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CLIENT NEWS BRIEF

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STATE LEGISLATURE VOTES FOR SIGNIFICANT CHANGES TO LABOR COMPLIANCE PROGRAM SERVICES FOR STATE BOND-FUNDED CONSTRUCTION PROJECTS

As part of the state budget package, the Governor signed Senate Bill X2 9 (“SBX2 9”) on February 20, 2009. SBX2 9 requires the Department of Industrial Relations (“DIR”) to provide Labor Compliance Program (“LCP”) services for all new construction contracts executed after the DIR adopts regulations setting a certain fee. This fee will be paid by awarding bodies to fund the DIR’s enforcement services. Such LCP services will include oversight of prevailing wage issues on new public construction projects. According to the legislative analysis of SBX2 9, this bill proposes generally to “move away from the LCP model” and have the DIR directly enforce prevailing wage requirements on public works projects. If an educational agency (such as a school district) has an approved in-house LCP at the time the new regulations are issued, it can apply to the DIR for an exemption from the new fee. Based on the new legislation, agencies without their own approved in-house LCP who are using third party LCP providers could be faced either with elimination of their third party program or with paying both DIR and the third party for the same services on future projects.

Since 2003, Labor Code section 1771.7 has required all school districts, community college districts, and other higher educational agencies who utilize state bond funds (the Kindergarten-University Public Education Facilities Bond Acts of 2002 and 2004) for construction projects to initiate and enforce a DIR-approved LCP. The LCP may be administered by agency personnel (“in-house”), or by a qualified third party LCP provider. The purpose of an LCP is to inform contractors about their prevailing wage obligations, review the timesheets of workers on public works projects, certify that the workers are paid the appropriate prevailing wage under DIR rules, investigate complaints and other suspected violations, and take appropriate enforcement action when violations are found. All LCPs must be approved by the DIR.

As one of the “economic stimulus” elements of the final state budget deal, SBX2 9 moves away from educational agencies voluntarily utilizing third party LCPs in the enforcement of prevailing wage rules on construction contracts executed after the new regulations are issued. Instead, the bill will require agencies to pay a fee to the DIR of up to 0.25 percent of the state bond fund match amount on these future projects. This fee will fund the DIR’s new direct LCP services. To offset the additional cost to awarding bodies, the bill also requires the State Allocation Board to increase grant amounts paid on future school projects to accommodate the new fee.

Under the bill, awarding bodies with an in-house LCP that is DIR-approved as of the effective date of the pending regulations may request that the DIR waive the fee and that they be able to continue to operate their in-house LCP. Educational agencies with an existing in-house LCP may wish to verify with DIR that their LCP status is up to date. For agencies that are interested in forming a new in-house LCP, it is unclear how the DIR will treat new applications. As we indicated in our February 26, 2009 Email Alert, February 27, 2009, was the deadline for educational agencies to file an update to their already approved in-house LCPs to prevent losing approval status.

Once the DIR's new regulations are in effect, the DIR will not waive its fee for educational agencies that use third party LCP providers. Thus, it appears that agencies that continue to use a third party LCP provider for new projects will be paying both DIR and the third party provider for the same services. Agencies that were already using third party providers for construction contracts executed prior to the DIR's issuance of the new regulations will be able to continue using the third party for those pre-existing projects. Agencies using third party LCP providers through contracts that apply to multiple current and future projects may wish to include a provision in their LCP provider contracts allowing for termination of the contract as to projects for which contracts have not been executed as of the effective date of the bill's regulations.

Because the bill was adopted during a Special Session, special legislative rules apply as to when it will take effect. The bill will take effect on May 22, 2009. However, by the terms of the bill, the new enforcement structure will not be operable until DIR issues regulations setting the new fee. All contracts entered into after the date of this regulation's passage will have to comply with the new law. The new legislation does not impact current projects, or contracts entered into between now and the date of the new regulations. Due to statutory timelines for public hearings and notices, it may take approximately four months or longer from the date the DIR issues proposed regulations to the date the regulations become effective. Initial indications from the DIR to our firm are that the new regulations will likely not be issued before January 1, 2010, and they could be issued even later.

If you have questions or concerns about this bill or initiating or updating a LCP, please contact one of our seven offices located statewide.

As the information contained herein is necessarily general, its application to a particular set of facts and circumstances may vary. For this reason, this News Brief does not constitute legal advice. We recommend that you consult with your counsel prior to acting on the information contained herein.

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