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APPLICATION OF CERTAIN LABOR LAWS IN THE MARIANAS

I have reviewed three basic types of federal labor laws with respect to their prospective applicability to the Marianas. The first is basically reflected in the National Labor Relations Act which governs labor/management relations, provides for administrative regulation of collective bargaining agreements, and prohibits certain types of union activity. The second is the Fair Labor Standards Act which provides for minimum wages, maximum hours, and certain child labor provisions. The third type of statute is epitomized in the Davis-Bacon Act which requires locally prevailing minimum wages to be paid in federal contracts.

The National Labor Relations Act regulates labor/management relations in all enterprises affecting commerce. It has been held that the NLRB has plenary jurisdiction over local as well as interstate commerce in territories. Apparently the NLRB has determined that its jurisdiction extends only to recognized territories and thus Puerto Rico, the Virgin Islands, and Guam are covered whereas American Samoa is not. Thus, it would seem that the TTPI is not presently covered by the NLRA. Despite its plenary jurisdiction over local commerce in the covered territories, the NLRB determined in 1965 that it would intervene only in those cases where the

impact on commerce was not strictly local, i.e., that the NLRB would apply the same standard in the territories that it is required by the limitations of the commerce clause to apply in the states. Despite this restraint, Liebowitz suggests that there is a continuing feud between Puerto Rico and the NLRB on whether the latter should regulate labor/management relations in Puerto Rico.

It strikes me that the issues at stake here are more of a house-keeping nature and do not affect any vital or fundamental interests of the Marianas. In other words, we could allow the application of the NLRA and other similar laws to be determined by the formal commission on the applicability of federal laws.

The second type of labor law that could affect the Marianas is the Fair Labor Standards Act, 29 U.S.C. § 201, et seq. Basically this Act provides for minimum wages, maximum hours, and other "safeguards" for employees of businesses engaging in interstate commerce. Section 202(c) defines the word "state" to include territories and possessions of the United States. Section 213(f) exempts from the Act territories and possessions of the United States other than Puerto Rico, the Virgin Islands, Guam, the Canal Zone (?), American Samoa, Eniwetok Atol, Kwajalien Atol, and Johnston Island. Note that the last three are part of Micronesia and

that the rest of Micronesia, as well as a number of other "possessions" of the United States, is presently excluded from the Act. Despite the inclusion of Puerto Rico, the Virgin Islands and American Samoa, the Act provides that the Secretary of Labor can establish a lower minimum wage for these territories based on considerations of: local economic and competitive conditions, the effect of the higher minimum wage on the amount of employment, and the effect of a lower minimum wage on local industries' securing a competitive advantage over U.S. businesses. These considerations apparently were also material in the Congressional decision to exclude from coverage of the Act the United States "possessions' not specifically listed above. Apparently the Supreme Court had applied the minimum wage law to a 99-year military lease base in Bermuda and the impact on the local economy would have been drastic and deleterious had Congress not changed the law.

From what Jim Leonard has indicated to us, it may be essential to exclude the Marianas from the Fair Labor Standards Act (or since they are currently excluded, to make sure that the FLSA is not applied to the Marianas in the future). Note that the FLSA does not apply to businesses in purely local commerce, even in the territories. Nevertheless, we might expect that a number of businesses engaging in

"interstate" commerce would have considerable employment in the Marianas and that the application of a U.S. minimum wage scale could throw the local economy out of balance. As a fallback condition to complete exclusion from the FLSA, we might accept a provision that allowed the Secretary of Labor to establish lower minimum wages (based on local prevailing conditions) as he presently does in Puerto Rico, the Virgin Islands and American Samoa. I would think, however, that the question of setting a minimum wage may be of such importance that we ought to insist that it be solely in the hands of the new government of the Marianas.

The third type of federal labor statute potentially applicable in the Marianas are the various acts which provide for minimum wages and maximum hours and other advantageous working conditions for employees of businesses engaged in federal contracts. These statutes include the Walsh-Healy Act which governs federal contracts for supplies and material exceeding $10,000, the Service Contract Act of 1965 which covers contracts to furnish services to the United States, the Davis-Bacon Act which governs federal construction or public works contracts, and a variety of specific acts such as the Federal Airport Act and the federal housing acts which incorporate the requirements of Davis-Bacon by reference. These statutes appear to do two things: first, they impose

the minimum wage required under the FLSA to the extent that the business is not already covered by that Act. Secondly, they require the federal contractor to pay a higher wage if the Secretary of Labor determines that there is a "prevailing" higher wage in the locality where the contract is to be fulfilled.

As best I can determine, none of these statutes is presently applicable in the TTPI. The Davis-Bacon Act applies only in the states and the District of Columbia, the Walsh-Healy Act applies only in the states, the District of Columbia, Puerto Rico and the Virgin Islands. (By administrative exception the Secretary of Labor has not enforced any "prevailing wage" requirement in Puerto Rico or the Virgin Islands but has rather enforced the locally applicable minimum wage as determined under the FLSA.) The Service Contract Act applies to the same extent as the FLSA.

There are basically two questions raised by these types of statutes. The first, of course, is whether the minimum wage provisions would be applied for federal contracts in the Marianas. As a general matter, I would think the Marianas would have little objection to having the Secretary of Labor require federal contractors to pay the "prevailing wage" -- provided that decision was governed by a statutory requirement to consider local conditions, etc. The real

problem is with the back-door application of the minimum wage as determined by the FLSA. For the reasons set forth above, I would not think the Marianas would want this minimum wage provision -- at least without a great amount of local control. The second problem that is raised by this set of laws is whether a contract of the Marianas government would be considered a federal contract for purposes of the requirement of the statutes. The general statutory coverage is for all contracts of the federal government or an instrumentality of the federal government or contracts substantially financed with federal monies. There do not appear to be any cases in point, but it would seem that the government of Guam, for example, could be held to be an instrumentality of the federal government. Even if we could avoid this problem, however, the heavy infusion of federal funds into the Marianas government could render any contract let by that government subject to the provisions of these acts. Therefore, because of the potentially broad scope of these statutes, I would think it would be in our interest to protect against their application.