

# ACWI ADVANCE

David Sparkman, Editor

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## Employers Face Obamacare Minefield

Since the Supreme Court turned back the last serious legal challenge to the Affordable Care Act, employers can expect to face a slew of consequences, including postponed deadlines coming due and Obama Administration attempts to use the act to push other aspects of its agenda.

For example, employers already should be aware that they are expected to determine exposure to various requirements based on meeting the definition of a "large employer" – having more than 50 full-time equivalent employees.

Terrence M. Finn, an attorney with the law firm of Ober Kaler, says that definition of employee is critical in addressing the 50 employee test. This has been made more challenging by the issuance of a legal interpretation by a top Department of Labor official declaring that almost all independent contractors are really employees.

On July 15, David Weil, administrator of the Labor Department's Wage and Hour Division, released an "interpretation" of employment law and said his agency now will assume "most workers are employees" for the purposes of wage and hour law enforcement (AA, 7-31-15, P. 1)

Independent contractors also maintain their own liability insurance and pay for their own Social Security, Medicare and other benefits.

"While the DOL action pertains to an interpretation

under the Fair Labor Standards Act and the administrative interpretation is not the equivalent of a law, the courts tend to give deference to the agency charged with administering certain laws," Finn points out.



"Therefore, for purposes of the FLSA and counting employees under the ACA, a review of the definition of employee is well-advised," he adds.

If a company is found to have misclassified employees as independent contractors, the costs can

run quite high – hundreds of millions of dollars in the recent case of a settlement agreed to by FedEx Ground.

Under Obamacare, falsely defining a large chunk of your workforce as contractors could add enormous additional costs, Finn notes.

Two new IRS forms must be used to comply with the ACA reporting requirement – Form 1095-B, which addresses covered individuals, and Form 1095-C, which pertains to health insurance offers and coverage.

"Unfortunately, recently, Congress decided to add a small minefield to the reporting and disclosure requirements," Finn says. "Trade legislation that was signed in June includes substantial increases in penalties for errors on informational returns."

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For example, the penalty for errors on the Form W-2 which reports compensation and withholding will increase from \$100 per failure to \$250 per failure for each incorrect information return that is filed with the IRS – and for each copy that must be sent to the payee.

As a result, a single error on a 2015 information return that will be filed in 2016 may result in a \$500 penalty. Although the penalty can be abated for reasonable cause, the employer's exposure now increases because of the new Forms 1095 and their respective transmittal forms, which must be filed annually.

### **Piling on the Employer Workload**

These are not simple forms to fill out, Finn warns, because they address whether an individual has qualifying health insurance coverage and whether the employer has met its shared responsibility requirements under the ACA..

“Certainly, the additional reporting requirements are difficult enough, but to increase the penalties for errors on the back of this new requirement is unnecessary, and for Congress to include this in the trade legislation is very troubling,” Finn says. “Nonetheless, we recommend that large employers meet with their accountants to establish a procedure for checking the information.”

He also recommends that employers put in writing a clear definition of who in the company or an outside service has primary responsibility for the preparation of the forms and if possible, who has primary responsibility for reviewing the forms.

“Employers may want to check with their payroll service to see how it will be addressing this requirement and whether or not it will attempt to pass the responsibility back to the employer,” Finn suggests.

Lastly, because of the Supreme Court decision eliminating state bans on same-sex marriages, employers now need to review the terms of their health care plan if it includes spousal coverage.

Finn also says employers will need to work with their insurance companies or third-party administrators to make sure that they have procedures in place for identifying spouses and for making sure that COBRA notices reach the right person in each case.

# **Court Rebukes Spur EEOC to Settle Suits**

Three long-fought and closely-watched federal government lawsuits against employers were settled recently.

BMW has agreed to settle a suit in which the Equal Employment Opportunity Commission charged it had illegally run criminal background checks of employees of a 3PL company that provided warehouse, distribution and transportation and services for the carmaker's South Carolina facility.

In the settlement, BMW agreed to pay \$1.6 million to the 56 claimants and other unidentified applicants. It also will offer those 56 claimants, and up to 90 other applicants, employment through a logistics labor contractor.

The company also agreed to use only an updated criminal record screening policy fashioned to resemble EEOC's recommended best practices

In another case, EEOC was ordered to pay about \$1 million to Freeman, a trade show and event logistics services company, which it had charged with discriminating against minorities by misusing credit and criminal background checks.

A U.S. Appeals Court panel and a lower court judge earlier had issued scathing criticisms of EEOC's methodology and tactics, including reliance on an expert witness whose work had been thoroughly repudiated. (AA, 3-31-15, P. 3).

In his award of legal costs to Freeman, the district court judge said: Because the EEOC insisted on playing a hand it could not win, it is liable for Freeman's reasonable attorneys' fees."

In another case, the Labor Department agreed to pay Gate Guard Services \$1.5 million to settle claims involving the DOL's overly aggressive and bad faith tactics in investigating whether Gate Guard's gate attendants were improperly classified as independent contractors.

A federal appeals court panel declared that “at nearly every turn, this DOL investigation and prosecution violated the department's internal procedures and ethical litigation practices” (AA, 7-31-15, P. 3).

# Real Estate Outlook Eases Through 2017

Although the overall real estate market is expected to start cooling off over the next two years, the industrial and warehouse segment will continue show strength, according to the Urban Land Institute.

Warehouse availability rates are expected to continue to decline in 2015 and 2016, with year-end vacancy rates at 9.7% and 9.5%, respectively, and remain steady in 2017 at 9.5%.

The prediction is for healthy rental rate growth to continue, with increases of 4.9% in 2015, 4.0% in 2016, and 3.0% in 2017. These forecasts are all above the 20-year average growth rate.

For retail on-going improvements are anticipated over the next three years, with year-end availability rates expected to decline to 11.1% by 2015, 10.7% by 2016, and 10.4% by 2017. Still, these rates remain above the 20-year average.

Rental rates are expected to sustain this growth, increasing by 1.5% in 2015, 2.5% in 2016, and 2.8% in 2017. Compared to six months ago, the outlook of availability rates and rental rate growth for the next three years is less optimistic.

The latest ULI Real Estate Consensus Forecast, a semi-annual outlook, is based on a survey of 49 of the industry's top economists and analysts representing 36 of the country's leading real estate investment, advisory, and research firms and organizations.

The forecasts for industrial/warehouse availability rates and rental growth rates in 2015, 2016 and 2017 are all more optimistic than the Consensus Forecast of six months earlier, ULI said.

"The latest Consensus Forecast has picked up on recent growth concerns and stock market corrections around the world," said ULI leader William Maher, director of North American strategy for LaSalle Investment Management.

"Still, the vast majority of indicators in the forecast indicate favorable economic and capital markets in the U.S., as well as moderately strong real estate fundamentals and investment returns," he noted.

# PRISM Logistics Is Picked by Sun-Maid

Sun-Maid Growers of California has selected PRISM Team Services to handle distribution of its products throughout Northern California and parts of Nevada and Utah.

A member of the American Chain of Warehouses Inc., PRISM' is headquartered in Danville, CA.



"After looking, not only at economics, but at the best fit for Sun-Maid, PRISM was the obvious choice," said John Slinkard, Vice President Customer & Supply Chain Services at Sun-Maid Growers of California.

"We look for companies that operate as we do. Sun-Maid is a cooperative of raisin growers, with a mentality very much like a family-owned company. Relationships are critically important and we're very big on service," he added.

There were four companies that competed for the business which Sun-Maid decided PRISM will handle through its Stockton, CA, facility.

All of them were credible companies and good options, Slinkard noted, but he stressed that PRISM's clear focus and a headquarters location in Northern California, were differentiating factors.

Sun-Maid said that it prefers to work with regional warehouse logistics and distribution providers, because of the aligned culture and values, and also because of their deep understanding and relationships with the retail grocery customers to whom they deliver Sun-Maid products.

Sun-Maid Growers is the largest raisin and dried fruit processor in the world. As a cooperative, it consists of approximately 850 family farmers who grow raisin grapes within 100 miles radius of the processing plant; the cooperative also sources dried fruit beyond this geographical area.

PRISM also has warehouse locations in Hayward, Sacramento, Stockton and Livermore, CA.

# CA Ports and Amazon Face Contractor Issue

The Teamsters union struck drayage carriers at southern California ports after Gov. Jerry Brown signed a law that pressures fleet operators into reclassifying their drivers as employees.



In late October the governor signed a law giving fleet operators a year to accept contractor reclassification or suffer the legal consequences.

Sponsored by the Teamsters, the new law provides drayage fleet operators with amnesty from statutory and civil penalties if they conduct a voluntary self-audit and reclassify their drivers as employees.

Adding pressure on employers, the new law takes effect on Jan. 1, 2016 and expires on Jan. 1, 2017. To participate, employers must apply and get permission from the state Labor Commissioner, who then negotiates a settlement agreement. That requires payment of all wages, benefits and taxes owed, workers' compensation coverage, and the commissioner's negotiation and execution costs.

A week after the law was enacted Teamsters struck southern California port facilities used by Pacific 9 Transportation, Intermodal Bridge Transport, and the XPO Logistics-owned Pacer Cartage and Harbor Rail Transport. Amazon warehouse workers at California Cartage held a short strike after 14 of them filed \$3.5 million in wage-and-hour claims.

Strikes at all the drayage carriers but Pacific 9 ended after the Los Angeles City Council voted unanimously on a resolution supporting the drivers.

On Oct. 27 a group of drivers filed a class action suit against Amazon.com and Scoobeez, a courier company operated by ABT Holdings. The drivers work exclusively for Amazon.com's Prime Now two-hour delivery service in Orange County, CA.

The drivers claim they are employees because Amazon micromanages every aspect of their daily work routine and schedule, and forbids them from selecting or rejecting any work assignments.

# Most Companies Plan To Invest in Big Data

Investment in big data continues to increase in 2015, but not as rapidly as in previous years. More than three-quarters of companies are investing or planning to invest in big data in the next two years, a 3% increase over 2014, according to a recent survey of IT and business leaders by Gartner, Inc..

"This year begins the shift of big data away from a topic unto itself, and toward standard practices," said Nick Heudecker, research director at Gartner.

"The topics that formerly defined big data, such as massive data volumes, disparate data sources and new technologies are becoming familiar as big data solutions become mainstream. For example, among companies that have invested in big data technology, 70% are analyzing or planning to analyze location data, and 64% free-form text."

As in previous years, firms are overwhelmingly targeting enhanced customer experience as the primary goal of big data projects (64%). Process efficiency and more-targeted marketing are now tied at 47%. Enhanced security capabilities saw the largest increase, from 15% to 23%.

"As big data becomes the new normal, information and analytics leaders are shifting focus from hype to finding value," said Lisa Kart, Gartner research director. "While the perennial challenge of understanding value remains, the practical challenges of skills, governance, funding and ROI come to the fore."

The majority companies planning to invest in big data and those that already have, expect a positive ROI. However, 43% of those planning to invest and 38% of those already invested don't know if their ROI will be positive or negative.

A significant changes is in the rank of who initiates projects. Last year, 37% of big data projects were initiated by the CIO, while 25% were initiated by business unit heads. In 2015, the roles are nearly tied, at 32% and 31%, respectively.

"Business leaders are taking a more active role in information and analytics projects as awareness of the value of data-driven decision making grows," said Heudecker.

# Buyers Choosy Even in an M&A Wave

Are you thinking that this might be a good time to cash out by selling your warehouse-based third-party logistics company or to seek an injection of private equity financing for expansion?

You could be right, but be careful that you're not laboring under common misperceptions, warned major players in the finance world who spoke at the third annual Value Creation Forum held last month in Chicago, by Armstrong & Associates and Infocast.

In recent years the pace of mergers and acquisitions in the 3PL sector has accelerated sharply, with headlines proclaiming yet another major transaction almost every week.

You would be surprised to learn how many uncounted others took place below the radar involving smaller companies – primarily freight brokers and other small 3PL intermediaries, as well as warehouse and trucking operations.

Size is not necessarily an obstacle. Some the M&A specialists and 3PL companies looking to expand their portfolio said they are willing to work with companies that have only \$5 million in annual revenues – in some cases as low as \$3 million.

But the trick is having something they want to buy. A crucial element is an established track record of net earnings growth. Frank Mountcastle III, managing director of Harris Williams & Co. said that for a company with \$10-15 million buyers are looking for at least 15% in organic growth.

Another is being a solid niche player specializing in serving a growing industry segment. Trying to be all things to all people is guaranteed to make a 3PL warehouse operation less attractive to buyers.

While some buyers are seeking to acquire additional capacity, “the truth is that buyers are looking for differentiation in the market,” said Robert Levin, managing director of Republic Partners.

Being small is not necessarily a drawback. Sean Coakley, senior vice president of Kenco Group said, “Smaller and family-owned warehouse companies

allow flexibility in deal making and can deliver hand holding and provide closer customer services.”

The most common reason for selling a company is that the owner wants to cash out and retire, and as quickly as possible once they've made that decision.

But the trajectory of a typical transaction usually takes about six months from the start of negotiations to the time the money hits your account.



A complicating factor is that buyers are looking for strength and continuity in top management. The common expectation is that the CEO will stay on for a few years to helm the operation.

The alternative is to make sure that you have a well-prepared succession plan, including a strong management team in place, before putting your company on the market.

“The truth is that in most cases they are investing in people,” said W. Keith Prusek, managing director of logistics and transportation investment banking at BB&T Capital Markets. “Management and succession planning is key.”

Some buyers look for a global capability, however small. All of them expect to see the best available technology deployed for optimizing omnichannel fulfillment and transportation management.

Don't get too hung up on assets. For one thing, a warehouse company that owns instead of leases property is considered to be more vulnerable if it loses a big client, noted Mountcastle.

But not all revenue dollars are equal. Several panelists from the private equity business observed that non-asset-based providers are valued in the market more than asset-based 3PLs because non-asset companies are perceived to be less vulnerable to inevitable downturns that are part of all business cycles than are warehouse and trucking firms.

However, the best bet for a smaller, asset-heavy 3PL seeking to raise capital in today's era of low interest rates is to simply obtain a loan from your bank, they said.