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A PRIMER ON LABOR LAWS OF INTEREST TO THE SURETY

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I. INTRODUCTION

This paper[1] will provide a brief primer on federal labor laws of interest to the surety. This paper is not intended to be a comprehensive treatise on labor law. Indeed, the paper will neither address state labor laws that might be of interest to the surety nor will it address all of the federal labor laws that might be of interest to the surety. Indeed, most notably, both the "prevailing wage acts" (state and federal)[2] and the Employee Retirement Income Security Act (ERISA) are notably absent from this paper. Finally, this paper will not address the various federal employment and employment discrimination laws that may be applicable and of interest to a surety[3]. Instead, this paper will provide a brief overview of the following acts and a discussion of their potential applicability or interest to surety:

- Contract Work Hours and Safety Standards Act - 40 U.S.C. § et seq.
- Fair Labor Standards Act - 29 U.S.C. § 201 et seq.
- National Labor Relations Act - 29 U.S.C. § 151 et seq.
- Occupational Safety and Health Act - 29 U.S.C. § 651 et seq.
- Portal to Portal Act - 29 U.S.C. § 251 et seq.
- Service Contract Act of 1965 - 41 U.S.C. § 351 et seq.
- Walsh - Healy Act - 41 U.S.C. § 35 et seq.
- Copeland Anti-Kickback Act of 1954 – 18 U.S.C. §874

II. THE STATUTES

A. Contract Work Hours and Safety Standards Act - 40 U.S.C. § 327 *et seq.*

1. Overview of the Statute

The Copeland Work Hours and Safety Standards Act, 40 U.S.C. §327 et seq., which applies to all contracts that require employment of laborers or mechanics upon a public work of the United States or of any territory, provides that the wages of any mechanic or laborer employed by a contractor or subcontractor shall be determined based upon a work week of forty hours, with any time thereafter warranting compensation at a rate of at least one and a half times the basic rate of pay. The statute further provides that any contractor or subcontractor who violates this statute, in addition to possible criminal penalties, will be liable to the affected employee for his unpaid wages and to the United States for liquidated damages in the amount of $10 for each calendar day on which such employee was required or permitted to work overtime without the proper compensation. The governmental agency, moreover, for which the contracted work is performed may withhold

[1] The author gratefully acknowledges the assistance of Peter Westhoff and Benjamin Westhoff in the preparation of this paper. Both Peter and Benjamin are law clerks at the St. Louis, Missouri law firm of Reinert & Rourke, P.C..

[2] The Davis Bacon Act and the "Little Davis Bacon Acts" were the subject of a paper by the author at the 11th Annual Northeast Surety and Fidelity Claims Conference entitled "A Survey of Prevailing Wage Laws and Their Implications for the Surety".

[3] There are a number of such statutes, including, for example, the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §621, et seq.; the Family and Medical Leave Act (FMLA), 29 U.S.C. §2601, et seq.; the Americans with Disabilities Act, 42 U.S.C. §12101, et seq.; and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2.

the appropriate amount to satisfy any liabilities incurred by the contractor or subcontractor as a result of violating this statute.

This statute does not apply to contracts for transportation by land, air, or water, or for the transmission of intelligence, or for purchase of supplies or materials or articles ordinarily available in the open market. The statute also does not apply to any work required to be performed in accordance with the Walsh-Healey Public Contracts Act, or to any work performed under a contract for less than $100,000.

An officer or inspector of the work to be performed under any applicable contract is required to report to the proper officer of the United States all violations of the statute. Determination of the liquidated damages amount is an administrative matter. The Comptroller General of the United States is authorized to pay, from the sums withheld on account of underpayment of wages, affected laborers and mechanics the amounts administratively determined to be due. However, if the withheld sums are insufficient to reimburse the laborers and mechanics, such laborers and mechanics will have a right of action and/or of intervention against the contractor and his sureties. In such a proceeding it shall be no defense that the laborers or mechanics accepted less than the required rate of compensation.

Any contractor or subcontractor aggrieved by this statute may appeal to the head of the agency of the United States or of the applicable territory for which the contract work is performed. The agency head, after the aggrieved parties have shown cause, may then make a recommendation to the Secretary of Labor to have the damages reduced. Contractors or subcontractors aggrieved by the agency head or Secretary's decision may file a claim in the United States Court of Federal Claims. However findings by the agency head or the Secretary will be conclusive with respect to findings of fact if such findings are reasonably supported by evidence.

It is a condition for each applicable contract that no contractor or subcontractor shall require any laborer or mechanic employed in the performance of the contract to work under hazardous conditions, as determined under construction safety and health standards promulgated by the Secretary of Labor. In the event that the Secretary determines noncompliance with safety standards, the governmental agency for which the contract work is done has the right to cancel the contract, and to enter into other contracts for the completion of the work, charging any additional cost to the original contractor.

If the Secretary determines that, by repeated willful and grossly negligent violations of this statute, a contractor or subcontractor has demonstrated that the provisions of the statute are inadequate to protect the safety and health of his employees, the Secretary shall transmit his name to the Comptroller General. The Comptroller General will then distribute each name so transmitted to him to all agencies of the Government, which will not award another contract to those persons named until three years has elapsed from the time the names are transmitted to the Comptroller General. Any person aggrieved by the Secretary's actions may within sixty days after receiving notice thereof file a petition in the

appropriate United States court of appeals. The findings of fact by the Secretary, if supported by reasonable evidence, shall be final.

2. Implications for the Surety

From the surety's standpoint, the Contract Work Hours and Safety Standards Act has several important ramifications. First, the surety is specifically subject to liability under the Act. Thus, the surety could be liable on its payment bond--and/or its performance bond (since there is deemed to be a provision in the bonded contract requiring compliance with the Act). This liability could include unpaid wages due the "affected employee" and perhaps the liquidated damages due the United States. Second, even short of direct liability, the surety's liability is affected by the Act since its bond principal may have sums due workers under the Act deducted from earned contract funds, thereby threatening the bond principal's ability to finish a project. Third, since it is specifically made a provision of each applicable contract that no contractor or subcontractor shall require its workers to work under "hazardous conditions", the surety is subject to completion obligations under its performance bond if its bond principal is terminated for noncompliance with the safety standards. This makes it incumbent upon the surety to concern itself with its bond principal's safety practices and compliance with Department of Labor safety standards.

B. FAIR LABOR STANDARDS ACT - 29 U.S.C. §201 *et seq*.

1. Overview of the Statute

The Fair Labor Standards Act (FLSA), 29 U.S.C. §§201, et seq., prescribes minimum standards for wages and hours of employees. § 206 of the FLSA prescribes the payment of a minimum wage (not less than $5.15 an hour beginning September 1, 1997). However, under § 214 of the FLSA, the Secretary of Labor may set wage rates lower than this for learners, apprentices, messengers, and handicapped. Additionally, §213 of the FLSA specifically exempts professionals, executives, and administrative personnel from the minimum wage and overtime provisions of the FLSA.

§ 206 of the FLSA prohibits subject employers from discriminating between employees on the basis of sex by paying wages at a rate less than the rate at which such employers pay wages to employees of the opposite sex.

§ 207, entitled "maximum hours", stipulates that an employee must receive overtime pay at a rate not less than one and one-half times the regular rate of pay for hours worked in excess of 40 hours per work week. Any consecutive seven-day period is considered a workweek. Employers may not average hours worked in more than one workweek to determine overtime. § 207 (b)(1) exempts employers from the overtime requirement if his employees are employed pursuant to a collective bargaining agreement certified as bona fide by the National Labor Relations Board. However, the agreement must provide that no employee shall be employed more than 1040 hours during any period of twenty-six consecutive weeks or not more than 2240 in fifty-two consecutive weeks.

§ 216 of the FLSA provides civil remedies and criminal penalties against employers which violate § 206 minimum wage requirements and § 207 maximum hours requirement. Any employer who violates those sections is subject to liability to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, attorney's fees, plus an additional equal amount as liquidated damages. According to § 216(b), a civil action for these damages may be filed in federal or state courts by affected employees.

2. Implications for the Surety

From the surety's standpoint, the FLSA has several important ramifications. First, although the surety is not specifically subject to liability under the Act, it could be subject to liability under its payment bond and/or its performance bond (if compliance with the FLSA were included as a provision of the Bond of if there were a provision in the bonded contract requiring compliance with the Act). This liability could include unpaid wages due the "affected employee" plus liquidated damages and attorney's fees. Second, even short of direct liability, the surety's liability is affected by the Act since its bond principal's financial welfare could be affected by liability for unpaid wages and penalties under the FLSA.

C. NATIONAL LABOR RELATIONS ACT - 29 U.S.C. §151 *et seq*.

1. Enactment of the National Labor Relations Act

The National Labor Relations Act ("NLRA") or Wagner Act was enacted in 1935 to govern relations between labor and management. Concerned with the denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining, which led to strikes and other forms of industrial strife and unrest, Congress wanted to encourage collective bargaining. To effectuate the general purposes of the Act, the NLRA established the legally enforceable rights to organize, bargain collectively, and to engage in strikes, picketing and other concerted activities. All of these rights were to be overseen by the newly created National Labor Relations Board (NLRB). The NLRB has the authority to enjoin any "unfair labor practices" as defined in § 8 of the Act.[4]

Since its enactment, the NLRA underwent significant amendments with: the Labor Management Relations Act of 1947 (Taft-Hartley Act), 29 U.S.C. §§141-197, which introduced some significant structural amendments to the NLRA; and the Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act), which enacted various provisions regulating unions, including a "bill of rights" for union members, and enacted several provisions regarding the construction industry. In addition to those major amendments, there have been numerous, less significant, changes to the NLRA since its enactment.

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[4] 29 U.S.C. §158.

§ 8(a) of the NLRA prohibits employers from (1) interfering, restraining or coercing employees in regard to their collective bargaining rights under § 7 of the Act; (2) interfering with and dominating a labor organization; (3) discriminating against an employee because of his/her engaging in union activities or refraining from such activities; (4) discriminating against an employee because he/she resorted to or cooperated with the NLRB; (5) refusing to recognize and bargain in good faith with a union that is the exclusive representative of employees.

2. Major features of the NLRA

§ 8(b) of the NLRA prohibits labor organizations, i.e. unions, from: (1) restraining and coercing employees with respect to their collective bargaining rights under § 7 of the Act; (2) coercing an employer in the selection of a representative; (3) causing an employer to commit a violation under § 8(a)(3) of the Act, i.e. discriminating against an employee because of his/her engaging in union activities or refraining from such activities; (4) refusing to bargain in good faith with the employer; (5) engaging in secondary boycotts and coercion to resolve a jurisdictional dispute; (6) charging excessive or discriminatory initiation fees; (7) causing an employer to pay for services that are not to be performed; (8) picketing an employer for recognitional or organizational purposes; (9) having a "hot cargo" agreement with an employer.

3. The NLRA in the Construction Industry

a. Unique features

Because of some of its idiosyncratic features, the construction industry has been treated differently than other industries by the NLRA. First of all, the NLRB did not begin asserting jurisdiction over the construction industry until 1948.[5] Second, the NLRA itself has several provisions that deal specifically with the construction industry. Finally, the NLRB has recognized some of the unique aspects of the construction industry through its procedures, rulings and interpretations of the NLRA.

b. Collective bargaining issues

The NLRA's regulation of collective bargaining in the construction industry is unique. Although NLRA §(a)(2) prohibits an employer from recognizing and entering into a collective bargaining agreement with a union that does not represent a majority of the employer's employees, NLRA §8(f) recognizes and permits the longstanding practice of employers to enter into "prehire agreements" with unions. Under this practice, employers enter into agreements with unions prior to even hiring any employees and prior to the union's establishing that it represents a majority of an employer's employees. Thus, although there are statutory conditions and qualifications, NLRA §8(f) specifically permits "prehire agreements" in the construction industry. The effect and enforceability of such

[5] See "The Construction Industry under the National Labor Relations Act", *National Labor Relations Act: Basic Law and* Procedures (ABA Section of Labor and Employment Law, 1999); John *Deklewa & Sons*, 282 NLRB 1375, 1380 (1987), enfd. Sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988).

"prehire agreements" has been developed by a number of cases and decisions on the subject. See, for example, *John Deklewa and Sons*, 282 NLRB 1375 (1987) enforced sub. nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3rd Cir. 1988); *Pierwson Electric, Inc.*, 307 NLRB 1494 (1988); *Laborers' Local Union No.* **1184**, 296 NLRB 1325 (1989); **Casale** *Industries*, 311 NLRB 951 (1993).

c. Fringe benefit fund issues

Multiple employers on various jobs often employ employees in the construction industry. For this reason, employers often contribute to centralized pension and welfare benefit funds on behalf of their employees. The nature and amounts of the employer's contributions to these funds is typically governed by the collective bargaining agreement between the employer and the particular union. Furthermore, the Labor Management Relations Act, 29 U.S.C. § 186, strictly governs the creation, maintenance and control of these funds. Litigation over contribution to and management of these funds is not infrequent.

d. Double-breasting issues

"Double-breasting" is the term used to describe the establishment of a separate, non-union company by a union employer. This enables the employer to simultaneously procure union labor on a union contract and nonunion labor on a nonunion contract. "Double breasting" is legal as long as the entities are truly run separately. If, however, the two companies are in reality operating as a "single employer" or as "alter egos", the nonunion company may be bound by the terms of the collective bargaining agreement entered into by the union company and therefore be subject to fringe benefit obligations. *Radio & Television Broadcast v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255 (U.S. 1965); *South Prairie Constr. Co. v. Local No. 627, Int'l Union of Operating Eng'rs*, 425 U.S. 800 (U.S. 1976); *Western Union Corp.*, 224 NLRB 274 (1976), aff'd, 571 F.2d 665 (D.C. Cir. 1978); *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489 (5th Cir. 1982); *Swift Independent Corp.*, 289 NLRB 423 (1988), remanded, 887 F.2d 739 (7th Cir. 1989).

e. Striking and picketing issues

The ability of a union to strike or picket is one of its most important rights and effective tools. § 7 of the NLRA guarantees this right. However, this right is not unlimited and has been balanced by the courts and the NLRB with an employer's private property rights. See, e.g. *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (U.S. 1956); *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (U.S. 1992). Moreover, § 8(b)(4) of the NLRA prohibits so-called "secondary strikes" or "secondary boycotts". That Section provides, in pertinent part:

> "(b) It shall be unfair labor practice for a labor organization or its agents--…
>
> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce…to engage in, a strike or a refusal in the course of his employment to use…or otherwise handle or work on any goods,…or to perform any

services; or (ii)to threaten, coerce, or restrain any person engaged in commerce…,where in either case an object thereof is—

(B) forcing or requiring any person to cease using…or otherwise dealing in the products of any other producer…or to cease doing business with any other person…: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing…"

The employer with whom the union has a dispute is known as the "primary" employer. The union obviously has a right to direct its picketing against the primary employer. However, the union is generally prohibited by the NLRA from picketing against another employer--the "secondary" or "neutral" employer--that is actually or potentially doing business with the primary employer in order to influence the union's dispute with the primary employer.

In *In re Sailors Union of the Pacific (Moore Dry Dock Co.)*, 92 NLRB 547 (1950), *enforced*, 249 F.2d 591 (9th Cir. 1957), the NLRB addressed guidelines for the most common scenario arising under § 8(b)(4)(B)—the so called "common situs" situation, i.e. a work site on which two or more employers are engaged in business operations. In *Moore Dry Dock*, the union had a dispute with the owners of a ship that was in dry dock for repairs. When the owner of the dry dock refused to allow the union to enter its property to picket at the dock where the ship was berthed, the union set up pickets at the entrance to the dry dock. The NLRB, in finding no violation of the NLRA, enunciated the standards for determining when picketing at a secondary site will be deemed to be a primary (rather than secondary) and therefore lawful:

"When a secondary employer is harboring the *situs* of a dispute between a union and a primary employer, the right of neither the union to picket nor of the secondary employer to be free from picketing can be absolute. The enmeshing of premises and *situs* qualifies both rights. In the kind of situation that exists in this case, we believe that picketing of the premises of a secondary employer is primary if it meets the following conditions: (a) The picketing is strictly limited to times when the *situs* of dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the situs; (c) the picketing is limited to places reasonably close to the location of the *situs*; and (d) the picketing discloses clearly that the dispute is with the primary employer."

Although the U.S. Supreme Court rejected the NLRB's attempt to make the standards in *Moore Dry Dock* automatic, per se, standards, see *International Union of Electrical Workers Local No. 761 v. NLRB*, 366 U.S. 667 (U.S. 1961), these standards continue to be applied and upheld to the "common situs" picketing scenario. See, *NLRB v. General Truck Drivers, Warehousemen, Helpers & Automotive Employees of Contra Costa County, Local No. 315*, 20 F.3d 1017 (9th Cir. 1994); *Oil, Chemical & Atomic Workers International Union, Local No. 1-591*, 325 NLRB 324 (1998). Thus, a presumption of legality attaches to the picketing activity if the *Moore Dry Dock* standards are met and a

presumption of illegality if they are not. See, *Kinney v. International Union of Operating Eng'rs, Local 150*, 786 F.Supp. 1431 (N.D. Ind. 1992), aff'd, 994 F.2d 1271 (7th Cir. 1993).

The *Moore Dry Dock* standards govern construction projects. *Building & Construction Trades Council of New Orleans (Markwell & Hartz, Inc.)*, 155 NLRB 319 (1965), enforced 387 F.2d 79 (5th Cir. 1967), cert. denied, 391 U.S. 914 (1968). Moreover, as in other industries, a failure to comply with these standards raises a presumption that the picketing has an unlawful secondary purpose. *Iron Workers Local 433 (United Steel)*, 293 NLRB 621 (1989)

The U.S. Supreme Court has held that on a construction project, the general contractor on the site is a "neutral" employer in regard to its subcontractors on the project. Thus, picketing directed at the general contactor in order to influence it to do business only with union subcontractors is a violation of NLRA Section 8(b)(4(B) and therefore prohibited. *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675 (1951).

As a result of the NLRB's and courts' application of *Moore Dry Dock* to construction projects, owners/employers on projects frequently set up a "reserved gate" system whereby one or more gates are set up on the project. Under this system, the "reserved gate" is reserved for the employees and suppliers of the "primary employer". All other subcontractors and employees use separate gates. Through this system, the owner/employer tries to limit the picketing to the "reserved gate" entrance and prevent the picketing from spreading throughout the project. If, however, the employees and suppliers of the "primary employer" utilize other entrances to the project, there is a danger that the other gates will be "tainted" and thereby result in picketing at these other gates. Since other workers might refuse to "cross the picket lines" of the picketing workers, this could result in the project being effectively shut down. For this reason, even though occasional or inadvertent breaches of a reserved gate system will not excuse picketing of a neutral gate, *Local Union No. 76 of the Int'l Brotherhood of Elec.* Workers, 268 NLRB 230 (1983), owners/employers in "reserved gate" projects fail at their peril to be careful about security at their gates since unions may lawfully have marked "observers" at a neutral gate to verify its proper use. *Solien v. Painters-Dist. Council No. 2 of the Brotherhood of Painters & Allied Trades*, 121 L.R.R.M. 3030 (E.D. Mo. 1985).

There are a number of cases dealing with "reserved gate" projects. The holdings in these cases are very fact-dependent. For example, in *NLRB v. International Union of Elevator Constructors, AFL-CIO*, 902 F.2d 1297 (8th Cir. 1990), the court upheld the NLRB's holding that a union had committed an unfair labor practice when it filed a grievance on behalf of an employee who was suspended for refusing to enter a job site through a neutral gate that was not being picketed. The court reasoned that the union's conduct was an attempt to stop a neutral employer's employees from working and to shut down the entire project. Likewise, in *United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States* & *Canada*, 277 NLRB 1231 (1986), the NLRB held that a union violated the NLRA when it disciplined its members who worked for subcontractors for failing to honor a picket line set up by a different union at a construction site against the general contractor, even though no reserved gate was established.

However, see *Dawson Construction Co.*, 320 NLRB 116 (1995) (neutral employer violated employee's NLRA §7 rights by firing him for refusing to hold a sign establishing a reserve gate for its employees); *United Union of Roofers, Waterproofers, & Allied Workers, Local No. 135*, 266 NLRB 321 (1983) (mere presence of picket near neutral gate does not show impermissible intent to involve neutrals in dispute with primary employer).

4. Implications for the Surety

The NLRA is complicated statute that encompasses many aspects of labor relations. For this reason, sureties prudently consult with lawyers experienced in labor law when an issue involving the NLRA arises. Nevertheless, a rudimentary knowledge of the NLRA is nearly as important to the surety representative as a basic knowledge of contract law and construction practices. The reason for this is that the NLRA may not only have direct implications for the surety—i.e. it may directly affect coverage and liability questions—but it may also indirectly affect the surety by affecting the viability of a project and the finances of the surety's bond principal. Thus, it can have important ramifications in the surety's calculus in its underwriting, monitoring and claims functions.

At the very least, the surety representative should be able to recognize the fact that the NLRA can have important ramifications on the surety's liability and be able to identify some of the major issues. Specifically, the surety should be aware that the NLRA as well as the various regulations and decisions of the NLRB may affect: (a) the surety's potential liability under collective bargaining agreements; (b) the rights and liabilities of employers, employees, trustees and labor organizations in regard to fringe benefit funds and contributions thereto; (c) "double-breasting" and the potential liability of the surety for wages and fringe benefit obligations on account of a bond principal being determined to be a "single employer" or "alter ego"; (d) the respective rights of various parties on a construction project in regards to the issues of striking and picketing.

D. Occupational Safety and Health Act - 29 U.S.C. § 651 *et seq.*

1. Overview of the Statute

The Occupational Safety and Health Act ("OSHA") regulates occupational safety on the job. OSHA applies to all employers engaged in any business affecting interstate commerce. The purpose of this statute is to assure healthful working conditions and to reduce work-related injuries and illnesses by establishing national standards for employers to follow.

Under OSHA, each employer[6] has duty to: (1) furnish to each employee a working environment free from hazards likely to cause death or serious physical harm; and (2) comply with the specific additional standards and regulations promulgated under OSHA.

[6] Although OSHA requires employees to comply with OSHA standards, regulations and orders, there is no provision enforcing this compliance. OSHA makes the employers responsible for their employees' compliance. See, 29 U.S.C. §654(b).

In addition, OSHA requires employers “to maintain accurate records of employee exposures to potentially toxic materials or harmful physical agents which are required to be monitored or measured under Section 665 of this title.” 29 U.S.C. §657 (c) (3). OSHA also contains a number of reporting requirements.

The Secretary of Labor or his authorized representative may conduct inspections and issue citations to effect compliance with OSHA.

Implications for the Surety

Although OSHA does not have a direct effect on the surety’s liability, it once again has an indirect effect on the surety’s liability since a surety’s bond principal and the construction project as a whole will be subject to OSHA liability, standards and supervision.

E. PORTAL-TO-PORTAL ACT - 29 U.S.C. §251 *et seq*.

1. Overview of the Statute

Congress enacted the Portal-to-Portal Act, 29 U.S.C. §251 et seq., to counteract the some of the unforeseen effects of the Fair Labor Standards Act of 1938. This enactment was in response to court decisions that, in enforcing the Fair Labor Standards Act, Walsh-Healy Act, and the Davis-Bacon Act, resulted in immense liability for employers by deciding that the mandated payment to employees for every hour "worked" covered any mental or physical exertion. As a result, employers were subject to liability for activities not normally considered a part of work, such as changing clothes or driving to and from work. The Portal-to-Portal Act established guidelines for determining whether an activity is compensable.

§ 252 of the Act provides that an employer is not liable under the FLSA, the Walsh-Healy Act, or the Davis-Bacon Act for failure to pay an employee minimum wage or overtime for an activity an employee engaged in unless the activity was compensable by an express provision of a contract or a custom or practice in effect at the time of the activity. Furthermore, § 254 expressly provides that no employer shall be subject to any liability under the FLSA, Walsh-Healy Act, or Davis-Bacon Act for failure to pay an employee minimum wage for traveling to and from work or activities that are preliminary or “postliminary” to the principal activity of work.

§ 225 of the Act sets a time limitation of two years for bringing legal action for wages due under the FLSA, the Walsh-Healy Act, and the Davis-Bacon Act. An exception to this limitations period is a cause of action arising out of a willful violation, which may be commenced within three years after the cause of action, has accrued.

2. Implication for the Surety

From the surety’s standpoint, the Portal-to-Portal Act needs to be considered when considering potential liability arising out of as well as the limitations period for bringing an action under the FLSA, the Walsh-Healy Act and the Davis-Bacon Act.

F. SERVICE CONTRACT ACT OF 1965 - 41 U.S.C. §351 *et seq*.

1. Overview of the Statute

The Service Contract Act of 1965, 41 U.S.C. §351 et seq., applies to service contracts with the United States. § 351(a) of the Service Contract Act requires that every contract entered into by the United States in excess of $2,500, except as provided in § 356, the principal purpose of which is to provide services in the United States through the use of service employees, shall contain five required provisions: (1) a provision specifying the minimum wages to be paid to various classes of employees in accordance with prevailing wage rates; (2) a provision specifying the fringe benefits to be furnished in the various classes of employees to be determined as prevailing by the Secretary of Labor. The fringe benefit obligation may be satisfied by making equivalent or differential payments in cash; (3) a provision that no part of the services covered by the Act will be performed in buildings or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health or safety or employees; (4) a provision that on the date an employee commences work on a contract the contractor will deliver to the employee a notice of the compensation required under paragraphs (1) and (2) of subsection (a) of the Act; (5) a statement of the rates that would be paid by the Federal agency to the various classes of service employees if § 5341 or § 5332 of Title 5 were applicable to them.

Significantly, exemptions to the Act, found in § 356, include any contract for construction, alteration and/or repair of public buildings or public works and any work required to be done in accordance with the provisions of the Walsh-Healy Act.

§ 352 outlines the penalties for violating the Act. Any violation of any of the contract stipulations required by the Act subject the responsible party to liability for a sum equal to the amount of any deductions, rebates, refunds, or underpayment of compensation due to any employee engaged in the performance of the contract. In addition, when a violation is found of any contract stipulation, the contract is subject, upon written notice, to cancellation by the contracting agency.

2. Implications for the Surety

The surety may be subject to liability under its payment and/or performance bond for liability under the Act. Illustrative of this is *U.S. v. Powers Building Maintenance Company*, 336 F.Supp. 819 (W.D. Okl. 1972). In that case, the U.S. sought to recover against Powers Building Maintenance Company and its surety for amounts determined to be underpaid and in violation of the Service Contract Act. In that case, the surety bonded two building maintenance service contacts. The contracts incorporated the statutory language required by the Service Contract Act and provided for the payment of minimum monetary wages. The surety's performance bonds were conditioned upon its principal's compliance with "all of the terms and conditions" of the contracts. The Court rejected the surety's defense that a previous administrative determination was not binding upon its since it was not a party to such proceeding and had no actual notice thereof. The Court held that there was no need to give notice to the surety, distinguishing the Service Contract Act with the Walsh - Healy Public Contracts Act which required a copy of the complaint and notice of hearing to be

served upon the surety even though the surety was not a party to such proceeding. In contrast, there was no such requirement in the rules of practice under the Service Contract Act.

G. WALSH-HEALEY ACT - 41 U.S.C. §35 *et seq.*

1. Overview of the Statute

The Walsh-Healey Act, 41 U.S.C. §35 et seq., is a statute which requires the federal government to use only goods produced under safe and fair working conditions. § 35 of the Act mandates four requirements for any contract made and entered into by any executive department, independent establishment, or other agency or instrumentality of the United States for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000. These four requirements are set out in §§ 35(a)-(d) of the Act.

§ 35(a) requires that all persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid not less than the minimum wage determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work.

§ 35(b) prohibits employers from requiring employees involved in the manufacture or furnishing of materials, supplies, articles, or equipment used in the performance of the contract to work in excess of forty hours in any one week. This section does not apply to employers who have entered into an agreement with their employees pursuant to 29 U.S.C. §207 (Equal Pay Act).

§ 35(c) prohibits males under the age of 16, females under the age of 18, and convicts from being employed by the contractor in the manufacture or production or furnishing of any of the materials, supplies, articles, or equipment included in such contract.

§ 35(d) states that no part of such contract will be performed nor will any of the materials, supplies, articles, or equipment to be manufactured or furnished under said contract be manufactured or fabricated in any plants, factories, buildings, or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety or employees engaged in the performance of said contract.

In addition, § 36 of the Act indicates that a breach or violation of any of the provisions of section 35 will result in liability to the United States for liquidated damages, in addition to damages for any other breach of such contract, in the sum of $10 per day for each male person under sixteen years of age or each female person under 18 years of age, or each convict laborer knowingly employed. In addition, a breach of § 35 may also result in the agency of the United States canceling the contract and entering into other contracts for the completion of the original contract and charging any additional cost to the original contractor.

2. Implications for the Surety

From the surety's standpoint, the Act is significant in that it may make the surety liable on its payment bond--and/or its performance bond (since there is deemed to be a provision in the bonded contract requiring compliance with the Act). This liability could include actual damages in the form of unpaid wages plus liquidated damages. In any case, even short of direct liability, the surety's liability is affected by the Act since its bond principal may have sums due workers under the Act deducted from earned contract funds, thereby threatening the bond principal's ability to finish a project. Moreover, since the requirements of the Act are specifically made a provision of each applicable contract, the surety is subject to completion obligations under its performance bond if its bond principal is terminated for noncompliance with the Act. This makes it incumbent upon the surety to concern itself with its bond principal's compliance with the Act, including its safety practices and compliance with Department of Labor safety standards.

An example of a surety's liability under the Act is *U.S. v. Glens Falls Insurance Company*, 279 F.Supp. 236 (E.D. Tenn. 1967). In that case, the surety bonded a contact between Cox Coal Company and the Tennessee Valley Authority for the purchase of coal. The contract incorporated the Walsh - Healy Act into the contract and required that a contract be paid the prevailing minimum wages determined by the Secretary of Labor. The District Court held that the surety was obligated not only to the TVA but also to the United States and that therefore notwithstanding actions of the TVA, it was liable to the U.S. which sought to recover minimum wages and overtime compensation due to Cox's employees. Moreover, notwithstanding the fact that the U.S. had waited until after the statute of limitations had run against the surety's bond principal, the surety was not discharged from liability.

In *U.S. v. Hudgins-Dize Company, Inc.*, 83 F.Supp. 593 (E.D. Va. 1949), the U.S. sued to recover as liquidated damages the amount of the underpayment of overtime wages. In that case, the government sued the sureties on five contracts for the manufacture and delivery of a large quantity of haversacks and pyramidal tents. These contacts incorporated the statutory duty to pay the applicable overtime rate as set by the Secretary of Labor. The performance bonds themselves were each conditioned that "the principal shall well and truly perform and fulfill all of the undertakings, covenants, terms, conditions and agreements of said contract". Only one of the contracts was accompanied by a payment bond, the condition of which was that "the principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided by for in said contract". The Court held that the conditions of the performance bonds and the payment bond incorporated and covered the violations of the act. In so doing, the Court specifically rejected the sureties' contention that the bonds were to indemnify only against losses under the Miller Act or the Davis Bacon Act. The Court further held that notwithstanding the fact that they were not parties to the prior administrative proceeding wherein the Department of Labor held there to be a violation of act, the sureties were bond by such finding since they had noticed of it.

H. Copeland Anti-Kickback Act of 1954 - 18 U.S.C. § 874

1. Overview of the Statute

The Copeland Anti-Kickback Act of 1954, 18 U.S.C. § 874, is an anti-corruption statute which is specifically designed to prevent "kick-backs" on federally-funded projects. The Act makes it unlawful to induce an employee working on a federally-funded construction project to give up any part of the wages to which such employee is entitled. The Act applies to all employees on public works projects that are in any way financed by federal loans or grants. In addition to penalties for violation of its provisions, the Act requires each contractor and subcontractor to furnish to the Secretary of Labor a weekly statement of wages paid to each employee.

2. Implications for the Surety

Although the Act has no provisions that have direct ramifications on the liability of the surety, it is useful for surety representatives to be aware of the prohibitions of the Act as well as the record-keeping requirements mandated by the Act.

III. GENERAL COVERAGE ISSUES

Unless a federal labor statute specifically prescribes otherwise, the statute may be of interest to the surety only to the extent that it affects the performance and viability of its bond principal. In other words, the bond principal's labor law problems may be of more pertinence to a surety's monitoring activities than in the context of a coverage issue per se. In that case, having an understanding of the nature and extent of the labor law problems is still important since these problems will surely affect the principal's ability to perform on the project and to pay for its labor and materials. Thus, at the very least, labor law problems will have an indirect effect on future performance and payment bond claims.

Notwithstanding the foregoing, there are situations where a claim for coverage under the surety's bond is made. In such a situation, the surety should raise as a threshold matter the issues of who is a beneficiary with standing to make a claim and what coverage the bond affords. By raising these issues initially, the surety can determine whether a particular claim is more properly brought against a payment bond, performance bond or neither. After making this determination, the surety can address the coverage issues that are more idiosyncratic to the statute at issue.

A. Liability under the payment bond

The payment bond is the primary source of liability for labor claims. The payment bond surety is generally liable for labor claims either by express statutory provision, such as the Miller Act, 40 U.S.C. §270(a)(2), by the terms of the bond itself, or both. Thus, the providers of labor have clear standing to pursue claims against the payment bond by either express statutory provision, by the express terms of the bond itself, or by the well-entrenched case law giving such claimants third-party beneficiary standing.

B. Liability under the performance bond

More problematic is the liability of the surety on its performance bond. Since the primary and named beneficiary of a performance bond is normally the project owner, third parties such as laborers and materialmen or their representatives or assigns have an initial obstacle of proving that they have standing to make a claim on the bond as third party beneficiaries or otherwise. Moreover, the surety will generally not be liable under the performance bond unless the bond: (1) is specifically required by statute; (2) the bond specifically incorporates the particular labor statute; or (3) the bonded contract specifically incorporates the labor statute.

IV. Conclusion

In sum, there is a wide body of federal labor law on the books that regulates the actions and relations of parties to construction projects. Representatives of surety companies should have some familiarity with primary statutes in this area of the law as well as the issues raised by these statutes since these statutes not only affect the viability and performance of sureties' bond principals but also may implicate payment or performance bond coverage.

JOHN W. ROURKE

Biographical Sketch

John W. Rourke is a shareholder and principal in the St. Louis law firm of Reinert & Rourke, P.C. His practice emphasizes fidelity and surety bond claims and litigation, construction litigation, and commercial law. He is a graduate of the University of Virginia and the University of Missouri School of Law.

Mr. Rourke is licensed to practice law in Missouri, Illinois, and a number of federal courts. He is a member of the American Bar Association, the Missouri Bar, the Illinois State Bar Association, the Chicago Bar Association, and the Bar Association of Metropolitan St. Louis. He has been a contributor to or co-author of a number of papers and publications pertaining to fidelity law, surety law and construction law. Most recently, he has been involved in the following papers or publications: "Issues in Litigation By and Against Banks Arising Under the Uniform Fiduciaries Act, Related Provisions of the Uniform Commercial Code and the Related Cases", 7th Annual Northeast Surety & Fidelity Claims Conference, Iselin, NJ, October 24, 1996; "Fair Debt Collection Laws and Sureties", 8th Annual Northeast Surety & Fidelity Claims Conference, Iselin, NJ, November 6, 1997; "The Fair Credit Reporting Act and Sureties", 9th Annual Northeast Surety & Fidelity Claims Conference, Iselin, NJ, October 22, 1998; "The Use of Waiver and Estoppel Against Fidelity Bond Sureties", 9th Annual Northeast Surety & Fidelity Claims Conference, Iselin, NJ, October 22, 1998; Mechanics Lien Law and Strategies in Missouri, National Business Institute (July 14, 1999 ed.) (co-author); Advanced Construction Law in Missouri, National Business Institute (1998 ed.) (co-author); Managing Construction Claims and Litigation for the Missouri Paralegal, Institute For Paralegal Education (1998) (co-author); "Keeping Crime From Paying: Strategies and Tactics for Recovering Funds From Embezzling Employees", 10th Annual Northeast Surety & Fidelity Claims Conference, Iselin, NJ, October 1999; Missouri Construction Law: What Do You Do When…?, National Business Institute (2000 ed.) (co-author).

BERNARD A. REINERT

Biographical Sketch

Bernard A. Reinert is a principal shareholder, the Chairman and the President of the St. Louis law firm, Reinert & Rourke, P.C. Mr. Reinert was admitted to the Missouri Bar in 1962 and the Illinois Bar in 1963. He went to undergraduate school at St. Mary's Mission Seminary College at Techny, Illinois and at St. Louis University in St. Louis, Missouri where he graduated with a Bachelor of Arts degree in 1958. He graduated from St. Louis University School of Law in 1962 with a Bachelor of Laws degree. He was a law clerk to the United States District Judge Omer Poos in Springfield, Illinois in 1962-1963.

Mr. Reinert is a member of the American Bar Association, the Missouri Bar, the Illinois State Bar Association, and the Bar Association of Metropolitan St. Louis. He has been a member of the Torts and Insurance Practice Section and of the Fidelity and Surety Law Committee for approximately thirty years. He has served several terms as a Committee Vice-Chairman. He has participated in many of the Committee's programs, chaired a program in San Francisco, and presented papers at dozens of industry programs.

One of Mr. Reinert's many papers which he has authored is entitled "Duty of the Performing Surety to Bond Principal and Indemnitors: Good Faith". Mr. Reinert has participated in many other activities of the Committee including the Commercial Blanket Bond National Institute, the Financial Institution Bond National Institute (London, 1992) and the Commercial Blanket Bond Annotation Project. He has participated in updating the Banker's Blanket Bond Annotation and has participated in the publication of the Fidelity and Surety News (FSN). Mr. Reinert participated in the "Subrogation Project" culminating in the August 1990 ABA Annual Meeting Program the Fidelity and Surety Law Committee entitled "The Subrogation Rights of the Contract Bond Surety". At that meeting, he presenting a paper entitled "Elements of Proof in the Contract Bond Surety's Subrogation Action to Recover the Bonded Contract Funds". Mr. Reinert and his firm have participated in the Northeast Surety and Fidelity Claim Seminar for many years.

Mr. Reinert lives in the St. Louis suburban community of Kirkwood, Missouri and has been active in community affairs there, particularly as a member of the Kirkwood R7 School District Board for 15 years, 1976 to 1991 and as Chairman of the City of Kirkwood Civil Service Commission.