ROBINSON & COLE LLP
ATTORNEYS AT LAW

Attorney Advertising


CONSTRUCTION UPDATE
Solutions

NOVEMBER 2010

Dear Readers,

As part of Robinson & Cole's ongoing efforts to meet the ever-growing needs of our clients, it is with great pleasure that we announce the expansion of our Construction Group in Boston with the addition of partner Joseph A. Barra.

Mr. Barra brings significant experience handling disputes and transactional matters that involve design and construction of commercial, retail, educational, industrial, transportation, and utility projects. With skills gained in his first career as a civil engineer, he has represented clients in the construction industry for the past 20 years.

Mr. Barra is active in major construction industry organizations, currently serving on the Board of Directors of the national and Massachusetts chapters of the Construction Management Association of America and the Board of Directors of the Massachusetts Building Congress and the Design Build Institute of America, New England region. He is also a former director for the Massachusetts chapter of the Associated General Contractors of America and the Massachusetts Society of Professional Engineers, as well as an active member of the American Arbitration National Panel of Construction Neutrals and the American Society of Engineers. He is admitted to practice in Massachusetts and New York.

As always, we strive to provide you with the latest legal news surrounding the construction and surety industries. We encourage our readers to provide us with any news, information, or other developments about these industries. Of course, for the latest information about our firm and the construction and surety industry, please be sure to visit our Web page at www.rc.com.

Peter E. Strniste, Jr.
Editor

ARTICLES

Federal Government Raises Threshold for Miller Act Bonds

By Todd R. Regan

On Aug. 2, 2010, the Civilian Agency Acquisition Council and the Defense Agency Acquisition

Council published a Final Rule (Rule) raising the dollar threshold for construction projects that require the posting of performance and payment bonds from $100,000 to $150,000. Thus, as a result of the revised Rule, effective October 1, 2010, any contract for the construction, alteration, or repair of any public building or public work of the federal government of more than $150,000 requires performance and payment bonds.

The Rule was issued pursuant to a federal statute passed in 2004, which requires regulators to adjust acquisition-related thresholds for inflation every five years, using the Consumer Price Index.

The Rule was opposed by groups representing both sureties and subcontractors on the grounds that it would result in fewer bonded projects and less protection for trade contractors. The Civilian Agency Acquisition Council and the Defense Agency Acquisition Council countered that the increase for inflation was mandated by federal statute. Furthermore, they argued that the increased dollar threshold will not decrease the number of bonded projects; rather, it will maintain the status quo by preventing the number of bonded projects to increase.

The Final Rule, which amends 40 U.S.C. § 3131, can be found at Federal Register, August 30, 2010 (Volume 75, Number 167).

Recent Connecticut Superior Court Decision Limits Subcontractor's Rights Under Connecticut's Fairness in Financing Statute
By Elizabeth K. Cunha

Connecticut's Prompt Pay Act provides that when an owner on a construction project receives notice from a contractor, subcontractor, or supplier, in a direct contractual relationship with the owner, that it has not been paid, the owner is required to place the funds at issue in an interest-bearing escrow account. An owner who fails to place the funds in an escrow account following timely notice is liable for certain punitive interest. In addition, an owner who is found to have withheld payments in bad faith is liable for an additional 10 percent in damages. The statute, however, is unclear as to whether this right applies to subcontractors not in a direct contractual relationship with the owner. A recent Superior Court decision analyzed this issue and determined that, while the statute allows a subcontractor not in a direct contractual relationship with the owner to bring a cause of action against the owner, it does not allow the subcontractor to require that the owner place the funds at issue in escrow or hold the owner liable for punitive interest and the additional punitive damages upon its failure to do so.[1]

Click here to read the full article.

The 2009-2010 Legislative Session Brings Substantial Changes to the Massachusetts Workplace
By Alida Bogran-Acosta

In the past few months, the Commonwealth of Massachusetts has enacted, amended, or implemented several statutes that will have, or already have, a substantial impact on the workplace. The legislation affects initial applications for employment, criminal background checks, personnel records, no-texting-while-driving laws, and workplace harassment (distinct from the antiharassment legislation of federal and state antidiscrimination statutes), and there is even a new cause of action for failure to provide workers' compensation insurance.

Click here to read the full article.

A Reexamination of Pass-Through Claims in Connecticut
By Elizabeth K. Cunha

In August 2010, a Hartford Superior Court judge issued a decision that confirmed the very limited circumstances under which a public works contractor may pass through the claims of its subcontractors when asserting a claim against the State of Connecticut. The decision arose from a dispute between Worth Construction Company and the Connecticut Department of Public Works on a project involving additions and renovations to a hall on the campus of Southern Connecticut State University. Worth, while working under a general construction contract with the State, encountered delays and incurred additional costs for which it claimed the State was responsible. Included in its claims were costs incurred by its subcontractors. Worth then brought suit against the State to recover; the State moved to dismiss the pass-through claims on the grounds that the subcontractors' claims were prohibited by sovereign immunity.

Click here to read the full article.

Class Action Challenges LEED® System as Deceptive

By Martin A. Onorato

No good deed goes unpunished. A federal, class action lawsuit was filed last month in Manhattan against the United States Green Building Council (USGBC), claiming that the Leadership in Energy and Environmental Design (LEED®) certification system misleads consumers. Based largely on a study commissioned by the USGBC in March 2008, comparing the performance of LEED® projects versus non-LEED® projects, the suit claims that the study was skewed by missing or unreported information, therefore deceiving the class of consumers as to the benefits of LEED® certification. The action includes claims of fraud, unfair competition, deceptive trade practices, and false advertising and seeks a platinum-level $100 billion in damages.

Connecticut Department of Revenue Services Withholding Tax Audits

By Felicia S. Hoeniger and Scott E. Sebastian

The Audit Division of the Connecticut Department of Revenue Services (DRS) has a long history of auditing contractors for sales and use taxes. Recently, we are seeing this division initiate withholding tax audits of contractors. In these audits, the Audit Division typically focuses on the contractor's relationships with its subcontractors and often seeks to reclassify subcontractors, or the subcontractor's employees, as direct employees of the contractor for withholding tax purposes. Connecticut follows federal law to determine the existence of an employer-employee relationship and relies on the criteria set forth in IRS Publication 15-A, Employer's Supplemental Tax Guide. See Connecticut DRS Policy Statement 2007(7). Contractors need to pay close attention to the fine line that can exist between using a properly characterized subcontractor and exercising a level of control over a subcontractor, or the subcontractor's employees, that can result in the Audit Division determining that an employer-employee relationship exists.

Massachusetts Provides Guidance on Permit Extensions

By Gregory S. Sampson

In August of this year, Governor Patrick signed into law Chapter 240 of the Acts of 2010 (An Act Relative to Economic Development Reorganization). Section 173 of this act contains the Permit Extension Act, which provides that an "approval" relating to the use or development of real property that was in effect or existence between August 15, 2008, and August 15, 2010 (tolling period) will be extended for two years beyond its otherwise applicable expiration date. On November 9, the Massachusetts Executive Office of Housing & Economic Development posted the Permit Extension Act Guidance Document on its Web site . The guidance document answers common questions about the law and describes its applicability to a variety of potential scenarios.

FIRM NEWS & NOTES

At the Podium

Construction attorneys Gregory R. Faulkner and Martin A. Onorato delivered a presentation at the Higher Education Real Estate Lawyers (HEREL) Eighth Annual Conference on October 14, 2010, in Princeton, New Jersey. Their session, "Managing Liability Issues in Green Buildings and Sustainable Construction," concentrated on how to allocate risk and assess responsibility in the design and construction of green buildings. HEREL is an organization of lawyers committed to providing continuing legal education opportunities for attorneys who practice real estate and construction law at higher education institutions.

The chair of the Construction Law Practice Group, Dennis C. Cavanaugh, recently participated in two panels on alternative dispute resolution. Mr. Cavanaugh was a panelist on the "Arbitration Discussion" panel at the Pearlman 2010 conference on September 9, 2010, at Gig Harbor, Washington. He also moderated the Connecticut Bar Association's Construction Practice and Federal Practice Section's panel "Keeping Construction Arbitration from Morphing into Litigation" on September 29, 2010, at Central Connecticut State University in New Britain, Connecticut.

Edward S. Hill, a partner in the Hartford Real Estate Group, spoke as part of a panel at the program Issues and Impacts — Southern New England Commercial Real Estate, sponsored by the Connecticut Chapter of Professional Women in Construction on November 3, 2010, in Hartford, Connecticut. The panel focused on critical issues for commercial real estate in Connecticut, examining what adjustments need to be made for current and anticipated market conditions. Professional Women in Construction is an organization committed to advancing professional, entrepreneurial, and managerial opportunities for women and other nontraditional populations in construction and related industries.

The chair of the Real Estate Litigation and Title Insurance Group, Lawrence P. Heffernan, recently was a featured speaker at the Massachusetts Continuing Legal Education program Understanding Lien Priorities. Mr. Heffernan presented the litigator's view of liens, challenges to liens, and lien priority, including equitable subrogation. Mr. Heffernan also addressed challenges to mortgage assignments and foreclosures pending in the federal district court class action, and the widely followed case, *U.S. Bank v. Ibanez*, pending before the Massachusetts Supreme Judicial Court.

The Northern New England Chapter of the American Planning Association held its annual planning conference in Portsmouth, New Hampshire, October 7 and 8. As part of the conference's track on integrating land use, natural resources, and transportation planning, Boston office land use attorney Matthew J. Lawlor delivered a presentation on selected legal issues raised by form-based codes adopted in New England. His presentation was in conjunction with a background presentation on form-based codes and New England examples by George Proakis, planning director for the City of Somerville, Massachusetts, and with a how-to presentation on the downtown Dover, New Hampshire, form-based code district by Chris Parker, the Dover planning director, and Steve Whitman, an architect and urban designer with Jeffrey Taylor Associates. Among the form-based codes reviewed and analyzed concerning characteristics and legal issues were the Hamilton Canal District in Lowell, Massachusetts, and the Tri-Town Development Area in Andover, Tewksbury, and Wilmington, Massachusetts, two codes on which Mr. Lawlor has worked for the firm.

In Print

LandLaw attorneys Brian W. Blaesser and Amanda S. Eckhoff recently published Part 2 of "The Greening of the Litigation Landscape" in *Retail Law Strategist*, a publication of the International Council of Shopping Centers (ICSC). The article is the second in a three-part feature and explains the two types of green initiatives impacting private development—

voluntary programs that provide incentives for green construction and mandatory programs requiring compliance. Mr. Blaesser and Ms. Eckhoff discuss how local green initiatives may affect allocation of responsibilities and risk among members of a real estate development team. They use one of the first-in-the-country "green" litigation cases, *Shaw Development, LLC v. Southern Builders, Inc*., as an example of how these risks and responsibilities may lead to litigation during development of a green retail building. They also examine the American Institute of Architects' forms B101 (2007) (Standard Form Agreement Between Owner and Architect) and B214 (2007) (Standard Form of Architect's Services: LEED Certification), intended to better allocate the responsibilities among development team members during construction of a green building and to reduce the risk of litigation. The authors recommend steps that members of a development team can take to reduce risk of litigation and ensure that members have a clear understanding of their roles, responsibilities, and degree of risk when undertaking a green retail construction project.

Smart growth innovations to make development more affordable and sustainable are taking a new direction by repurposing recycled shipping containers. Land use and real estate attorney Joel C. Norwood discussed the possibilities of building with shipping containers in the article "Housing Innovations: Shipping Containers," published in the July-September 2010 issue of Connecticut Planning, the quarterly newsletter of the Connecticut Chapter of the American Planning Association. The article highlights lessons learned from a roundtable discussion Mr. Norwood organized about the development of recycled metal shipping containers in May 2010 and whether these materials can make cities more affordable and sustainable.

In Attendance

Construction attorneys Gregory R. Faulkner and Martin A. Onorato participated in the 15th Annual Robert J. LeFloch Memorial Golf Outing, held at Racebrook Country Club in Orange, Connecticut, on September 21. Robinson & Cole was a silver sponsor of the event.

Construction attorneys Peter E. Strniste, Jr., and Todd R. Regan participated in the 16th Annual Construction Institute Golf Classic, held at Tunxis Plantation Country Club in Farmington, Connecticut, on September 15. For a photo of the event, please click here.

Construction attorneys Dennis C. Cavanaugh, Peter E. Strniste, Jr., and Todd R. Regan attended the Associated General Contractors of Connecticut's Industry Recognition & Awards Dinner, held at the Aqua Turf in Plantsville, Connecticut, on October 12.

Of Note

Construction chair Dennis C. Cavanaugh was named president-elect of the national board of directors of the University of Connecticut Alumni Association for the 2011 to 2012 term. Mr. Cavanaugh's term as president of the association will become effective as of June 2011.

At the opening of the new Artist in Residence Studio at the Weir Farm National Historic Site (WFNHS) in Wilton and Ridgefield, Connecticut, the National Park Service (NPS) and the Weir Farm Art Center (WFAC) recognized real estate attorney Charles E. Janson for providing twelve years of *probono* legal services to their public/private partnership. Mr. Janson's services, as a trustee of WFAC and an attorney with Robinson & Cole, resulted in the Art Center's acquisition, with the assistance of Charles F. Martin III, of over 110 acres of land adjoining WFNHS. Thirty-seven of the acres are original historic farm lands of American artist Julian Alden Weir, which includes his farm, home, and studio. More recently, Mr. Janson's work included funding agreements between NPS and WFAC, linking private donations with grant monies of public Save America's Treasures to result in the construction of the Studio. The WFAC is a private nonprofit partner with the NPS and WFNHS, the only national park in Connecticut and the only national park dedicated to preserving and interpreting the life and work of an American painter. WFAC

manages the artist in residence program, which has hosted 130 working artists to date. Artists from around the world are selected to spend a month living and creating art at Weir Farm.

Robinson & Cole received a favorable decision for its client in an eminent domain proceeding captioned *Gyrodyne Company of America, Inc. v. The State of New York*. As reported in the *New York Law Journal*, a Court of Claims judge has added nearly $100 million to the amount that the private owner of 245 acres of property on Long Island should receive through an eminent domain proceeding. Together with statutory interest, the ultimate award should be in excess of $140 million. Gyrodyne Company of America initially received $26.3 million for the property, which was taken for a research and development project on the State University of New York's Stony Brook campus. Joseph L. Clasen argued that his client was not afforded a fair price during condemnation of its property in 2005, based on the highest and best use of the land. Judge Lack agreed and rejected the state's valuation of the property according to the highest and best light industrial use of the property.

In addition to Mr. Clasen, the Robinson & Cole team included Dwight H. Merriam, Thomas J. Donlon, and Sue E. Silverman. The article "Court Adds $100 Million for Eminent Domain Taking" by Joel Stashenko appeared in the *New York Law Journal* on July 8, 2010.

The Mutual Housing Association (MHA) of Southwestern Connecticut, Inc. recently dedicated the completion of 100 Maple Avenue in Stamford, the MHA's first property built under the federal Neighborhood Stabilization Program. Mayor Michael Pavia and Department of Economic and Community Development Commissioner Joan McDonald attended the ribbon-cutting ceremony with other federal and state officials. MHA acquired the property in foreclosure with assistance from Bank of America. Charles F. Martin III and Steven L. Elbaum, real estate partners in Robinson & Cole's Stamford office, provided legal services pro bono.

---

[1] *LVI Environmental Services, Inc. v. Yale University*, 2010 Conn. Super. LEXIS 2232, Docket. No. CV-09-6005098 (Conn. Super. Ct., Sept. 2, 2010)

For more information, please contact Dennis C. Cavanaugh, Chair of the Construction Law Group, in our Hartford office at dcavanaugh@rc.com.

ROBINSON & COLE LLP
ATTORNEYS AT LAW

Attorney Advertising


CONSTRUCTION UPDATE
Solutions

NOVEMBER 2010

Recent Connecticut Superior Court Decision Limits Subcontractor's Rights Under Connecticut's Fairness in Financing Statute

By Elizabeth K. Cunha

Connecticut's Prompt Pay Act provides that when an owner on a construction project receives notice from a contractor, subcontractor, or supplier, in a direct contractual relationship with the owner, that it has not been paid, the owner is required to place the funds at issue in an interest-bearing escrow account. An owner who fails to place the funds in an escrow account following timely notice is liable for certain punitive interest. In addition, an owner who is found to have withheld payments in bad faith is liable for an additional 10 percent in damages. The statute, however, is unclear as to whether this right applies to subcontractors not in a direct contractual relationship with the owner. A recent Superior Court decision analyzed this issue and determined that, while the statute allows a subcontractor not in a direct contractual relationship with the owner to bring a cause of action against the owner, it does not allow the subcontractor to require that the owner place the funds at issue in escrow or hold the owner liable for punitive interest and the additional punitive damages upon its failure to do so.[1]

In making its decision, the court analyzed the language and construction of Connecticut's Fairness in Financing Laws. Connecticut General Statute § 42-158j requires "that the owner pay any amounts due any contractor, subcontractor or supplier in a direct contractual relationship with the owner, whether for labor performed or materials furnished, not later than thirty days after the date any written request for payment has been made by such contractor, subcontractor or supplier." Section 42-158j(c)(1) of the same statute goes on to state that if the owner fails to make payment, "*in accordance with the requirements of subdivision (1) of subsection (a) of this section* or any applicable construction contract, such contractor, subcontractor or supplier shall set forth its claim against the owner through notice by registered or certified mail." Subsection (c)(4) further describes the owner's obligation, stating the following:

> Ten days after the receipt of any notice *specified in subdivisions (1)(2)(3) of this subsection*, the owner, contractor, or subcontractor or supplier, as the case may be, shall be liable for interest on the amount due and owing at the rate of one per cent per month....In addition, such owner, contractor, subcontractor or supplier, upon written demand from the party providing such notice, shall be required to place funds in the amount of the claim, plus such interest of one per cent per month, in an interest-bearing escrow account in a bank in this state, provided such owner, contractor, subcontractor or supplier may refuse to place the funds in escrow on the grounds that the party making such demand has not substantially performed the work or supplied the materials according to the terms of the construction contract.

The court noted that the language of the statute indicates that subsections (c)(1) and (c)(4) refer directly to subsection (a)(1) of the statute. Thus, the court stated that the right to demand payment pursuant to subsection (c)(1) and the requirement that the owner deposit funds in an interest-bearing account pursuant to subsection (c)(4) only applies to parties to whom the owner is required to make payment under subsection (a)(1), that is, a contractor, subcontractor, or supplier in a direct contractual relationship with the owner.

Further, the court noted that subsection (e) of the statute is separate and distinct from subsection (a)(1) and, thus, does not impact the rights and obligations under subsections (c)(1) and (c)(4). Subsection (e) provides that "[e]ach owner that enters into a contract under this section and fails or neglects to make payment to a contractor for labor and materials supplied under a contract, shall, upon demand of any person who has not been paid by the contractor for such labor and materials...promptly pay the person for such labor or materials." Subsection (e) further states that "[i]f the owner fails to make such payment, the person shall have a direct right of action against the owner in superior court for the judicial district in which the project is located. The owner's obligations...shall be limited to the amount owed to the contractor by the owner for work performed under the contract at the date such notice is provided."

Based on the language and construction of the statute, the court held that only a contractor in direct contractual relationship with the owner may require that the owner place funds in escrow. Subsection (e) provides for a separate judicial remedy for subcontractors not in a direct contractual relationship with the owner to seek payment by filing a complaint directly against the owner, but it does not allow for a subcontractor, who is not in a direct contractual relationship with the owner, to demand that the owner place funds in escrow or hold the owner liable for additional punitive interest and damages upon the owner's failure to do so.

The true legislative intent of the statute is difficult to discern from the legislative history. It is possible that the statute was originally intended to grant subcontractors, not in a direct contractual relationship with the owner, the right to require that the owner place the funds in escrow and to hold the owner liable for additional punitive interest and damages upon the owner's failure to do so. Therefore, it is possible that the statute will be revised in the future to broaden its scope. However, in the meantime, while this case is not binding, it does reflect one court's reading of the statute, which other courts may find persuasive. Until the legislature alters the language of the statute, the outcome of this case should be considered when determining the rights of subcontractors not in a direct contractual relationship with the owner to demand payment under Connecticut's Fairness in Financing Laws.

---

[1] *LVI Environmental Services, Inc. v. Yale University*, 2010 Conn. Super. LEXIS 2232, Docket. No. CV-09-6005098 (Conn. Super. Ct., Sept. 2, 2010)

ROBINSON & COLE LLP
ATTORNEYS AT LAW

Attorney Advertising


CONSTRUCTION UPDATE
Solutions

NOVEMBER 2010

The 2009-2010 Legislative Session Brings Substantial Changes to the Massachusetts Workplace

By Alida Bogran-Acosta

In the past few months, the Commonwealth of Massachusetts has enacted, amended, or implemented several statutes that will have, or already have, a substantial impact on the workplace. The legislation affects initial applications for employment, criminal background checks, personnel records, no-texting-while-driving laws, and workplace harassment (distinct from the antiharassment legislation of federal and state antidiscrimination statutes), and there is even a new cause of action for failure to provide workers' compensation insurance.

Extensive Reform of the Criminal Offender Record Information (CORI) Act

In August 2010, Governor Deval Patrick signed legislation that drastically amends the CORI Act. Most of the amendments relate to the criminal background information that will be available from a yet-to-be-created Criminal Justice Information Services Department as well as the procedures to request, safeguard, and dispose of the information. The new system will be Internet-based and require employers who request five or more criminal history checks per year to have a written CORI policy. Employers will also be required to provide applicants with a copy of their criminal history record if they have questions for the applicant about information on the record or if they intend to deny employment based on information contained in the record. These amendments are effective February 6, 2012.

However, as of November 4, 2010, employers are prohibited from asking any questions about an applicant's criminal record on an "initial written application form." There are only two exceptions to this prohibition: (1) if the criminal conviction disqualifies the applicant from the position under federal or state law or regulation or (2) if the employer is prohibited by federal or state law or regulation from employing an applicant with a criminal conviction. These exceptions generally cover individuals or agencies that provide services to children, the disabled, or the elderly.

Although it is still permissible to ask questions about criminal history during an interview, employers must make sure they comply with existing law and not ask questions already prohibited. An employer cannot ask an applicant questions about the following:

- Arrests that did not result in conviction
- Sealed records

- Crimes committed as a juvenile unless the individual was charged as an adult
- Convictions for misdemeanors where the date of conviction predates the inquiry by more than 5 years
- First convictions for misdemeanors involving drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbing the peace

Employers are still prohibited from asking applicants to provide a copy of their CORI record to the employer.

Massachusetts employers (except for those covered under the two exceptions noted above) must delete any questions about criminal history from their initial applications for employment before November 4, 2010.

Personnel Records: Notice of Negative Information and Access by Employee

As of August 2010, an amendment to the Personnel Record Act, M.G.L. c. 149, § 52C, requires that an employer notify employees whenever information that "is, has been used or may be used" to negatively affect them has been placed in their personnel record. The notice must be provided within 10 days of the information being placed in the file. Employees can then request access to their personnel file by submitting a written request. The employer must allow employees the opportunity to review their file within 5 business days of receiving their request.

The statute defines "personnel record" as "a record kept by an employer that identifies an employee, to the extent that the record is used or has been used, or may affect or be used relative to that employee's qualifications for employment, promotion, transfer, additional compensation or disciplinary action." To trigger the notice obligation, employers must first determine whether the information is a "personnel record." If so, the document must be "placed" in the file. If the information is "negative," the employee must be informed within the 10-day period.

Other than the review triggered by the notice of negative information (which does not count towards the annual limit), employees are now limited to two reviews of their personnel record per year. As with the notice of negative information, employees must submit a written request and the employer must grant access within five business days.

Managers must be made aware that any employee-related communications with the Human Resources Department (or with other supervisors) that contain negative information about an employee may not be confidential but may become part of the employee's personnel record. Employers should develop procedures to make sure that (1) the appropriate information be included in the employee's personnel record, (2) notice to the employee be given in a timely manner, and (3) access to the record be given within the proper timeframe.

Fines for noncompliance range from $500 to $2,500 per violation. The Attorney General's Office is responsible for the enforcement of the statute.

Data Privacy Law — Security and Breach Notification

In response to highly publicized reports of theft of confidential consumer information, Massachusetts enacted the Data Privacy Act. On March 1, 2010, the regulations implementing the act became effective. The regulations apply to those who collect and retain personal information about Massachusetts residents for commercial purposes and for purposes of employment.

Personal information is defined as the following:

"A Massachusetts resident's first name and last name or first initial and last name in combination with any one or more of the following data elements that relate to such resident:

(a) Social Security number;

(b) driver's license number or state-issued identification card number; or

(c) financial account number, or credit or debit card number, with or without any required security code, access code, personal identification number or password, that would permit access to a resident's financial account[.]"

Information obtained from public records is excluded from the definition of "personal information."

Given the breadth of the definition, it is clear that employment records such as payroll and wage statement records (which contain names and social security numbers), direct deposit forms (which include names and bank account numbers), 401K statements (which include names and bank account numbers), and other similar information are covered by the statute. Consequently, employers have an obligation to protect the security and integrity of the information.

To do so, employers must have a comprehensive, written information security program (WISP) that performs the following:

- Designates one or more individuals who are responsible for the security program
- Assesses reasonable risk of breach, both by internal and external sources
- Evaluates security measures, including authentication protocol, access to information, user ID requirement, encryption, monitoring, and firewall/virus protection
- Conducts periodic employee training and employee monitoring
- Institutes disciplinary action for employee violation

An employer who uses third-party vendors has the obligation to select and retain vendors "capable of maintaining appropriate security measures."

Compliance with the statute is enforced by the Office of the Attorney General.

For additional information, please review the following publications by the Office of Consumer Affairs and Business Regulation:

- Small Business Guide (http://www.mass.gov/Eoca/docs/idtheft/sec_plan_smallbiz_guide.pdf)
- Compliance Checklist (http://www.mass.gov/Eoca/docs/idtheft/compliance_checklist.pdf)
- Regulations (http://www.mass.gov/Eoca/docs/idtheft/201CMR1700reg.pdf)

Prevention of Abuse and Harassment — No Longer Limited to Domestic Relations

"An Act Relative to Harassment Prevention Orders" became effective in May 2010. This new

statute allows victims to obtain a harassment prevention order if they have been subjected to "at least three acts of fear, intimidation, abuse or property damage" or who "by force, threat or duress" involuntarily engage in sexual relations.

Though not explicitly workplace-related, this statute does not require a familial or household relationship between the parties; it applies regardless of the relationship of the parties.

The proceeding to obtain a prevention order is a civil matter, and remedies include a no-contact order, an order to stay away from the plaintiff's home or workplace, and monetary compensation; however, a violation of a prevention order is criminal in nature, with penalties of up to $5,000 and/or imprisonment of up to 2½ years.

No Texting or E-Mailing While Driving — Even at a Red Light

The Massachusetts Safe Driving Act prohibits drivers from using a "mobile telephone, or any handheld device capable of accessing the internet, to manually compose, send or read an electronic message while operating a motor vehicle." The prohibition does not apply if the vehicle is stationary and is not located in a part of the public way intended for travel. Fines range from $100 for a first offense to $500 for a third or subsequent offense.

The act became effective on September 30, 2010. Employers should review their policies to ensure compliance with the new restriction.

A New Private Right of Action for Enforcement of the Workers' Compensation Act

An amendment to the Workers' Compensation Act allows any three private citizens to bring a civil action against an employer for failure to provide workers' compensation insurance.

To bring the claim, the plaintiffs must provide the employer and any insurer with notice of their intent to sue, together with the substance of the allegations, 90 days prior to filing the lawsuit. To prevail, the plaintiffs must show, by a preponderance of the evidence, that the employer failed to comply with the law.

If the plaintiffs win, the employer is liable for *all* of the following:

- The lesser of 25 percent of the amount the employer failed to pay or $25,000
- Compensatory and liquidated damages equal to the lesser of 25 percent of the amount that should have been paid or $25,000
- Reasonable attorney's fees and costs

There is a six-year statute of limitations to bring an action under this new provision.

This provision greatly increases exposure for misclassification of workers as independent contractors. Any employer who does not provide workers' compensation insurance to some workers under the assumption that they are independent contractors should conduct a very rigorous review to ensure that the workers are properly classified. Keep in mind that the 2004 amendments to the Massachusetts Independent Contractor Law make it extremely difficult to truly qualify as an "independent contractor" in the Commonwealth.

ROBINSON & COLE LLP
ATTORNEYS AT LAW

Attorney Advertising


CONSTRUCTION UPDATE
Solutions

NOVEMBER 2010

A Reexamination of Pass-Through Claims in Connecticut

By Elizabeth K. Cunha

In August 2010, a Hartford Superior Court judge issued a decision that confirmed the very limited circumstances under which a public works contractor may pass through the claims of its subcontractors when asserting a claim against the State of Connecticut.[1] The decision arose from a dispute between Worth Construction Company and the Connecticut Department of Public Works on a project involving additions and renovations to a hall on the campus of Southern Connecticut State University. Worth, while working under a general construction contract with the State, encountered delays and incurred additional costs for which it claimed the State was responsible. Included in its claims were costs incurred by its subcontractors. Worth then brought suit against the State to recover; the State moved to dismiss the pass-through claims on the grounds that the subcontractors' claims were prohibited by sovereign immunity.

In Connecticut, sovereign immunity generally prohibits actions against the State, except where the State has consented to be sued. Such consent may be given, and sovereign immunity may be waived, by acts of the legislature. Connecticut General Statutes § 4-61 provides such a waiver for public works construction contractors. The statute provides that anyone who has a contract with the State on a public works construction project may bring an action against the State for all claims arising "under the contract." It does not expressly provide such a right to subcontractors who are not in a direct contractual relationship with the State, and courts have consistently interpreted the statue very narrowly to preclude subcontractors' claims unless the prime contractor is actually liable to the subcontractor. Therefore, contractors attempting to pass through the claims of subcontractors on public works projects face a significant legal hurdle in Connecticut.

In the Worth decision, the Court reanalyzed existing Connecticut decisions that addressed whether a contractor may pass through its subcontractor's claims under the limited waiver of sovereign immunity provided by § 4-61. The Court ultimately held that pass-through claims are permitted only if the general contractor admits *unconditional* liability to the subcontractor, liquidates its liability to a sum certain, and incorporates subcontractors' claims into its own. The Court conceded that the unconditional nature of the admission of liability is harsher than federal law on pass-through claims, but it found the requirement necessary under Connecticut law. To hold otherwise allows the contractor to make its liability to its subcontractor contingent on the amount recovered against the State in the future, typically in the form of a liquidating agreement. In other words, without such a requirement, the Court held that the claim does not truly belong to the general contractor but instead still belongs to the subcontractor who is simply litigating it against the State through its proxy, the general contractor.

The Worth decision both summarizes and reinforces the existing rule in Connecticut that a

contractor may not pass through a subcontractor's claim to the State under a liquidating agreement that allows the contractor to extinguish virtually all of its obligations to the subcontractor. In applying this rule, the Court examined two liquidating agreements presented by Worth in support of two subcontractor's claims and found one to be contingent (and therefore ineffective for pass-through purposes) and the other to be unconditional. The ineffective liquidating agreement contained language that released the contractor from all liability to the subcontractor upon payment to the subcontractor of the amount recovered from the State. The Court found that this language limits the contractor's liability to whatever amount it is able to recover from the State (which was, most likely, Worth's intent). By rendering the admission of liability conditional, the Court refused to permit the pass-through claim under § 4-61. In contrast, the other liquidating agreement contained no provision that permitted the contractor to extinguish virtually all of its liability to the subcontractor. Therefore, the contractor was obligated to pay the subcontractor the entire liquidated amount of its liability. The Court held that the unconditional nature of this liquidating agreement made the pass-through claim presentable to the State under § 4-61.

Until the Connecticut legislature addresses this issue, subcontractors and contractors have to be mindful that the State will not accept pass-through claims under a liquidating agreement that allows the contractor to extinguish virtually all of its obligations to the subcontractor. The Connecticut Bar Association Construction Law Section, of which four of our attorneys, Dennis C. Cavanaugh, Gregory R. Faulkner, Martin A. Onorato, and Christopher J. Hug , are executive committee members, for years has been unsuccessfully seeking a legislature remedy which would permit pass-through claims against the state.

---

[1] *Worth Construction Co. v. State of Connecticut Department of Public Works*, Docket No. CV-075011827 (August 10, 2010).