Weekly Wright Report (3/12/18)

The Accidental Protest

By Mike Stover

Okay, so let's say you are considering submitting a bid in response to an RFP from a federal agency, but you note that a solicitation amendment seems to have changed the procurement's set aside status, which creates an ambiguity. So, you decide to send an e-mail to the contracting officer noting the perceived ambiguity and asking the agency to clarify the set aside status.

You may have just unwittingly submitted an "agency-level protest." To constitute an agency level protest, there must be a written communication to the government detailing a disagreement and requesting agency action.

In *Office Design Group*, B-415411 (Jan. 3, 2018), the Government Accounting Office ("GAO") ruled that an e-mail was effectively an agency level protest, observing that when the contracting officer later responded to the e-mail and did not take the action requested, that response became an adverse agency action. Even though there was no decision on the part of the bidder to protest, the communication was deemed a protest. The GAO stated "[a] letter (or email) does not have to explicitly state that is intended as a protest for it to be so considered ..."

If your correspondence does become a protest, it also triggers the GAO's timing rules when the agency responds. Once the agency responds to the deemed protest adversely, the 10-day time period to file a protest with GAO begins to run.

Because pre-award communications can be construed as an agency level protest and trigger deadlines, a bidder must be aware of the results of such communications and take the necessary steps to protect its protest rights. When in doubt, contact experienced government contract counsel.

New 2018 Rules for Paying Interns

By Laura L. Rubenstein

Following pressure from numerous judicial decisions from around the country, the Department of Labor has adopted the "primary beneficiary test" to determine whether an intern is, in fact, an employee under the Fair Labor Standards Act and must be compensated for their time worked. The test allows courts to examine which party is the "primary beneficiary" of the relationship based on seven general factors:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.
2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.

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4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.

5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.

6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.

7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

Courts have described the "primary beneficiary test" as a flexible test, where no single factor is determinative. If analysis of these circumstances reveals that an intern is actually an employee, then he or she is entitled to both minimum wage and overtime pay under the FLSA.

For help determining whether your company's internship program should compensate for work performed, please reach out to a WCS attorney.

March Tournament Fever

By Don Walsh

As we enter March every year, college hoops fever attacks most business and everyone looks to capitalize on the excitement generated by the NCAA basketball tournament. A word to the wise should exist, however, that the phrase "MARCH MADNESS" is a registered trademark of the National Collegiate Athletic Association (NCAA). They have also federally registered several other common terms to include "ELITE EIGHT", "FINAL FOUR", and "MARCH MAYHEM". Any use of these terms in advertising, promotion or other types of commercial purpose are likely to draw the ire of the NCAA and the lucky receipt of a cease and desist notice or worst. The NCAA enforces its rights aggressively and has challenged past efforts at similar trademark filings.

Oh yeah, and the friendly office pools are illegal too. Although they seem to be harmless, you are likely breaking the law. The FBI estimates that at least $2.5 billion is illegally wagered each year on March Madness, more than the Super Bowl, according to the NCAA.

"Age Will Matter" Cost Company $50,000

By Laura L. Rubenstein

ON March 8, 2018, the Equal Employment Opportunity Commission (EEOC) announced that Diverse Lynx, LLC, a Princeton, New Jersey-based IT staffing firm with offices in New Jersey and India, will pay $50,000 to settle an age discrimination lawsuit.

Diverse Lynx allegedly violated the Age Discrimination in Employment Act (ADEA) when, after learning an applicant's date of birth, the company sent the applicant an email stating that he would no longer be considered for the position because he was "born in 1945" and "age will matter."

Under the consent decree entered by the Court, Diverse Lynx is prohibited from considering an applicant's age, and may not request or solicit an applicant's year of birth before referring the applicant to a prospective employer.

There are very few situations where age can be a legally relevant factor in hiring or when making other employment decisions. This case was certainly not one of those situations.

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