Weekly Wright Report (8/7/17)

SURETY LAW
MD Court of Appeals Affirms its Position on the Effect of Incorporation by Reference

In *Schneider Electrical Buildings Critical Systems, Inc. v. Western Surety Company*, (decided July 28, 2017) the Court of Appeals held that the surety on a subcontract performance bond was not bound by the arbitration agreement between an electrical contractor and its subcontractor. The electrical contractor and its subcontractor entered into a "Master Subcontract Agreement" ("MSA") that governed the relationship between the two parties in general. The MSA stated that any unresolved disputes between the two parties would be submitted to arbitration. Subsequently, the parties entered into a project specific subcontract agreement. The subcontract incorporated by reference the MSA. The performance bond issued by the subcontractor's surety incorporated the subcontract by reference. A dispute arose on the project, and the electrical contractor made a demand for arbitration on the subcontractor and its surety.

The surety filed a motion with the trial court to stay arbitration and sought a declaratory judgment that the surety was not compelled to arbitrate. The court granted the surety partial summary judgment as a matter of law as to its request for a stay of arbitration. On appeal, the electrical contractor argued that the incorporation clause in the bond made the surety a part of the subcontract and therefore was bound by the arbitration clause. The Court disagreed. It reviewed the terms of the bond and concluded that the surety's agreement to be jointly and severally liable for the performance of the subcontract indicated that provisions regarding the performance of the work were incorporated into the bond, rather than every contractual provision. The Court also found that the language in the arbitration clause of the MSA unambiguously limited its application to disputes between the electrical contractor and its subcontractor. The Court also found that the provision in the bond that provided for litigation of disputes was contrary to an interpretation that the surety was required to arbitrate disputes. Ask Mike mstover@wcslaw.com

EMPLOYMENT LAW
Time Off Not Always a Reasonable Accommodation Under the ADA

In a decision with important ramifications for temporary staffing agencies and employers that use their services, the 10th U.S. Circuit Court of Appeals held that the Americans With Disabilities Act (ADA) did not entitle a temporary employee diagnosed with breast cancer to a leave of absence as a reasonable accommodation for her disability.

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Kristin Punt, an employee of Kelly Services, a temporary staffing agency, was assigned to work as a receptionist 40 hours per week. Her physical presence in the office lobby was an "essential function" of the position. While on assignment, Punt was diagnosed with breast cancer and began missing work for medical appointments. Six weeks into Punt's assignment, she emailed her manager at Kelly that she could not come to work that week, she would need more time off for future surgery and radiation treatment.

The customer asked Kelly to replace Punt because it "needed an employee that's going to be able to show up and fulfill the needs of the position." Kelly did so and offered Punt alternative assignments, which she declined. In violation of Kelly policy, Punt never contacted Kelly to tell the company she was available or wanted additional assignments.

Punt sued, alleging that Kelly and its customer violated the ADA by failing to accommodate her by allowing her to take the week off as well as future time off for medical appointments and procedures. The 10th Circuit disagreed with Punt and held that her request to miss a week of work and future unknown days in the future was "not plausibly reasonable on its face" noting that physical attendance in the workplace is an essential function of most jobs.
The 10th Circuit's decision is a common-sense victory for staffing agencies and the employers that use their services. It suggests that while leave is a form of reasonable accommodation, it is not automatically required, and the circumstances of both the request and the employee's job should be considered in deciding whether it is reasonable. Even employers that do not use temporary staffing arrangements can benefit from the 10th Circuit's reminder that attendance is an essential function of most jobs and that employees who request leave as an accommodation are required to identify the expected duration of their impairment. Ask Laura lrubenstein@wcslaw.com

GOVERNMENT CONTRACTING
Service Contract Act

The U.S. Department of Labor has released its annual memorandum with the rate increase for Service Contract Act (SCA) Health and Welfare (H&W) Fringe Benefits. The new rate of $4.41 per hour (up from the 2015-2016 rate of $4.27 per hour) is required in all government contract bids or other service contracts awarded on or after August 1, 2017. The new rate does not go into effect automatically for existing contracts; rather, it goes into effect only when a contracting agency modifies an SCA covered contract with an updated Wage Determination. Generally, the new rate will go into effect on the anniversary date or upon the renewal/modification date of these contracts. Ask Don dwalsh@wcslaw.com