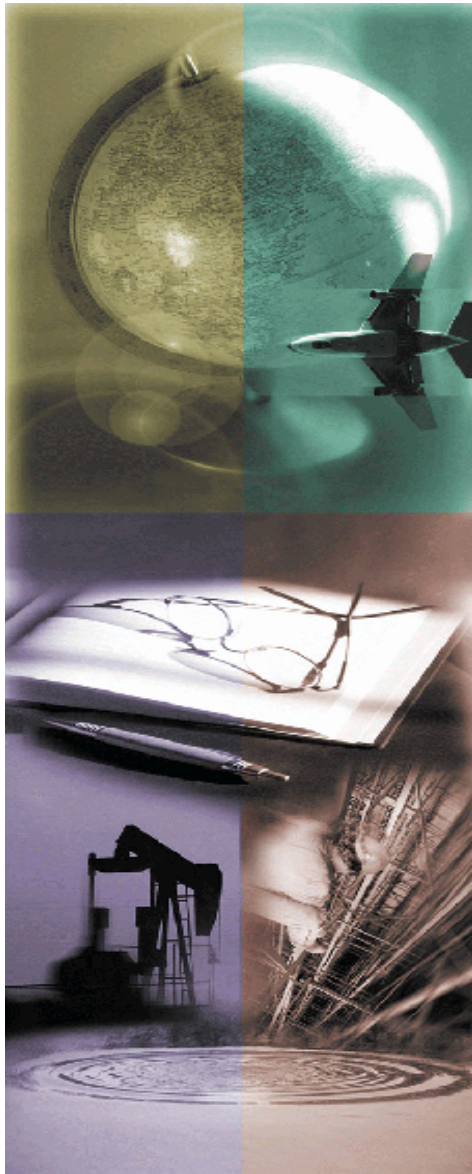


February 15, 2009

The democracy will cease to exist when you take away from those who are willing to work and give to those who would not.

Thomas Jefferson



Environmental Law – Taxable Aroma

Livestock operators could be penalized for their livestock's natural aroma by a new rule proposed by the Environmental Protection Agency (EPA), 73 Fed. Reg. 44354 (July 30, 2008). The proposed rule would result in an assessment of \$175 per dairy cow, \$87.50 per beef cattle and \$20 per hog for emissions of greenhouse gases in connection with livestock operations. Due to the fact that agriculture profitability is largely dependent on a global market, livestock and dairy farmers have little ability to pass increased costs on to the consumer. Therefore, these proposed assessments could place producers in a significant pinch.

Construction Law – Crane Operators

After a series of fatal crane accidents in Oklahoma, state officials are considering a means for increased safety in the form of a new licensing requirement for crane operators. Newly-proposed legislation, House Bill 2079 proposed by State Representative Paul Wesselhoft, would establish a state license for crane operators. Under this new legislation, crane and hoist operators would be required to be licensed by November 1, 2011. The license would require an age limit of 21 years for operators and 18 years for trainees, 2,000 hours of crane operation or related experience, a written and practical exam, and a \$60 fee. The license will be good for five years.

Employment Law – Stage is Set for Legal Labor Brawl

As reported in *The National Law Journal*, the Employee Free Choice Act (EFCA) is labor's top priority for the new Congress. It is also creating the most debate, with business and labor taking strong, opposing views. Under the current form of the bill, the EFCA will "make it easier for workers to organize a union; impose binding arbitration on employers and the union if they fail to negotiate a first contract under certain deadlines; and create stiff, new penalties for employers who violate workers' rights during organizing campaigns or contract negotiations."

Business leaders are calling the bill Armageddon. Mostly businesses fear the loss of power in having to abide by the ruling of an arbitrator if contracts cannot be negotiated. It is an understandable argument, given that an arbitrator will have a difficult time putting himself or herself in the shoes of the business. However, with a new Congress having a majority that support the EFCA, coupled with a new Secretary of Labor, a new President and a new Vice-President (all in support), it is not likely that a compromise acceptable to business will develop.

More businesses are expected to close or move overseas.

Environmental Law – Jackson to Serve as New EPA Administrator

As of Friday, January 23, 2009, New Jersey's Lisa P. Jackson has been appointed and confirmed as head of the Environmental Protection Agency (EPA). Jackson is the former head of New Jersey's Department of Environmental Protection. Jackson has pledged that she will uphold the core values of scientific integrity, rule of law, and daily transparency. She has highlighted five priorities that will receive her personal attention: reducing greenhouse gas emissions, improving air quality, managing chemical risks, accelerated clean-up of hazardous waste sites, and added protection for America's water.

Employment Law – New Form I-9 Release Update

As mentioned in the January 2009 LINC, the federal government has released new Form I-9 requirements, which employers must comply with for every new hire to verify identity and eligibility for employment in the United States. Employers may **no longer** accept expired documents to verify employment eligibility. In addition to what was previously acceptable, the following documentation is also acceptable to establish identity and/or employment authorization:

- A preprinted temporary I-551 notation on a machine-readable immigrant visa (MRIV) is acceptable.
- An addition of a reference to Form I-94A, containing computer generated fields, next to each reference to the Form I-94 has been made. In other words, the forms can be filled out by hand or online.
- Social Security cards with restrictions on employment are not acceptable.
- The new U.S. Passport Card is acceptable.

The following documents remain acceptable:

- U.S. passport;
- Permanent Resident Card or Alien Registration Receipt Card (Form I-551);

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- An unexpired foreign passport with a temporary I-551 stamp;
- An expired Employment Authorization Document that contains a photograph (Form I-766, I-688, I-688A, & I-688B);
- An expired foreign passport with an expired Arrival-Departure Record (Form I-94);
- Driver's license or ID card issued by a state or outlying possession of the U.S.;
- ID card issued by a federal, state, or local government agencies or entities;
- School ID card with a photograph;
- Voter's registration card;
- U.S. Military card or draft record;
- Military dependant's ID card;
- U.S. Coast Guard Merchant Mariner card;
- Native American tribal documents;
- Driver's license issued by a Canadian government authority;
- U.S. Social Security card issued by the Social Security Administration;
- Certification of Birth Abroad issued by the Department of State (Form FS-545 or Form DS-1350);
- Original or certified copy of a birth certificate issued by a state, county, municipal authority, or outlying possession of the U.S. bearing an official seal;
- U.S. citizen ID card (Form I-197);
- ID card for use of Resident citizen in the U.S. (Form I-179); and an unexpired employment authorization document issued by the Department of Homeland Security.

Employers should be aware that risk of audit has increased due to a renewed emphasis on illegal immigration, and that failure to comply with new Form I-9 requirements can result in substantial legal and financial consequences, including fines, debarment from government contracts, and potential imprisonment.

*Employers **must** use the new form for any individual hired or re-verified on or after April 3, 2009. (This has been extended from the original compliance date of February 2, 2009.) The public written comment period for the regulation has also been extended through March 4. The text of the regulation, USCIS-2008-0001, can be commented on and accessed at www.regulations.gov.*

Intellectual Property – Patent Infringement Filings Down in 2008

The number of patent infringement suits filed in 2008 was down 8% from the previous year, leading some to worry even more about the overall state of the economy. As reported in *The National Law Journal*, these numbers are especially telling because IP litigation has, for some time, been seen as a recession-proof practice area. One cause for this may be because more corporate defendants are choosing to settle cases rather than participate in what is often multimillion-dollar litigation.

For further information regarding patent law, please contact Chris K. Miller.

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Environmental Law – Changes to Spill Prevention Regulation Postponed

The effective date of the Environmental Protection Agency (EPA) amendments to the Spill Prevention, Control, and Countermeasure (SPCC) rule, 73 Fed. Reg. 74236 (Dec. 5, 2008), has been extended until April 4, 2009. EPA is requesting additional public comment. As discussed in the January 2009 LINC, the SPCC final rule:

- exempts hot-mix asphalt (HMA), pesticide application equipment and related mix containers, and heating oil containers at single-family residences from the SPCC rule;
- amends the definition of “facility” to clarify the existing flexibility associated with describing a facility’s boundaries; amends the facility diagram requirement to provide additional flexibility;
- defines “loading/unloading rack” to clarify the equipment subject to the provisions for facility tank car and tank truck loading/unloading racks, as well as amends the provisions for this equipment;
- provides streamlined requirements for a subset of qualified facilities;
- amends the general secondary containment requirement to provide more clarity;
- exempts non-transportation-related tank trucks from the sized secondary containment requirements; amends the security requirements;
- amends the integrity testing requirements to allow greater flexibility in the use of industry standards;
- amends the integrity testing requirements for containers that store animal fats or vegetable oils and meet certain criteria;
- streamlines a number of requirements for onshore oil production facilities; and
- exempts underground oil storage tanks at nuclear power generation facilities.

EPA’s stated goals in formulating the SPCC amendments are to increase clarity, to tailor requirements to particular industry sectors, and to streamline certain requirements for those facility owners or operators subject to the rule in the hope of providing greater protection to human health and the environment.

In general, those facilities subject to the SPCC regulation could be any facility having an aggregate oil (petroleum and non-petroleum based) storage capacity greater than 1,320 U.S. gallons in above-ground containers or greater than 42,000 U.S. gallons in completely buried tanks.

Originally, subject facilities had until November 20, 2009, to amend their spill-prevention plans. Farms had until November 20, 2010, and certain oil producers had until November 20, 2013. Note that EPA is currently reviewing these compliance deadlines, and they are subject to change. The deadline for comments on the new SPCC rule, Docket EPA-HQ-OPA-2007-0584, is March 5, 2009.

Criminal Law – Law on Harassment by Communications

Under the Telecommunications Harassment Statute, 47 U.S.C. 223, phone calls or other telecommunications transmitted with the intent to harass another person could be punishable by fines, or even imprisonment. Conduct covered under this statute includes, but is not limited to, continuously calling another with intent to harass regardless of whether conversation is involved,

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calling anonymously with intent to harass, and transmission of obscene communications knowing that the recipient is under 18 years of age.

Environmental Law – Start up, Shut down, and Malfunction Rule Changes Could Be Forthcoming

A recent judgment could signal changes to the EPA's startup, shutdown and malfunction (SSM) rules. On December 19, 2008, the Court of Appeals for the District of Columbia awarded the Sierra Club a judgment against the EPA. 2008 WL 5264663 (C.A.D.C.). This judgment vacated the EPA's SSM exemptions. Under the Clean Air Act (CAA), facilities that are considered "major sources" are required to meet certain emissions standards, known as the "maximum achievable control technology" (MACT) standards. Prior to the judgment, these facilities were exempt from the MACT standards during SSM procedures. The judgment vacated this exemption; thus, if upheld, facilities will have to continuously meet the MACT standards, even during SSM events.

The EPA will most likely appeal this decision, but there has not been any movement on the case since the December 2008 verdict.

Please watch for future LINC articles on this topic. If you have any question please contact David W. Lawson.

Employment Law – Amendment Broadens ADA Definition of "Disability"

The ADA Amendments Act of 2008 broadened the definition of "disability" under the Americans with Disabilities Act. Congress says the definition "shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of the Act." The ADA defines a "disability" as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." Prior to the amendments, courts interpreted this definition very narrowly, which set up a more demanding standard for individuals to qualify as disabled.

The amendments clarify how the definition should be interpreted and in some cases specifically relax the standards required to qualify as disabled. According to the Equal Employment Opportunity Commission's (EEOC) website, the most significant aspects of the amendments are that it:

- directs EEOC to revise that portion of its regulations defining the term "substantially limits";
- expands the definition of "major life activities" by including two non-exhaustive lists:
 - the first list includes many activities that the EEOC has recognized (e.g., walking), as well as activities that EEOC has not specifically recognized (e.g., reading, bending, and communicating);
 - the second list includes major bodily functions (e.g., "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions");

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- states that mitigating measures other than “ordinary eyeglasses or contact lenses” shall not be considered in assessing whether an individual has a disability;
- clarifies that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active;
- provides that an individual subjected to an action prohibited by the ADA (e.g., failure to hire) because of an actual or perceived impairment will meet the “regarded as” definition of disability, unless the impairment is transitory and minor;
- provides that individuals covered only under the “regarded as” prong are not entitled to reasonable accommodation; and
- emphasizes that the definition of “disability” should be interpreted broadly.

The ADA generally applies to all employers and businesses with 15 or more employees, including state and local governments.

The amendments went into effect on January 1, 2009. The EEOC is currently investigating the impact of the amendments and will most likely be issuing new guidance and regulations shortly. Please watch for upcoming LINC articles on the issue.

Environmental Law – The Environmental Protection Agency is Monitoring Your Waste

A California company has been fined \$10,300 for failing to notify the EPA that a shipment the company was exporting to Hong Kong contained cathode ray tubes, or CRTs. Federal hazardous waste laws require that exporters shipping CRTs to another country for recycling must notify the EPA and receive written consent from the receiving country before the shipment can be sent.

Hong Kong custom authorities rejected the shipment, which listed the cargo as “mixed metal scrap” but which actually contained 441 computer monitors. U.S. Customs officials alerted the EPA when the shipment was returned to the United States.

Environmental Law – Textile Owner Will Serve 16 Months for Hazardous Waste

The former owner of a textile factory was recently sentenced to 16 months in federal prison and his son is awaiting sentencing. The owner pleaded guilty to illegally storing hazardous waste. The son has pleaded guilty to making a materially false statement to the EPA.

The defendants owned a textile factory in Allentown, Pennsylvania. The factory closed in 2001 and the owners left behind numerous containers of hazardous waste which were stored at the site without the proper permits. Two fires at the factory alerted authorities to the waste and the EPA and the city of Allentown initiated a cleanup of the site in October 2005. In addition to the prison sentences, the defendants will jointly be responsible for the \$450,000 restitution awarded by the court.

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Environmental Law – Hexavalent Chromium Standard Compliance Deadline Fast Approaching

In 2006, three regulations were promulgated changing the exposure standards regarding hexavalent chromium [Cr(VI)]. The regulations, found under 29 C.F.R. 1910.1926, 1915.1026, and 1926.1126, provide procedures for Cr(VI) exposure in the areas of general industry, shipyards, and construction, respectively. Under the regulations, compliance with non-engineering provisions was required as of May 30, 2007. However, engineering-related provisions must be complied with by May 31, 2010. Engineering and work practice controls include installing ventilation systems, working with materials that do not contain Cr(VI), or altering work practices to limit exposure to 5 micrograms of Cr(VI) per cubic meter of air as an eight-hour time-weighted average.

The most effective approach would obviously be to not use Cr(VI) in any operations; however, that would be impractical for many businesses. Some businesses have opposed the regulations because implementing engineering and work practice controls would be infeasible, either altogether or in the time-frame provided. The regulations allow for this possibility and provide guidance. If engineering and work practice controls cannot be feasibly implemented to sufficiently reduce exposure to Cr(VI), the employer must provide appropriate respiratory protection, protective clothing, and any other equipment necessary for dermal protection. Additionally, employers must use adequate housekeeping, medical surveillance, and record keeping procedures. Employees must also be provided adequate training in line with OSHA's Hazard Communication Standard.

To view the regulation, please see 29 C.F.R. 1910.1926 (General Industry), 1915.1026 (Shipyards), and 1926.1126 (Construction).

Corporate Law – Eli Lilly Pays \$1.4B in Whistleblower Case

Eli Lilly has the privilege of paying the largest whistleblower settlement in U.S. history. The case, brought by six former pharmaceutical salesmen for the company, centered around the company's push of the anti-psychotic drug Zyprexa to customers who did not need it. The salesmen had complained to management and were all either fired or "encouraged" to resign. The total settlement includes \$800 million in civil and \$600 million in criminal fines. The six plaintiffs will share about \$100 million with legal fees topping out at around \$40 million.

The whistleblowers were reportedly heard whistling the tune "Lucy in the Sky with Diamonds."

Immigration Law – U.S. Prosecutions Against Immigrants On the Rise Since 2001

One of former President Bush's legacies may be the increasing number of immigration prosecutions. As reported in *The National Law Journal*, immigration prosecutions are up over 700% from when President Bush took office in 2001. With this huge increase in activity, it is not surprising that immigration prosecutions now make up over 50% of all federal prosecutions. Federal judges in border states have expressed concern over the flooding of their dockets with immigration-related matters.

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For questions concerning Oklahoma state immigration law HB 1804, please contact Katie A. Sattre.

First Amendment Law – Blogger Anonymity Issues Flare Up

Free speech treads a slippery slope when it comes to posting on the internet. The Supreme Court of Maryland has been forced to tackle this issue as “trash talk, criticism and negative comments flood chatrooms, blogs, and message boards.” Courts in California and Texas have protected the anonymity of online users citing the First Amendment protection of free speech. However, attorneys in the Maryland case are arguing that false speech which harms someone’s reputation crosses the line and warrants the loss of anonymity. In the Maryland case, a real estate developer is claiming defamation from comments made about his Dunkin’ Donuts store. The comments related to the unsanitary conditions of the store and called its owner a “community polluter.” Independent Newspapers, Inc., the host of the internet forum, has been ordered by a lower court to reveal the identity of its online users. No identities have yet been revealed, as the case is currently on appeal.

Local police had no complaints about the store.

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