
SB on HR

Federal Budget Deal Includes Potential 80% Increase In OSHA Fine Amounts

On November 2 President Obama signed the Bipartisan Budget Act of 2015 to prevent another looming government shutdown. One item in the law that was not highly publicized in advance but is of great interest to those operating in the construction industry, is a significant increase in OSHA fines.

OSHA penalties have not been adjusted since 1990 as OSHA was exempt from the adjustments required of other civil penalties by the Federal Civil Penalties Inflation Adjustment Act. Thus, perhaps in an effort to increase revenues for the federal government, the Budget Act contained a section titled the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015. This requires OSHA to issue an interim final rule by July 1, 2016 containing a "catch up adjustment" to its civil penalties.

The initial catch-up adjustment will be the percentage difference between the CPI in October 2015 and the CPI in October 1990, which is currently nearly 80%! The October 2015 CPI numbers are not yet complete but are not likely to change dramatically. Therefore, OSHA penalties are likely to be adjusted as follows:

- *Other-than-Serious Violation*: increased maximum from \$7,000 to approximately \$12,476.
- *Serious Violation*: Increased maximum from \$7,000 to approximately \$12,476.
- *Repeat Violation*: Increased maximum from \$70,000 to approximately \$124,765.
- *Willful Violation*: Increased minimum from \$5,000 to approximately \$8,912; and maximum from \$70,000 to approximately \$124,765.
- *Failure-to-Abate*: Increased maximum from \$7,000 to approximately \$12,476 per day.

After the initial catch up adjustment is made by July 1, 2016, annual adjustments must be made by January 15 of each subsequent year. Employers should expect to see OSHA penalties increase annually with inflation.

Sick Leave Laws

Since our coverage last June and July of the paid sick leave law movement, many more cities, counties and even states have passed such laws. There are currently 4 states, 22 cities and 1 county that provide for paid sick leave. Regionally here in the Pacific Northwest, Oregon became the most recent state to pass such legislation. Oregon's law takes effect January 1, 2016. The City of Tacoma also passed legislation providing for paid leave earlier this year.

Employee Awarded Unemployment Benefits Due In Part To Employer's Lack of Policies

Is it time to dust off and review your Employee Handbook? Or perhaps, perish the thought, you don't even have one! A decision earlier this year serves as a good reminder of one of the many reasons a good Employee Handbook can be an important defensive tool for employers.

In *Kirby v. Wash. State Dep't of Emp't*, the court upheld a decision awarding unemployment benefits to an employee terminated for a Facebook post. The employee was a security guard who posted incendiary comments about police officers deserving to get shot. Her post was made after work and was only visible to her Facebook "friends." One of those "friends" disagreed with the comment and provided a copy to her employer.

The employer terminated her for making the comment. The employee filed for and was awarded unemployment benefits over the employer's objection after a contested hearing. The employer appealed the award.

Under Washington's Employment Security Act, unemployment benefits are provided to employees who become involuntarily unemployed through no fault of their own. An employee can be disqualified from receiving benefits if she is terminated for "misconduct connected with her work."

Whether off-duty conduct by an employee is deemed to be "misconduct connected with her work" is determined subject to a three part test established by our Supreme Court. The employer must prove a reasonable person would find the employee's conduct (1) had some nexus with the employee's work; (2) resulted in some harm to the employer's interest; and (3) was in fact conduct which was (a) in violation of some code of behavior contracted for between employer and employee, and (b) done with intent of knowledge that the employer's interest would suffer.

For the third element, the prohibited conduct cannot be implied, but must rather be part of a contract or agreement, although it need not be formal. To wit, reasonable rules and regulations the employee has knowledge of and is expected to follow will suffice.

In *Kirby*, the court held that the employer did not have any stated rules or policies concerning social media posting. The employer tried to rely on a rule requiring "professionalism, courtesy, and respect," which the court rejected as lacking any nexus to off-duty, off-site social media posts. Thus, the court upheld the award of benefits.

This case provides a good reminder of why Employee Handbooks with their typical multitude of policies and lengthy descriptions of prohibited conduct are important for employers. But handbooks also serve other important purposes besides merely protecting an employer against an award of unemployment benefits.

If you have an existing Employee Handbook that has not been updated in some time, it is time to get your employment counsel to review it. New laws, new local ordinances for Seattle employers, court decisions and other agency actions have all impacted how lawyers are crafting policies now. I frequently find "gotcha" errors or omissions in reviews of older handbooks. If you are a new or small company that has no handbook yet, have a discussion with your lawyer about whether its time to get one.

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