



## *Weekly Wright Report* (7/31/17)

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### **New Form I-9**

On July 17, 2017, United States Citizenship and Immigration Services (“USCIS”) released a revised Employment Eligibility Verification Form I-9 for employer use. Employers should already be familiar with this I-9 employment verification process, which has been in effect since 1986, requiring employers to complete and keep on file a Form I-9 for all employees hired in the United States. Employers must use the updated Form I-9, starting no later than September 18, 2017. Employers can download the updated Form I-9 (revision date 7/17/2017) from the [USCIS website](#). Ask Don [dwalsh@wcslaw.com](mailto:dwalsh@wcslaw.com)

### **Who Owns Employee Tips?**

The Supreme Court is set to decide whether an employer who pays the minimum wage (or more) instead of taking the tip credit owns the tips instead of the employee. In a recent decision, the Tenth Circuit has created a split on tip credits finding they belong to the employer. This conflicted with other court decisions and a 2011 Department of Labor wage rule which states that tips are the property of the employee who receives them, regardless of whether the employer takes a tip credit. The Tenth Circuit affirmed the dismissal of the employee’s claim, finding that the DOL exceeded its authority in protecting tips when the tip credit was not used to meet the minimum wage obligation. Stay tuned for more information as we follow and report on the outcome of this case. Ask Steve [skaufman@wcslaw.com](mailto:skaufman@wcslaw.com)

### **The Importance of Following the (Administrative) Rules**

*In Balfour Beatty Infrastructure, Inc. v. Mayor and City Council of Baltimore*, 2017 U.S. App. Lexis 7252 (4th Cir. 2017), the United States Court of Appeals for the Fourth Circuit upheld the requirement that administrative remedies must be exhausted before litigation may proceed. The dispute arose between the City of Baltimore and Balfour Beatty Infrastructure regarding the renovation and expansion of the City’s wastewater treatment plant. The City contended that Balfour delayed the project and was assessing \$40,000 a day in liquidated damages. Balfour contended that the City’s defective designs prevented timely completion of the project. The project was governed by the City’s “Department of Public Works Specifications

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– Materials, Highways, Bridges, Utilities and Incidental Structures 2006,” known as the “Green Book.” The Green Book has an administrative dispute resolution process which requires contractors to seek administrative review by the City’s Department of Public Works of any dispute related to their contracts before suing the City in court. Balfour argued that the City had abandoned the required administrative dispute resolution process by assessing the liquidated damages without first initiating a delay claim through the administrative dispute resolution process. Balfour contended that such abandonment relieved Balfour of any obligation to use the administrative dispute resolution process and filed suit in federal court. The Fourth Circuit held that whether the City acted unlawfully by assessing liquidated damages without first engaging in the administrative dispute resolution process is a regulatory interpretation issue that should be decided administratively before proceeding to judicial review. The Court noted that under Maryland law, the only exception to the exhaustion requirement is when the reviewing administrative agency does not have jurisdiction to adjudicate the claim and the complaining party would suffer irreparable injury by postponing litigation until the completion of administrative review. Ask Mike [mstover@wcslaw.com](mailto:mstover@wcslaw.com)

### **Materially False and Misleading Flyers Encouraging Union Membership Violate NLRA**

In MikLin Enterprises, Inc. v. NLRB, the U.S. Court of Appeals for the Eighth Circuit refused to enforce a National Labor Relations Board (“NLRB”) decision in which the Board found the owner of 10 Jimmy John’s franchises in the Minneapolis violated the National Labor Relations Act (“NLRA”) when it disciplined employees for engaging in a public protest against MikLin’s sick leave policy during a labor organizing campaign. The Eighth Circuit found that the employees’ public attacks – which included distributing flyers implying that Jimmy John’s sandwiches could be tainted by sick employees – were so disloyal, materially false, and misleading that they lost the protection provided by Section 7 of the NLRA, which shields employees who engage in concerted activities for mutual aid or protection from adverse employment actions. The decision recognizes that employees’ rights under the NLRA to protest the terms and conditions of their employment are not entirely unfettered. Ask Laura [lrubenstein@wcslaw.com](mailto:lrubenstein@wcslaw.com)