NDA Advocacy News Jan. 21, 2020

DOL Publishes Final Joint Employer Rule

The Department of Labor (DOL) recently published a final rule to revise its regulations interpreting joint employer status under the Fair Labor Standards Act (FLSA). These regulations have not been updated in more than 60 years. The rule provides new guidance for determining joint employer status when an employee performs work for his or her employer that simultaneously benefits another individual or entity, including guidance on the identification of certain factors that are not relevant when determining joint employer status. The final rule goes into effect on March 16, 2020.

According to the DOL, the final rule:

- specifies that when an employee performs work for the employer that simultaneously benefits another person, that person will be considered a joint employer when that person is acting directly or indirectly in the interest of the employer in relation to the employee;
- adopts a four-factor balancing test to determine whether the potential joint employer is directly or indirectly controlling the employee, assessing whether the potential joint employer:
    - hires or fires the employee;
    - supervises and controls the employee's work schedule or conditions of employment to a substantial degree;
    - determines the employee's rate and method of payment; and
    - maintains the employee's employment records.
- clarifies that an employee's "economic dependence" on a potential joint employer does not determine whether it is a joint employer under the FLSA;
- specifies that an employer's franchisor, brand and supply, or similar business model and certain contractual agreements or business practices do not make joint employer status under the FLSA more or less likely; and
- provides several examples applying the DOL's guidance for determining FLSA joint employer status in a variety of different factual situations.

You can read the final rule here. The DOL also published a fact sheet and frequently asked questions page on their website. For any further questions please contact Kevin McKenney at kmckenney@demolitionassociation.com.

Senate Ratifies the USMCA

On January 16, the Senate ratified the United States-Mexico-Canada Agreement (USMCA) to update and replace the North American Free Trade Agreement (NAFTA). The House of Representatives passed the USMCA overwhelmingly last month. Mexico has already approved the agreement, and Canada's parliament is expected to take action in the next several months. With some additional minor procedural action, the agreement should take effect later this year.

President Trump Signs Phase One Trade Agreement with China

On January 15, President Trump signed a "phase one" trade agreement with China during a ceremony at the White House. The deal includes a commitment by China to purchase at least $200 billion in U.S. exports over two years including food, manufactured goods, agricultural products, energy products and services. The agreement requires China to ban the unauthorized disclosure of trade secrets and similar confidential business information during any criminal, civil, administrative, or regulatory proceedings conducted by Chinese government officials. It calls on China to levy heavier penalties for intellectual property theft or infringements. The agreement also requires both countries to refrain from currency devaluations or otherwise acting to set exchange rates for "competitive purposes."

DOL Releases Civil Penalty Amounts

The Department of Labor (DOL) recently released the annual civil penalty adjustments for each of their agencies as required by law. The new amounts will applied to penalties assessed after January 15, 2020. Below is a summary of the new maximum penalties for the Occupational Safety and Health Administration (OSHA).

Type of Violation	New Maximum
▪ Serious ▪ Other-Than-Serious ▪ Posting Requirements	$13,494 per violation
Willful or Repeated	$134,937 per violation
Failure to Abate	$13,494 per day beyond the abatement date