2010 Security Industry Symposium

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Mr. Bauer has over twenty-three years of experience representing and advising employers in all aspects of labor and employment law. He also represents clients before state and federal courts and administrative agencies, as well as in arbitration proceedings.

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Dana B. Pashkoff provides government contracts counseling for a variety of clients. Ms. Pashkoff also routinely works with clients who sell homeland security products and services, and provides counseling on the regulatory process for obtaining SAFETY Act coverage from the Department of Homeland Security.

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Stephen Amitay is the president of Amitay Consulting LLC, a lobbying and consulting firm in Washington D.C. For the past four years, Mr. Amitay has served as federal legislative counsel for the National Association of Security Companies (NASCO). Mr. Amitay has been counsel to ASIS International for the past twelve years. Through his work for NASCO and ASIS, he is involved in many issues at the intersection of government policy and security.

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Mr. Ingber’s legal practice is dedicated to the representation of security firms throughout the United States. Mr. Ingber is admitted to the New York Bar, the United States Supreme Court and the U.S. federal District Courts for the Eastern and Southern Districts of New York and has been admitted pro hac vice in numerous jurisdictions to represent clients’ interests.
What’s Really Happening to Labor Law Under the Obama Administration – Unions, EFCA and an Activist NLRB

Today, only 7.5% of those people who are working in the private sector belong to a labor union. This shrinking union membership coincides with a worsening reputation for labor unions among Americans. Today, 51% of Americans who were interviewed by the Gallup organization believe that labor unions mostly hurt the US economy. Only 39% believe they mostly help. But while the labor union movement has experienced serious setbacks since its heyday in the 1950s, service unions including security guard unions are thriving.

CONTEXT
The loss of union jobs cannot simply be blamed on management interference.

- Many laws that protect employees have been legislated during the past fifty years, reducing the need for union representation.
- Blue collar manufacturing jobs – where unions were strongest – have steadily slipped away. Recent job losses in the auto industry have continued this trend.
- Union infighting has weakened unions.

THE OBAMA NLRB BOARD
- Reverse Controversial Decisions of Bush Board
- Facilitate Union Organizing – Reverse Membership Decline of Last Two Generations
- Tilt the “Balance of Power” to Labor from Management

A $450,000,000,000 INVESTMENT
Labor unions are trying to reverse these trends. Big labor spent $450 million during the most recent election cycle. Unions expect to be repaid with the Employee Free Choice Act and other union-friendly initiatives.

EMPLOYEE FREE CHOICE ACT (“EFCA”)
This bill, which is presently before Congress, proposes to “amend the National Labor Relations Act to establish an efficient system to enable employees to form, join, or assist labor organizations, to provide for mandatory injunctions for unfair labor practices during organizing efforts, and for other purposes.”

In the event of EFCA passage, this is the effective takeaway for employers:
- If a majority of workers signs cards signaling their desire to form a union, the need for an additional ballot to require the employer to recognize a union will be eliminated.
- Employers will be required to negotiate with a union to reach a collective agreement within 90 days. Otherwise, both sides will be referred to compulsory mediation. If that fails, binding arbitration will follow.
- Penalties assessed against employers who “punish” employees for union activity will be tripled.

WARNING SIGNS
- Andrew Stein, former President of the Service Employees International Union, was the most frequent White House visitor in 2009. The Obama administration is committed to passage of the EFCA.
- Mail ballots, and even electronic ballots, might replace physical voting. Union activists are more likely to exercise the remote ballot, while management sympathizers are more likely to remain on the sidelines.
- More workplace posters supporting union organizing – particularly adjacent to time clocks – are likely.
- Use of company e-mail and other company IT systems for union solicitation and campaigning is a risk. Union activists will make greater use of social media.

WHAT YOUR COMPANY CAN DO
- Assign “Labor Relations” Responsibility. A company manager or team should be made responsible for monitoring legal developments, while devising and implementing strategic responses.
- Assess your company’s vulnerability. Do you have positive employee relations? You should create a workplace where employees do not want or feel that they need a union. Does your company belong to a vulnerable industry?
- Prepare a rapid response campaign that begins with hypervigilance. Train supervisors to recognize warning signs and behavior changes that could signal interest in unionization.
SAFETY Act – Liability Exemption From Acts of Terrorism

The Support Anti-Terrorism by Fostering Effective Technologies (SAFETY) Act was enacted in 2002 as part of the Homeland Security Act. This important tool helps to mitigate risk in the Post 9/11 world, by eliminating or minimizing tort liability for sellers or providers of Qualified Anti-Terror Technology that has been approved by the U.S. Department of Homeland Security should lawsuits arise in the U.S. following an act of terrorism.

CONTEXT
Post 9/11 realities exposed significant liability vulnerabilities.

- New York City suffered $20 billion in losses after insurance and federal emergency money had been paid.
- Insurers’ losses exceeded $36 billion.
- Federal court permits wrongful death suits filed by decedents of 9/11 attacks to continue against airports, security companies and the Port Authority of NY/NJ.
- The Port Authority of NY/NJ was found 68% liable in a lawsuit resulting from the 1993 WTC bombing because it failed to implement prior vulnerability assessment recommendations.
- Insurance companies are unlikely to insure losses from an act of terrorism.
- Indemnification from customers, particularly the federal government, is unlikely.
- Public Law 85-804 (indemnification from the government for “unusually hazardous activities”) is generally unavailable.

THERE ARE THREE TYPES OF SAFETY ACT COVERAGE

Certification Protections
- Sellers/Providers receiving Certification enjoy the presumption that it is immediately dismissed from the suit unless there is clear and convincing evidence that it acted fraudulently or with willful misconduct in submitting data to the Department of Homeland Security (“DHS”) during the application process.
- Upon obtaining Certification, the Seller/Provider automatically obtains Designation as well.
- Companies that are denied Certification can reapply at a later date

Designation Protections
- Sellers/Providers receiving Designation but not Certification are granted a cap on any resulting liability damages, which is required to be covered by terrorism insurance.
- If insurance does not cover the event, liability should be $0.
- Sellers/Providers can obtain Designation without receiving Certification.
- Development Test & Evaluation (DT&E)
  - Same as Designation, but DT&E coverage is given for a shorter period of time – typically one or two years, or for the period of live testing.
  - Once testing has been completed, applicants can turn “DT&E” coverage into a full Designation and/or Certification application.

SAFETY ACT COVERAGE ALSO BENEFITS YOUR CUSTOMERS
SAFETY Act protections also flow down to benefit a seller’s subcontractors, vendors, distributors and customers. This includes U.S. and foreign customers (either commercial or governmental), deploying SAFETY Act approved Qualified Anti-Terror Technology.
Companienes that obtain SAFETY Act coverage significantly diminish or eliminate their tort risk from a terrorist attack, and also give themselves a competitive advantage in the highly competitive marketplace.

SAFETY ACT COVERAGE IS AVAILABLE ONLY TO THOSE COMPANIES THAT APPLY FOR IT.
- Applicants must complete and submit the DHS SAFETY Act Application Kit, which is available at www.safetyact.gov
- The DHS Review and Approval Process takes approximately 120 days.
- Documented instances of adherence to DHS guidelines are crucial to receiving SAFETY Act approval.
- Applicants’ proprietary data is protected by DHS.
- It is never too late to seek coverage. Past deployments may also receive coverage.

SEEK THE ADVICE OF A PROFESSIONAL
Companies that specialize in the SAFETY Act will expedite the process and help you to make the right choices regarding the types of coverage that are available.
What Banks Look For When Approving Credit Lines

The financial crisis that continues to challenge both the U.S. and global economies was partially caused by credit that was extended too easily to those for whom paying it back was too hard. Add falling asset values – from stocks to houses – and the federal government has embarked on a strategy of hope and IOUs to prop up the teetering economic edifice. This is the reality we confront as we seek to preserve and build our private security and investigation businesses.

CONTEXT
The economic situation in 2010 contains seeds of recession and glimmers of hope:
• Lower interest rates hid the cost of debt.
• Rising consumer debt was funded by lower quality loans.
• Mortgage delinquencies skyrocketed.
• Unemployment trends are showing early signs of recovery, led by Louisiana.
• Even in recovery, low levels of optimism are driven by economic conditions.
• While the overindulgence in credit has decreased, firms report that credit remains difficult to obtain.

GETTING BACK TO BASICS
• Despite continued ups and down in the U.S economy, loan demand is expected to increase in 2010 and beyond.
• With the increase in loan demand, banks are likely to look more closely at the fundamental building blocks of a borrower’s business operations and resulting credit conditions. What do your fundamentals look like?

WHAT BANKS LOOK FOR WHEN REVIEWING LOAN APPLICATIONS
• Cash flow from continuing operations, industry dynamics, financial conditions, management quality, guarantor support and collateral/security

DOES YOUR COMPANY PASS THE 5 C’S OF CREDIT?
• Character – the proven commitment to honor your transactions even under adverse conditions
• Capacity – the ability to apply the loan funds, the existence of a business plan, sufficient PP&E, fully realized marketing and product delivery
• Capital – sufficient net worth to absorb normal business risk
• Conditions – the ability to withstand potential economic and market conditions that could compromise the borrower’s ability to service the debt and repay the loan
• Collateral – adequate resources to repay the principal, outstanding interest and the bank’s liquidation administration fees

KEEP THIS IN MIND WHEN SEEKING AN EXTENSION OF CREDIT
• Although the signs of economic recovery are trending toward the positive, banks will evaluate historical business trends and the business owner’s finances.
• Your business may be like many others and suffered a significant decline in revenue. Many financed their operations by taking on additional debt. Lenders will look for these signs.
• Continued losses and declining revenues are expected by banks – the implications of the recession were far-reaching.
• You must demonstrate that your business was able to weather the economic storm – adapting business operations if necessary to service existing debt. Profit reductions must be matched by cost reductions.

BANKS REQUIRE THIS INFORMATION WHEN EVALUATING CREDIT REQUESTS
• 3 years of company financial statements
• 3 years of company and personal tax returns
• Current receivable and payable aging reports, as well as interim statements from the previous and current year.
• Current personal financial statement
• Personal and business credit bureaus will be pulled by the lending institution

MECHANIC GROUP CREDIT RECOMMENDATIONS
• Business Plan to a Debt to Equity Ratio of under 4:1
• Financial statements should be CPA reviewed or audited.
• While distributions are tempting, building equity with retained earnings will lower debt to equity ratios. This facilitates borrowing money at lower rates, especially during hard economic times.
• Personal financial strength should match business strength.
• Don’t expect “good will” to be a significant factor in extending receivables based credit.
In the post 9/11 world, the use of contract guards by all federal agencies is being challenged. The Government Accountability Office has issued reports and had red team tests at Federal Protective Services (“FPS”) guarded facilities, where the performance of the guards was dismal. However, TSA screeners showed similar results. Federal officials in general, and Congressman Bennie Thompson in particular, favor federalizing all contract security guards. As Chairman of the Homeland Security Committee, Congressman Thompson exerts significant influence.

CONTEXT
The contract security industry has given those who favor the federalization of all contract security guards an opening through a lack of industry-wide standards and occasionally lax practice management. While this mode of operation may have been adequate prior to the events of 9/11, a tightening of standards became necessary following that day.

TRADE ORGANIZATIONS INCLUDING NASCO AND ASIS HAVE RISEN TO THE CHALLENGE BY ADVOCATING THE CREATION OF STANDARDS FOR CONTRACT SECURITY GUARDS.

The initiatives put forth by these associations have marked a positive turn for the contract security guard industry. Critics have focused on the lack of standards, while also charging that guards aren’t well trained or adequately screened. By both setting and raising industry standards, arguments made by members of Congress who favor federalization can potentially be blocked.

Contract security companies are advised to support these association efforts through words and policies.

One study has reported that 163 Department of Defense guards will be necessary to replace 130 contract guards. Federalization will strain an already overcommitted federal budget, without raising the level of guard performance. It is our job to make sure this message is heard through all of our channels of influence.

CONTRACT SECURITY GUARDS THROUGHOUT THE FEDERAL GOVERNMENT ARE UNDER SCRUTINY FOR FEDERALIZATION/IN-SOURCING.

- Department of Energy
- Court Security Officers
- Federal Protective Services
- Department of Defense

If FPS improves its level of oversight of the contract guard industry, this will support the industry. FPS is comfortable working with private contractors. But FPS is underfunded and understaffed, making greater oversight difficult. Companies with FPS contracts are advised to be sensitive to this situation.

WATCH OUT FOR THESE FEDERAL INITIATIVES

- “High Road” Contracting Policy – contractors bidding on a government contract are scored on how they treat their employees. Smaller companies will be disadvantaged because they aren’t able to afford to provide benefits supplied by larger companies.
- Non-Displacement of Qualified Workers Under Services Contracts – when a +$100,000 federal contract is taken over by a new contractor, employees of the previous contractor have the right of first refusal on jobs.
- New regulations concerning the Persuader Rule – when a company brings in outside counsel to advise on how to deal with union organizing efforts, unions want to gain access to that advice. Unions want to destroy attorney/client privilege.
- Department of Labor – a significant amount of money has been given to this department, and a new regulation to report labor violations has been added.
- OSHA enforcement has received additional funding
- Ergonomics regulations have been reintroduced
- Unified database – this “bad boys” list will record labor violations at all federal agencies.
- Health Care Reform – beginning 2014, companies with 50+ employees must provide essential healthcare or face a $2,000/employee fine.
- Increased 1099 filings – buy $600+ of merchandise from a vendor and you will have to file a Form 1099. This provision, which is buried in the health care bill, is scheduled to go into effect 2012.
Security Agency Legal and Liability Trends

The private security industry confronts a liberal White House administration, an employee-friendly National Labor Relations Board, a costly health care bill and a tricky economy. With so little room for operational missteps, legal prudence is critical.

CONTEXT
These are a few current legal trends that affect private security companies.

- **FSLA WARNING:** There has been an increase in class action lawsuits against employers for unpaid wages and overtime. This problem arises because many senior managers may not know how their account managers and site supervisors are operating various accounts. For example, a site supervisor may ask employees to arrive 10 minutes prior to the beginning of their shifts. These employees must be compensated for the extra 10 minutes, or the employer risks being sued.

- **FSLA WARNING:** In California, state law requires paid meal and break periods. An employer must allocate 10-minute morning and afternoon breaks for every 6-hour work period. This can be tough if the guard company has only one guard working a gate. If a break is not given, the guard company must pay the guard a penalty of one hour.

- **FSLA WARNING:** If restrictions are placed on where a guard goes during a lunch period, the lunch period becomes compensable.

- **FSLA WARNING:** Plaintiff attorneys may try to sue a guard company in federal court, which can be ruinously expensive. The exploratory alone can be burdensome, as the plaintiff’s attorney goes through time sheets, payroll, e-mail records, Internet searches, and more. If the guard company is found to be in violation of regular or overtime pay, damages will include back pay + 25% penalty + plaintiff’s attorney fees. This is why plaintiff’s attorneys are so to assume these cases, and why defendants can be eager to settle even before the discovery process.

- **FSLA WARNING:** Reduce the likelihood of any legal issues to prevent a potential class action suit.

LIABILITY TRENDS
The liability trend is that there is plenty of bad stuff still out there.

- In cases of negligence, plaintiff attorneys will seek to add security guard companies to the suit to have another pocket to reach into.

- In contracts between guard companies and their clients, the clients are becoming more aggressive regarding indemnification and hold harmless on suits brought by guard employees. For example, if a guard wrenches his back while opening a gate a client’s facility, the client will claim it was the guard company’s responsibility.

HEALTH CARE REFORM – BAD NEWS DURING ALREADY CHALLENGING TIMES

- As companies seek to cut expenses to pay for health care benefits, guard contracts will be a likely place to look. Clients will both shop price more aggressively and cut down on the number of guards they contract for.

- Guard companies themselves will be further burdened by their own health care benefits. Attempts to pass on added costs will be blocked by public and private entities seeking to cut rather than add to costs.

- The economy is resisting a return to full health, narrowing the margin for business error.

CONTRACTORS WORKING IN NEW YORK CITY – BEWARE THE PREVAILING WAGE

The NYC Controller calculates the prevailing wage for employees working on all city contracts, locking in payroll. Add to this health care benefits whose costs are passed onto city agencies, and the agencies reduce the number of guards they contract for.

RULES OF THUMB

- Seek counsel from an attorney or human resources professional prior to taking any action that may have legal consequences for your firm.

- Do not agree to any contract that indemnifies any customers for their own negligence or intentional acts.

- Audit all parts of your organization to insure that employees are being paid for all hours of work. Overtime hours must be paid at the overtime rate.
The 2010 Security Industry Symposium is dedicated to the private security community that helps to keep our nation’s businesses and communities safe. Through this and similar events, The Mechanic Group is committed to helping private security agencies stay ahead of business risks.

With over 21 years of first-hand experience and service to the private security industry, all members of The Mechanic Group remain focused on delivering Best In Class Insurance Solutions, 24/7 Customer Service and Availability and the tools, resources and information that protect your business and bottom line.