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Developments in the Prevailing Wage Law

The Ohio Prevailing Wage Law, enacted in the 1930s and modeled after the federal Davis-Bacon Act, essentially requires contractors to pay union scale wages and benefits on almost all construction and remodeling work in connection with a "public improvement" – i.e., a project "by and for" a public authority supported in whole or in part with public dollars. The law includes numerous code provisions and regulations that can trip up the unwary employer, including public employers. A recent decision from the Ohio Ninth District Court of Appeals illustrates this point by adding a new twist with ominous implications for Ohio businesses and employers.

The case, *Sheet Metal Workers Local 33 v. Gene's Refrigeration,* arose in Medina County and concerned an HVAC contractor who had performed work on a relatively small public project. The union did not represent the employees of this employer, but it secured the written authorization of one employee to file a lawsuit on his behalf for alleged prevailing wage underpayments. The union, in turn, used this one written authorization to sue "on behalf" of all the other employees of the contractor, despite the fact that the union did not represent those employees and did not have authorization from them. More important, however, was the union's claim that prevailing wages had to be paid for sheet metal fabrication performed in the employer's shop, offsite. Offsite fabrication and assembly is a common component of many of the building trades. The union claimed that HVAC work, such as duct work, that was fabricated offsite but used for the prevailing wage project should also be paid at prevailing wage rates. The employer won at the trial court level, but the union then appealed to the Ninth District.

In This Issue:

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On appeal the employer argued it was preposterous to pay for offsite fabrication at prevailing wage rates, as employers could not be sure where materials prepared in a shop would ultimately end up – some might make its way to a prevailing wage project, and some might not. Moreover, the prevailing wage rate differs in every county in Ohio. What rate would apply if the shop was in one county but the job was in another? And what if the material was fabricated out of state? In a two-to-one decision, the dissenting judge understood these problems precisely, and pointed out other problems as well. (He also concluded that the union could only sue on behalf of the one employee, as the plain sense of the law indicates.) However, the majority agreed instead with the union. The court thus not only made it easier for unions to sue employers "on behalf" of non-union employees for alleged violations, but also greatly expanded the scope of the prevailing wage law.

The seriousness of this case cannot be overestimated. While this decision is binding only in the Ninth District Court of Appeals, the absence of any other precedent on these points make it probable that it will be cited and perhaps relied upon by other courts. Moreover, since the statute of limitations for prevailing wage cases does not end until two years after the last date of construction on a public project subject to the prevailing wage law, more lawsuits are likely.

This is only the most recent decision in which the prevailing wage law has been at issue. In multiple court actions across the state, unions are attempting to enlarge and broaden the scope of the law by arguing it applies no matter how attenuated the relationship between the public authority, public dollars and the project itself. Thus, an argument has been made that the use of tax increment financing (TIF) can make a project subject to prevailing wage. Another argument claims the mere possibility of a future right of reentry can "tie" a municipality to a prevailing wage project, even if the municipality has otherwise no connection to the project. These questions and others are sure to come before the courts in the very near future.

Proposed Federal Legislation Would Adversely Affect Ohio Municipal Corporations That Levy an Income Tax

Under Ohio law, a municipal corporation may, with certain limited exceptions, tax the compensation that a nonresident individual earns for working in the municipal corporation only if the nonresident works there for more than 12 days in a calendar year. H.R. 3359, which was introduced in the United States House of Representatives on August 3, 2007, would generally preclude a state or its

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political subdivisions from taxing the compensation of a nonresident unless the nonresident works in the given state or political subdivision for more than 60 days in a calendar year. If enacted, H.R. 3359's 60-day threshold would supersede the 12-day threshold currently in place under Ohio law and would thus adversely affect Ohio municipal corporations that levy an income tax. H.R. 3359 has been referred to the House Judiciary Subcommittee on Commercial and Administrative Law, which heard testimony both for and against the bill on November 1, 2007. To date, the Subcommittee has taken no further action on H.R. 3359, but it is welcoming additional comments on the bill. *Any comments on H.R. 3359 can be sent to Representative **Jim Jordan** (R, OH-4), a member of the Subcommittee and a co-sponsor of the bill.*

Municipal Income Taxation Developments

Governor Ted Strickland recently signed into law two bills (House Bill 224 and House Bill 24) that amend Ohio Revised Code Chapter 718, which governs the imposition of municipal income taxation. House Bill 224 amends Ohio Revised Code Section 718.05 such that: (1) the due date of the annual municipal income tax return cannot be earlier than the due date for the taxpayer's federal income tax return (this deals with situations where the federal income tax return due date is not the 15th day of the fourth month following the end of the taxpayer's taxable year – for example, for a year in which April 15 falls on a weekend, with the federal return therefore due on the first following business day that is not otherwise a holiday); (2) where a municipal corporation requires the signature of a return preparer on any municipal income tax returns, reports or other documents the preparer prepares, a facsimile signature of the return preparer will be acceptable; and (3) a taxpayer may check a box on the municipal income tax return to authorize the taxpayer's return preparer to communicate directly with the municipal income tax administrator about the taxpayer's municipal income tax return. House Bill 224 will first apply when municipal income tax returns for the 2008 tax year are filed in 2009. Accordingly, municipal corporations will need to modify their income tax return forms to be used for the 2008 tax year and thereafter so that taxpayers can indicate on their returns whether they authorize their return preparers to communicate directly with the applicable municipal income tax administrator on matters regarding the returns.

House Bill 24, which first takes effect for the 2008 tax year, amends Ohio Revised Code Sections 718.01 and 718.02 to allow municipal corporations to grant income tax deductions for amounts: (1) paid by self-employed individuals for medical care insurance premiums to insure the self-employed individual, the individual's spouse and

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dependents (to the extent such amounts are deductible for federal income tax purposes and net of any related premium refunds, reimbursements or dividends); or (2) deposited by taxpayers into health savings accounts (to the extent such deposits are deductible for federal income tax purposes). Municipalities are permitted, not required, to allow either of these deductions. A municipal corporation that wishes to grant either or both deductions will need to amend its codified income tax ordinances to make these deductions available to its taxpayers.

Finally, the federal Economic Stimulus Act of 2008 was signed into law on February 13, 2008. Among other things, this legislation amends the Internal Revenue Code of 1986 to provide that businesses may immediately deduct for federal income tax purposes up to $250,000 of certain depreciable business assets acquired in 2008. The act further amends the Internal Revenue Code to provide that, with respect to business assets acquired in 2008, businesses are entitled to an immediate federal income tax deduction equal to 50 percent of the depreciation the business would otherwise deduct over the asset's recovery period. Federal taxable income, as determined under the Internal Revenue Code and as modified under Ohio Revised Code Section 718.01(A), constitutes the "net profits" base for Ohio municipal income taxation of business entities. If the Internal Revenue Code is amended, however, those amendments will not affect the calculation of net profits for Ohio municipal income tax purposes unless the General Assembly amends Ohio Revised Code Section 718.01 to incorporate the amended version of the Internal Revenue Code. The General Assembly has not amended Ohio Revised Code Section 718.01 to incorporate the version of the Internal Revenue Code as amended by the Economic Stimulus Act of 2008. Accordingly, unless the General Assembly so amends Ohio Revised Code Section 718.01, the increased expensing and bonus depreciation of business assets afforded by the new federal legislation will not be available to business entities in determining net profits for Ohio municipal income tax purposes.

Property Tax Exemption Update

House Bill 160, approved by the Governor March 21, 2008, and effective June 20, 2008, would change the law relating to the filing of property tax exemptions to remove the requirement that special assessment payments be current before filing a property tax exemption application. Prior to the enactment of House Bill 160, special assessments, unlike property taxes, penalties and interest, were not subject to remission and thus had to be current for the Tax Commissioner to have jurisdiction over an exemption application. Failure to pay special assessments no longer bars the Tax Commissioner's

review of a property tax exemption application. Note, as under current law, property taxes, penalties and interest (that are not subject to remission) due with respect to the previous tax years must be paid before the application is filed, including those to be paid in the year the application is filed.

The Bill further provides that if the county treasurer's certification with respect to unpaid taxes, penalties and interest that accompanies an exemption application is not completed, or if it reflects unpaid taxes, the State Tax Commissioner shall notify the property owner, who is given 60 days to correct the treasurer's certificate. In addition, the Bill also changes the timing for notifications of exemption applications sent by the Tax Commissioner to school districts from a quarterly cycle to a monthly cycle. In this connection, the Bill also changes the date by which a school district must notify the Tax Commissioner and applicant that the district intends to submit evidence and participate in any hearing on the exemption application. Under the Bill, a school district must provide such notice prior to the first day of the third month following the end of the month in which the Tax Commissioner dockets the exemption application, rather than the first day of the third month following the end of the quarter in which the Tax Commissioner dockets the application. The Bill also expands the persons who may file a property tax exemption application. The Bill provides that, in addition to the owner of property, a "vendee in possession under a purchase agreement or a land contract, the beneficiary of a trust, or a lessee for an initial term of not less than thirty years" may file an exemption application.

Although House Bill 160 takes effect on June 30, 2008, it specifically provides that the foregoing amendments are remedial in nature and thus apply to the tax years at issue in any exemption application pending before the Tax Commissioner, the Board of Tax Appeals, a Court of Appeals or the Supreme Court on June 30, 2008.

When House Bill 160 takes effect on June 30, 2008, it will further amend current law such that a single member limited liability company that operates with a nonprofit purpose shall be treated as part of the same legal entity as its nonprofit member for Ohio tax purposes and that either the single member limited liability company or its nonprofit member may file an exemption application for property held by the single member limited liability company.

In other recent developments, the Ohio Supreme Court in *Toledo v. Levin* (2008 Ohio LEXIS 690), decided March 19, 2008, confirmed that an application for a property tax exemption to commence, for example, in tax year 2009,

must be filed before December 31, 2009, and not in the year of first collection (2010) for property to be exempted on the tax list in 2009.

Recent Decisions of Interest

Real property owned by a park district established under R.C. Chapter 1545 cannot be acquired by adverse possession. *Houck v. Bd. of Park Commrs. of the Huron Cty. Park Dist., 116 Ohio St.3d 148*

City ordinance permits persons to operate excessively wide vehicles on certain roads without engaging in the statutorily mandated permit process and without demonstrating good cause for the exception, while R.C. 5577.05 and 4513.34 prohibit such traffic without a permit. Because that city ordinance, which is an exercise of the municipality's police power, conflicts with R.C. 5577.05 and 4513.34, which are general laws of the state, it is void. *Marich v. Bob Bennett Constr. Co., 116 Ohio St.3d 553*

In addressing an issue certified to it by the United States District Court for the Northern District of Ohio, Eastern Division, the Ohio Supreme Court held that an Ohio municipality does not exceed its home rule authority when it creates an automated system for enforcement of traffic laws that imposes civil liability upon violators, provided that the municipality does not alter statewide traffic regulations. *Mendenhall v. Akron, 117 Ohio St.3d 33. Note: Squire, Sanders & Dempsey L.L.P. worked closely with the City of Akron in the briefings and arguments before the court on this issue, as well as on the case in federal court.*

A single-county board of mental retardation and developmental disabilities is a "county agency" for purposes of R.C. 124.391(C). *2007 Op. Att'y General No. 2007-041*

A board of township trustees may donate money to a local school district only if the board has statutory authority to make a donation and the township has funds that are available for that purpose. *2007 Op. Att'y General No. 2007-043*

A board of county commissioners has a duty to provide janitorial services to the board of health of the general health district that occupies a county-owned building. *2007 Op. Att'y General No. 2007-045*

The provisions of R.C. 511.13 prohibit a member of the board of township trustees or an officer or employee of the township from being interested in any contract of the board except in circumstances directly addressed by R.C.

511.13 or R.C. 505.11. A trustee, officer or employee of a township who is employed by an entity with which the township enters into a contract has an interest in the contract for purposes of R.C. 511.13, regardless of whether it can be demonstrated that the trustee, officer or employee has a direct pecuniary or personal interest in the contract. *2008 Op. Att'y General No. 2008-002*

R.C. 325.19 does not entitle a county employee to receive service credit for purposes of vacation leave for any biweekly pay period in which the employee did not work and was not scheduled to work. *2008 Op. Att'y General No. 2008-005*

R.C. 5705.14(E), which states that money may be transferred from the general fund to any other fund of a subdivision, does not authorize a transfer of proceeds of the general levy for current expenses to a road and bridge fund because of the provisions of R.C. 5705.05 and R.C. 5705.06 that expressly exclude county and township road and bridge expenditures from the purposes for which the proceeds of the general levy for current expenses may be used and the provision of Ohio Const. art. XII, § 5 requiring that proceeds of a tax be expended only for the purpose for which the tax is levied. However, to the extent that the general fund contains moneys that are not subject to any limitation against expenditure for county and township road and bridge purposes, those moneys may be transferred to a road and bridge fund in accordance with R.C. 5705.14(E), provided that those moneys can be separately identified and have not been commingled with general levy moneys or other moneys that cannot be used for county and township road and bridge purposes. *2008 Op. Att'y General No. 2008-009*
