Quarterly Bytes

Fees & Burgess, P.C.

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Regulations Remain Pending Regarding "Conflict Minerals" Law

In 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act included a provision regarding disclosure of sourcing and supply chain information related to public companies' use of certain "conflict minerals" originating in the Democratic Republic of Congo (Congo), including: Columbite-tantalite (colton), cassiterite, gold, wolframite, or their derivatives such as tungsten, tin, and tantalum. Use of these minerals is highly prevalent in various industries, including electronics manufacturing, automotives, aerospace, and medical devices. These new requirements may place heavy burdens on the entire supply chain of many public companies, as industries work to address origination and certification issues related to use of these minerals, and, by extension, their suppliers.

While the language in the original statute is vague, Congress directed the Securities and Exchange Commission (SEC) to issue regulations implementing the law. The SEC has issued proposed regulations, but it has not yet published a final rule. Although the proposed regulations are subject to change prior to publication of the final rule, the proposed regulations require the following:

- An initial determination as to whether the conflict minerals "are necessary to the functionality or production of a product manufactured by the company." If they are not, the company has no further obligations.
- If so, the company must perform a "reasonable country of origin" inquiry to determine whether or not the minerals originated in Congo (or any country physically adjacent to Congo).
    - Results of this inquiry must be included in its annual report to the SEC.
    - The proposed regulations also require that such information be posted to the company's "Internet website."
    - If the company cannot determine whether or not the materials originated from Congo, the company must attach a separate exhibit to its annual report which describes the measures taken by the company in its attempt to make an origination determination, including: a certification that a third-party performed an audit; description of due diligence efforts related to chain of custody of the materials in the supply chain; and, the third-party audit report. The proposed regulations would require companies to post this exhibit to their website for at least one year (until the subsequent annual report is filed with the SEC.)

Questions linger as to how companies will be required to treat materials purchased as recycled materials or other scrap.

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The proposed regulations appear to require manufacturers to provide a similar analysis for recycled materials as it does for the materials that it cannot trace, including a requirement that it perform the same independent audit on these materials and file the same exhibit with its annual report as described above. Various industry groups have objected to this requirement, arguing that it would be unduly burdensome and almost impossible to perform such due diligence on recycled or otherwise scrap materials.

Although these proposed regulations may change significantly prior to implementation of the final rule, it is clear that companies will have some responsibility to track their supply chains and attempt to determine the origination of various minerals used in their manufacturing processes. Accordingly, manufacturers should begin the process of reviewing their supply chain management procedures. Similar to the effect of RoHS directive regarding the incorporation of lead and other materials into products, companies will need to revise their supply chain practices and certification processes, and begin researching the sourcing of materials from their various upstream suppliers. While many industry groups hope that the final regulations will provide a longer timeline in which to accomplish these goals, it is unclear what the final rules will entail.

LITIGATION SPOTLIGHT

Alabama Appellate Court Distinguishes Defenses in Construction Law Context

In a recent decision, the Alabama Court of Civil Appeals distinguished the difference between "recoupment" and "setoff" in a suit brought under Ala. Code 1975, § 39-1-1 et seq., commonly known as the "little Miller Act."

J.F. Pate & Associates Contractors, Inc. (Pate) was hired as the contractor for the construction of a school. Pate entered into a subcontract with Delta Flooring, Inc. (Delta), to provide labor, materials, and equipment for the installation of tile, resilient flooring, and carpet in the school. Pate ordered 5,000 square feet of tile from The Finish Line. The Finish Line filled the order and shipped the tile to Delta, and Pate paid for the tile. Before Delta's installation of the tile was finished, the chief operation officer of Pate and the project architect found the tile to be unacceptable because of irregularities in the tile. The Finish Line was given an opportunity to cure the problem. However, the architect concluded that The Finish Line's proposed solution would not cure the problem, and it sent Pate a memorandum formally rejecting the tiles. Pate ordered and paid for alternate tiles. Later, Pate ordered additional flooring materials to be installed in other areas of the school. Delta installed the flooring materials, and The Finish Line sent Delta an invoice. Pate refused payment on that invoice, asserting that it was entitled to a setoff for the payment it had made earlier.

The Finish Line sued Pate, Pate's surety, Delta, and two individuals who had signed personal guaranties for the credit The Finish Line had extended to Delta. Delta moved for summary judgment, contending that Pate was responsible for payment and denying that its installation was the reason for the architect's rejection of the tiles.

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The Finish Line opposed that motion by submitting an affidavit from its credit manager, who attested that improper installation methods were used. The trial court granted all defendants' summary judgment motions.

The Alabama Court of Civil Appeals affirmed, explaining that Pate's setoff defense was more correctly characterized as a defensive claim of recoupment. A setoff is a "counter demand which the defendant [has] against plaintiff arising out of a transaction *extrinsic* to plaintiff's cause of action." On the other hand, recoupment "authorizes the recovery of any damages sustained by defendant, which grow out of, or are connected with, the matters set forth in plaintiff's complaint, and in breach of the contract upon which his suit is founded, or in violation of any duty imposed by the contract." In the absence of privity of contract, one may not assert a setoff defense to a Miller Act claim. Thus, the setoff defense asserted by Pate was actually a counterclaim in the nature of recoupment. According to the court, "a general contractor may assert, in defense of a little Miller Act claim, recoupment against a supplier even in the absence of privity." Summary judgment was, therefore, properly entered on The Finish Line's Miller Act claims.

The Finish Line v. J.F. Pate & Associates Contractors, Inc., 2012 WL 517310 (Ala. Civ. App. 2012)

HR CORNER

Proposed Changes to OFCCP Regulations

According to a recent proposed rulemaking issued by the Office of Federal Contract Compliance Programs (OFCCP), new changes are underway regarding government contractors' obligations regarding affirmative action and nondiscrimination. The OFCCP has proposed rules that will expand obligations regarding written affirmative action programs for certain federal contractors. These changes include enhanced tracking and analysis for both disabled and veteran workers, which is a significant change from the current policy requirements. As currently proposed, all government contractors would have a utilization goal of 7% for disabled workers, regardless of company size or location. The proposed rule also increases job listing requirements including a mandate of at least three "linkage agreements" with local recruiting sources, to help identify qualified veterans. The rule also requires data collection related to disabled and veteran applicants and hires. While the OFCCP estimates that this would take one hour per contractor, private industry groups estimate the burden to be anywhere from 100 to 500 hours of time, annually, per contractor.

The proposed rule is still under analysis by the OFCCP, who is currently reviewing public commentary regarding its provisions. Industry groups hope to see significant changes to the rule prior to its final form. In the meantime, employers can expect at least some change to their recordkeeping and data analysis requirements.

PROTECTIVE MEASURES

Are You SURE?
Statute of Limitations if No Bona Fide Intent to Serve

The Alabama Court of Civil Appeals recently affirmed that filing a complaint is not enough to stop a statute of limitations – the time in which a person can file a complaint. See Kendrick v. Lewis, 2012 WL 104893 (Ala. Civ. App. Jan. 13, 2012). Kendrick claimed Lewis caused a three-car pile-up, of which Kendrick's vehicle was the third. Seven days before the statute of limitations for Kendrick's claim expired, Kendrick filed suit against Lewis and State Farm Mutual Automobile Insurance Company (State Farm). Kendrick delayed serving Lewis, expressly instructing the clerk of court not to serve Lewis. Four months later, Kendrick was ordered to serve or dismiss Lewis. Kendrick finally served Lewis, and Lewis answered the complaint, raising the statute of limitations as an affirmative defense. The circuit court granted Lewis summary judgment on that issue.

The Court of Civil Appeals held that, to avoid summary judgment in favor of Lewis, Kendrick had to, and could not, prove that he intended to serve Lewis when he filed the complaint. Telling the clerk to delay service did not show a bona fide intent to serve the complaint before the statute of limitations expired. Therefore, the statute of limitations expired before Kendrick served Lewis.

The decision is a helpful defense decision. Even if a complaint is filed within the statute of limitations, the statute of limitations may still be a valid defense if there is any indication plaintiff deliberately delayed serving the insured.

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

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

Downsizing and Reductions in Force: Minimizing Risks and Defending Business Decisions

When: March 13, 2012 11:30-12:45
Where: Fees & Burgess, P.C. - Huntsville, Alabama

It is never too late to prepare for and plan a strategy for reduction of risk in a downsizing environment. Even if your company has suffered significant reductions in force in the current economic downturn, start planning now to do it right the next time.

Join us for a lunch and learn, presented by Jeff Roth and Leah Green, to discuss downsizing and reductions in force, with a focus on: proper downsizing decisions; employee selection; reviewing and defending decisions; areas of enhanced risk; WARN Act requirements; pending legislation regarding employee entitlements; issues associated with reductions in hours worked; severance policies; releases; and practical implementation.

The cost for attendees will be $49, including lunch from the Honey Baked Ham Company. Each attendee will also receive a matrix to assist in completing a WARN Act analysis and performing related calculations using the definitions provided in the statute.

To register, or more information on this 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.

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 many 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

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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.

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