QUARTERLY BYTES

FEES & BURGESS, P.C.

Volume 9, Issue 2 June2011

Alabama Immigration Reform

Alabama lawmakers are poised to vote on a controversial immigration reform bill. The bill, titled SB256, originated in the Alabama State Senate and was passed by that body on April 21, 2011. The bill then moved to a House of Representatives committee on April 26, 2011.

As an initial matter, the bill defines an "alien" as "any person who is not a citizen or national of the United States" as described by federal law. A person will be regarded as an unauthorized alien if "the person's unlawful immigration status has been verified by the federal government" or if the person does not possess (1) a valid, unexpired Alabama driver license or non-driver identification card; (2) a valid tribal enrollment card; (3) a valid government-issued identification document if issued by an entity that requires proof of lawful presence in the United States; (4) a foreign passport with a United States Visa; or (5) a foreign passport issued by a visa-waiver country accompanied by proper documentation.

Numerous provisions in the bill have the potential to impact businesses operating within Alabama. First, any business who seeks the award of any contract, grant, or incentive from the state of Alabama (or any of its political subdivisions or state-funded entities) shall not knowingly employ an unauthorized alien and must attest to that fact in a sworn affidavit. In addition, the business must provide documentation that it is a registered participant in the federal E-Verify program. Violations of these provisions may result in the state terminating the contract, suspending or barring the business from doing business with the state, and/or levying fines on the business. The penalties increase for subsequent violations of the bill. Second, any business that employs an unauthorized alien to perform work in the state violates the bill, unless the business used E-Verify or reviewed valid, government-issued documents to verify the alien's work authorization. Violating this provision of the bill may result in suspension of the business' permit or license. Third, a business may not claim any wage or compensation paid to an unauthorized alien as a deductible business expense for tax purposes. Lastly, the bill designates as discriminatory practices instances where a business fails to hire or discharges a U.S. citizen or authorized alien while retaining or hiring an unauthorized alien.

The deadline for the House to vote on the bill quickly approaches as June 9, 2011, marks the official end to the legislative session.

LITIGATION SPOTLIGHT

Excessive Force Claims Under Federal Law Do Not Survive Claimant's Death

This spring, the Eleventh Circuit Court of Appeals determined that a federal civil rights claim under 42 U.S.C. § 1983 did not survive the death of the injured party. In order to arrive at this conclusion, the Eleventh Circuit decided that it must review the survivorship statute of the forum state – Alabama – to determine whether the federal claim survived.

In the case at issue, the section 1983 claims arose out of a traffic stop two City of Prattville, Alabama, police officers initiated on Eugene Gilliam. During the course of the stop, the officers found marijuana in Mr. Gilliam's pockets and attempted to arrest him. Mr. Gilliam resisted the arrest and was tasered multiple times by the officers. After being tasered, Mr. Gilliam complained of chest pains and breathing difficulties. Although he was taken to the hospital almost immediately, he died seven hours later. The medical examiner performed an autopsy and concluded Mr. Gilliam died of natural causes due to hypertensive cardiovascular disease. Cocaine and marijuana were also found in Mr. Gilliam's blood.

After Mr. Gilliam's death, his mother, as personal representative of his estate, sued the officers for (1) state-law wrongful death claims; (2) section 1983 excessive force claims that alleged death resulted from the use of force; and (3) section 1983 excessive force claims that did not allege death was the result of the use of force. During the course of the proceedings, the trial judge excluded certain evidence regarding whether the officers' use of tasers caused Mr. Gilliam's death. As a result, there was no evidence to link Mr. Gilliam's death to the allegedly excessive force. The trial judge then dismissed the state-law wrongful death claims and section 1983 claims alleging that the force caused Mr. Gilliam's death. The case proceeded to trial on the non-death section 1983 claims, and the jury returned a verdict of $30,000 against one of the officers.

On appeal, the officer argued that, under Alabama law, the section 1983 claims terminated, or abated, when Mr. Gilliam died prior to filing the lawsuit. The trial judge found Alabama's survivorship law should not apply in the case because it was inconsistent with the United States Constitution and federal law. This was expressly rejected by the Eleventh Circuit. Instead, the Eleventh Circuit determined that the Alabama survivorship law – which provides that unfiled personal injury claims do not survive the death of the person with the claim – was constitutional and consistent with federal law. Consequently, the Alabama survivorship law should be used by courts to fill in a gap in section 1983 because that statute did not include any language about whether claims abated or not. This gap-filling process was the basis for the Eleventh Circuit's holding that Mr. Gilliam's section 1983 excessive force claims did not survive after his death. Because the claims did not survive, his mother could not bring them in a lawsuit and the trial court should have dismissed them.

Notably, the Eleventh Circuit expressly stated that its holding does not apply to a section 1983 claim that alleges the excessive force *caused* the death of the complainant.

The case is <u>Estate of Gilliam ex rel. Waldroup v. City of Prattville</u>, No. 10-10670, --- F.3d --- (11th Cir. Apr. 26, 2011).

HR CORNER

National Labor Relations Board Attempts to Enforce Protections of "Concerted Activity" in Social Media

On May 18, 2011, the National Labor Relations Board (NLRB) issued a press release indicating its intent to file a lawsuit against a non-profit company for violations of the National Labor Relations Act (Act). The non-profit fired five employees who had criticized working conditions of the non-profit on Facebook. According to the NLRB, an employee of the non-profit posted comments to her Facebook page describing a co-worker's allegation that the non-profit was not properly supporting its client base. She posted these comments prior to a meeting with management regarding the working conditions at the non-profit. These comments sparked replies from other employees of the non-profit, who all defended their work for the company's clients and that instead cited poor working conditions related to workload and staffing problems. The non-profit later discovered these Facebook posts, and it terminated the employees, stating that their replies amounted to harassment of the employee mentioned in the original post.

The NLRB, however, claims that such comments were protected, concerted activity among co-workers under the Act. While the non-profit is not a unionized company, the NLRB notes that concerted activity is protected regardless of the union status of an employee. According to the NLRB, any conversations among employees regarding the terms and conditions of their employment is "concerted activity," and any adverse actions taken by a company in response to such concerted activity may subject the company to liability under the Act. As such, the NLRB claims that the non-profit violated the Act when it terminated the employees, since the employees appear to have been terminated based on their concerted activity on Facebook.

The NLRB previously announced its intent, earlier in May of 2011, to institute a similar action against a Chicago car dealership. In this case, a car dealership employee posted photos and complaints about the dealership on Facebook. Specifically, the employee complained that his sales suffered because the dealership did not provide sufficiently high-quality food and drinks at sales events. He posted photos on his Facebook page of hot dogs and bottled water that the dealership offered to customers, and he included critical comments about these offerings in his posts. Other employees of the dealership maintained access to this Facebook page. The dealership eventually terminated the employee for posting the critical comments and images. As with the case against the non-profit, the NLRB claims that such comments and postings on Facebook constitute "concerted activity" under the Act, and that the dealership's response to such concerted activity is a violation of the Act.

Clearly, such allegations by the NLRB make it difficult for employers to determine the difference between harassment and/or insubordinate activity, and concerted activity, under the Act. While these claims are in their initial stages and may not result in liability to the defendant companies, employers should carefully analyze any discipline stemming from employee complaints against the company. While such complaints may rise to the level of harassment or basic insubordination, the current NLRB has made clear that it will monitor such actions with a wide-sweeping interpretation of "concerted activity" and a broad view of protected employee rights under the Act.

PROTECTIVE MEASURES

"You Only THOUGHT That Case Was Settled"
Medicare Set Asides

The requirement to create a Medicare set-aside trust (MSAT) has received significant attention lately. In ArvinMeritor, Inc., v. Johnson, 2011 WL 751925 (Ala. Civ. App. Feb. 25, 2011), a workers' compensation case, ArvinMeritor, Inc., agreed to pay $65,000 to set up an MSAT, and Johnson agreed to contribute $18,936.17, to the MSAT, to reach the $83,963.17, that a vendor indicated the MSAT would cost. The vendor was wrong. Johnson refused to contribute more than his $18,936.17, and ArvinMeritor refused to contribute more than its $65,000. Based on the plain language of the settlement agreement between the parties, the court held that ArvinMeritor was obligated to pay Johnson's continuing medical expenses, and was also entitled to recover its subrogation rights against a third-party settlement Johnson reached with companies he held liable for his injuries. In short, ArvinMeritor was not able to "cut off" its future medical liability, and Johnson faces additional litigation regarding the settlement proceeds.

This case emphasizes the importance of understanding the MSAT rules; obtaining accurate information before reaching settlement; and including contingencies in the event the MSAT costs more than the parties anticipate.

FEES & BURGESS, P.C. — Calendar of Events

Fees & Burgess, P.C., is proud to present, and participate in the presentation of, the following upcoming seminars:

2011 NCMA World Congress
July 10 – July 13, 2011; Denver, Colorado

Certified Commercial Contracts Manager (CCCM) Training
This four-part series, presented by Jeffrey Roth and Allen Anderson of Fees & Burgess, P.C., provides a practical introduction to the foundations of domestic commercial contracting. These sessions will feature discussion of risk management in several areas key to those buying or selling under the Uniform Commercial Code (UCC), including formation of commercial agreements and determination of applicable contract terms; performance issues under those agreements or terms, including risk of loss and delivery, acceptance, repudiation, warranties, and disclaimers, and of course, disputes, remedies, and dispute resolution.

Use of the New Incoterms® 2010 in Domestic and International Transactions
This workshop, presented by Jeffrey Roth and Allen Anderson of Fees & Burgess, P.C., will help educate both buyers and sellers in the domestic and international arenas of changes found in the new and recently-released version of Incoterms® 2010, which became effective January 1, 2011.

Click here to register, or for more information on NCMA's 2011 World Congress.

If you would like more information on these, and other seminars, please visit us online at www.feesburgess.com.

Seminars

During these rough economic times it is important to get the most for your money. The lawyers of Fees & Burgess, P.C., combined, have over forty years experience working in various fields, as both in-house and private counsel, representing a diverse clientele. Our attorneys have extensive experience in many areas of law, including employment law; intellectual property; supply chain management; mergers and acquisitions; contract negotiation; dispute resolution; and various other fields.

This wide field of knowledge provides our attorneys with the insight and know-how to be able to provide quality training on various topics. Our programs can be customized to fit any business need while keeping the costs of our training competitive, without sacrificing quality.

Topics that Fees & Burgess, P.C., can provide training on include, but are not limited to:

A Recession Era Guide to Collecting on Construction Contracts

Conducting Effective Workplace Investigations

Construction Contracting

Contingent Employees and Labor Outsourcing

Diversity Training

Elements of an Electrical Manufacturing Services Contract

Employment Law Survival Training for Managers

Family Medical Leave Act

Hiring and Firing

Immigration Compliance

Incoterms® 2010

Indemnity and Limitation of Liability Contract Clauses

International Contracting

Limiting Liability for Sexual Harassment

Managing Gender Identity Issues in the Workplace

Negotiation and Resolution of Federal Contract Claims

Privacy in the Workplace

Reducing Employee Benefits Costs for Alabama Businesses

Reducing Risk in Purchasing Terms and Conditions

Reduction in Workforce Strategies

Retaliation and Whistleblowers

Uniform Commercial Code: Primer to Articles 1, 2, and 2A

Violence in the Workplace

Wage and Hour Issues/Fair Labor Standards Act

Americans with Disabilities Act

Managing Employee Use of Internet and E-mail in the Workplace

Ethics, Business Conduct and Compliance in Government Contracting

For more information on these and other programs, please visit us online at www.feesburgess.com; contact us by e-mail at seminars@feesburgess.com; or by phone at (256) 536-0095.

QUARTERLY BYTES

FEES & BURGESS, P.C.

Volume 9, Issue 2 June2011

SPEAKERS

FEES & BURGESS, P.C., provides speakers, training programs, seminars, and webcasts for various trade associations; business groups; and clients. For information regarding a program, please contact us at seminars@feesburgess.com.

NEWSLETTERS

FEES & BURGESS, P.C., also publishes *F&B HR Corner*, focusing on human resource issues; and *F&B SCM Memo*, focusing on the supply chain management industry. To receive any of these e-newsletters, please provide your contact information to newsletters@feesburgess.com.

To remove your name from our mailing list, please contact us at newsletters@feesburgess.com.

Michael L. Fees
mfees@feesburgess.com

C. Gregory Burgess
gburgess@feesburgess.com

Allen L. Anderson
anderson@feesburgess.com

Jeffrey L. Roth
jroth@feesburgess.com

FEES& BURGESS, P.C.
213 Green Street
Huntsville, Alabama 35801

Telephone (256) 536-0095
Facsimile (256) 536-4440

www.feesburgess.com

Stacy L. Moon
smoon@feesburgess.com

Leah M. Green
lgreen@feesburgess.com

Ryan G. Blount
rblount@feesburgess.com

Lauren A. Smith
lsmith@feesburgess.com

Allison B. Chandler
achandler@feesburgess.com