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ABC REGULATORY ALERT – SUMMER 2011

ABC's Regulatory Alert provides an overview of federally mandated rules, regulations and enforcement actions from the U.S. Department of Labor, National Labor Relations Board, Equal Employment Opportunity Commission and other federal agencies. Below are brief summaries of current issues, as well as links to more detailed information and guidance. If you have questions, contact ABC's Senior Manager of Labor and Employment Policy Sean Thurman, thurman@abc.org, or ABC's Director of Policy Karen Livingston, livingston@abc.org.

Additional information and resources on recent regulatory action are available on [ABC's Regulatory Affairs webpage](#).

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NLRB Proposes Drastic Overhaul of Union Representation Procedures, Establishment of "Ambush" Elections

On June 22, 2011, the National Labor Relations Board (NLRB) published a notice of a proposed rulemaking to overhaul the procedures employers must follow for union representation elections.

The [proposal](#) will have a substantial impact on employers before and after the union representation election process. The new [procedures and requirements](#)

could result in "ambush" union representation elections within 10 to 20 days of a union filing for an election. This would significantly impede an employer's ability to make facts and information regarding union representation available—which, in turn, increases the likelihood of union victories due to a misinformed electorate.

Please note this is only a proposed rule. The NLRB is [accepting written feedback](#) and recommendations from stakeholders and the public until August 22, 2011. ABC has [raised](#) serious concerns about the proposal, and has already [presented](#) some of those concerns to the Board in person. ABC also plans to file a formal response, which will be available at [abc.org/comments](#). In addition, ABC will provide a sample letter for ABC members to file by the agency's deadline. A link to the sample letter and instructions will be sent to members in the coming weeks.

For more on the proposal, visit [ABC's Newsline](#).

DOL Seeks Intrusive "Persuader" Reporting Procedures, Redefinition of Employer "Advice"

On June 21, 2011, the Department of Labor's (DOL) Office of Labor-Management Standards published a notice of proposed rulemaking to reinterpret what constitutes "persuader" activity under the Labor-Management Reporting and Disclosure Act.

The [proposal](#) will have a substantial impact on employers and the attorneys and consultants hired to assist them before and during union organizing campaigns. The new [procedures and requirements](#) will make getting advice about critical aspects of labor relations more difficult for employers, and also may have an impact on ABC's efforts to advise contractor members on labor issues of vital concern to them and their employees.

Please note this is only a proposed rule. DOL is [accepting written feedback](#) and recommendations from stakeholders and the public until Sept. 22. ABC has serious [concerns](#) about the proposal and plans to file a formal response, which will be available at [abc.org/comments](#). In addition, ABC will provide a sample letter for members to file by the agency's deadline. A link to the sample letter and instructions will be sent to members in the coming weeks.

For more on the proposal, visit [ABC's Newsline](#).

DOL Releases Semiannual Regulatory Agenda

This month, DOL released its [semiannual regulatory agenda](#), outlining the agency's plans for the next six months. The agenda includes proposals that would mandate workplace safety and health programs for businesses of all sizes, and impose new paperwork and reporting requirements on employers that deal with labor relations consultants (see the previous entry in this Alert on DOL's "persuader" proposal) or independent contractors.

For more information on these and other upcoming DOL regulatory proposals, visit [ABC's Newsline](#) or the [DOL website](#).

OSHA Proposes Revisions to Recordkeeping and Reporting Requirements

On June 22, 2011, the Occupational Safety and Health Administration (OSHA) published a notice of proposed rulemaking to revise its recordkeeping and reporting requirements for work-related injuries and illnesses.

Under the [proposal](#), employers would have to report to OSHA all work-related fatalities and in-patient hospitalizations within eight hours. Under the current regulations, only fatalities and in-patient hospitalizations of three or more employees must be reported in that timeframe. In addition, the proposal now would require employers to report all work-related amputations within 24 hours. Reporting amputations is not required under the current regulation.

OSHA is accepting written feedback and recommendations from stakeholders and the public until Sept. 20, 2011. More information on the proposal, including [frequently asked questions](#), is available on the [OSHA website](#).

OSHA Issues Long-Awaited Compliance Guide for Cranes and Derricks Standard

On Aug. 9, 2010, OSHA [issued](#) a final rule updating work practice, training and certification requirements for crane and derrick safety in the construction industry.

That same month, ABC [requested](#) small entity compliance assistance resources be issued immediately. On March 8, 2011—eight months after the rule was published and four months after it became enforceable—OSHA finally issued its [Small Entity Compliance Guide](#), designed to help small businesses comply with the new requirements.

For more on the final rule, including an overview of its major provisions, visit [ABC's Newsline](#) or [OSHA's resource page](#).

EPA Halts Expansion of Lead Testing Requirement in RRP Rule

On July 15, 2011, the Environmental Protection Agency (EPA) [announced](#) it would forego implementing additional employer requirements for its residential Lead-Safe Renovation, Repair and Painting (RRP) program that would have mandated contractors already performing certified renovation, repair and painting activities that disturb lead-based paint in most pre-1978 homes and “child-occupied facilities” to perform complex and extensive third-party testing for the presence of lead dust following the project. ABC was on record [opposing](#) the expansion of EPA’s program to include more extensive testing, citing cost,

feasibility and necessity, and questioning the agency’s authority to even issue the proposal.

Last year, EPA [established](#) requirements that contractors performing the above

Last year, EPA [established](#) requirements that contractors performing the above-mentioned activities must be certified and follow specific work practices to prevent lead poisoning. In May 2010, EPA [issued](#) a follow-up proposal that would have amended and expanded the requirements even further, mandating dust-wipe testing after renovations were completed and delivery of the results to building owners and occupants. The proposal would have required unnecessarily low lead dust levels.

Note: This move by EPA does not change or suspend the [existing residential requirements](#), nor does it halt EPA's plans to implement requirements for [commercial buildings](#)—a policy the agency is still considering.

For more information on the RRP program—including existing requirements that remain unchanged by EPA's recent decision—visit [EPA's website](#).

EEOC Final Rule Implements ADA Changes; DOJ Guidance Offered for Title III Changes

On March 25, 2011, the Equal Employment Opportunity Commission (EEOC) [issued](#) a final rule to implement the Americans with Disabilities Act Amendments Act of 2008 (ADAAA), which revised the Act's definition of "disability."

EEOC's final rule was revised substantially from the original proposed rule by incorporating recommendations [submitted](#) by ABC and others in Nov. 2009. ABC advised the agency to delete a section that stated an employer must regard a person as disabled if the employer takes an employment action against that person based solely on a symptom of a perceived or actual impairment. ABC also expressed concern with the proposed rule's new interpretation of "working" as a major life activity. In the final rule, both provisions were removed.

In addition to the release of the ADAAA final rule, the Department of Justice (DOJ) March 23 issued its [Small Business Compliance Guide](#) for ADA Title III regulations. Title III regulations update the 1991 ADA Standards for Accessible Design. The rule became effective March 15 and compliance is required by March 15, 2012.

For more on the final rule, visit [ABC's Newsline](#). For more resources on Title III compliance, visit the [DOJ website](#).

Congressional Oversight Hearings and Regulatory Reform Efforts Underway in Washington

The November 2010 midterm elections brought sweeping change to Capitol Hill and set a new tone for governance in Washington. Today, federal regulatory reform is at the top of lawmakers' agendas, and many have signaled their willingness to review and streamline the process.

ABC National has participated directly in several congressional oversight hearings, testifying on the need to curb excessive regulation and other anti-business policies hindering job creation and economic growth.

We will continue to identify existing, proposed and upcoming regulations that

we will continue to identify existing, proposed and upcoming regulations that have or could have negative impacts on the construction industry. In addition, we will continue advocating for common sense reforms of the overall federal rulemaking process.

Below are short summaries of ABC's congressional hearing appearances to date in the 112th Congress.

Issue: Government-Mandated Project Labor Agreements

On March 16, 2011, ABC General Counsel Maury Baskin testified at a hearing titled, "[Regulatory Impediments to Job Creation: The Cost of Doing Business in the Construction Industry](#)." In his testimony before the House Committee on Oversight and Government Reform's Subcommittee on Regulatory Affairs, Stimulus Oversight and Government Spending, Baskin stated recent administration efforts to make discriminatory project labor agreements (PLAs) part of the federal procurement process are "threatening to violate the longstanding congressional mandate of full and open competition in federal procurement." ABC members [John Ennis, Jr.](#), CEO of Ennis Electric Company, Inc., and [John F. Biagas](#), CEO of Bay Electric, also testified at the hearing.

On June 3, 2011, ABC representatives again testified on the negative impacts of the Obama administration's controversial Executive Order 13502 and its effort to push government-mandated PLAs on federal construction projects. At a hearing titled, "[H.R. 735 and Project Labor Agreements: Restoring Competition and Neutrality to Government Construction Projects](#)," ABC member [Kirby Wu](#), president of Wu & Associates and 2011 chair of ABC's New Jersey Chapter, along with ABC General Counsel Maury Baskin, educated members of Congress on the Government Neutrality in Contracting Act ([H.R. 735/S. 119](#)), which would ensure fair and open competition on federal construction projects by prohibiting the government from requiring the use of PLAs.

Full summaries of ABC's PLA-related testimony are provided at [TheTruthAboutPLAs.com](#).

Issue: The NLRB and Aggressive, Anti-Business Corporate Campaigns

On May 26, 2011, ABC member [Chet Karnas](#), president and owner of Lone Sun Builders, Inc., testified at a hearing titled, "[Corporate Campaigns and the NLRB: The Impact of Union Pressure on Job Creation](#)." In his testimony before the House Committee on Education and the Workforce's Subcommittee on Health, Education, Labor and Pensions, Karnas recounted his experience as a small business owner battling union corporate campaigns—and particularly the unethical practice of "bannering." Karnas testified his business has suffered "a 20 to 30 percent decline in sales directly due to the negative impact of corporate campaigns."

A full summary of ABC's testimony is provided in [ABC's Newsline](#).

Issue: DOL and its Fundamentally Flawed Implementation of the Davis-Bacon Act

On April 14, 2011, ABC member [Tom Mistick](#), president and owner of Church Restoration Group, LLC, testified at a hearing titled, "[Examining the Department of Labor's Implementation of the Davis-Bacon Act](#)." In his testimony before the House Committee on Education and the Workforce's Subcommittee on Workforce Protections, Mistick stated the Davis-Bacon Act "hinders economic growth, increases the federal deficit, and imposes an enormous paperwork burden on contractors and the federal government." Mistick testified that "at a time of shrinking public construction budgets, the Davis-Bacon Act's fundamentally flawed system is arbitrarily limiting the amount of construction that can be built by needlessly increasing project costs. Jobs have been lost, businesses have closed and taxpayers are getting four buildings for the price of five because of this broken process."

A full summary of ABC's testimony is provided in [ABC's Newsline](#).

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