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REGULATORY REVIEW

Your Right To Appeal: Use It or Lose It!

Many businesses are faced with the difficult question of whether or not to file an appeal from actions of government agencies. This article describes how the failure to file an appeal from final actions of the Pennsylvania Department of Environmental Protection (DEP) may result in a loss of valuable rights by a company regulated by DEP.

When DEP encounters a violation of the law, it has at its disposal a variety of responses to the violation. The lowest level formal response may result in the inspector "writing up" the violation in an inspection report. The inspector may also issue a written field order, demanding compliance or further action. Back at the office, the DEP compliance specialist may issue a written notice of violation (NOV). Finally, a formal order may be issued by DEP. While many believe that only the formal order may require an appeal, *the reality is that each of the documents issued by DEP may require that an appeal be filed to preserve the rights of the regulated company.*

The law is clear; if you fail to appeal from a "final action" within thirty days, you lose your right to appeal – forever. Failure to take an appeal from a final action will mean the loss of the ability to challenge the action. It also means that DEP can enforce the order in court and that the recipient has waived the right to challenge the order itself. Furthermore,

the action of DEP probably will form the basis for a civil penalty proceeding.

Whether a communication from DEP constitutes a final action subject to appeal cannot be determined merely by the way DEP characterizes the communication. Accordingly, although DEP usually takes the position that an NOV, inspection report, or letter does not constitute an appealable action, if the communication has a direct and immediate adverse impact upon the recipient, such as requiring closure of a facility or directing that a business engage in or cease some activity, the communication may be subject to appeal.

When a final action is issued by DEP, it must be appealed to the Environmental Hearing Board (EHB); otherwise the action becomes final and unappealable. EHB Rule 21.52 provides in pertinent part: "[J]urisdiction of the Board will not attach to an appeal from an action of the Department unless the appeal . . . is filed with the Board within 30 days after the party appellant has received" notice.

Virtually the only exception to the 30-day rule is where there has been a breakdown in the procedures of the EHB itself, preventing the party from filing an appeal to the EHB. In *Falcon Oil Co., Inc. v. DER*, 609 A.2d 876 (Pa. Cmwlth. 1992), the company appealed from the EHB's denial of its petition for appeal after the 30-day time period had expired, arguing that its failure to file a timely appeal with the EHB was excusable because a secretary mistakenly believed service to DER alone was sufficient to constitute a "non-negligent happenstance." The Commonwealth Court affirmed the EHB's decision to deny the "nunc pro tunc" appeal holding that the mistake did not constitute either a breakdown in the EHB's administrative process or unique and compelling circumstances.

Often the question that the recipient of a DEP notice must ask is, "Does this DEP document constitute a final action?" If the answer is yes, then an appeal must be taken to preserve legal rights, even if the document does not ordinarily appear to be a final action (e.g., a handwritten inspection report). If the answer is maybe, then a party may file a protective appeal to prevent the possibility that the document was a final action from which an appeal should have been taken.

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What You Need To Know About the Wage Payment Law

All employers appreciate that the employment relationship is subject to considerable government regulation. Even the general public is well aware of many aspects of the regulatory scheme. But some regulatory requirements are not so well known. Of course, ignorance of the law is no excuse, so employers must beware of lurking liability. For instance, Pennsylvania's Wage Payment and Collection Law is a law that you do not hear much about; however, it packs a powerful punch.

Most states have some type of law that controls the payment of wages to employees within that state. Pennsylvania is no different. Commonly known as the WPCL, Pennsylvania's law governs all aspects of the payment of wages and deductions from those wages by all Pennsylvania employers to their employees. The WPCL provides employees with a vehicle to recover wages or other compensation that the employee has "earned." If an employer is found liable for the wages, the employer may also have to pay additional damages in the amount of 25 percent of the wages or \$500, *whichever is greater*. In addition, the employer will have to pay the employee's attorneys' fees.

Or, the employee may file a complaint with the Pennsylvania Department of Labor and Industry. The department is then charged with investigating the complaint on behalf of the employee. The department may impose a fine against the employer as well as hold the employer liable for the employee's lost wages.

Under the WPCL, it is not only the employing entity that may be held responsible for the damages. Rather, the definition of employer in the WPCL expressly includes persons or officers of the entity. The courts have interpreted this to apply to all decision-making or policy-making officers, administrators, and directors. This means that all such individuals may be held *personally* liable for the wages not paid to the employee. Further, all such individuals could be held criminally liable.

Most questions asked by employers about the WPCL concern what deductions may an employer take from an employee's paycheck. The permissible deductions are defined by regulation and include such things as contributions to a pension fund, union dues or deductions authorized by the employee. Many employers want to know whether they are required or even permitted to withhold moneys to satisfy a legal claim against the employee. The answer is generally no, with some exceptions, perhaps the most common of which is withholdings to pay court-ordered child support or alimony.

The WPCL can be a powerful tool to employees who feel that they have been wrongfully denied compensation. Employers need to ensure that they are in compliance with the law, or they run the risk of some severe sanctions.

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LEGISLATIVE MONITOR

General Assembly Begins New Session

The Pennsylvania General Assembly began a new two-year legislative session (2001-2002) in January. At the beginning of each new session, both the House of Representatives and the Senate begin with a clean slate. No bills from the prior session are carried forward into the new session.

While approximately 2,300 bills have been introduced, the primary focus of the General Assembly this spring will be the adoption of a budget for fiscal year 2001-2002 and the adoption of a spending plan for Pennsylvania's share of the national tobacco settlement.

The General Assembly will review Governor Ridge's proposed \$20.8 billion state budget and proposed \$217 million tax-cut package, which includes the continued phase out of the Capital Stock and Franchise Tax, and will adopt a final spending and tax-cut plan before the end of the fiscal year on June 30. Other tax cuts could be considered including a reduction in the state's inheritance tax.

The debate surrounding Pennsylvania's \$400 million (annual) tobacco settlement seems focused on whether or not funding should be provided to reduce the cost of prescription drugs for the elderly and, if so, how much. Other funding under consideration would be used to provide insurance for the uninsured, to

compensate hospitals for uncompensated care, to provide for medical research, to provide for home care for the elderly, and to provide for tobacco cessation and prevention programs. The General Assembly would like to pass a tobacco settlement-spending plan before adjourning for the summer.

Attorney General Mike Fisher is advocating passage of a False Claims Act in Pennsylvania and passage of an anti-trust statute. A bill to establish a False Claims Act has been reintroduced in the House. This False Claims Act was introduced last session, but died when the session ended last year. It would authorize the Attorney General, district attorneys and private plaintiffs to file civil suits against companies that knowingly file false claims with the state or local governments.

The environmental agenda could include legislation introduced in both the House and Senate to manage Pennsylvania's water resources. Also, legislation to require solid waste landfills to have host community agreements before the Department of Environmental Resources issues permits is under consideration. A bill has been introduced in the House, which would overhaul Pennsylvania's current auto emissions program.

In the health care area, legislation is being considered in the House that would provide for availability of and access to a

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Tax Reassessments May Prompt Challenges by Property Owners

Between March 12 and April 22 of this year, most property owners in Dauphin County received preliminary real estate tax reassessment notices from Manatron-Sabre of Ohio, a mass-appraisal consulting firm engaged by the county to assist in first countywide revaluation since 1985. The reassessment affects owners of approximately 107,000 separate parcels of real estate located in Dauphin County. Official tax reassessment notices are expected to be mailed to property owners on June 21, 2001. Similar countywide reassessments were completed within the past few years in Allegheny, Carbon, Cumberland, Lancaster, Lycoming, Northampton and Schuylkill Counties.

According to the Pennsylvania State Tax Equalization Board, in 1999 the total assessed value of real property in Dauphin County totaled more than \$6.4 billion, but the actual market value of property in the county based upon reported sales records was approximately \$8.9 billion, suggesting properties were under-assessed by approximately 40 percent. In addition, prior to the reassessment, a substantial degree of non-uniformity existed in assessment practices. In 1999 the Pennsylvania Economy League estimated that sales transactions showed an average 27-percent variation between the ratio of assessed value to market value for individual parcels as compared to the countywide average ratio of assessed value to market value. A similar or greater lack of uniformity in tax assessment practices exists in many Pennsylvania counties.

Although following a countywide reassessment, local taxing authorities are required to reduce millage rates to ensure that total revenues generally do not increase by more than 10 percent, additional taxes imposed upon particular property owners can be more substantial. Local taxing authorities also sometimes creatively calculate millage rate adjustments so as to generate larger total tax increases. The impact of reassessments upon taxes levied by school districts contained in more than a single county are also difficult to evaluate and predict.

While a countywide reassessment is intended to eliminate the unequal treatment of comparable property owners, the track record of mass-appraisal firms is at best checkered. A recent countywide reassessment conducted by Manatron-Sabre in Allegheny County, for example, has been challenged by the City of Pittsburgh based upon findings that even in the year of reassessment a 15-percent average variation occurred between market value (as based upon arm's-length sales transactions) versus assessed valuation. In addition, in countywide reassessments, many property owners discover serious errors or mistakes in property descriptions. The formulas used to estimate the value of commercial and industrial properties also sometimes provide an unreliable estimate of actual market value.

Regardless of whether countywide reassessment occurs, appeals of tax assessments in most counties can be annually filed before the county board of assessment appeals by September 1st of each year. Following formal notice of a countywide reassessment, appeals generally must be filed within 30 days of the date of the reassessment notice. Deadlines vary among counties, however, and local requirements and assessment appeal rules should be reviewed.

Property tax assessment appeals, especially for commercial and industrial properties, can often result in substantial valuation adjustments. For example, in a recent assessment appeal regarding an electric power plant in Greene County, Kirkpatrick & Lockhart was successful in obtaining a reduction in valuation from approximately \$70 million to \$29 million. While this case involved unique circumstances and should not be assumed to reflect the likely results of other assessment appeals, it does illustrate the desirability of carefully reviewing tax assessments. In order to evaluate potential tax savings associated with tax appeals, property owners should review the accuracy of county assessment records and consult with competent counsel and real estate appraisers.

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DEP Plans E-Mail Notification System

Karen Bassett, Assistant Regional Director of the Pennsylvania Department of Environmental Protection's (DEP) South Central Regional Office, recently advised that DEP was getting ready to roll out a new feature on its web site. Tentatively entitled "Permit Alert," this feature will enable a subscriber to be advised by e-mail of new permit applications filed with DEP and related DEP permit activities within any municipality in the Commonwealth.

In addition to notice of permit applications, the service will provide an e-mail notice of all public meetings regarding the permit, public comment periods, Act 2 public participation events, and permit issuances. Subscribers will be notified by e-mail when a permit application is filed or another event occurs. Thus, someone in, say, Jones Township, who is interested in all permit-related activity in Jones Township, may subscribe to the service. DEP will automatically notify the subscriber by e-mail of all permit applications, public meetings, comment periods, permit issuances, and the like occurring in Jones Township. If the subscriber is also interested in permit-related activity in, say, Smith Township, he or she can subscribe to Permit Alert for that township as well.

According to Ms. Bassett, the system was supposed to "go live" by the end of April; however, a technical glitch has delayed implementation of the Permit Alert program until later this spring.

"Permit Alert" will provide an additional challenge to regulated companies in Pennsylvania. At the same time, it will provide an up-to-the-minute source of information for residents and existing businesses in the Commonwealth that are interested in knowing of permit-related activities in a particular municipality.

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Awards & Recognition

K&L Partner Honored by the Water Resources Association of the Delaware River Basin. R. Timothy Weston, a partner in K&L's Harrisburg office, has received the regional association's most prestigious Samuel S. Baxter Memorial Award. The award recognizes Mr. Weston's 28 years of service in promoting the cause of wise water resource management.

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The best protection against losing the valuable rights associated with an appeal of a DEP final action is to file an appeal from any DEP document that contains mandatory, final language. Reliance on the title of the document to protect the company is not enough to preserve your appeal rights. Waiting more than 30 days to file an appeal will guarantee the loss of those rights.

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comprehensive training care system. Medical malpractice reform and shortages among health care professionals are also being studied.

A major update to Pennsylvania's Uniform Commercial Code has passed the Senate and is under active consideration in the House. The General Assembly is also considering revisions to the Business Corporation Law.

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