

ROUTE TO:



Tom Dailey - editor

Business Law Scope

To help keep your business informed and healthy October - December 2005

A courtesy publication by your **Neighborhood pro-Business Lawyers** at
Knaak & Kantrud, P.A. and Thomas M. Dailey, P.A.

Suite 800 • 3500 Willow Lake Boulevard • Vadnais Hts. (St. Paul) MN 55110 U.S.A.

PHOTOCOPIES NOT RESTRICTED

Memorable Quotation

“Chance favors the prepared mind.”

Louis Pasteur

Ripples and Waves – Katrina, Rita & Oil

Overview: Oil availability and pricing still compete for headlines with the effects of Hurricanes Katrina and Rita. Before those storms, and even with oil prices steadily creeping upwards, many informed economists anticipated about 4 % economic growth in the U.S. in 2006. Now, also impacted by estimates of 200,000 jobs lost to Katrina (and untold more to Rita), that growth estimate has been widely recalculated at around 3.3 % with downward adjustments for Europe, Japan and overall global growth too. In fact, U.S. GNP growth for the first 2 quarters of 2005 was reported in late September at 3.3%.

Some worry about more U.S. inflation, beyond the 3.2 % increase in the past year, and the prospects of higher commodity prices that are largely driven by wage increases and energy prices. Expected upward pressure on salaries would broadly impact domestic prices of goods and services, and could induce the Federal Reserve to further raise interest rates. The weakened condition of domestic unions and labor competition with offshore manufacturing powerhouses may help keep that lid on briefly. Or not.

In recent years, tax rebates, low interest rates, cheap goods from Asia, high house prices and equity borrowing, savings depletion, and modest

wage growth have helped sustain U.S. consumer spending and the national economic recovery. However, high prices for vehicle and heating fuels, and for derivative petrochemicals will force decisions by both consumers and employers on what expenditures to suck-up or adjust, and what to cut. We've been there before: in 1973-74 during the Arab oil embargo, when oil prices tripled during a period of high inflation and interest rates, and in 1979-80 during the Iranian revolution.

Minnesota and Region: In the 2nd quarter of 2005, Minnesota exported \$3.4BB of manufactured goods, a 17% increase over the same period a year ago and well ahead of the 12.5% export growth rate for the U.S. as a whole. (See <http://www.exportminnesota.com/PDFs/qes05q2.pdf>). However, agricultural commodities (grains and meals) account for a significant portion of total exports from MN and adjacent states. Yes – 2005 harvest costs will be adversely affected by increased gas and diesel prices for field machinery and trucks, and for LP, propane or natural gases used in crop dryers. That just compounds the situation after a year of widespread drought, high cost fertilizer, and with corn and soybeans well below last year's prices. But Katrina has added an additional twist.

The Port of New Orleans normally handles one-half of all U.S. crop exports, through large grain terminals located there. While over 50% of those weathered Katrina (and Rita) intact, displacements of Mississippi River buoys and other navigational aids may impede low-cost barge traffic and commerce as usual in that region for a period of months. As a result, some of the elevators that supply these terminals are requesting postponement, until January, of grain deliveries. With the barge system largely sidelined for now, elevators along the Mississippi and its tributary rivers (Ohio, Missouri, Illinois, etc.) can't ship as normal, and worry about accommodating new crop deliveries. That has reduced grain trading and further depressed prices. Meanwhile, on the eve of harvest, producers and elevators are scrambling all though the Heartland to find or build storage facilities. This impact of Katrina on agri-based communities in MN will play out for months to come, and is predicted to affect regional prosperity and both what and how business is done in the next several calendar quarters by many of us.

Attitude is Key in Skilled Positions

Sixty-six percent (66%) of the small business owners who responded to a recent survey by the National Federal of Independent Business said that they look mainly for good attitude and work habits in their evaluations of persons to fill skilled positions. That was followed by the ability to follow directions (65%), the ability to read and write explanations and

directions (55%), proficiency in English (52%), work experience (51%) and dress and behaviors appropriate for the workplace (48%). Only 30% of survey respondents required a specific occupational skill, and even fewer – 21% - demanded knowledge of the company’s particular business operations.

When it comes to learning job skills, most small businesses depend on OJT, with 61% assigning an experienced person to teach the new hire, and 11% using outside courses or seminars. Only 2% indicated a preference for training by an outside expert. After a year, 90% said that they continue training by sending their best workers outside for skill supplementation. For more on this survey, see http://www.nfib.com/object/IO_24447.html.

Exempt Employees’ PTO - Part-Days Off

Under the Fair Labor Standards Act and federal rules, salaried exempt employees are **not** converted to non-exempt simply because the employer requires them to cover part-day vacations with paid time off/PTO; that is, unless some state rule prohibits such requirement. (MN law and rules do not.) Even so, some employers have been reluctant to implement this policy, for fear that it may cause a “salary status” change in classification and expose them to overtime assessments. In late July, a state appellate court in California directly addressed this issue, and upheld the federal approach, subject only to a California rule that requires employers to give reasonable notice to exempt employees before implementing this policy. If the question should come before a MN court, we would expect the same result.

Faster Check Processing

You’ve probably noticed it – that your checks seem to process (and debit) faster than before; that the couple-day “float” you were used to is gone. What happened?

Late last year, Congress passed the Check 21 Act, which allows banks to transfer funds using electronic facsimiles of checks instead of paper checks. That permits fund transfers instantly between the account on which a check is drawn and that into which it is to be deposited, all without the original paper check changing hands. As a result, the old 3 or 4 day “float” is no more.

The “bad news” is that, if you don’t now have available funds in your account (or adequate account overdraft protection), you could be hit with a bounced-check charge, a negative notation on your credit rating, or unkind call from a supplier or customer. The “good news” is that,

once you deposit a customer's check, those funds will be available more promptly – perhaps within a few hours. (Check that with your particular bank.)

Improving Performance Reviews

Some of our clients use annual job review procedures that are very sophisticated while others, well, don't. Among the reasons we hear from the latter group is that "our employees don't like them." Guess again.

In an independent survey performed late last year for OfficeTeam, 77% of the employees polled said that they consider performance reviews to be valuable. (See <http://officeteam.com/PressRoom?LOBName=OT&releaseid>.) That's understandable when additional training, role expansion and promotional opportunities are figured into these discussions.

In its report of these survey results, OfficeTeam identified – for managers - some pitfalls to successful reviews. Under each, suggestions for avoidance are offered.

Saving it all up: Don't wait until the performance review to share kudos and constructive criticism. Offer feedback all year long. That will inspire stronger performance over a greater period and minimize surprises at the review.

Winging It: Make sure to prepare in advance for individual meetings. Tell the employee how much time will be set aside, what will be discussed, and how you would like them to prepare (e.g., with a self-evaluation). Having your reviewers prepared will also help assure that they apply the same standards to all reviews.

Failing to consult others: Also in preparation, have your reviewers get feedback from those, in different departments, who routinely work with the employee. You may be surprised at what you hear.

Not following through: Make sure that agreement is reached with the employee on key objectives for the next review period, and establish periodic checkpoints for progress assessments and feedback.

Central Am. Free Trade Agmt (CAFTA)

By a close vote of 217-215, the U.S. House of Representative in late July approved a trade pact with six small Central American countries: Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and the Dominican Republic. Called the Central American Free Trade Agreement and widely referred to as "CAFTA," this pact will take effect only after approval by

the national assemblies in all of those six participant countries. To date, the agreement has been ratified in the Dominican Republic, El Salvador, Guatemala and Honduras. Nicaragua and Costa Rica have not approved, and opposition is reported to be strong in both of those countries.

Current U.S. trade with those countries and their small economies is relatively insignificant, accounting for only about 0.5% of our GNP. Viewed another way, their combined, total annual exports to the U.S. are about the same as what China exports to the U.S. in a single month.

Patterned loosely after the North American Free Trade Agreement (“NAFTA”) signed 10 years ago among the U.S., Canada and Mexico, this new agreement will require market liberalization for the majority of goods and services in Central America – including agriculture, manufacturing, public services and government procurement. In return, the U.S. has promised increased market access for their textiles, pharmaceuticals, with a slight increase in sugar quotas.

Congressional approval of CAFTA was considered important to the U.S. for a variety of other reasons, including the general domestic benefits of lowering trade barriers reciprocally with other nations, to show other countries (e.g., in Asia) that Congress can subdue its usual partisan, political in-fighting when necessary to preserve or expand trading opportunities from which the Country may otherwise be excluded, and as a possible prelude to the eventual creation of a Western Hemisphere free trade zone covering all countries in North, Central and South America. The latter has been proposed and strongly supported by the current Administration under the name, “Free Trade Area of the Americas.” But that expanded trade zone now has little support in Congress, or in large countries like Brazil and Peru that will want a better deal (greater reciprocity and more level playing field) than the U.S. gave under CAFTA. Venezuela, which furnishes over half of its oil exports to the U.S. (about 14% of total U.S. oil imports) is also likely to want strong trade concessions to join.

Hostile Work Environments

Nicknames: In a recent federal case involving an ethnic Arab employee, the appellate court found that the CEO’s continuous efforts to “Westernize” his name with an alternate nickname – over the employee’s repeated objections - constituted intentional discrimination against the employee and, for him, created a hostile work environment. The court upheld the \$30,000 jury award.

Sexual Favoritism: Often in cases of sexual harassment, the focus is on abusive and coercive behaviors that override legitimate merit assessments and create a hostile work environment for those exposed. But, the California Supreme Court recently held that a male supervisor's sexual involvements with several in a group of female employees created an inference of sexual favoritism and inverse influence of the favored females over those who weren't involved. That was enough, said the Court, to seriously demean the latter women, create a dis-equal and hostile work environment, and violate state sexual harassment law.

Sarbanes-Oxley – Whistle Blowing

Domestic: Articles in earlier editions of this newsletter have reviewed the broad application and general objectives of the federal Sarbanes-Oxley law in this post-Enron era; e.g., elevating business accountabilities and fair dealing, promoting transparency in governance, and inducing legal compliances. One of the devices this law provides is protection for “whistle-blowers” - principally insiders with information on what they consider to be serious shortcomings in obligatory practices or compliances.

As a general rule, such employee whistleblowers are protected against retaliation by their employers – termination, demotion, transfers, etc. And, where retaliation is believed to have occurred, Sarbanes-Oxley provides a sequence of rights to whistleblowers. The first recourse is to file a complaint with an appropriate outside federal agency, which must promptly review the facts and make an administrative determination of whether or not retaliation has occurred. Either the employee or employer can appeal from that determination (request rehearing). And, at the far-end of the process, but not later than 180 after that retaliation complaint has been filed, Sarbanes-Oxley allows the matter to be filed as a lawsuit, for determination by a federal court. But, what happens when the investigating agency takes longer than 180 days to issue its initial determination on the retaliation complaint? Is it proper for the employee – who is subject to the 180 day cut-off - to immediately seek relief in federal court?

In a recent federal case in Florida, the court said, “Yes.” Since the agency opinion hadn't been returned, the administrative appeal procedure wasn't triggered, and the court had jurisdiction to receive and decide the matter. (*Editor's Note: The whistle blowing in this case claimed employer non-compliance with an occupational safety & health standard, and the*

reviewing agency was OSHA, a sub-agency of the U.S. Department of Labor which for many years has extended legal protection to whistle blowers and practiced 60-day review of retaliation complaints.)

International: Sarbanes-Oxley also obligates companies that publicly trade their stock in the U.S. to set up anonymous tip lines which employees can use to report corporate abuses. However, the EU has previously adopted a data-protection law that applies to basic privacy concerns of its citizens. And a French agency has recently ruled that anonymous “ethics hot lines” don’t guarantee adequate protection for persons accused of wrongdoing – and violate that law. While regulators from the American S.E.C and French Data Protection Authority try to sort through this, some European firms have chosen to get around this quandary by de-registered their stock from trading in the U.S.

What makes this particularly messy is that each of the 25 members of EU is authorized to separately interpret and enforce this law. The U.K. counterpart to the French agency has said it doesn’t see anything wrong with these hot lines. Other EU countries haven’t weighed in on the subject yet, but eventually may have to. Meanwhile, U.S. companies fear that if the hot lines are forced out of Europe and an avoidable but unreported corporate scandal arises in, say their French subsidiary, there could be significant liability under Sarbanes-Oxley and associated S.E.C rules to the domestic parent firm.

Snap Shot of our Domestic Well-Being

Contrary to assertions about stagnant or declining wages, the economic well-being of the American family – measured by per capita income, disposable income, consumption and wealth – has probably never been better. In real terms, workers on average today earn more in 4 days than their parents made in 5, and more in three days on the job than their grandparents earned in a week.

According to the Bureau of Labor Statistics, the average hourly wage in the U.S. is \$18.00 (or \$26.00 when benefits are added in) and the median U.S. annual household income is \$52,600. Much of this is tied to the exceptional productivity of workers in the manufacturing sector, with investment support by employers in both “human capital” (better skills and training) and “physical capital” (computers, technology, modernized plants, etc).

Between 1980 and 2005, the percent of Americans worker who are also stockowners doubled from 25% to 52%, while domestic shareholder

wealth increased by \$15 trillion thanks in significant part to a bull market. Through innovations like 401(k) plans and IRA's, much of this wealth is now widely spread (with dividends) across worker/shareowners in the middle class.

While wages and salaries have increased nationally by only about 4% since 2000, the value of employer contributions to benefits in the same period has risen 16%, yielding an increase of 7.5% in total compensation and about the same in after-tax income. Over the past 20 years, employer medical insurance costs have doubled relative to the average wage, and those have absorbed funds otherwise available for pay hikes.

“Fringe benefits” are no longer at the fringe. Today, 82% of all U.S. employers offer tuition assistance, 33% offer long term healthcare insurance, 31% offer adoption assistance, and almost half voluntarily provide paid military leave. Meanwhile, 62% offer flexible work scheduling, and 42% offer telecommuting even though questions remain about true productivity in these situations.

Is this picture “bad?” No. It simply confirms: that every U.S. business dollar saved or particularly well spent or invested, and all efficiencies and improvements that we separately contribute through working-smart, can have positive yield in several directions.

New Surveys of Wage & Salary Trends

The Twin Cities-based Employers Association recently compiled wage-trend data from 294 firms in MN and western WS. The survey results are categorized for various groups (e.g., union, non-exempt, exempt and executive) in both the manufacturing and non-manufacturing sectors. The results of that sampling project 2006 wage increases from 2.6 to 3.5%, quite similar to those through July 2005. Meanwhile, WorldatWork's national 2005-06 Salary Budget Survey reported in August that 92 % of the 2,483 participating companies are budgeting for larger averaged increases in 2006 - 3.8% versus 3.7% in the 2004-05 survey.

If you would like to receive future editions of this Newsletter by e-mail (or if you don't want to receive them), please call our offices and let us know. Also let us know of any topics you'd like covered in later editions. Thank you!

Knaak & Kantrud, P.A. and Thomas M. Dailey, P.A.
Suite 800 • 3500 Willow Lake Boulevard • Vadnais Hts. MN 55110 U.S.A.
Phone: 651-490-9078 • Fax: 651-490-1580