

May 15, 2009

The ignorance of one voter in a democracy impairs the security of all.

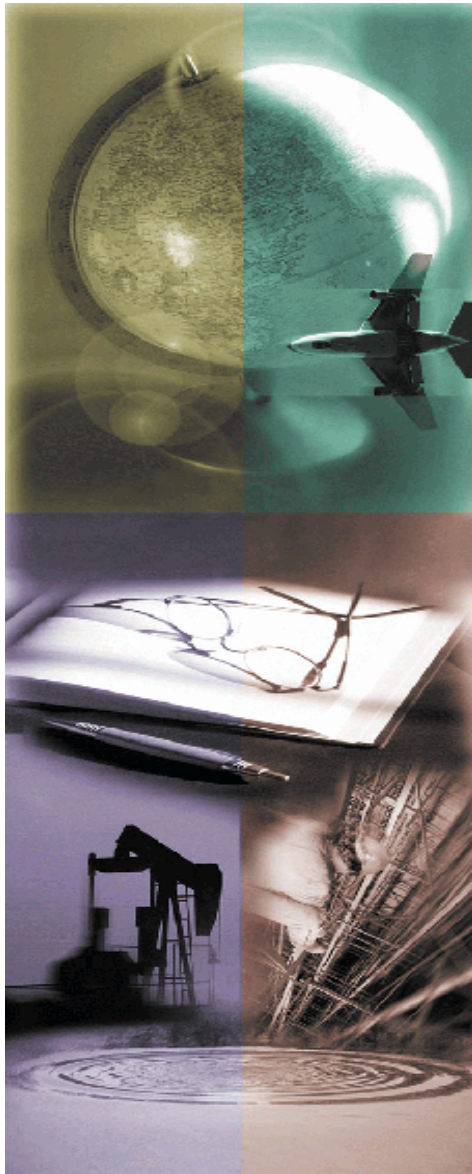
John F. Kennedy

Employment Law – OSHA National Emphasis Programs (NEPs)

As part of its overall enforcement activities, the U.S. Occupational Safety and Health Administration (OSHA) routinely uses national emphasis programs (NEPs) to target establishments or industries that have known or suspected hazardous conditions, such as exposure to lead or silica, the potential for amputations or trench cave-ins, or the presence of combustible dust. In response to recommendations by the U.S. Chemical Safety and Hazard Investigation Board (CSB), in June 2007, OSHA launched a process safety management (PSM) NEP aimed at reducing or eliminating the workplace hazards associated with the catastrophic release of Highly Hazardous Chemicals at petroleum refineries. The agency has conducted comprehensive regulatory compliance inspections at dozens of refineries throughout the U.S., and it expects to be finished inspecting 81 refineries under federal jurisdiction by the end of 2009.

Recently, the agency announced its plan to expand the PSM NEP to include the chemical industry to target chemical facilities' compliance and implementation efforts related to PSM *and other workplace-safety standards* associated with chemical hazards. OSHA is in the process of developing the protocols and procedures needed to roll out the program.

More information will follow as this program unfolds.



Corporate Law – Companies Sweat over Bonus Turmoil

According to *The National Law Journal*, attorneys are busy helping corporations revise their bonus plans in response to a public fury created by the payment of \$165 million in bonuses by American International Group, Inc. (AIG) after accepting a massive government bailout. This fury has triggered a variety of litigation targeted at corporations, ranging from officers alleging that their companies reneged on bonuses to officers who claim they were fired for protesting the payment of bonuses to others. *Schwab v. Citizens Republic Bancorp*, No. 09-090916-CZ (Genessee Co., Mich., Cir. Ct.); *Pautsch v. Centex Corp.*, No. 2:2008cv02360 (E.D. Calif.); *Edwards v. Edwards Wines*, No. CV-08-5008054-S (New London, Conn., Super. Ct.). According to Gary R. Basham of Basham Parker, an employment defense boutique, bonuses are a valid tool for rewarding good performance; however, companies must be careful as to how they are paid out. Basham stated: “[t]here’s been a real upswing in employers wanting to have attorneys review their plans and determine if there is a better way to accomplish the same thing, and protect them from the nightmare that AIG is going through.”

Litigation – Need to Send a Personal E-mail? Keep it at Home!

Personal e-mails sent on the job could come back to bite you, despite a claim of privilege. Henry Nicholas, ex-CEO of Broadcom, sent an e-mail from his Broadcom account to his wife containing admissions of drug use and various types of misconduct in his capacity as CEO of Broadcom. Nearly five years after sending the e-mail, an IT technician at Broadcom discovered it and turned it over to the government and the press. On June 4, 2008, Nicholas and his co-defendant were indicted for an alleged conspiracy relating to the practices of granting stock options at Broadcom. Despite Nicholas’ claim of marital privilege, the court in *U.S. v. Nicholas*, 2008 WL 5546721 (C.D.Cal. 2008), held that the e-mail could be used at trial, must be disclosed to the co-defendant, and may be used for purposes of cross-examination and impeachment.

Perhaps the district court is telling us that keeping things from our spouses could potentially save our careers.

Employment Law – Workplace Defamation Suits Rise

According to *The National Law Journal*, lawyers say the current state of economic affairs has created an environment ripe for defamation claims from departing employees. Employers are pressured to explain the departures of employees without hurting their reputations and potentially opening the door to defamation claims. Technology such as e-mail, Twitter, Facebook, and blogs have made it harder to control the release of potentially hurtful information about a departing employee, which can make it very hard for them to find new work. Doug Christensen, a partner in the Minneapolis office of Dorsey & Whitney, said employers’ actions following layoffs are being scrutinized as never before. Tina Maiolo of Washington’s Carr Maloney advises employers to have a uniform termination policy backed by good business rationale.

The truth is still a good defense.

Immigration Law – H.R. Chief Pleads Guilty after Immigration Raid

According to *The National Law Journal*, Elizabeth Billmeyer, former human resources manager with Agriprocessors, Inc., faces up to 20 years in prison. In addition, Ms. Billmeyer faces a

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\$500,000 fine after pleading guilty to one count of conspiracy to harbor undocumented aliens for profit and one count of knowingly accepting false resident alien cards.

Civil Litigation – Monsanto Affiliate Wins Verdict in Toxics Case

According to *The National Law Journal*, an Alabama jury ruled against five people claiming that their illnesses, including diabetes and arthritis, resulted from exposure to polychlorinated biphenyls (PCBs) released from a factory operated by Pharmacia Corp. in Anniston, Alabama. Jurors sided with Pharmacia Corp., a Monsanto affiliate, arguing that such problems are a part of life as people get older.

Environmental Law – Company Pays Largest Environmental Protection Agency Audit Policy Penalty

Invista will pay a civil penalty of \$1.7 million to the EPA and several state agencies for violations of water, air, hazardous waste, emergency planning, and pesticide regulations. In addition, Invista will spend an estimated \$500 million to correct the violations. The violations, 680 in all, were discovered after Invista conducted environmental audits at 12 facilities it acquired from DuPont in 2004. Invista self-disclosed the violations to the EPA under the EPA's Audit Policy. The Policy allows companies to reduce, and possibly eliminate, penalties if certain protocols are met for discovering, remediating, and reporting violations.

Invista discovered significant and widespread environmental noncompliance shortly after taking ownership of the facilities from DuPont. Under the purchase contract, DuPont is responsible for correcting noncompliances. Invista filed a lawsuit in March 2004 seeking over \$800 million in actual and punitive damages, as well as a court order requiring DuPont to fulfill its contractual obligations.

Employment Law – Attorneys Fight to Tame “COBRA”

According to *The National Law Journal*, companies across the nation must adjust their policies to comply with new laws and regulations subsidizing Consolidated Omnibus Budget Reconciliation Act (COBRA) health insurance extensions for involuntarily terminated employees. COBRA generally gives departing workers the right to continue the health insurance plan offered by their employer for up to 18 months if the entire premium is paid. In February, a stimulus bill took effect which requires the government to subsidize 65% of COBRA premiums for the first nine months for employees involuntarily terminated between September 1, 2008, and December 31, 2009. Companies must notify workers who were involuntarily terminated between September 1, 2008, and February 17, 2009, of their COBRA subsidy rights by April 18. Implementation guidance from several government agencies regarding the definition of an involuntarily terminated employee and treatment of severance packages that include company subsidies are clear as mud. For example, Keith R. McMurdy, a labor and employment partner in the New York office of Philadelphia's Fox Rothschild, stated that many employers are surprised to learn that the IRS defines workers who didn't return from a disability leave as having been involuntarily terminated for COBRA subsidy purposes.

COBRA applies to companies with 20 or more employees, both full-time and part-time employees being counted. Part-time employees are counted as a fraction of a full-time employee.

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Criminal Law – A New Type of Crime Victim is Speaking Up

According to *The National Law Journal*, the 2004 Crime Victims Rights Act (CVRA), a law designed to give crime victims a stronger voice in the justice system, is increasingly turning up in government environmental prosecutions to punish companies accused of environmental crimes. For example, the Ninth Circuit recently ruled that 34 victims could attend trial and testify at the sentencing of W.R. Grace & Co., accused of “knowingly endangering” the residents of Libby, Montana, by exposing them to asbestos. Decisions similar to that of the Ninth Circuit have created a clash between prosecutors and defense attorneys on how the meaning of “crime victim” in the CVRA should be interpreted. Defense attorneys have argued that the CVRA was intended for murder and drug cases and that its use in connection with environmental crimes improperly lets prosecutors play on the court’s emotions during sentencing. Prosecutors argue that people hurt in environmental catastrophes deserve a say in the punishment.

Civil Law – Law License Pulled Due to Debt

According to *The National Law Journal*, failure to pay student loan and other debt could result in the revocation of an attorney’s license. In *Santulli v. Texas Board of Law Examiners*, No. 03-06-00392-CV, the Texas Third Court of Appeals revoked Frank P. Santulli III’s license to practice law. The court found that Santulli’s failure to adhere to a court order requiring him to pay his debts indicated a lack of trustworthiness necessary to represent clients.

Makes sense to us. He should have applied to be Secretary of the Treasury.

Environmental Law – EPA’s Performance Track to Take a Hiatus

The Environmental Protection Agency (EPA) sent notice to the members of its Performance Track program that the program will be halted so that the EPA can refine its concepts for the future. The Performance Track is an EPA leadership program whose members commit to exceeding current environmental regulations. The EPA plans to continue an evaluation of the program currently underway by the RAND Corporation.

As of 2008, there were 548 Performance Track members, and recent members include Xerox, the U.S. Postal Service, Frito-Lay Inc., and the City of Dallas, Texas.

Civil Law – Department of Justice Files Suit against BPXA

The Department of Justice (DOJ) recently announced that it has filed a civil complaint against BP Exploration (Alaska, BPXA). The complaint alleges that BPXA discharged more than 200,000 barrels of crude oil in Prudhoe Bay on the North Slope of Alaska. As a result, the DOJ says that BPXA: violated the Clean Water Act by failing to prepare and implement adequate spill prevention measures and plans, violated the Clean Air Act by improperly removing asbestos-containing materials from its pipelines, and failed to comply with a Corrective Action Order from the Department of Transportation.

The civil suit follows a guilty plea by BPXA to negligent discharge of oil to U.S. waters on November 29, 2007.

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Environmental Law – California Rule Puts Auto Shops Under Pressure

A new California rule requires automotive maintenance shops to check the tire pressure of every vehicle they service. The rule, one of 44 early action measures required by AB 32 (The Global Warming Solutions Act), was adopted by California's Air Resources Board on March 26, 2009, and goes into effect June 1, 2010. It is said that by keeping tires properly inflated, the rule will annually: eliminate 700,000 metric tons of greenhouse gas emissions, reduce the state's fuel consumption by 75 million gallons, and extend the tire's useful life by 4,700 miles.

The rule will apply to smog inspection stations, engine repair facilities, and oil change shops, but it will not apply to car washes, paint and body shops, or glass repair businesses.

Responsible persons, of course, will do this on their own.

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