Weekly Wright Report (2/26/18)

FMLA Biggest FAIL

By **Laura L. Rubenstein**

Many people remember the classic presentation in the courtroom of Felix Unger explaining the hazards of making assumptions. In case you missed it, you can find here. Apropos to the legal world, this same lesson exists for employers who fail to affirmatively notify employees of their elected leave under the Family Medical Leave Act (FMLA).

Rather than assume an employee is on FMLA leave, employers must designate leave as FMLA-qualifying, in writing, within five business days of gathering sufficient information to note that the leave is for an FMLA-qualifying reason. 29 CFR § 825.300(d)(1). Leave covered under the FMLA must be designated as FMLA-protected and the employer must inform the employee of the amount of leave that will be counted against the employee's FMLA leave entitlement. The Department of Labor has a Designation Notice form available for employers to use at https://www.dol.gov/whd/forms/WH-382.pdf.

This form helps designate the leave and ensures that a qualifying reason has been provided. Employers frequently run into problems when they fail to send the notices or assume the employee has agreed the leave is under FMLA. Failure to follow the simple steps often gets employers into hot water. Employers should always communicate with employees before designating FMLA leave.

Pushing the Government Contracting Officer

By Don Walsh

Anyone who has spent any time working with the government recognizes several things. First, government contracts can be lucrative and a steady source of income and cash flow. Second, government contracts are long, boring and incorporate a book of contract clauses found elsewhere. Third, government agencies move at their own pace and on "government-time" which may not match the standards typically found in the commercial world.

These certainties frequently lead to frustration in managing expectations and getting the government to do what the contractor needs to keep the business and contract running smoothly. This past December, the Armed Services Board of Contract Appeals (ASBCA) decided *Flour Federal Solutions, LLC*, and exposed how frustrating government contracting can be and the necessary diligence contractors need to endure to work with the Government.

There are required procedural steps before a contractor's claims for additional compensation or even regular invoicing to a contract can be finalized. Unlike the commercial world where courts stand at the ready to decide such issues, in the government world there are numerous procedural hurdles which must first be overcome. Essential to these steps is a decision on the requested additional consideration by the government contracting agency.

Flour Federal Solutions discussed a factual scenario where the contractor fought for over two years with the Navy to simply stop delaying a decision on the contractor's claims so that the issue could be brought before the ASBCA for a final resolution. After two years of trying to get the Navy to perform its contractual required review, the contractor finally petitioned the ASBCA to compel a decision on its claim. Like the contractor, the ASBCA was clearly perplexed by the trail of broken promises to provide a decision and ordered the contracting officer to issue a final decision on the claim so it could proceed.

This case is an important reminder of the importance of diligence in government contracting. Without the contractor proactively seeking decisions from the government agency, efforts to recoup costs owed may simply be brushed aside or ignored making resolution an even more difficult uncertainty later. To keep the government motivated to resolve and to protect cash flow, contractors should ensure consistent follow-up on requests for equitable adjustments, timely filing claims and appeals to contractually motivate the government to a final resolution.

The Automatic Stay in Bankruptcy – An Overview

By **Mike Stover**

When a bankruptcy case is filed, in any chapter of bankruptcy – 7, 11, 13, something called the "automatic stay" goes into effect. As its name suggests, the stay arises automatically and immediately by operation of law, no order of the court or issuance of a notice is required to bring it into existence and it is applicable to all entities and persons.

The purpose of the stay is to provide relief to the debtor from the pressure and harassment of creditors and to give the debtor a "breathing spell" to focus on rehabilitation or reorganization. Importantly, the stay also promotes an equality of distribution among creditors by preserving the status quo and a "disorganized dismemberment" of the debtor.

To accomplish the purposes of the bankruptcy process, the automatic stay prohibits the commencement or continuation of any judicial or other proceeding against the Debtor. It stops the enforcement of a judgment or lien against the Debtor or property of the Debtor's bankruptcy estate that arose prior to the filing of the Debtor's bankruptcy, including any act to obtain possession or control of the Debtor's property. It even stops the filing of a UCC financing statement.

The automatic stay remains in force until property subject to the stay is no longer property of the estate or the earliest of: (i) the time the case is closed; (ii) the time the case is dismissed; or (iii) the time a discharge is granted or denied. The stay may also be lifted by the Bankruptcy Court upon motion by an interested party.

Although there are limited exceptions permitting a party to get around the stay, generally, if the automatic stay is violated, the court can completely reverse whatever action was taken. Further, in the event of a willful violation of the stay, an individual may recover actual damages, costs, attorneys' fees and in appropriate circumstances punitive damages or punished under the Bankruptcy Court's contempt powers.

The lesson to be learned—once you have a debtor who has filed for bankruptcy, call your attorney before you risk losing even more money.