



Weekly Report for January 4, 2019

GOVERNMENT CONTRACTING

According to an article on Law360, American freight shipping company, YRC Worldwide (YRC), was sued in a securities class action lawsuit filed in New York federal court that claims investors paid the ultimate price when the company allegedly overcharged the federal government for carrier services and later tried to cover it up. An investor, who is looking to represent all those who bought stock in YRC from March 10, 2014, to December 14, 2018, alleges that YRC hid the fact that it systematically overcharged the Department of Defense by millions of dollars for freight shipping services from 2005 to at least 2013. According to the article, the complaint further alleges YRC increased the recorded weights of government shipments to artificially raise the price.

The Federal Communications Commission (FCC) issued a message that it will suspend most operations in the middle of the day on January 3, 2019. This message came after the FCC initially indicated it had sufficient funding to stay open during the partial government shutdown. According to a Government Executive [article](#), contractors working to support the FCC are among those who expressed concerns with the Professional Services Council about stop-work orders from agencies. The Council, whose members have contracts with the shutdown-affected Departments of State and Justice, the U.S. Agency for International Development, and the Department of Homeland Security, recently posted on its website for members an updated Congressional Research Service [report](#) on the history of shutdowns, their costs, and changes in agency guidance. Another contractors group, the National Defense Industrial Association, posted its own [guidance](#) for handling a shutdown.

The Congressional Research Service updated its [report](#) entitled “Small Business Size Standards: A Historical Analysis of Contemporary Issues.” The report provides a historical examination of the Small Business Administration’s (SBA) size standards, assesses competing concerns about how to define small businesses, and discusses multiple statutes.

LABOR AND EMPLOYMENT

According to an exclusive interview with Law360, the National Labor Relations Board’s (NLRB) chairman, John Ring, and general counsel, Peter Robb, reported that the NLRB will not only move toward finalizing its hotly debated joint employer rule in 2019, but will explore ways it can use the rulemaking process more often. Regulations covering board member recusals and employer property access rights are potentially on the horizon.

According to Law360, the Equal Employment Opportunity Commission (EEOC) will continue to pressure employers over claims of discrimination and sexual harassment in 2019, but it may be slow to enact new policies with three of the five seats on the Commission now vacant. The Senate failed to confirm nominees Daniel Gade and Janet Dhillon and reconfirm two-term commissioner Chai Feldblum by the end of the legislative session, so there is no longer a quorum, with only Acting Chair Victoria Lipnic and Commissioner Charlotte Burrows seated. However, Attorney James Paretti, Acting Chair Lipnic's former chief of staff, told Law360 that the agency would "mostly hum along" even with these vacancies at the top, which means the EEOC will continue to field and investigate bias complaints and bring suits alleging mistreatment of workers. But, according to Mr. Paretti, the agency's policymaking will grind to a halt.

The U.S. Court of Appeals for the D.C. Circuit held that the NLRB acted properly in 2015 when it adopted a more expansive test for determining when companies in franchise, staffing, and other relationships should be considered joint employers for liability and collective bargaining purposes. According to Bloomberg Government, the NLRB broke new ground with the more expansive test by saying that a company that has the authority to exert control over another company's workforce could be required to bargain with or be held liable for unfair labor practices against the workers, even if it does not exercise that ability. The NLRB's test, crafted by a Democratic majority, has been the subject of debate in the business community, courts, and Congress, including litigation involving McDonald's and allegations against Microsoft. However, the now Republican-majority board is working on a regulation that would limit joint employment and allow businesses more leeway to outsource labor and other components. But, the D.C. Circuit's 2-1 ruling could constrain the NLRB to a standard close to the more expansive test that is currently in place because the court said the judicial branch has primary authority to define what an "employer" is, not agencies.

Bryan Jarrett, the Department of Labor's (DOL) acting wage and hour administrator and President Trump's nominee for a permanent position in the agency, withdrew his name from consideration and accepted another position in California. According to Bloomberg Government, Mr. Jarrett was the face of an effort to expand overtime pay requirements and was also involved in the effort to update joint-employer liability for franchise and other businesses. His departure comes as the DOL is still grappling with what to do about overtime. The DOL has largely abandoned an Obama-era proposal, blocked by a federal court, that would have made about four million workers newly eligible for overtime pay, but it has not yet offered an alternative approach.

According to an [article](#) in the New York Times, Judge Reed O'Connor, the federal district judge who struck down the Affordable Care Act (ACA) as unconstitutional, said his ruling should not go into immediate effect. Judge O'Connor's original ruling had caused some confusion because it came as many states were finishing open enrollment for 2019. Though the Judge ruled the ACA's individual mandate as unconstitutional and the rest of the law was therefore invalid, he did not issue an injunction stopping the law from being enforced. The Department of Justice did not object to delaying enforcement of Judge O'Connor's ruling, either, in order to prevent causing confusion and disrupting health care markets, especially if the decision is appealed. Employers, in the meantime, must still abide by the ACA and its requirements.

RULES AND REGULATIONS

The SBA issued a proposed rule extending the comment period on its proposed revisions to the HUBZone regulations to February 14, 2019. [83 Fed. Reg. 249, 67701](#). The proposed rule outlines a comprehensive overhaul of the program's current eligibility and compliance requirements. As mentioned in last week's Weekly Report, PilieroMazza submitted [comments](#) to the SBA's proposed rule on December 27, 2018.

CAPITOL HILL

House Democrats announced that they plan to pass a combination of six Senate appropriations bills to fund closed agencies on January 3, 2019, the first day of the 116th Congress. No end to the shutdown is expected on January 2, but Government Executive [reported](#) that the House will vote on a consolidated package of bipartisan bills that came out of the Republican-controlled Senate Appropriations Committee to provide full fiscal 2019 funding for the Departments of Transportation, Housing and Urban Development, State, Interior, Agriculture, Treasury, Commerce, and Justice, as well as a number of independent agencies such as the Environmental Protection Agency, Office of Personnel Management, and General Services Administration. Government Executive also noted the House is expected to pass stopgap funding through December 8, 2019 for the Department of Homeland Security.