee, 61, formerly of Manchester, Conn., pleaded guilty in February to violating the Arms Export Control Act, 22 U.S.C. § 2778, which prohibits the export of U.S. arms, munitions and defense articles without a State Department license.

U.S. District Judge Vanessa L. Bryant of the District of Connecticut sentenced Khazaee to 97 months in federal prison and three years of supervised release and ordered him to pay a $50,000 fine, the Justice Department said in a statement.

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Preparing for mandated paid sick leave for federal contractors

By Aron C. Beezley, Esq.
Bradley Arant Boult Cummings LLP

President Barack Obama signed a new executive order Sept. 7 aimed at ensuring federal contractor employees "can earn up to seven days or more of paid sick leave annually, including paid leave allowing for family care."[1]

The "Establishing Paid Sick Leave for Federal Contractors" EO applies to "covered contracts where the solicitation for such contract has been issued, or the contract has been awarded outside of the solicitation process, on or after ... Jan. 1, 2017."

The EO is the latest action item on the Obama administration's labor agenda that specifically affects federal contractors.[2] Notably, the EO is the latest move by the administration with respect to federal leave policies in particular.[3]

> The executive order is the latest action item on the Obama administration's labor agenda that specifically affects federal contractors.

Although the EO does not become applicable until the beginning of 2017, and the implementing regulations will not be issued until fall 2016, federal contractors should not delay in familiarizing themselves with the requirements or in undertaking the preparatory measures discussed below.

BACKGROUND

As noted, the EO on paid sick leave is the most recent action on the Obama administration's labor agenda impacting federal contractors. With regard to federal leave policies in particular, it is noteworthy that Obama signed on Jan. 15 a presidential memorandum on "Modernizing Federal Leave Policies for Childbirth, Adoption and Foster Care to Recruit and Retain Talent and Improve Productivity."

This memorandum — which applies to federal agencies as opposed to federal contractors — is particularly significant here because it telegraphed President Obama's next significant move with respect to federal contractor labor policy. Among other things, the memorandum requires agencies to:

- Ensure that their policies offer 240 hours of advanced sick leave at the request of an employee and, in appropriate circumstances, in connection with the birth or adoption of a child or for "other sick leave-eligible uses."
- "[C]onsider, consistent with existing resources, providing access to affordable emergency backup dependent-care services such as through an employee assistance program."
- Make "necessary changes" to their practices and policies to ensure that "employees experiencing the birth or adoption of a child, foster care placement in their home, or who have other circumstances eligible for sick or annual leave are aware of the full range of benefits to which they are entitled."

Furthermore, the memorandum directed the Office of Personnel Management to issue guidance to federal agencies regarding implementation of advanced sick leave and annual leave policies, and the agency did this in April.[4] The OPM's guidance is relevant to federal contractors because it will likely give them a good idea as to what the new EO's implementing regulations will encompass.

THE NEW EO'S KEY REQUIREMENTS

Although the January 2015 presidential memorandum on federal sick leave policy foreshadowed the new EO on paid sick leave for contractors, the specific requirements of the new sick leave directive do not perfectly mirror the requirements set forth in the memorandum.

The following are among the new EO's key requirements:

- Executive departments and agencies must ensure that new contracts "include a clause, which the contractor and any subcontractors shall incorporate into lower-tier subcontracts, specifying, as a condition of payment, that all employees, in the performance of the contract or any subcontract thereunder, shall earn not less than one hour of paid sick leave for every 30 hours worked."[5]
- A contractor may not set a limit on the total accrual of paid sick leave per year or at any point in time at less than 56 hours.
- Paid sick leave accrued under the EO "shall carry over from one year to the next and shall be reinstated for employees rehired by a covered contractor within 12 months after a job separation."
- The paid sick leave required under the EO is in addition to a contractor's obligations under the Davis-Bacon Act, 40 U.S.C. § 3141, and the Service

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Contract Act, 41 U.S.C. § 6702, "and contractors may not receive credit toward their prevailing wage or fringe benefit obligations under those acts for any paid sick leave provided in satisfaction of the requirements of th[e] order."

- For contracts covered by the Davis-Bacon Act or the Service Contract Act, the EO will apply only to contracts or contract-like instruments at the monetary thresholds specified in those statutes. The Davis-Bacon Act generally applies to contractors and subcontractors performing on federally funded or assisted contracts in excess of $2,000 for the construction, alteration or repair of public buildings or public works. *See* 40 U.S.C. § 3142(a). The Service Contract Act generally applies to contracts for services in excess of $2,500. *See* 41 U.S.C. § 6702(a)(2).
- Paid sick leave "shall be provided upon the oral or written request of an employee that includes the expected duration of the leave, and is made at least seven calendar days in advance where the need for the leave is foreseeable, and in other cases as soon as practicable."
- The use of paid sick leave "cannot be made contingent on the requesting employee finding a replacement to cover any work time to be missed."
- The secretary of labor "shall have the authority for investigating potential violations of and obtaining compliance" with the EO."[6]

POLICY

Moreover, according to the White House, the new EO will accomplish the following:

- "Give approximately 300,000 people working on federal contracts the new ability to earn up to seven days of paid sick leave each year."[7]
- "Protect the public health of employees of federal contractors, their customers and clients by ensuring employees are allowed to stay home when they have communicable diseases."
- "Allow workers to use paid sick leave to care for themselves, a family member — such as a child, parent, spouse or domestic partner — or another loved one, as well as for absences resulting from domestic violence, sexual assault or stalking."
- "Improve the health and performance of employees of federal contractors and bring benefits packages offered by federal contractors in line with leading firms, ensuring they remain competitive in the search for dedicated and talented employees."

> The executive order will affect about 300,000 people working on federal contracts by giving them the chance to earn up to seven days of paid sick leave each year.

PREPARING FOR MANDATED PAID SICK LEAVE

The EO does not become applicable to contractors until Jan. 1, 2017, but the secretary of labor is expected to issue implementing regulations by Sept. 30, 2016. Within 60 days of the secretary issuing such regulations, the Federal Acquisition Regulatory Council is also expected to issue regulations. These regulations will be part of the Federal Acquisition Regulations and will provide the appropriate contract clauses for inclusion in federal procurement solicitations and contracts.

CONCLUSION

While awaiting the regulations, federal contractors and their attorneys would be wise to familiarize themselves with the EO's requirements and key provisions, as discussed above. Contractors should also review the OPM's guidance on the January 2015 presidential memorandum because it will give them a good idea as to what to expect with regard to the EO's upcoming implementing regulations.

Moreover, federal contractors should not delay in reviewing their policies and procedures so as to ensure full and timely compliance with the EO's requirements. Additionally, contractors should begin the process of analyzing how the directive's requirements will potentially affect their costs on a going-forward basis. Finally, contractors should be prepared by Jan. 1, 2017, to immediately pass down to their subcontractors the substance of the EO's requirements. Companies that neglect to take these important interim measures risk being caught "flat-footed" when the requirements officially become applicable. WJ

NOTES

[1] *See* Exec. Order No. 13706 (Sept. 7, 2015).

[2] In July 2014 Obama signed the "Fair Pay and Safe Workplaces" executive order, which is aimed at "promot[ing] economy and efficiency in procurement by contracting with responsible sources who comply with labor laws." *See* Exec. Order No. 13673 (July 31, 2014). Moreover, in February 2014 Obama signed the "Establishing a Minimum Wage for Contractors" executive order, which raised the minimum wage for workers on federal service and construction contracts. *See* Exec. Order No. 13658 (Feb. 12, 2014).

[3] *See* https://www.whitehouse.gov/the-press-office/2015/01/15/presidential-memorandum-modernizing-federal-leave-policies-childbirth-ad.

[4] *See* https://www.opm.gov/policy-data-oversight/pay-leave/leave-administration/fact-sheets/handbook-on-leave-and-workplace-flexibilities-for-childbirth-adoption-and-foster-care.pdf.

[5] The executive order provides that paid sick leave may be used by an employee for an absence resulting from: (i) physical or mental illness, injury or medical condition; (ii) obtaining diagnosis, care or preventive care from a health care provider; (iii) caring for a child, a parent, a spouse, a domestic partner, or any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship who has any of the conditions or needs for diagnosis, care or preventive care described in paragraphs (i) or (ii) of this subsection or is otherwise in need of care; or (iv) domestic violence, sexual assault or stalking, if the time absent from work is for the purposes otherwise described in paragraphs (i) and (ii) of this subsection, to obtain additional counseling, to seek relocation, to seek assistance from a victim services organization, to take related legal action (including preparation for or participation in any related civil or criminal legal proceeding), or to assist an individual related to the employee as described in paragraph (iii) of this subsection in engaging in any of these activities. *See* Exec. Order No. 13706 (Sept. 7, 2015).

[6] The executive order states that it "creates no rights under the Contract Disputes Act, and disputes regarding whether a contractor has provided employees with paid sick leave prescribed by this order, to the extent permitted by law, shall be disposed of only as provided by the secretary in regulations issued pursuant to this order."

[7] *See* https://www.whitehouse.gov/the-press-office/2015/09/07/fact-sheet-helping-middle-class-families-get-ahead-expanding-paid-sick (emphasis omitted).

Labor law gone wild: NLRB's joint-employer decision may help unions and hurt business

By Russell J. McEwan, Esq.
Littler Mendelson

The National Labor Relations Board, once described as the "Rip Van Winkle of federal agencies" because it was perceived to be in sleep mode, is unquestionably now wide-awake. And in a recent surprising decision overruling longstanding precedent, the board again demonstrated that the labor movement is the primary beneficiary of its efforts.

To employers who follow labor law developments, the board's continuing nod to unions has become all too predictable. In many cases, its pro-union decisions have created actual or potential legal exposure for many employers.

Regardless of whether you are an employer, an employee or a union advocate, the takeaway from the board's efforts to make labor laws relevant in today's workplace is clear: The labor relations rules of engagement have changed in a significant way. Those who do not take steps to understand and proactively deal with the new normal are the ones truly asleep, and they may not like what they find when they awaken.

The board is the federal agency charged with administering the nation's key labor law: the National Labor Relations Act. The board's internal politics and its interpretation of the law have the potential to affect nearly every American business, regardless of whether or not they employ union-represented employees.

Since President Barack Obama announced in 2008 that "[i]t's time we had a President who didn't choke saying the word 'union,'" many in the business community have perceived the board as intent on helping unions regain their footing after decades of declining membership.

That help has come in the form of numerous changes to the process through which unions gain the right to represent workers: the union-organizing process. The result is that today, the process of union-organizing is easier and the climate better than it has been in a very long time. And it continues to improve, as a recent board decision provides labor with a new tool that should yield greater success in its quest for members.

For years, the board considered two entities to be joint employers if they exercised "direct and significant control" over the same employees such that they shared or co-determined matters governing the essential terms and conditions of employment. The board considered factors such as the right to hire, supervise, discipline and fire employees.

Under that analysis, the board evaluated whether an employer merely retained the right to exercise its authority in these areas via, for example, a commercial contract between the parties, or whether it actually exercised authority to act directly regarding employees. If the employer did not actually and directly exercise its authority, the board was far less likely to conclude that a joint employer relationship existed.

> The NRLB concluded that just having the ability to control terms and conditions of employment of another employer's workers could be enough to establish a joint employer relationship.

JOINED AT THE HIP?

On Aug. 27, the NLRB handed down its long-awaited decision in *Browning-Ferris Industries of California Inc. and FPR-II LLC and Sanitary Truck Drivers and Helpers Local 350*, No. 32-RC-109684, 2015 WL 5047768. In that decision, the board revised the standard for determining when nominally separate employers constitute joint employers, such that they may share exposure to union organizing, collective bargaining obligations, labor disputes and unfair labor practice liability.

In *Browning-Ferris*, the board opined that cases over the past three decades have strayed from the core principles set forth in the past — and concluded that it was time to refocus. It then decided that just having *the ability* to control terms and conditions of employment of another employer's workers — whether that ability was exercised or not — could be enough to establish a joint employer relationship.

Further, the list of terms and conditions of work subject to the board's joint employer analysis expanded significantly. It now includes terms dealing with staffing levels, scheduling, the assignment of work, and the manner in which work is to be performed.

Thus, if Company A contracts with Company B for services and requires in its commercial contract that the employees who will render

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the services possess minimum training standards, or if Company A mandates that Company B's employees abide by Company A's anti-discrimination or harassment policy while rendering services on its premises — very customary (and prudent) terms in commercial relationships — the parties could be waltzing themselves toward a finding of joint employer status.

Of course, the need to abate workplace harassment and safety hazards must be balanced against this consideration. For example, the Occupational Safety and Health Administration is currently aggressively pursuing its temporary worker initiative, focusing investigations on providers and users of temporary labor to ensure adequate safety training is provided. Similarly, the Equal Employment Opportunity Commission anticipates corrective action by both employers if sexual harassment occurs between employees of different employers working at the same work site.

The *Browning-Ferris* decision creates significant legal and practical issues for any company in any industry that enters into contracts with onsite vendors, hires outside contractors, subcontracts work or contracts for services conditioned upon the other party's agreement to conduct its business a certain way.

The ruling could affect businesses that employ a contingent workforce, businesses that subcontract a portion of their work to others, businesses that insure or invest in other businesses, and/or businesses that hire other companies for any purpose that involves employee interaction.

As to each, the consequences of a joint employer finding could include, but are not limited to:

- A seat at the table: Because joint employers share in each other's collective bargaining obligations, the union or non-union status of business partners takes on much greater significance. Contracting with a business partner that employs union-represented employees could result in both employers' mandatory participation in the bargaining process in the wake of a joint employer finding. Contracting with a business partner that does *not* employ union-represented workers may or may not insulate a company, depending upon the likelihood of an organizing drive directed at the business partner's employees, and/or its preparedness to lawfully campaign against any resulting organizing drive. And in a post-*Browning Ferris* world, a joint employer likely can no longer terminate its contract partner due to a concern over union organizing. Cases in which the board has found it lawful for an employer to simply cut ties to avoid the headaches and exposure of union organizing directed at a business partner do not apply to or protect joint employers.
- Increased scrutiny: Getting caught up in litigation on the joint employer issue would likely entail the collection and analysis of a significant amount of information about both companies. In the course of that process, and regardless of the representational status of its workforce, an employer may have to divulge business and employee information. That information would then become subject to greater scrutiny by the board, or perhaps by a union interested in organizing workers of the alleged joint employer.
- Labor disruptions: Because companies that are joint employers are both considered "primary" for labor dispute purposes, the law's prohibition against picketing neutral employers would offer no relief to union demonstrations triggered by one of the joint employers but directed at both. Thus, a general contractor or franchisor that is a joint employer with a subcontractor or franchisee would be open to picketing at its locations. The potential disruption that often accompanies such job actions could be crippling, such as where a general contractor's or franchisor's own union-represented employees engage in sympathy strike activity, effectively shutting down operations.

These are but a few brief examples of how the *Browning-Ferris* decision could suck into its gravitational pull all sorts of business relationships that were previously untouched by the joint employer doctrine.

The decision is likely to spawn new and creative organizing and litigation tactics, as unions probe to see just how good life has now become (assuming, of course, that the courts do not override the board's decision).

At the same time (and largely for the same reason), the new joint employer standard will generate litigation before the board and then in court. Businesses will first litigate to avoid a joint employer finding and then potentially sue each other under contracts that address issues of liability and indemnity.

To deal with the board's latest boost to unions, employers who wish to avoid labor relations issues must, at a minimum, understand:

- The red-flag issues that could invite a joint employer challenge.
- How to structure relationships to minimize risks.
- How to develop contingencies to deal with potential joint employer findings.

Businesses should evaluate their existing commercial relationships to ascertain the degree of risk attendant to any given relationship. Is the type of relationship a hot button issue for the labor movement, such as the use of temporary employees or the franchisor/franchisee model? Regardless of whether the relationship is a perceived lightning rod for union issues, what is the overall labor relations climate of each business partner?

If labor and employee relations are bad for one partner, the risk of union organizing, labor disputes and unfair labor practice liability increases for the other. Therefore, the risks as a joint employer increase. By the same token, to remain an attractive business partner and a minimal joint employer risk, employers should also evaluate their own exposure to employee dissatisfaction, organizing, labor disputes and unfair labor practice liability.

By being able to demonstrate that they have done so in a systematic and thorough fashion, employers can hold themselves out as safe business partners — at least insofar as the joint employer issue is concerned.

Employers should also review existing commercial agreements to determine whether any indicia of direct or indirect control are present, such that evidence sufficient for the board to find joint employer status may already exist.

In *Browning-Ferris*, the board found such control to exist in contract clauses enabling one employer to, among other things, dictate staffing levels, work schedules and training prerequisites. If contract clauses like these

exist — and they likely do — amendments should be considered to decrease the likelihood of a successful joint employer challenge. Such amendments should also attempt to preserve — to the extent possible — the quality control, reputation management, goodwill and security that is every company's objective in negotiating protective contract language.

In addition, employers should strategize in advance what their position will be if a joint employer allegation is made, as it relates to both the union making the allegation and the alleged joint employer. For example, if a joint employer finding requires participation in union negotiations, who will be the chief spokesperson at the bargaining table, who will draft and respond to bargaining proposals and information requests, and what will the parties do in the event an agreement cannot be reached? What arrangements can and should be made at the outset of the joint employer relationship to memorialize these concerns, apportion costs and responsibilities, and minimize legal exposure?

Finally, employers must follow developments in this area of law, as even the board acknowledged in *Browning-Ferris* that it will only be through future litigation that the joint employer doctrine continues to develop. Thus, an employer's approach to the joint employer dilemma will continue to evolve. Stay tuned, and stay awake. WJ

CRIMINAL LAW

Navy range manager admits to taking kickbacks for scrapped equipment

A former bombing range manager for the U.S. Navy has pleaded guilty to accepting $175,000 in kickbacks from scrappers in exchange for illegally supplying them with government-owned heavy equipment.

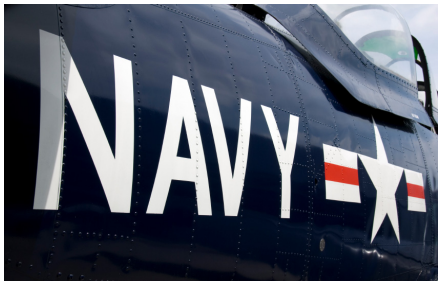
United States v. Mann, No. 2:14-cr-00014, plea entered (E.D.N.C., N. Div. Oct. 28, 2015).

"Corrupt Department of Defense employees who enrich themselves at the expense of American taxpayers are reprehensible," John F. Khin, Defense Criminal Investigative Service special agent in charge for the Southeast field office, said in a statement. "DCIS' top priority is to root out fraud and corruption affecting the DOD and bring these violators to justice."

Harry C. Mann, 79, of Manns Harbor, N.C., faces up to two years' imprisonment when he is sentenced Jan. 25 by Chief U.S. District Judge James C. Dever III of the Eastern District of North Carolina.

The Justice Department said in a statement that Mann had worked at the Dare County Bombing Range near Manteo, N.C., since 1968. The training grounds allow military pilots to hone their skills by dropping inert bombs and firing live rounds at targets. Mann's duties included constructing and maintaining these targets, prosecutors said.

Mann requisitioned about $16 million worth of excess government property from the government's Defense Reutilization and Marketing Office between January 2005 and May 2011, the charges said. These items included functional trucks, bulldozers, excavators and other heavy equipment.



The DRMO is tasked with redirecting or disposing of excess government property, which includes heavy equipment that could be sold to the public or used in emergency management and humanitarian aid projects.

Federal prosecutors said that between March 2009 and May 2011, Mann sold some of this equipment to local scrappers Rudy Lozano and John Williams, both of whom pleaded guilty to theft of government property in the District Court.

Lozano and Williams paid Mann about $175,000 in kickbacks from the money they earned scrapping numerous pieces of heavy equipment, according to the charges.

Prosecutors said Mann directed both men to pay the illegal gratuities in private. One such payment took place at Mann's residence May 18, 2011, when he had one of the scrappers put an envelope containing more than $16,000 in cash into a flowerpot.

"It is essential that we hold government employees accountable for using their positions of trust for their own personal gain at the expense of the U.S. Treasury," Deputy Inspector General Jerry Unruh of the Defense Logistics Agency said in a statement.

> "It is essential that we hold government employees accountable for using their positions of trust for their own personal gain," a Defense Logistics Agency official said.

In addition to prison time, Mann faces a maximum $250,000 fine, an order of restitution and one year of supervised release, prosecutors said. Williams and Lozano are scheduled for sentencing Dec. 14 before Chief Judge Dever. WJ

Related Court Document:
Criminal information: 2015 WL 6551553

See Document Section B (P. 27) for the criminal information.

Homebuilders want Supreme Court to review Clean Water Act case

By Rita Ann Cicero, Legal Writer, Westlaw Journals

The National Association of Home Builders is urging the U.S. Supreme Court to decide whether a landowner can obtain judicial review of a Clean Water Act jurisdictional determination if a property contains wetlands connected to navigable waters.

U.S. Army Corps of Engineers v. Hawkes Co. et al., No. 15-290, amicus brief filed (U.S. Oct. 6, 2015).

In its *amicus* brief, the NAHB argues that the high court should affirm a decision by the 8th U.S. Circuit Court of Appeals that property owner Hawkes Co. could appeal the U.S. Army Corps of Engineers' jurisdictional determination that the property contained wetlands under the Administrative Procedure Act, 5 U.S.C. § 706. *Hawkes Co. v. U.S. Army Corps of Eng'rs*, 782 F.3d 994 (8th Cir. 2015).

The association argues that when the government asserts jurisdiction over private property, landowners have a right to contest such a finding in court.

In September the Army Corps argued in its petition to the high court that the 8th Circuit ruling conflicts with a ruling from the 5th U.S. Circuit Court of Appeals.

The 5th Circuit in *Belle Co. et al. v. U.S. Army Corps of Engineers*, 761 F.3d 383 (5th Cir. 2014), held that an Army Corps jurisdictional determination is not a final agency action and not reviewable by a federal court.

One of the plaintiffs in that case, Kent Recycling Services, unsuccessfully sought Supreme Court review of the appeals court's decision and has asked the high court for a rehearing on its *certiorari* petition. *Kent Recycling Servs. v. U.S. Army Corps of Eng'rs*, No. 14-493, *petition for reh'g filed* (U.S. Apr. 16, 2015).

'WATERS OF THE UNITED STATES'

Hawkes wanted to mine 530 acres of land in Minnesota for peat and in 2010 applied for a Section 404 permit from the Army Corps, the 8th Circuit's opinion says.

Section 404 of the Clean Water Act, 33 U.S.C. § 1311, requires a property owner to obtain a permit from the Army Corps to discharge dredged or fill material if the property contains wetlands.

The Army Corps issued a jurisdictional determination that the property contained 150 acres of wetlands that have a significant nexus with navigable waters.

Hawkes then filed suit in the U.S. District Court for the District of Minnesota, seeking declaratory judgment and injunctive relief challenging the agency's jurisdictional determination that the property contained "waters of the United States" and therefore was subject to the Clean Water Act.

The District Court dismissed the suit, finding that the determination was not a final agency action and therefore was not subject to judicial review. *Hawkes Co. et al. v. U.S. Army Corps of Eng'rs*, 963 F. Supp. 2d 868 (D. Minn. 2013).

The 8th Circuit reversed, finding that an Army Corps jurisdictional determination is reviewable by the courts.

The Army Corps petitioned the Supreme Court for review Sept. 8.

IMPACT ON PROPERTY OWNERS

The NAHB says that property owners cannot just look at a property to determine whether they need a permit to build. They must hire consultants to assist the developers with the permitting process and those consultants may submit a "jurisdictional determination" for approval to the Army Corps.

The consultants and the Corps often disagree about whether jurisdiction exists, the NAHB says.

> "The amount of jurisdiction the Corps asserts over a project will affect whether and how the development proceeds, and sometimes results in a community not being built," the National Association of Home Builders says.

"The amount of jurisdiction the Corps asserts over a project will affect whether and how the development proceeds, and sometimes results in a community not being built," the NAHB says.

The group says that it is imperative that their members be able to challenge the government's jurisdiction over their land in a court of law without spending thousands of dollars. WJ

Attorneys:
Amicus: Norman D. James, Fennemore Craig PC, Phoenix

Related Court Document:
Amicus brief: 2015 WL 5895932

See Document Section C (P. 28) for the brief.

Military contractor lied about worker qualifications, wages, suit says

By Tricia Gorman, Managing Editor, Westlaw Journals

A government contractor that supplies aircraft maintenance support to the U.S. military in the Middle East hired workers who were not qualified for the work and violated contract wage provisions, a California state court suit says.

Weaver et al. v. AECOM et al., No. BC597572, complaint filed (Cal. Super. Ct., L.A. Cty. Oct. 13, 2015).

Ten former workers for AECOM Government Service Inc. say the company hired them even though they did not meet government qualification standards and then quickly fired them after they relocated to Afghanistan.

In a suit filed in the Los Angeles Superior Court, the plaintiffs seek unspecified damages, plus compensation for pay and benefits they say the company promised in their employment contracts.

According to the complaint, AECOM hired the plaintiffs as contractors in July 2012 to serve as aircraft maintenance technicians at military bases in Afghanistan.

Shortly after arriving in Afghanistan, between late 2012 and early 2013, each plaintiff was fired for failing to meet the job qualifications, according to the complaint.

The plaintiffs further allege the employment contract they signed with AECOM misrepresented their pay and benefits.

While the one-year contract provided for compensation for 12 hours of work per day, plus incentive pay, housing and other expenses, the plaintiffs were paid for only eight hours of daily work for the short time they were in Afghanistan, the suit says.

The suit alleges the company violated the California Labor Code and the state's unfair-business-practice law, Cal. Bus. & Prof. Code § 17200.

Ten former workers for AECOM Government Service Inc. say the company hired them even though they did not meet government qualification standards and then quickly fired them after they relocated to Afghanistan.

The company hired them in an attempt to quickly fulfill staffing numbers under the government contract, despite the fact that they did not military-mandated qualifications for the job, specifically a minimum of three years of military service training and an A&P license required to perform aircraft maintenance, the suit says.

The plaintiffs allege the company told them the qualifications had been waived and that they would be trained when they arrived overseas.

AECOM representatives allegedly told workers to alter their resumes to conform to guidelines and then to "hide" from military personnel in Afghanistan. Supervisors also told workers to start looking for new work before they were terminated, the suit says.

AECOM fraudulently induced the plaintiffs to take jobs they were not qualified for, intentionally and negligently misrepresented the job and its benefits and breached their employment contract, the complaint says.

The plaintiffs say they passed up employment opportunities in the United States based on the company's misrepresentations. WJ

Attorney:
Plaintiffs: William W. Bloch, LA Superlawyers Inc., Beverly Hills, Calif.

Related Court Document:
Complaint: 2015 WL 5964999

See Document Section D (P. 34) for the complaint.

FALSE CLAIMS ACT

Second-largest nursing home pharmacy to pay $9.25 million over kickbacks

By Phyllis L. Skupien, Esq., Managing Editor, Westlaw Journals

PharMerica Corp. has agreed to pay $9.25 million to settle allegations that the nursing home pharmacy received kickbacks from Abbott Laboratories in exchange for illegally promoting one of its drugs.

United States ex rel. Spetter v. Abbott Laboratories et al., No. 10-cv-0006, settlement announced (W.D. Va. Oct. 7, 2015).

United States ex rel. McCoyd v. Abbott Laboratories et al., No. 07-00081, settlement announced (W.D. Va. Oct. 7, 2015).

"Nursing home pharmacies accepting kickbacks from drugmakers in exchange for prescribing certain prescription drugs puts vulnerable residents at risk for receiving unnecessary medication, corrupts medical decision making, and inflates health care costs," Special Agent in Charge Nick DiGiulio of the U.S. Department of Health and Human Services' Office of Inspector General said in a statement.

Moreover, the kickbacks were disguised as rebates, grants and other financial support, the Justice Department said.

The allegations were filed by two former Abbott employees, Thomas J. Spetter Jr. and Meredith McCoyd. The suits were filed under the whistleblower, or *qui tam*, provisions of the False Claims Act, 31 U.S.C. § 3729, which permits private individuals to sue on behalf of the government and share in any recovery.

The FCA also allows the government to intervene and take over the suit, as it did in this case.

In May 2012 the government and numerous states entered into a $1.5 billion global civil and criminal settlement with Abbott to resolve the charges. The settlement announced Oct. 7 specifically resolves PharMerica's role in the alleged scheme.

> PharMerica recommended that doctors prescribe Depakote, an anti-epilepsy drug made by Abbott Laboratories, to nursing home residents in exchange for kickbacks.

About $6.75 million of the settlement will go to the United States, while the remainder will be used to cover Medicaid program claims by states that participated in the case. In the suit, the United States and 44 states contended that PharMerica received the kickbacks from Jan. 1, 2001, to Dec. 31, 2008.

According to the Justice Department, nursing homes use consultant pharmacists to review patients' charts and make recommendations to doctors about various prescriptions. In this case, PharMerica, of Louisville, Ky., recommended that doctors prescribe Depakote, an anti-epilepsy drug made by Abbott, to nursing home residents in exchange for kickbacks.

"Elderly nursing home residents suffering from dementia have little control over the medications they receive and depend on the unbiased judgment of health care professionals for their daily care," Principal Deputy Assistant Attorney General Benjamin C. Mizer said in the statement. "Kickbacks to entities making drug recommendations compromise their independence and undermine their role in protecting nursing home residents from the use of unnecessary drugs." WJ

Pipe fitter settles asbestos claim after partial judgment favors shipbuilder

Lockheed Shipbuilding Co. has reached a settlement with a former pipe fitter and piping inspector after a federal judge in Seattle dismissed his product liability and conspiracy claims in an asbestos suit against the company.

Hassebrock et al. v. Air & Liquid Systems Corp. et al., No. 2:14-cv-01835, notice of settlement filed (W.D. Wash., Seattle Oct. 14, 2015).

The settlement was filed just a week after U.S. District Judge Richard S. Martinez of the Western District of Washington granted the company partial summary judgment on the product liability and conspiracy claims but left unresolved the plaintiff's negligence claims.

No details of the agreement were disclosed in the company's settlement notice.

According to Judge Martinez's summary judgment order, Glenn Hassebrock worked as a pipe fitter at the Puget Sound Naval Shipyard from 1956 to 1964 and as a piping inspector for the U.S. Navy at the Lockheed Shipyard from 1967 to 1970.

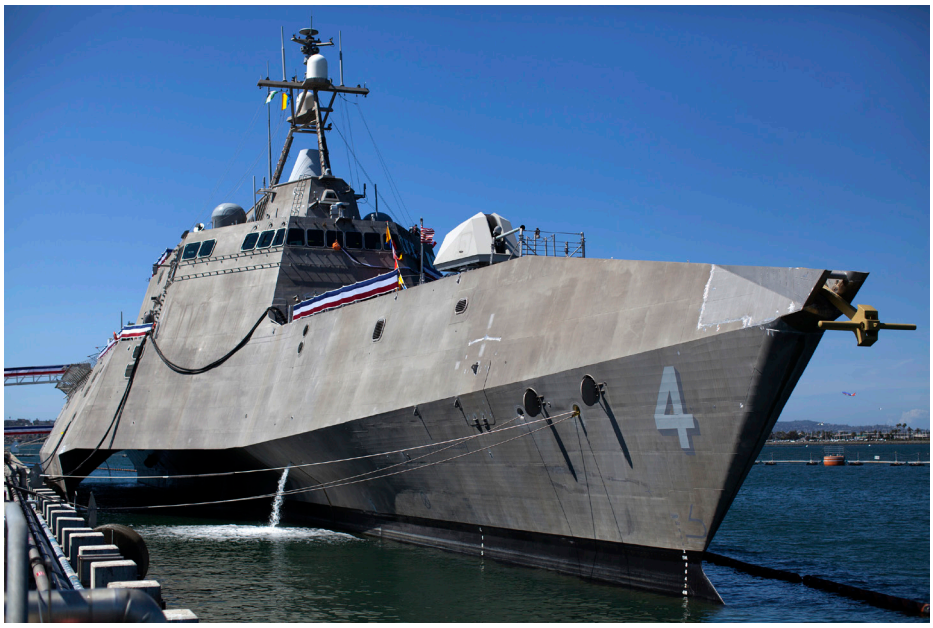
Hassebrock inspected the USS Denver, the USS Coronado and the USS Plainview, which were constructed at Lockheed Shipbuilding's premises, the order said.

He was diagnosed with the fatal lung cancer mesothelioma in June 2014 and died May 2 at age 77.

Hassebrock and his wife filed the suit against Lockheed and other defendants companies in the Kings County Superior Court in November 2014. It was later removed to the Western District of Washington.

The suit alleged he was exposed to asbestos-containing materials such as dry cement, pipe covers, blankets and cloth at the Lockheed worksite.

According to the order, the plaintiffs "apparently conceded" that their claims were not governed by the Washington Products Liability Act, which was enacted after Hassebrock was exposed to asbestos. They asserted, however, that Lockheed was still subject to product liability under common law.



REUTERS/Mike Blake

The plaintiff said her husband developed lung cancer from exposure to asbestos-containing materials while performing inspections aboard military ships, including the USS Coronado, shown here.

In response, Lockheed cited *Mack v. General Electric Co.*, 896 F. Supp. 2d 333 (E.D. Pa. 2012), in which the court found that a shipbuilder's product is the ship itself, not the component parts, the order said.

The *Mack* court also said the burden of preventing an injury is on the party best able to prevent the harm and concluded this burden should be borne by the manufacturers of the various products aboard the ship.

Lockheed also argued that it provided a service rather than a product and that strict tort liability does not apply to defective services, the order said.

In reply, the plaintiffs cited *Filer v. Foster Wheeler LLC*, 994 F. Supp. 2d 679 (E.D. Pa. 2014), in which the court ruled that a shipbuilder is liable for the individual products on the vessel.

Judge Martinez found *Mack* was more persuasive and ruled for Lockheed.

The judge said the shipbuilder was "not in the chain of manufacturing and selling asbestos-related products, rather it was providing the service of producing Navy vessels."

"The product is the vessel," he said. "The manufacturers of the asbestos-related products ... were in a better position to prevent the harm."

The judge also found that the plaintiffs' response "generally confirms for the court that [Lockheed's] liability falls under negligence," saying that they alleged the company controlled work practices and safety at its shipyard.

Judge Martinez dismissed the conspiracy claims, saying the plaintiffs did not address any of the Lockheed's arguments on these issues. WJ

Related Court Document:
Order: 2015 WL 5883403

See Document Section E (P. 41) for the order.

FAA, DOT announce drone registration task force

By Melissa J. Sachs, Esq., Senior Legal Writer, Westlaw Journals

Stakeholders from the federal government and aviation industry have joined a newly created task force to recommend a registration process for unmanned aircraft systems, commonly known as drones.

The heads of the U.S. Department of Transportation and the Federal Aviation Administration announced the new task force Oct. 19. It is made up of 25 to 30 representatives, including some from the drone industry, and will have about one month to recommend a streamlined registration process for unmanned aircraft systems.

Attorney **Zachary D. Ludens**, an associate at **Carlton Fields Jorden Burt**, who has been following the developments with drone regulation, noted the DOT and FAA have deviated from their previous position.

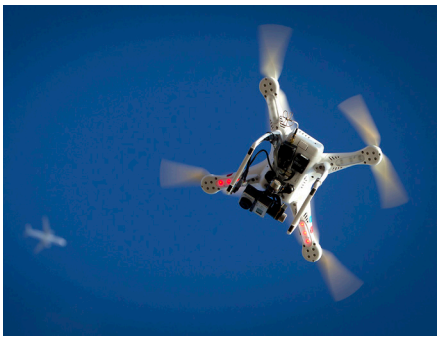
The agencies had said only commercial drones would need to register under proposed regulations, but now the task force is evaluating whether all unmanned aircraft operators will need to register, including hobby drone operators, Ludens said.

"Registering unmanned aircraft will help build a culture of accountability and responsibility, especially with new users who have no experience operating in the U.S. aviation system," Transportation Secretary Anthony Foxx said in a statement.

The number of drone sightings reported to the FAA doubled between 2014 and 2015, the statement said. These include incidents near major sporting events and near manned aircraft flights.

Ludens also mentioned an incident in which a drone prevented a helicopter from entering airspace near Los Angeles to help fight a wildfire.

"All of these incidences prompted questions of how the FAA would deal with noncommercial operators that were operating in an unsafe manner," Ludens said.



REUTERS/Carlo Allegri

The number of drone sightings reported to the FAA, including those flying near manned planes, doubled between 2014 and 2015, the Department of Transportation said. Here, a plane flies in the distance above a commercial drone in New York.

The task force will also recommend which unmanned aircraft systems should receive an exemption from the registration process, such as toys or those that pose a small safety risk, according to the joint agency statement.

"Registration will help make sure that operators know the rules and remain accountable to the public for flying their unmanned aircraft responsibly," FAA Administrator Michael Huerta added in the government's statement.

The task force may also offer other safety recommendations.

At least six industry groups and companies, including the Association for Unmanned Vehicle Systems International, drone developer PrecisionHawk, the Academy of Model Aircraft and the Air Line Pilots Association, are supporting the task force.

Ludens also noted the FAA recently proposed a $1.9 million civil penalty against drone operator SkyPan International Inc. for allegedly operating in a careless or reckless manner.

The FAA said in an Oct. 6 statement that the Chicago-based SkyPan conducted 65 unauthorized unmanned aircraft flights between March 21, 2012, and Dec. 15, 2014.

SkyPan's flights, some of which flew in highly restricted New York airspace without air traffic control clearance, involved aerial photography, the statement said.

Q&A with the FAA on the new drone registration task force

Les Dorr from the Federal Aviation Administration's Office of Communications talks about the newly formed task force on drone registration.

Westlaw Journals: Will the task force address how drone operators will find out about registration requirements? Will there be a public awareness campaign or will manufacturers be responsible to alert their customers about registration requirements?

Dorr: The registration task force is just beginning its work, so details such as these will be worked out. By creating a task force comprised of a variety of stakeholders, we believe we can develop a workable process that will encourage responsible flying and help maintain our record as the safest aviation system in the world. We also want to hear from the public as well. We've published a notice in the Federal Register asking people for ideas that might help the task force do its work. http://1.usa.gov/1WdJoyX

Westlaw Journals: Why does it make sense to have the U.S. Department of Transportation, rather than the FAA, be in charge of the registration process?

Dorr: While Transportation Secretary [Anthony] Foxx made the task force announcement, the FAA will ultimately be responsible for overseeing the registration process, just as we currently do for commercial unmanned aircraft operations.

Westlaw Journals: Will registration be more like an owner's card for a vehicle or a driver's license?

Dorr: Federal aviation regulations require an aircraft operator to have an effective U.S. registration certificate while operating a civil aircraft. The task force will provide recommendation on how this will be issued under the new streamlined registration system.

The company has about a month to respond to the FAA's enforcement letter.

"Anyone that is using drones should pay attention to the DOT's and FAA's guidance in this arena, as this may be the start of more severe enforcement actions that the FAA pursues under its duty to keep the U.S. airspace safe," Ludens said.

The FAA published notice in the Federal Register on Oct. 22 asking for public comment. The notice is available at http://1.usa.gov/1WdJoyX. WJ

INSPECTOR GENERAL REPORT

Pentagon spends $43 million to build Afghanistan gas station, watchdog says

(Reuters) – The U.S. Department of Defense spent nearly $43 million on a gas station in northern Afghanistan and has been unable to explain why it cost so much, a U.S. special inspector reported Nov. 2.

The Pentagon "charged the American taxpayers $43 million for what is likely to be the world's most expensive gas station," said John Sopko, head of the Special Inspector General for Afghanistan Reconstruction, a congressionally mandated body. The amount was spent between 2011 and 2014 on construction and initial implementation of the station.

> The report said a compressed natural gas filling station in neighboring Pakistan cost no more than $500,000 to construct, making the gas station in Afghanistan more than 140 times more expensive.

The gas station in Sheberghan, Afghanistan, opened in 2012 and was created to show that compressed natural gas could be used in Afghanistan in cars effectively.

However, the task force behind the project closed operations in March and for that reason, according to the report, the Department of Defense said it did not possess "the personnel expertise to address these questions."

"Frankly, I find it both shocking and incredible that [the Defense Department] asserts that it no longer has any knowledge," the report said. It added that the task force reported directly to the Office of the Secretary of Defense and was an $800 million program.

The report found that a compressed natural gas filling station in neighboring Pakistan costs no more than $500,000 to construct. That would make the gas station in Afghanistan more than 140 times more expensive.

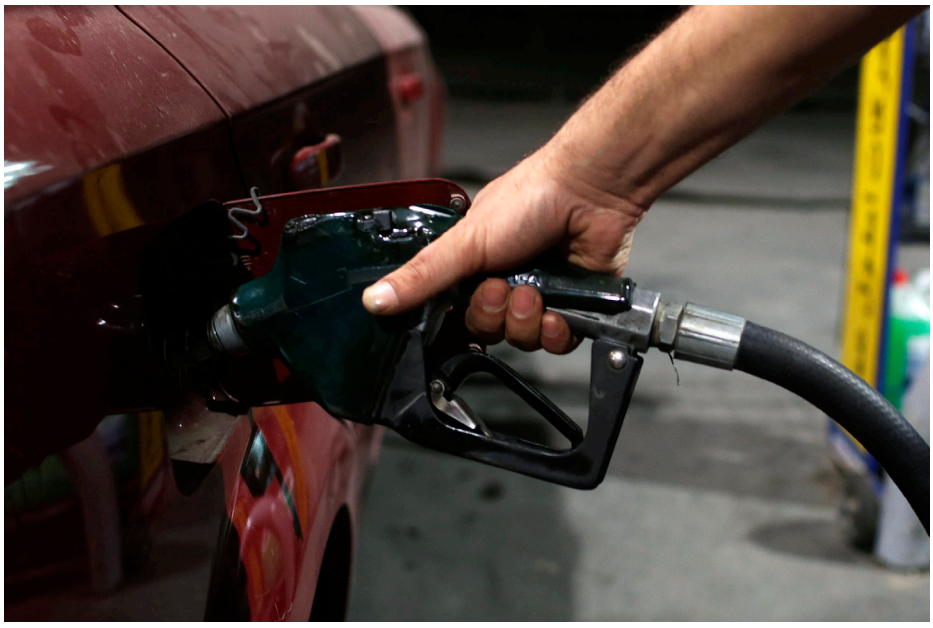
A Defense Department spokesman said the Pentagon continues to provide access to documents to SIGAR through a reading room.

"Further, we have offered to assist SIGAR in locating and contacting any former TFBSO [Task Force for Business and Stability Operations] personnel they wish to interview," said Army Lt. Col. Joe Sowers.

Nearly $110 billion has been appropriated in Washington for reconstruction in Afghanistan since 2002, when U.S. forces drove the Taliban from power for harboring militants from al-Qaida, which carried out the Sept. 11, 2001, attacks.

The report is available at https://www.sigar.mil/pdf/special%20projects/SIGAR-16-2-SP.pdf. WJ

(*Reporting by Idrees Ali; editing by Cynthia Osterman*)



REUTERS/Asmaa Waguih

Unlawful export

CONTINUED FROM PAGE 1

Khazaee holds a Ph.D. in mechanical engineering and worked for three unidentified defense contractors between 2001 and 2013, prosecutors said. Each granted him access to highly sensitive material, including trade secrets and export-controlled information, according to a criminal information filed in the case.

Investigators also found cover letters and job applications on Khazaee's computer, indicating he was trying to secure employment at state-run Iranian universities so he could pass on the knowledge gained from working for U.S. defense contractors, prosecutors said. The documents indicated he was interested in "transferring my skill and knowledge to my nation."

He also attempted to send a large container purporting to be household goods to Iran through a freight-forwarding business in California in November 2013, but was thwarted by federal law enforcement. The shipment actually contained thousands of technical and specification documents related to U.S. jet systems, many of which were clearly labeled "export-controlled," the Justice Department said.

> Prosecutors said defense contract worker Mozaffar Khazaee admitted he sent to Iran documents containing U.S. defense technology in the interest of "transferring my skill and knowledge to my nation."

In late 2009, Khazaee started sending technical information relating to fighter jet engines to an individual in Iran over the Internet, the Justice Department said. He told the other person that the documents were "very controlled" and he was taking a big risk by sending them. Khazaee instructed the recipient to download the attachments and delete the emails immediately.

Prosecutors said Khazaee stole and tried to export some 50,000 pages of material, including 1,500 documents containing trade secrets and 600 documents relating to highly sensitive defense technology. Investigators and the victimized contractors estimated the materials would have allowed Iran to "leap forward" 10 years in military turbine engine research, the Justice Department said.

"Violations of the Arms Export Control Act, particularly those involving attempts to transfer sensitive defense technology to a foreign power, are among the most significant national security threats we face, and we will continue to leverage the criminal justice system to prevent, confront and disrupt them," John P. Carlin, assistant attorney general for national security, said in a statement.

Khazaee has been in prison since his January 2014 arrest at Newark International Airport in New Jersey while attempting to board a flight to Iran. He had secreted about $60,000 in cash in his carry-on bag and had media files containing sensitive information related to U.S. fighter jets in his luggage, prosecutors said. WJ

Related Court Documents:
Criminal information: 2015 WL 7069640
Plea agreement: 2015 WL 802754

See Document Section A (P. 17) for the plea agreement.

LOSING BIDDERS PROTEST AIR FORCE'S AWARD OF BOMBER CONTRACT

Boeing Co. said in a Nov. 6 statement that, together with Lockheed Martin, it has filed a protest action with the Government Accountability Office challenging the Air Force's choice of Northrop Grumman Corp. to produce Long Range Strike-Bomber aircraft. The Defense Department announced Northrop had won the two-part contract Oct. 27. The first part of the job, estimated to cost $21.4 billion, involves engineering and manufacturing development. The second phase calls for the production of 21 planes out of a planned lot of 100. The cost of each aircraft must not exceed $550 million. Boeing and Lockheed say the Air Force did not properly evaluate bidders' cost projections and other factors. In a Nov. 6 statement, Northrop said the GAO would affirm its award because the Air Force made a correct assessment of its contract bid. The GAO has 100 days to issue its decision.

NAVY ADDS $65.8 MILLION TO SONAR SYSTEMS JOB

The Navy will pay an additional $65.8 million to Raytheon Co.'s Integrated Defense Systems unit so the company can continue supplying sonar systems under an existing contract. The Defense Department said in a Nov. 5 statement that the funding will allow Raytheon to provide 20 systems for the Navy and two systems for the government of Saudi Arabia as part of the Foreign Military Sales Program, under which the United States buys goods and services from domestic contractors and sells them to friendly foreign nations. Raytheon will perform the contract work at facilities in France, Rhode Island and Pennsylvania and is scheduled to finish the job by September 2018, the statement said.

6 FIRMS WIN NAVY PAINTING CONTRACTS

The Defense Department said in a Nov. 5 statement that Chavis Inc., G.T. Painting & Construction Co., Olympic Enterprises Inc., Pro Coating Services Inc., Vima Construction Corp. and WB Brawley Co. have won Navy contracts for painting work. The government has allotted $10 million for all the work, and the companies will compete against each other for task orders. The companies will perform the jobs, which involve interior and exterior painting and the removal of asbestos and lead paint, at Navy facilities in North Carolina, South Carolina, Georgia and Virginia. The Defense Department said Olympic will handle the first job under the contract at Marine Corps Base Camp Lejeune in North Carolina. The winning companies were the only bidders for the contracts.

CASE AND DOCUMENT INDEX