



LEGAL NOTES

ABA-- ARIZONA BUILDERS' ALLIANCE

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Labor Unions' Threats to Disrupt Construction Sites

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Owners and general contractors have been receiving letters from construction trade unions which, in essence, inform them of the union's labor dispute with one or more of the contractors working at their jobsites, and of "the public information campaign" which the union intends to conduct. Typically, these letters state:

It has come to our attention that XYZ, Inc., is or will be working at your project. Please be informed that this union has an ongoing labor dispute with XYZ, Inc. We want you to be aware of our aggressive public information campaign against XYZ, Inc. This campaign may include picketing, highly-visible banner displays, distribution of handbills, and demonstrations at the construction jobsite.

In these letters, employers, such as the owner and the general contractor, with whom the union does not have a labor dispute are the "neutral employers." Employer(s) with whom the union does have a labor dispute, such XYZ, Inc., in the above scenario, are considered the "primary" employers(s).

Under current NLRB law, a letter such as the one above, would be unlawful, because it uses the term "picketing" without qualification.

It is well established that a union may picket against an employer at a construction site where other employers also perform work (common situs) if: a. The primary employer is present at the site during the picketing; b. The primary employer is engaged in its normal business at the site; c. The picketing occurs reasonably close to the location where the primary employer works at the site (reserved gates); and d. The picket signs identify the primary employer.

The NLRB requires that any warnings or threats directed to neutral employers that the union plans to picket a construction jobsite must

include assurances that the picketing will be conducted in a lawful manner.

If the union's letter to the neutrals does not specifically refer to "picketing," as part of the "public information campaign," the letter, by itself, is not unlawful. The NLRB takes the position that threats to engage in bannering, handbilling, or other demonstrations "do not constitute threats to engage in unlawful confrontational conduct."

The NLRB and the courts scrutinize bannering, handbilling, or other demonstrations to determine whether, under the totality of the circumstances, "confrontational activity" occurs. If it is determined, under the circumstances, the activity is "confrontational," the NLRB may prosecute the union's conduct as violating the prohibition against secondary boycotts.

In order to prevent costly disruptions at the construction site, labor counsel should be consulted as soon as there is information that a union may have a labor dispute with one of the contractors performing services at the site. At Snell & Wilmer, we have the resources to assist owners and contractors at construction jobsites to prevent and minimize disruptions arising from labor disputes.

Gerard Morales is a Partner in Snell & Wilmer's Phoenix office. His practice involves representation in employment related matters, including wrongful termination, employment discrimination, arbitration and other alternative dispute resolution proceedings. He has extensive experience in NLRB unfair labor practice trials, and union elections matters, collective bargaining, labor law issues affecting the construction industry, wage and hour compliance, corporate policy development, and administrative proceedings before state and federal regulatory agencies, including the Equal Employment Opportunity Comm., U.S. Dept. of Labor, and NLRB. He can be reached at 602-382-6362 or jmorales@swlaw.com.

OSHA SAFETY ALERT

FEDERAL REVIEW COMMISSION DECISION ELIMINATES “CONTROLLING CONTRACTOR” LIABILITY IN CONSTRUCTION

By Charles Keller, Snell & Wilmer,
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On April 27, 2006, the Federal Occupational Safety and Health Review Commission (“OSHRC”) handed down a dramatic decision which according to the dissenting judge in the case “reversed over 30 years of legal precedent” involving multi-employer liability. The decision, which has already been appealed by the Occupational Safety and Health Administration (“OSHA”) to the Eighth Circuit, U.S. Court of Appeals, eliminates OSHA’s ability to issue citations to “controlling employers” on construction sites. This decision is a huge victory for general contractors and other controlling employers on construction sites.

Under OSHA’s multi-employer citation policy, in the past, OSHA has held liable any employer who was the creating, controlling or correcting employer on a jobsite even if its own employees were not exposed to a hazard. The “controlling employer” has been defined as “an employer who has general supervisory control over the worksite, including the power to correct safety violations itself or require others to correct them. Control can be established by contract or in the absence of . . . contractual provisions, by the exercise of control in practice.” OSHA Instructional CPL 2-0.124 at I.E.1# (Dec 10, 1999). As a result of this policy, OSHA was able to cite a general contractor for violations of its subcontractor even when none of the general contractor’s employees were exposed to the hazard and the general contractor did not create the hazard.

In Secretary of Labor vs. Summit Contractors, Inc., Summit, the general

contractor, was constructing a dormitory in Little Rock, Arkansas. Summit had a superintendent and three assistant superintendents on site. It also contracted with All Phase Construction, Inc. (“All Phase”) to perform masonry work. All Phase failed to properly protect its employees working on scaffold from fall hazards. None of Summit’s employees was exposed. Summit did not create the hazard. The compliance officer found, however, that All Phase’s fall protection violations were in plain view of the Summit job trailer and Summit had knowledge of the hazards. Therefore Summit, as the controlling employer, received the same violations as All Phase for the fall protection violations. All Phase did not contest the violations Summit did. It argued that the controlling employer concept arising out of OSHA’s multi-employer citation policy was not enforceable. Summit also argued that the multi-employer policy was not valid because it was contrary to the language of 29 C.F.R. 1910.12(a). That standard states, in part:

Each employer shall protect the employment in place of employment of each of his employees engaged in construction work by complying with the appropriate standards prescribed in the paragraph.

In a well-reasoned decision, the outgoing OSHRC Chairman, Scott Railton, held that 1910.12(a) limits applicability to an employer’s own employees. Therefore, since Summit had no employees exposed to the hazard and it did not create the hazard, Section 1910.12(a) precluded OSHA from citing Summit for the hazard created by the subcontractor, All Phase.

There are several key points to keep in mind while savoring the victory of this decision. First, general contractors and other controlling employers on a jobsite may still be cited if their employees are exposed to the hazard or if they create a hazard to which other employers are in fact exposed.

As an employer, you should properly protect all employees from hazards that you create on a jobsite. Second, the decision only applies to construction employers subject to OSHA's construction standards. It does not yet apply to general industry employers. The Commission never addressed the validity of or the applicability of the OSHA multi-employer citation policy to general industry employers. Third, OSHA has appealed the decision to the Eight Circuit United States Court of Appeals. It is unclear whether OSHA will change its enforcement policy while the case is under appeal.

Additionally, it will also be interesting to see how state plan states, that have adopted the federal OSHA standards, react to this decision. Arizona OSHA representatives have publicly stated it is business as usual. However, court decisions have held that Review Commission decisions are precedent for the states.

In the meantime, any construction employer being cited by OSHA as a "controlling employer" under the multi-employer theory, when none of its employees were exposed to the hazard and it did not create the hazard, has a significant defense to the citation based on Summit Contractors, and should seek to have such citations immediately deleted.

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The Art of Papering Your Project

By Josh Grabel

**Edited by Jim Sienicki
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Articles about the construction industry often highlight "hot" issues in construction, like new designs, best locations or new means and methods. So why devote an entire article to "papering" a file, a topic about as exciting as watching grass grow? Simple. Because in many instances, it is as important as securing beams, laying a strong foundation, or building a sound structure. Indeed, when an attorney receives a call on a new matter, within 10 minutes we are likely to ask our client, "Did you get that in writing?" and the answer determines how we proceed. Proper documentation is often determinative, regardless of what **actually** happened on a project.

This article highlights some common issues related to documentation and, while it does not address every situation, provides some general guidelines that, if followed, will substantially improve your ability to protect your rights.

Pre-Construction. Every architect, owner, developer, construction manager, general contractor and subcontractor, should, before becoming involved in a project understand: (1) proper licensing and/or registration; (2) all contract documents, including supplemental terms and conditions; and (3) their lien and/or bond rights.

First, before bidding on a project, all contractors, subcontractors and design professionals should be licensed in the state the project is located. In Arizona, if a contractor enters a contract without a license, the owner/general contractor can void the contract, even if millions of dollars of work has already been done. The lack of a proper license can also indicate a contractor/professional lacks the skill, training or expertise needed on the project.

Second, all parties must make sure they are familiar with all relevant contractual terms and conditions before entering a contract. "Supplemental" documents can add or modify requirements and add conditions a party would not necessarily agree to (particularly related to indemnification, payment schedules, insurance, and/or arbitration/mediation). For instance, if an owner-architect contract has a binding arbitration clause, the owner must ensure its GC contract has a similar clause. Otherwise, an owner may be forced to arbitrate with an architect and litigate with a GC on the same Project. In fact, for any remotely complicated contract, an attorney should review it with you before signing—an ounce of prevention is worth a pound of cure.

Third, all parties should understand statutory lien and bond rights and proper notices. In Arizona, a proper Notice: (1) gives a general description of the type and value of work being provided; (2) names the contractor; (3) names the entity who contracted this contractor; (4) identifies the jobsite; and, (5) includes other statutory language. If you are a GC and/or owner/developer, you should collect all Notices received on a project and develop a chart listing who served the Notice, what type of work they are performing, who they are performing it for, and the estimated value. As payment applications are submitted, a GC/owner/developer can compare them to the chart you developed to ensure proper lien waivers are submitted before payment is made to subcontractors.

Documentation During Construction During construction, parties should: (1) memorialize all changes in writing; (2) keep daily logs; and (3) provide timely payment applications, objections, and payments. First, any changes, whether additional scope of work, changes to shop drawings, RFIs, ASIs, authorizations to proceed, or minor deviations, should be documented. In a perfect world, this would mean formal approved change orders.

However, we all know this is often not possible during construction. Thus, informal documentation—emails (including those from Blackberry's, Treo's or PDAs), handwritten notes, can be sufficient. Documentation should include as much information as possible, particularly related to issues like delay, acceleration or loss of productivity. If a change is estimated, documenting the fact it was discussed and approved (or not approved) is substantially better than nothing. Similarly, if construction is falling behind, is defective, or not going to plan, a timely email confirming the issue can decide whether a dispute is won or lost. While you may be able to win claims without this sort of documentation, it is much more difficult and expensive.

Second, daily logs are invaluable both during and after construction. They allow architects/owners/developers/GCs/subcontractors to evaluate whether a project is on schedule, protect parties from delays, acceleration, or defective construction claims, and support later claims. Logs do not have to be comprehensive—just highlighting what the daily schedule was, who was on-site when, what work was done, and what caused delays, can be helpful. If, for example, a subcontractor is failing to provide sufficiently experienced work crews on a regular basis, a developer or GC who notes this in a daily log is in a much better position than someone without a daily log. Five (5) minutes a day can save hundreds of thousands of dollars.

Third, submitting timely payment applications and objections is imperative, particularly in Arizona. The Arizona Prompt Payment Act ("the Act") establishes a mandatory payment schedule for almost all private construction projects. If a general contractor submits a payment application on the 1st, the owner must inspect the work site and either accept the work *listed on the application* or object in writing within 14 days (by the 15th). If no written objection is made, the application is *deemed accepted and approved by law*, and must be paid in 7

days (by the 22nd). If a written objection is made, the owner can only withhold monies sufficient to cover the objection. Once paid, the GC must then pay its subcontractors/material suppliers within 7 days. Any owner/contractor who does not comply with the Act is in material breach of contract, and the GC/subcontractor can terminate the contract and sue for damages. If you are unsure of your obligations, you should contact a knowledgeable construction attorney.

Closing Out the Project

Determining what is needed to close out a project depends on your role. As an owner, before making final payment, you should: (1) conduct a final inspection and provide a punch list; (2) make sure you have all applicable warranty documents and permits; and (3) have copies of all necessary final lien waivers. As a GC, you should have: (1) final written approval of all work; (2) copies of all final lien waivers; and (3) final payment. And, as a subcontractor, you should also: (1) have final written approval of your work; (2) provide final conditional lien waivers listing the amount due; and (3) obtain final payment. These simple steps will, if followed, make closeout of your Project much smoother.

Conclusion. While not exciting, properly documenting a project by obtaining complete copies of contracts, using proper Prelim Notices, keeping daily logs, ASI logs, Change Order logs, and RFI logs, submitting appropriate change orders and payment applications, making timely objections to incomplete and/or defective work and obtaining lien waivers can determine whether a project is truly successful.

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