

THE WIT ADVOCATE UPDATE
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The Editorial Staff of the WIT Advocate welcomes you to its second edition. We thank those of our WIT members who provided articles for this edition. Your efforts have been outstanding! Also included in this edition is an article sent to The WIT Advocate Update by a Guest Writer that was written in response to an article that appeared in our first edition. It represents the views of the author, not necessarily those of The WIT Advocate or its staff.

We look forward to hearing from you and to receiving comments or articles from you. If you are interested in writing an article for us, or wish to contact us, please see the Staff Notes at the end.

We hope you enjoy our Update!

Mary Gayle Holden

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Employment Issues Update
By: Elizabeth A. Lalik, Esquire

Pillsbury Winthrop

The United States Supreme Court provided additional guidance this summer to employers and employees regarding the scope of claims for discrimination based on race, sex and disability. On June 10, 2002 the Court issued two decisions which help to clarify the limits of claims for discrimination under Title VII of the Civil Rights Act ("Title VII") and the Americans with Disabilities Act ("ADA").

In a unanimous decision, the Supreme Court narrowed the scope of protection provided by the ADA in Chevron U.S.A., Inc. v. Echazabal, 122 S.Ct. 2045 (2002). In short, the Court held that the ADA does not protect individuals whose medical condition poses a threat to themselves. Specifically, the Court upheld an EEOC regulation that filled a silence left by the ADA regarding an employer's ability to terminate or refuse to hire an employee whose own health or safety is put at risk by a particular job. While the ADA has never extended protection to employees whose medical condition threatened the safety of others, this decision extends this exception to individuals whose condition only poses a threat to themselves. While the Court will require employers to make individualized determinations regarding the employee's medical condition and the potential risks of the job based on current medical knowledge, this decision arguably allows employers to play a more "paternalistic" role toward their employees. In effect, this decision may also allow employers to protect themselves from tort liability, potential Occupational Safety and Health Administration Act (OSHA) violations and the cost of lost time from high turnover and sick leave.

On the same day, in National Railroad Passenger Corporation v. Morgan, No. 001614 (June 10, 2002), the Supreme Court held that with respect to discrete acts of discrimination, an employee must file a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") within 180 or 300 days of the alleged act to avoid the dismissal of her claim as untimely. In contrast to this strict application of the statutory time limit for discrimination claims, the Court, in the same decision, recognized the theory of a "continuing violation" of Title VII for purposes of hostile work environment claims. In a hostile environment case, courts may look outside the strict limitations period to determine whether actionable discrimination occurred. This decision may limit an employee's ability to pursue claims based on specific discriminatory acts, and may encourage more employees to cast their claims as being part of a general discriminatory hostile environment.

Public Company Accounting Reform and Investor Protection Act of 2002 **By: Katherine Chalmers**

Mar Com Basics

On Thursday July 25, 2002, the United States Congress sent the Public Company Accounting Reform and Investor Protection Act of 2002 to President Bush. The stated purpose of the bill is to "protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes." The most important measures in the bill include:

Public Company Accounting Oversight Board

This five-member board would oversee the audits of all public companies; register, inspect and investigate public accounting firms; and establish standards for auditing, quality control, ethics, and other related issues. The budget for maintaining this board and its staff would come from fee assessments from every public company based on relative market capitalization.

Prohibitions against Consulting Services

Accounting firms would be barred from performing many types of consulting activities for their auditing customers, including bookkeeping, financial information systems design and implementation, appraisals, valuations, and fairness opinions; actuarial services, internal audit outsourcing services, management or human resources functions, investment advisory and investment banking services, and legal or expert services unrelated to the audit.

Conflicts of Interest

The bill directly addresses several potential conflicts of interest. Registered public accounting firms could not conduct an audit for any company whose chief financial executive had worked for the auditor or helped with on the company's previous audits within a 12-month period. Also, members and executives will no longer be allowed to receive personal loans from the companies they serve. The bill also directs the SEC to establish a set of rules to address possible conflicts of interest between securities analysis and investment banking departments of brokerage firms.

Audit Committees

The bill stipulates that the audit committee of the board of directors – not company executives – must engage public accountants for auditing services. It also mandates that only independent board members may serve on audit committees, that they establish processes for accepting and resolving accounting complaints, and that they have the authority to engage independent advisors on auditing matters. Also, each audit committee must have at least one member who is a financial expert.

Expanded Executive Responsibilities

The bill would require each CEO and CFO to personally certify that the company's financial statements materially represent the condition of the company. If the company must issue a restatement of its accounting statements within 12 months, these executives would have to repay all bonuses they received based on the company performance as reported and all profits from stock trades made during that 12-month period. Also, each company would be required to create a code of ethics for its senior financial officers.

Pension Fund Blackout Periods

Directors and executives would be prohibited from trading company stock during pension fund blackout periods.

Off-Balance Sheet Transactions and Other Financial Disclosures

The bill forces the SEC to establish reporting rules for off-balance sheet transactions, pro forma figures

Criminal Penalties

The bill would strengthen the penalties for securities fraud and white-collar crime.

Full Text Available on the Library of Congress' Thomas Legislative Information Web Site
<http://thomas.loc.gov/cgi-bin/query/D?c107:1:./temp/~c107rTiQFK>

GUEST ARTICLE:

TRAC Act is a Major Threat to Government Technology Providers

By: Stan Soloway

Professional Services Council

The battle over the outsourcing of federal work is perhaps more contentious today than ever before. Federal employee unions, recognizing that some 50% of the federal workforce will be eligible to retire in the next half dozen years, are deeply concerned about their future dues base, and are pushing hard for the passage of legislation that would, in effect, put an end to government outsourcing. And they are not limiting their efforts to work currently being performed by federal employees; rather, the legislation they seek to pass is aimed at all work performed in support of the government, including new requirements and work already contracted-out.

The main legislative vehicle being advocated by the unions is the Truthfulness, Responsibility and Accountability in Contracting Act, or "TRAC". The bill, principally sponsored by Rep. Al Wynn (D-MD), was first introduced in the last Congress and at one point had more than 220 co-sponsors. However, as the campaign to educate Members of Congress about the real impacts of the bill has progressed, the numbers of supporters has begun to drop. In the current Congress, there are about 185 co-sponsors, and many of them now recognize the devastating impact of the legislation. As such, their support too is waning.

While the title seems benign enough, the legislation itself would require that all government service contracting requirements—including new contracts, recompletions, task orders, renewals, and options—be subject to a public-private competition. Those competitions currently take place under the umbrella of OMB Circular A76, and involve a process that has been widely discredited for being inequitable, expensive and exceptionally time consuming. Indeed, the average A76 competition takes some three years or more to complete (even for small, discreet functions), and that does not include the seemingly endless stream of appeals and reconsiderations that typically accompany decisions made under A76. In addition, A76 "competitions" are not really competitions; they are cost comparisons, which do not and cannot consider the panoply of non-cost factors that go into making a true best value decision. In fact, A76 cost comparisons are the only federal procurements that cannot be conducted under best value rules. Finally, the process is poorly understood, requires such things as technical leveling, and the government is, according to the General Accounting Office, incapable of fully and accurately accounting for its own costs. As such it is a process lacking credibility and one that is chock full of problems (the protest sustain rate by GAO is more than twice as high for A76 competitions than for traditional federal procurements!). Just imagine the impact of applying A76 to federal requirements for information technology, biotechnology, engineering, high-end consulting and more.

Against this backdrop, Congress last year instructed the Comptroller General to convene a panel of experts from government, the unions, industry and academia to make recommendations to Congress on future government sourcing policies. The so-called "Commercial Activities Panel", or "CAP", submitted its report on April 30 and, among other things, recommended that A76 be terminated (the CAP called it "a process for another era", particularly when the requirements involve any significant degree of technology or other complexity), and that all public-private competitions be conducted in a process based on the normal Federal Acquisition Regulations (including the use of "best value"). That report is now before Congress and has formed a further foundation for continued congressional debate on the future of outsourcing.

This year, the TRAC Act, while not moving on its own, has formed the basis for amendments to the House and Senate versions of the FY03 defense authorization bills. In both cases, the amendments were withdrawn or defeated, thanks to the concerted efforts of the Administration and a unique and broad coalition of industry (including the high tech sector), private sector unions, small businesses, taxpayer groups and national security organizations. The Professional Services Council has been in the forefront of the battle, helping to lead the coalition and dramatically expand communications with the Congress.

But the battle is not over. As the Administration works to implement the recommendations of the CAP, the unions will fight every proposed change. And further efforts to amend appropriations bills are undoubtedly on the horizon. Needless to say, if they don't succeed this year, the unions undoubtedly will be back in 2003 to try again.

As the debate continues, it is vital that everyone concerned with the government's ability to attract the best solutions to meet its mission weigh in and join the battle. The more Congress learns about the real impacts of the legislation, the more Members of Congress seek to distance themselves from the bills. We have made a lot of progress. But much more progress and support is needed. Feel free to contact the Professional Services Council at (703) 875-8059 for more information.

*Stan Soloway is President of the Professional Services Council
He previously served as deputy undersecretary of defense in the Clinton Administration and was a member of the congressionally-mandated Commercial Activities Panel. He can be reached at
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Tax Issues Effecting Technology Businesses

**By: Shannon Stafford -Tax Partner, Joy Ryles - Tax Senior Associate, and
Enjoli Bhambri - Tax Associate
PricewaterhouseCoopers Industry Services Group**

1. The Job Creation and Worker Assistance Act of 2002 Offers Federal Income Tax

Relief for Businesses

Through both administrative actions and legislative changes, the federal government has provided a variety of tax relief measures for those affected by the terrorist attacks of September 11, 2001. Some of these relief measures for federal income tax are addressed below:

New 5-Year Carryback Rule for Net Operating Losses (NOLs) - Prior to the Job Creation and Worker Assistant Act, NOLs could be carried back only 2 years. Effective for tax years ending in 2001 and 2002, NOLs can now be carried back 5 years.

Special Depreciation Allowance - The Job Creation and Worker Assistance Act of 2002 provides an additional "bonus" depreciation allowance of 30 percent of the adjusted basis of qualified property, for the year in which the property is placed in service. This 30-percent amount is in addition to the usual annual depreciation allowance. In general, the property must be acquired on or after September 11, 2001, and before September 11, 2004. The property must be placed in service before January 1, 2005 (January 1, 2006 for certain property). Note, not all states follow the federal treatment.

For more information related to tax relief measures addressed above and other highlights of the Job Creation and Worker Assistance Act of 2002, IRS Publication 3991, can be accessed at:

<http://www.irs.gov/pub/irs-pdf/p3991.pdf>

For the full text of the Job Creation and Worker Assistance Act of 2002, go to:

http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_bills&docid=f:h3090enr.txt.pdf

2. Reduction in Workforce? Payroll tax refunds may be available. . .

As evidenced by the vacancies along the Dulles Technology Corridor, the technology boom seems to have settled and has left many companies with no option but to reduce their workforce. These rounds of layoffs are often accompanied by severance packages. The Internal Revenue Code (Section 3402(o)) specifically provides that an employer must withhold income taxes from "supplemental unemployment compensation benefits." Section 3402(o) defines supplemental unemployment benefits as "amounts which are paid to an employee, pursuant to a plan, because of an employee's involuntary separation from employment, resulting directly from a reduction in force, the discontinuance of a plant or operation, or other similar conditions." Therefore, the section specifically applies to many payments made due to involuntary separation from employment (i.e., severance packages). However, the Code fails to have a similar provision related directly to FICA taxes.

In 1990, the IRS stated that "supplemental unemployment compensation benefits" must not be received in a lump sum in order to be excludable from the definition of wages for FICA purposes (Rev.

Rul. 90-72, 1990-2 CB 211). Despite the IRS' position, CSX Corporation filed refund claims for FICA taxes paid from 1984 through 1990 on the grounds that the payments related to a substantial reduction in force, and therefore, were "supplemental unemployment compensation benefits." Thus, CSX argued, that these payments were not subject to FICA taxes. The IRS rejected the claims, and litigation proceedings began.

The Federal Court of Claims concluded on April 1, 2002 in CSX Corp. v. United States (No. 95-858 T) that certain involuntary severance payments made by CSX were not subject to FICA taxes. For example, payments made as a result of forced reductions in hours and voluntary terminations were not considered to be supplemental unemployment benefits and would therefore require FICA withholding. However, payments made to employees who had an option to receive either separation payments or layoff benefits were found to be supplemental unemployment compensation payments, and thus not subject to FICA, since either type of payment was the result of a separation from employment.

The CSX ruling may ultimately provide a unique opportunity to file claims for refunds of FICA taxes paid in the past. Therefore, employers should act to protect potential refunds from being barred by the statute of limitations by filing "protective" refund claims for prior years that are still open. The statute of limitations on all four employment tax quarters runs from April 15th of the following year. As a result, if an employer made severance payments in any quarter of 1999 that would qualify as supplemental unemployment compensation benefits under CSX, it should file a protective claim for refund of any related FICA taxes by April 15, 2003.

This strategy may appear to be an easy refund opportunity, however the IRS will have a chance to appeal the CSX decision after an order is ultimately entered by the Court in the case. In the meantime, if an employer relies on this decision, and fails to withhold the required FICA taxes from an employee on any involuntary severance payments, the employer will be held liable for both the employee's share of FICA taxes as well as its own employer share if the case is ultimately overturned. Therefore, it would be prudent to continue to pay the employer's share of FICA tax and withhold and remit the employee's share of such tax on the aforementioned payments, while keeping the option open to claim a refund of those taxes later upon the issuance of further guidance from the IRS or the Courts.

For the full text of CSX Corp. v. United States, Fed. Cl., No. 95-858 T, 4/1/02, go to:
<http://www.uscfc.uscourts.gov/Opinions/Wiese/02/WIESE.CSX.Opn.pdf>

For additional information related to FICA taxes, go to:
<http://www.irs.gov/faqs/display/0,,i1%3D54%26genericId%3D15866,00.html>

3. Is our Technology Company Located In the District of Columbia? If so, there are multiple tax incentives available. . .

In April 2001, DC Mayor Williams signed the New E-Conomy Transformation Act (NET 2000). This Act outlines certain District of Columbia tax benefits for Qualified High Technology Companies (QHTC) for tax years beginning after December 31, 2000. To be eligible for any of the tax incentives a company must be organized for profit, maintain an office, headquarters, or base of operation in the District, have 2 or more employees, and receive at least 51% of its gross revenue from high tech business as defined in the act (including the Internet, but excluding a retail store or electronic equipment facility).

If eligible, a QHTC can take advantage of the following tax benefits: Exemption from personal property tax for 10 years on qualified personal property purchased and held for use after December 31, 2000 beginning the year of purchase; Exemption from sales and use tax on QHTC sales of certain taxable intangible property/services otherwise taxable as a retail sale (this exemption does not apply to telecommunication service providers); Exemption from sales and use tax on certain computer hardware

and software purchases for use in connection with the operation of the QHTC that are otherwise subject to sales tax; A reduction of the corporate franchise tax rate to 6.0% providing parity with Virginia (if the QHTC is located in a high-technology development zone, then no franchise tax for 5 years after beginning business in that zone); Election to deduct Internal Revenue Code Section 179 property in the amount of the lesser of \$40,000 or actual cost of the property; Deductions for substantial leasehold improvements made, even if it does not become an integral part of the realty provided that certain conditions outlined in the Act are satisfied (including the criteria that the improvements be completed by December 31, 2002); Exemption from tax on capital gains from the sale or exchange of certain assets held for more than 5 years.

A QHTC can benefit from the following tax credits taken against franchise tax: Costs of retraining qualified disadvantaged employees; Wages paid to qualified disadvantaged employees; Wages paid to qualified employees; QHTC payments for employee relocation costs.

A qualified employee is one who is employed by a DC based QHTC for 35 hours or more per week. A qualified disadvantaged employee is a resident of the District who was immediately preceding employment or currently is a recipient of Temporary Assistance for Needy Families, a person released from incarceration within 24 months prior to date of employment, or an employee for which the company is eligible to claim the Federal Welfare to Work Tax Credit or the Federal Work Opportunity Credit.

In addition, if a QHTC is not a corporation, it is no longer subject to the Unincorporated Business Tax in the District of Columbia, which was set at 9.975%.

In order to receive the tax benefits and credits outlined above, a QHTC must complete a self certification form (QHTC-CERT) certifying in good faith that it meets all of the conditions required of a QHTC. This self certification should be attached to the company's D.C. Corporate Franchise Tax Return (Form D-20).

For additional information on D.C. tax benefits for Qualified High Tech Companies, go to:
<http://www.cfo.dc.gov>

To determine the exact boundaries of the High-Technology Development Zones, please call: (202) 442-6500.

4. Doing Business in Maryland? Here are some business tax credits you should be aware of:

In 2000, Maryland enacted legislation that added new business tax credits, effective in 2001, to the many existing business tax credits available to Maryland taxpayers. As a result, an opportunity exists for Maryland taxpayers to review their operations to determine if they are taking full advantage of all of the available Maryland business tax credits. Some of the credits available to Maryland taxpayers are as follows:

Businesses that Create New Jobs Credit

Businesses located in Maryland that create new positions and establish or expand business facilities in the state may be entitled to a tax credit. To be eligible for the tax credit, businesses must first have been granted a property tax credit by a local government of Maryland for creating new jobs.

Commuter Tax Credit

Maryland-based businesses that provide commuter benefits to employees may be entitled to a tax credit for a portion of the amounts paid during the taxable year. Commuter benefits include an employee's travel to and from home and the workplace, van-pool to or from home and the workplace, a Guaranteed Ride Home program or a parking "Cash-Out" program.

Employment Opportunity Tax Credit

Businesses that hire an individual who is receiving Aid to Families with Dependent Children (AFDC) or Family Investment Program (FIP) entitlements may be entitled to a tax credit for wages paid to the employee and child care and transportation expenses paid on behalf of the employee.

Enterprise Zone Tax Credit

Businesses located in a Maryland enterprise zone may be entitled to a tax credit for wages paid to newly hired employees. The local enterprise zone administrator must certify the business to qualify for the credit.

Job Creation Tax Credit

Businesses that expand or establish a facility in Maryland resulting in the creation of new positions in the state may be entitled to a tax credit. The amount of the tax credit is based on the number of positions created or on the wages paid to the new employees.

Neighborhood Partnership Program Tax Credit

Businesses that contribute cash or goods to approved projects operated by tax exempt organizations (under Internal Revenue Code section 501(c)(3)) are eligible for a tax credit of up to \$125,000 per year. This credit is in addition to any charitable contribution deduction that is allowed for these contributions on both the state and federal income tax returns.

One Maryland Economic Development Tax Credit

Businesses that establish or expand a business facility in a priority funding area or as part of a project approved by the Board of Public Works, and that are located in a "distressed" Maryland county, may be entitled to a tax credit for costs related to the new or expanded facility. A "distressed" county has an average rate of unemployment that is 150% higher than the statewide average or an average per-capita personal income that is equal to or less than 67% of the statewide average.

Telecommunications Property Tax Credit

A telecommunications company that is a public utility is allowed a credit for a portion of the total property taxes paid by the company on its operating real property in Maryland, other than operating land, that is used in its telecommunications business.

To learn more about the qualifications and pre-certification requirements for these Maryland business tax credits and to view more information regarding other credits that may be applicable to your business, visit the below website: <http://www.marylandtaxes.com>

For more information, and descriptions of those areas considered to be Enterprise Zones, go to: <http://www.choosemaryland.org/datacenter/taxesincentives/incentives/enterprise.asp>

5. The State of Virginia has Available Tax Credits as Well. Read on about credits available:

Whether you are looking to start a new business, relocate or expand an existing business, the State of Virginia, offers tax credits that should not be overlooked.

Major Business Facility Job Tax Credit

For taxable years beginning after January 1, 1995 and before January 1, 2005, Virginia taxpayers are entitled to claim an income tax credit if the establishment or expansion of a major business facility results in the creation of at least 100 new jobs for qualified full-time employees in Virginia. The amount of the credit is equal to \$1,000 per qualified full-time employee in excess of the threshold amount of 100 new qualified full-time employees hired during the taxpayer's expansion period.

Enterprise Zone Program

The Virginia Enterprise Zone Program assists business development and expansion in specially targeted, economically depressed areas. The program stimulates private investment and job creation by

offering businesses located within these selected areas, called enterprise zones, a package of state and local incentives. The program offers the following four incentives to help encourage business expansion and new business development within an enterprise zone.

General Income Tax Credit

Currently under the Enterprise Zone Program, the state offers tax credit incentives to businesses that choose to locate in the enterprise zone. In order to qualify, an existing business must increase its employment by 10% over a base taxable year and at least 40% of the increase in permanent, full-time employees must be either, low income or zone residents.

Real Property Improvement Tax Credit

Qualified zone residents are eligible to receive tax credits equal to an amount of up to 30% of qualified zone improvements with a maximum amount not to exceed \$125,000 within a five year period. In order to qualify for tax credits, new construction projects must cost at least \$250,000, while rehabilitation projects must cost at least \$50,000 and be equivalent to the assessed value of the subject property.

Investment Tax Credit

Qualified zone businesses that make qualified zone investments in excess of \$100 million and create 200 jobs are eligible for a credit in an amount of up to 5% of the qualified zone investments in lieu of the real property improvements tax credit.

Job Grants

Grants for new jobs creation are available at \$500 per job. If the job is filled by a zone resident, the grant increases to \$1,000 per job.

For forms to qualify and additional information on these credits, go to:

http://www.tax.state.va.us/it_credit.htm

For more information related to the Enterprise Zone and a link to the Enterprise Zone map, go to:

<http://www.dhcd.state.va.us/CD/crd/ezp/ezpindex.htm>

For information about areas within Alexandria, Virginia within the Enterprise Zone, go to:

http://www.alexecon.org/aedp_entrzone.html

Member To Member: Concerned about Privacy in the Work Place?

The Privacy Advisory Committee for the Virginia General Assembly's Joint Committee of Technology and Science (JCOTS) wants your help. JCOTS is seeking input from the business community in its efforts to draft bills relating to privacy issues in the work place. Members of the Privacy Advisory Committee have been asked to talk with employers and employees who have privacy/work place issues so that these issues can be considered by the Privacy Advisory Committee in its discussions concerning proposed privacy legislation that JCOTS may want to recommend to the General Assembly for the next session.

Mary Gayle Holden, an attorney at Foley & Lardner and fellow WIT member, is a member of the Privacy Advisory Committee and will make sure that your voice is heard. If you have any issues that you believe would be of concern to the Privacy Advisory Committee, or if you are interested and want to learn more about what Virginia is doing in this area, please contact Mary Gayle at mholden@foleylaw.com, or call her at 202-672-5330. The next meeting of the Privacy Advisory Committee is November 7 at the General Assembly Building in Richmond at 10:00.

For more information on the Privacy Advisory Committee and JCOTS, see the JCOTS web site at <http://jcots.state.va.us/>

Staff Notes:

The staff of The WIT Advocate Update continue to look for ideas and contributions of articles. Any article that you wish to submit should be concise, objective and informative articles, and contain enough information to sketch the major facets of the specific issue. The article should be between 250 and 600 words, and should include 2 – 4 links to additional resources about that issue or a related topic. We reserve the right to decide whether or not to print any article that is submitted and to make modifications unless you specifically request otherwise. The materials and information contained in this newsletter are intended to provide information (not advice) about important new legislation or other legal developments. The information contained in this newsletter is not intended to be legal advice, nor should you rely or act on this information without first having consulted with legal counsel licensed in your own jurisdiction. This newsletter is produced by volunteers, and none of us has had time to confirm the accuracy of the material presented or the sources of the information. There may be errors or events described in these articles that may have been overtaken by latter events about which we have no knowledge. The great number of legal developments that occur daily does not permit the issuing of an update for each issue addressed in this Newsletter, nor does it allow the issuing of a follow-up on all subsequent developments. You can help make this better by sending us any inaccuracies or clarifications that you find relevant or appropriate. We welcome your comments and suggestions, and, of course, articles. Please forward them to the editors at Mholden@foleylaw.com .

If you have any information or know of upcoming events regarding legislative, administrative, or judicial issues that may be of interest to other WIT Members, please forward this to us. At our discretion, we will post your information in the Member-to-Member section.

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