BUSINESS BRIEFS

Legal Developments Affecting Business

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Third Quarter 2016

Thanks for Nothing: OSHA Changes Post-Accident Testing Rules (and Other Things)

By David Briggs

On August 10, 2016 new rules issued by the Occupational Safety and Health Administration went into effect relating to injured workers. While OSHA has labeled the rule about electronic submission of injury data, the bigger news relates to post-accident drug and alcohol testing and safety incentive programs.

What is OSHA's New Post-Accident Testing Rule?

The new rule will prohibit blanket post-accident testing, as OSHA views that kind of mandatory testing as a form of retaliation against employees. Soon, I suppose that retaliation will include not greeting each employee every morning with a warm "good morning" and a hearty handshake (but no hugs, please; that's harassment).

More seriously, OSHA's position on blanket post-accident testing may discourage employees from reporting workplace injuries. Of course, post-accident testing is still allowed; employers just need to be more careful about having a reason for testing employees post-accident.

When Can I Do Post-Accident Testing?

OSHA says that testing should be limited to situations where employee drug use "is likely to have contributed to the incident, and for which the drug test can accurately identify impairment caused by drug use." In other words, testing can be done for most injuries caused by an employee's lapses in judgment, failure to pay attention, or other instances of employee negligence.

Here are some examples of situations where you can and cannot do post-accident testing:

Probably Should Not Test	Probably Can Test (If Employer Policies Allow Testing)
Employee injures his wrist because repetitive stress due to his work as a mechanic	Employee injures his wrist while beating his computer keyboard because Outlook stopped working again
Employee's ladder fails while changing light bulbs because of the ladder's faulty design	Employee gets a glass shard in his eye when he and a coworker decide to reenact their favorite Star Wars fight scene with fluorescent light bulb "light sabers"
Employee gets stung by a bee	Employee decides that a bee hive on site is a piñata and gets repeatedly stung

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In This Issue

Employee injures his leg when he is rear-ended through no fault of the employee	Employee accidentally stabs his own leg when he is juggling scissors preparing for his America's Got Talent audition

What if I am Required to Do Post-Accident Testing?

OSHA acknowledges that some state and federal laws, such as DOT, require testing for employees after each accident. In those cases, OSHA recognizes that the employer is not trying to intimidate workers, but rather is following other laws. So, employers required by law to test after an accident should continue with that practice.

Do I Need to Start Electronically Submitting Incidents of Injury and Illness?

OSHA is requiring large employers (those with 250 or more employees) and medium-sized employers (those with 20 or more employees) working in high hazard industries to submit injury and illness information electronically from their 2016 Form 300A, which is due by July 1, 2017. For 2017 injury and illness reporting, all forms (300A, 300, and 301) will be due by July 1, 2018. Finally, starting in 2019 OSHA will be moving the deadline to submit your forms to March 2 (for 2018 reports).

What is a High Hazard Industry?

OSHA maintains a list of high hazard industries, which include agriculture, construction, manufacturing, general merchandise store, residential care facilities, and others. The full list can be found at https://www.osha.gov/recordkeeping/NAICScodesforelectronicsubmission.pdf. Somehow lawyering did not make the list. I'm curious if OSHA is aware of the number of lawyers training for their America's Got Talent auditions. . .

Changes to Safety Incentive Programs

Much like BOLI, OSHA is looking skeptically at employer-sponsored safety incentive programs. The new regulations broaden the prohibition on incentive programs, even when they are part of a broader compliance program.

In essence, OSHA is taking the position that individuals or groups of employees should not lose out on a bonus (an "adverse action") because of a work-related injury.

While state and federal regulations continue to whittle away at employers' options, OSHA encourages incentive programs that promote worker participation in safety-related activities, like identifying hazards or participating in investigations of injuries, incidents or near misses. OSHA also allows employers to create inventive programs that are based on employees being able to correctly follow legitimate safety rules, rather than a lack of reported injuries or illnesses.

What Do I Need to Do Now?

OSHA is requiring employers to inform their employees of the right to report work-related injuries and illnesses free from retaliation. You can meet this obligation by posting the OSHA "Job Safety and Health – It's the Law" poster from April 2015 to your ever-burgeoning poster board. This poster can be found on-line and in a variety of languages at https://www.osha.gov/Publications/poster.html.

Employers should also update their handbooks on drug testing. Many employers have policies that read that mandatory testing will be done after each accident. OSHA can view that policy alone as retaliation, as it may deter some employees from reporting injuries.

Finally, OSHA is requiring employers to change policies that threaten discipline when an employee fails to immediately report an injury. OSHA's concern is that these policies discourage employees from reporting slow-developing or chronic injuries or illnesses. These policies should be changed to require employees to report injuries within a reasonable time after realizing that the employee is injured or ill.

Please contact David Briggs or a member of our employment team if you have questions about the information in this article.

Federal Action Concerning Food Labeling

By Caleb Williams

GMO Labeling National Standard

On July 20, 2016, President Obama signed into law federal legislation addressing labeling of food containing genetically modified ingredients. Most significantly, the new law, known as the Roberts-Stabenow Biotech Disclosure Agreement, preempts state law, avoiding what food processors and manufacturers feared would be a "patch-work quilt" of state food-labeling laws.

The law is a result of tremendous efforts by farmers and food processors in response to state-level citizen initiatives and legislation requiring food labels or packaging to state whether food contains genetically modified ingredients. Oregon voters narrowly rejected such an initiative petition in 2014. Vermont had adopted a GMO labeling requirement, which became effective July 1 until preempted by this federal law. Farmers and processors were justifiably concerned about the cost of labeling in order to comply with different laws in multiple states, and whether they could effectively ensure that a product delivered to a distributor or broker is delivered to the state for whose laws the label has been created to comply. In addition, there continues to be disagreement as to whether there is any health risk associated with genetically engineered food, and if there is not, why a food processor would need to include information on a label that may further confuse consumers.

To meet the mandatory labeling requirements of the bill, a food product label must contain either:

1. an on-package disclosure;
2. a USDA-regulated symbol; or
3. a digital or electronic link (i.e. QR code) with accompanying text and a phone number subject to rules laid out in the bill (see "QR Code Rules" below for more information).

Small food manufacturers will be permitted to include a telephone number or web address directing consumers to a site that will provide them with additional information on product ingredients. "Very small food manufacturers" will be excluded from the labeling requirements altogether. The USDA will define "small food manufacturers" and "very small food manufacturers" through its rulemaking process. The USDA has two years to evaluate the matter and adopt rules to establish a disclosure standard within the parameters of this law.

Other items of interest from this law include:

1. Food served in restaurants is excluded;
2. Food derived from an animal is not considered "bioengineered" under the law simply because the animal consumed feed that included bioengineered ingredients; and
3. Small processors will have one year more than other producers to comply with the adopted rules.

Is a Definition of "Natural" Food Coming?

The standards by which food and beverage producers may market their products as "natural," "pure," "hand crafted," etc., is getting much needed attention. The US Food and Drug Administration is currently combing through more than 7,700 comments in response to its request for public comment on the need to promulgate rules concerning the use of the term "natural" on food labels. The FDA has not yet determined whether it will define "natural," but has sought the public's opinion on whether such a definition is necessary.

Four federal agencies regulate the labeling of food or beverage products – the FDA, USDA, FTC and TTB. However, none of these agencies has adopted guidance on the proper use of the term, or how it is defined. Recently, the lack of a federal standard has created an avenue for litigation against food manufacturers by consumer advocates and class-action lawyers for what the plaintiffs believe are deceptive marketing practices. With little guidance to assist judges in determining whether the use of "natural" to describe a food product that includes even the most minimal artificial or genetically engineered ingredient, courts have requested that the FDA and the other regulatory agencies define the term.

In 1993, the FDA adopted a policy concerning use of

the term "natural," without formally defining the term, stating it means "nothing artificial or synthetic (including all color additives regardless of source) has been included in, or has been added to, a food that would not normally be expected to be in the food" (58 FR 2302 at 2407). In requesting comments on whether to define "natural," the FDA explained: "When we established our policy concerning the use of the term 'natural', it was not intended to address food production methods, such as the use of genetic engineering or other forms of genetic modification, the use of pesticides, or the use of specific animal husbandry practices." The FDA has recognized the growing concern among consumers to better understand where their food comes from and how it is made. Whether the FDA, or any other federal agency, believes it can effectively establish a standard balancing the varying interests in food labeling is as yet unknown.

Our office will continue to monitor federal activities that concern our farmer and food manufacturer clients, and update these pages as rules are developed.

Presidential Election – Tax Edition Part II

By James Martinez

Earlier this year, we presented the tax plans of the candidates vying for the Democratic nomination for president, and promised a follow up article presenting the tax plans of the Republican presidential nominees. Since we now know that Donald Trump has won the Republican nomination, our task has been made simpler. This article presents the basic details of Mr. Trump's tax plan.

Donald Trump's overall tax policy objectives can be summarized as "reduce and simplify." Looking first at business income taxes, Mr. Trump has expressed a preference for a 15% maximum corporate income tax rate. This means that C-corporations would receive a reduction of 20% to their current maximum rate of 35%. Mr. Trump's proposed reduction to the corporate tax rate would also affect the tax rates applicable to the business profits of entities other than C-corporations. The 15% maximum tax rate would also apply to the earnings of pass-through business structures, such as most limited liability companies, partnerships, and S-corporations, which are generally currently taxed at individual income tax rates of up to 39.6%.

The Alternative Minimum Tax (AMT) would be repealed, and individual taxpayers would receive a simplified tax rate structure. Currently, there are seven rates (10%, 15%, 25%, 28%, 33%, 35% and 39.6%) applicable to individual taxpayers. Revisions to his plan announced on August 8, 2016, provide for rates of 12%, 25% and 33%.

Under the proposed tax rate structure, single individuals with less than $25,000 of taxable income and married couples with less than $50,000 of taxable income would pay no income tax. Mr. Trump's team believes that this would take an additional 30 million Americans off the income tax rolls, allowing such individuals to file a single page form for tax reporting.

Additionally, in order to help working families, Mr. Trump's plan calls for additional deductibility of child care costs, increasing the current limit of $6,000 to an unspecified amount.

Mr. Trump has also expressed a desire to repeal gift and death taxes.

Critics of Mr. Trump's tax plan contend that it will disproportionately benefit the wealthy and significantly increase the federal budget deficit. For a comparison of Mr. Trump's tax plan to Hillary Clinton's plan, please refer to our first quarter 2016 Business Briefs, which can be found at:

www.sglaw.com/wp-content/uploads/SG_BusinessBriefs_2Q2016_web-final-1.pdf.

It's not all in the name: the ambiguity of "farm use"

By Andrew Salgado

July 20th, 2016, was the day that finally lay to rest the question over whether a straw-compressing facility is considered an outright "farm use" under Oregon law.

We had the privilege of representing John Gilmour before the Oregon Court of Appeals in the case that provides protections for farmers across Oregon. The case centered on a question that often puzzles business owners of varying operations located on resource zoned lands in Oregon: What exactly is a "farm use," is what I am doing considered "farm use," and why does this matter?

Under Oregon law there are generally two types of activities which are allowed in resource zoned land: (i) an outright permitted "farm use" under Oregon Revised Statute (ORS) 215.203(2)(a) and (ii) a "non-farm use" permitted only through approval from a governing body under ORS 215.283(2). While the distinction between these two types of activities can be surprising, whether the use is classified as "farm use" or "non-farm use" can have a dramatic impact on the profitability of your business.

In 1993 the Oregon legislature passed ORS 30.390-947, more commonly known as the Right to Farm Act, as a means of protecting "farm uses" on resource based land. The Right to Farm Act limits the legal rights of those individuals residing near a "farm use" by protecting farmers from court decisions based on customary noises, smells, dust, or other nuisances associated with the use. Further, since "farm use" does not require approval from a governing body, a City or County is unable to impose any restrictions on that "farm use". Therefore, if your use qualifies as a "farm use," you are protected not only from lawsuits by neighboring property owners, but also from restrictive conditions on that use.

The dispute for Mr. Gilmour started in 2012 with the commencement of his straw pressing facility on his 92 acre Exclusive Farm Use (EFU) zoned property. The operation is best summarized as follows: the straw is cut on the property, baled in the field, and then transferred to the compressing facility, where the bales are compressed and loaded on to trucks. In 2014, following numerous complaints from neighbors due to truck traffic, Benton County reviewed Mr. Gilmour's operation and determined that Mr. Gilmour's operation was best classified as "processing," a "non-farm use" and not "preparation" of a product, which would have been an outright "farm use." That determination was based primarily on the fact that the County believed pressing straw added value to the cut straw. The County allowed Mr. Gilmour to continue his operation through a conditional use permit but only after placing severe restrictions on the hours of operation and truck traffic, the effect of which would turn his operation unprofitable.

Mr. Gilmour appealed this decision to the Oregon Land Use Board of Appeals (LUBA) and requested relief in the form of a LUBA determination that straw pressing is an outright "farm use." LUBA granted Mr. Gilmour's requested relief, and declared that straw pressing is an outright farm use. In its decision, LUBA stated that straw pressing is "essentially an extension of the initial bailing of the straw, which occurs in the field that is simply further preparation in the facility and therefore accurately characterized as "farm use." The LUBA decision was later affirmed by the Oregon Court of Appeals, allowing Mr. Gilmour to continue his straw pressing facility without any restrictions and with the protection of Oregon's Right to Farm Act.

A few things can be learned from Mr. Gilmour's experience. Whether a certain use is "farm use" is not a matter of local law, but state law. No matter how your local jurisdiction classifies the use, state governing bodies may interpret the particular facts differently, making an appeal to the state governing body a worthwhile venture in some cases. In differentiating between the "preparation" and "processing" of crops, state governing bodies will consider whether a new or different product was created and whether the product can be reversed back to its initial state. For example, turning berries into jam, which cannot be reversed, demonstrates that a new product was created and thus goes beyond mere "preparation." In addition, whether the use or product is sold for commercial purposes is not a relevant consideration in classifying the type of use.

If you need help interpreting whether your use or activity is an outright "farm use" or a "non-farm use," please contact any of our Real Estate and Land Use Attorneys.

What You Must Know About Measure 97

By James Martinez

Oregon Ballot Measure 97, formerly known as Initiative Petition 28, or simply "IP 28" would give Oregonians the largest tax increase in state history by imposing a new 2.5% "gross receipts" tax on certain corporations with gross receipts in Oregon of $25 million or more. It would directly affect approximately 1,000 of the largest corporations operating in the state, regardless of profit.

The measure, backed by public employee unions and endorsed by Governor Kate Brown, would grow the size of the state's budget by approximately $3 billion annually. It would increase income taxes imposed on corporations by over 400% and increase total state taxes by about 25%.

Supporters argue the state has a revenue problem that limits the government's ability to provide needed services, especially with regard to education and healthcare, and that a tax on large corporations operating in the state is the best way to solve the problem. Indeed, the measure does direct the funds to be used for "public early childhood and kindergarten through twelfth grade education; healthcare; and, services for senior citizens." Critics, supported by statements made by Chief Deputy Legislative Counsel Ted Reutlinger, argue that because the funds will be part of the state's general fund, they may be effectively re-directed later at the whim of the legislature.

Many believe that the gross receipts tax is essentially a veiled sales tax that will ultimately be paid by the consumer in the form of higher prices. Critics are especially concerned about the pyramiding (or cascading) effect of the tax structure, which imposes the tax not only the final sale of a product or service (as with a sales tax), but also at each step in the chain of commerce, thus multiplying its effects. For example, assuming all entities in the chain are subject to the tax, a manufacturer will pay the tax on sales of its widgets to a distributor, who will then pay the tax on its sales of the widgets to retailers, who will then pay the tax on its sales to customers. This essentially stacks the tax multiple times, significantly increasing the final cost to the consumer.

Critics also point out that, although the tax will directly affect "only" 1,000 or so of the largest corporations operating in the state, it will indirectly affect everyone, including small businesses and individuals. The tax will increase the costs of inputs of all kinds, from supplies and building materials to fuel. Businesses of all sizes will likely see their expenses increase, and many of these increases will find their way to consumers in the form of higher prices.

The text of the measure can be found at http://oregonvotes.org/irr/2016/028text.pdf.

A detailed report by the State of Oregon's Legislative Revenue Office can be found at:

https://www.oregonlegislature.gov/lro/Documents/IP%2028%20-%20RR%203-16.pdf

A list of those supporting the measure can be found at: http://voteyeson97.org/coalition/

A list of those opposed to the measure can be found at: https://www.defeat97.com/our-coalition/

FIRM ANNOUNCEMENTS AND SEMINARS

On June 9-10, Saalfeld Griggs and of counsel attorney Paul Sundermier co-sponsored the **9th Annual Eminent Domain Conference** at the Crowne Plaza in Portland.

The Firm sponsored the **Idaho, Nevada & Oregon Bankers Association Annual Convention** in Coeur d'Alene, Idaho on July 11-13. In addition to sponsorship, attorney Erich Paetsch moderated the panel discussion "A View from Washington." The session evaluated political and regulatory compliance risks; the most pressing issues and advocacy priorities currently facing the nation's banking industry.

On August 11-13, the Firm's Real Estate and Land Use group attended the **Oregon State Bar Real Estate & Land Use Annual Summer Conference** in Lincoln City, Oregon**.**

The Firm sponsored the **Salem Hospital Foundation**

Wellness Classic Golf Tournament on August 12 at Illahe Hills Country Club.

The Firm had two teams of golfers in attendance at the **4th Annual Salem Chamber McLaran Classic Golf Tournament**, on September 19 at Illahe Hills Country Club.

On September 22 the Firm's women attorneys hosted the **7th Annual Celebrating Women in Business Event** at the **Historic Deepwood Estate.** The event's presenting speaker was **Irene Firmat, CEO & Co-Founder of Full Sail Brewing**, located in Hood River, OR.

The Firm hosted the **Marion County Bar Association** Social & Meeting of the Membership on September 29.

On Friday, October 7, the Firm will sponsor a hole at the **Marion County Bar Association Val Sloper Golf Tournament** at Illahe Hills Country Club. In addition to sponsorship, the Litigation group will have a team of golfers on course.

We would also like to extend a warm welcome to our newest attorneys:

Joshua Feil has joined the Litigation group. Josh's practice is primarily focused on business litigation and creditors' rights. Prior to joining Saalfeld Griggs, Josh graduated from the University of Iowa College of Law.

Mitchell Emmert recently joined our Business & Taxation group. Mitchell's practice is centered on corporate and individual tax planning, tax representation in matters of controversy, and evaluating commercial contracts and transactions, including the purchase and sale of business entities. Mitchell is a graduate of Pepperdine University School of Law and New York University School of Law (LLM, Taxation) and previously worked at Ernst and Young, where his group assessed state and local tax considerations relevant to proposed mergers and acquisitions.

Abby Fitts recently joined our Employment Law group. Abby's practice is focused on general employment litigation, business litigation, and helping employers comply with changes in the law. Abby graduated Willamette University College of Law.

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