



IN THIS ISSUE

Federal Court Upholds OSHA Multi-Employer Policy.....2

Enforcing Limitation of Liability Clauses.....3

The Economic Loss Rule in Nevada.....4

Recent EPA Action on Climate Change4

Are You Ready for Stimulus Act Challenges?5

Utah Legislative Summary6

Colorado Decision Recognizing Claim for Impaired Bonding Capacity7

Colorado: Governor Signs New Law on Independent Contractors7

Construction Case Alerts.....8



The Employee Free Choice Act: Restoring the Middle Class Dream or Bolstering the Influence of Unions?

**By: Steven M. Gutierrez
Denver Office**



The Employee Free Choice Act (EFCA) is proposed federal legislation that seeks to eliminate secret ballot elections for union representation and seeks to impose collective bargaining agreements upon employers and employees. According to some sources, EFCA could become law in a few months. The question remains: Is the true purpose behind EFCA to restore the American middle class and fix the American economy, as its advocates claim? Or, is EFCA designed to empower politically connected labor unions by swelling their membership rosters?

What is the EFCA?

EFCA is legislation that seeks to amend the National Labor Relations Act (NLRA). The NLRA was established with two primary goals in mind:

- (1) To ensure that employees may decide whether or not to join a union without coercion from either their employer or the union; and
- (2) To ensure the fair negotiation of labor contracts.

EFCA makes dramatic changes to the original NLRA goals and will make it easier for employees to form, join, or assist labor organizations. EFCA also provides for mandatory injunctions against unfair labor practices during organizing efforts, and for other purposes.

What is the Current Law?

As it stands now, the NLRA requires a union attempting to organize to first obtain signed authorization cards from the employees in order to prompt a secret ballot election. Importantly, there is much freedom in the

manner in which these cards are currently collected. Once a union obtains cards from at least 30 percent of the employees in the proposed bargaining unit, the union must then petition the United States National Labor Relations Board (NLRB) to direct that a secret ballot election be held within a specific time period. During that period, an employer typically campaigns against the formation of the union and the union, of course, campaigns in favor of formation.

If a majority of the employees who vote in the secret ballot election vote in favor of the union, the union becomes the exclusive bargaining unit for the employees. Although an employer is then compelled to bargain in good faith with the union in an effort to work out a collective bargaining agreement, employers are not required to reach an agreement on any proposal under current law.

Elimination of Secret Ballot Elections

EFCA essentially eliminates the secret ballot election, despite polls showing that the public favors secret ballot elections. The new law would allow for "card-check" certification of unions, despite the Supreme Court's declaration "that cards...[are] inferior to the election process for determining employee sentiment." Thus, once a majority of employees sign the authorization cards, a union is automatically recognized as the exclusive bargaining unit for employees. The NLRB would be required to certify a bargaining representative without directing an election. As a result, the employer could very well have no chance to argue why a union is not the best choice for its employees.

Mandatory Arbitration for Collective Bargaining

EFCA will permit a union to demand that an employer begin bargaining within ten days of

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certification of the union. Then, if the union and employer cannot agree upon the terms of the first collective bargaining contract within 90 days, either party may request federal mediation – which, if not successful within 30 days, could then lead to binding arbitration.

This is contrary to current law, under which an employer cannot be forced to agree on a collective bargaining agreement. Again, employers are only required to bargain in good faith. EFCA, as proposed, provides no criteria by which the arbitrators are to make their determinations and the arbitrators are accountable to no one. Under EFCA, if a federal arbitrator determines the terms of the agreement, the arbitrator is not bound by any prior negotiations and the employees will lose their current right to ratify the terms of the agreement. Both sides could end up with terms they do not like.

Further, binding arbitration is only mandatory for the first collective bargaining agreement. If one side is particularly stung by the results of the first arbitration, “then all bets may be off” in subsequent negotiations. Employers view this change as unnecessarily involving a neutral party who is not familiar with either an employer’s business or its culture.

Severe Penalties for Employer Violations

Finally, EFCA would impose penalties on employers who are found to have violated the NLRA during the union organizing campaign. Employers who discriminate against an employee during a union organizing campaign—because of that employee’s union activities—must pay liquidated damages amounting to three times the employee’s back pay.

The Act also would impose a \$20,000 penalty upon employers for each employer violation of the proposed legislation if the NLRB and/or a court deems the violation willful or repetitive. In contrast, current law simply requires an employer found to have violated the NLRA to hold another election or, in the case of discrimination, to pay back pay less any interim earnings.

Imminent Action on the Horizon

The first few months of the new President’s administration reveals that President Obama and fellow Democrats in Congress tend to strongly advocate pro-labor initiatives.

Best Practices to Prepare

Open shop employers who seek to resist unionization in the workforce can take the following action to prevent unionization:

1. Contact political leaders;
2. Review current wage and benefit programs to ensure they are competitive;
3. Fully communicate with employees in an effort to provide them with a voice that fosters good morale;
4. Always reward employees for productivity;
5. Find innovative ways to help foster a healthy work environment that encourages the dignity and respect of both the employees and the management team
6. Implement an aggressive training program reaching all levels of management that teaches managers to distinguish fact from myth, to understand the legal risks of certain conduct, and to educate the workers about the drawbacks of union membership.

Employers who seek to maintain a union-free workplace should understand that it is critical to implement proactive and aggressive strategies now. Employers are encouraged to reach out and learn from experts about how to formulate the necessary strategy to address EFCA and other pro-labor initiatives that are sure to be proposed, debated, and perhaps, even become law in the months or years ahead.

Federal Court Upholds OSHA Multi-Employer Policy

By: **David Zimmerman**
Salt Lake City Office



A recent ruling by a federal circuit court upheld an Occupational Safety and Health Administration (OSHA) policy of citing general contractors for safety violations committed by their subcontractors. For several years, the Secretary of Labor has maintained a policy known as the “Controlling Employer Citation Policy” or “Multi-Employer Policy.” This policy provides that OSHA may issue citations to general contractors at construction sites who have the ability to prevent or abate hazardous conditions created by a subcontractor through the reasonable exercise of supervisory authority, regardless of whether the general contractor created the hazard or whether the general contractor’s own employees were exposed to the hazard.

In this case, Summit Contractors was a general contractor for the construction of a college dormitory in Little Rock, Arkansas.

Summit subcontracted the entire project and had only four employees on the construction site: a project superintendent and three assistant superintendents. Summit subcontracted the exterior brick masonry work to All Phase Construction. On three separate occasions, Summit’s project superintendent observed All Phase employees operating without personal fall protection on scaffolds that lacked guard rails and advised All Phase to correct this problem. However, when All Phase’s employees moved the scaffolds to another location, they would again work without fall protection and without guard rails.

In June 2003, the OSHA compliant safety and health officer observed All Phase employees working on scaffolds over 10 feet above the ground without fall protection or guard rails, in violation of OSHA regulations. None of Summit’s employees were exposed to any hazard created by the violation. Nonetheless, the OSHA officer issued Summit a citation for violation of OSHA regulations,

based on the controlling employer policy.

After an administrative law judge upheld the citation, Summit appealed to the Occupational Safety and Health Review Commission (“OSHRC”). OSHRC agreed with Summit that OSHA regulations require each employer to protect only its own employees and therefore preclude implementation of the controlling employer citation policy. On that ground, OSHRC vacated the citation. The Secretary of Labor appealed to the United States Circuit Court of Appeals, Eighth Circuit.

At issue before the court was interpretation of the following regulation implemented under the OSHA Act.

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

29 CFR § 1910.12(a).

Analyzing the grammar of this section, the court discussed whether an employer has a duty to protect its employees’ “employment” or “places of employment.” The court found that protecting employees’ “employment” is limited to requiring employers to protect their

CONTINUED ON PAGE 3

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The Limits on Limiting Liability: Enforcing Limitation of Liability Clauses

By: **Buck Beltzer**
Denver Office



As the Arizona Supreme Court recently noted, “Our law generally presumes, especially in commercial contexts, that private parties are best able to determine if particular contractual terms serve their interests.” Yet, recent activity across the country shows that courts are divided on the extent to which they will agree to follow this rule to enforce limitation of liability provisions negotiated between sophisticated parties.

Parties to construction and design contracts routinely rely on limitation of liability clauses to limit their potential financial exposure in the event that the project does not go as expected. Such clauses make it commercially practicable for designers to undertake certain types of services for limited compensation, without worrying about liability for potentially catastrophic damages later.

Some courts have recently upheld limitation clauses, while other courts have struck them down. While the difference in approach

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own employees. However, the court found that the second phrase, which requires an employer to protect his employees’ “places of employment” does not preclude the interpretation by the Secretary of Labor under its controlling employer policy.

Interestingly, one of the three judges that heard the case disagreed with the decision. That judge found the court’s analysis of the regulation to be simply wrong. Further, the court was troubled because “it is impossible under the OSHA Act for even the most sophisticated general contractor to recognize violations by specialized subcontractors, many of whom are larger employers than the general or the prime contractor.” Perhaps the dissent opens the doors for a potential appeal to the United States Supreme Court. There is no indication whether Summit will appeal.

Whether the OSHA Act is implemented and enforced by OSHA, or a state agency under delegation of OSHA’s regulatory authority, contractors should anticipate that the controlling employer policy (or, multi-employer policy) will be readily enforced on construction job sites.

can frequently be explained by differences in state law and fact scenarios, recent court activity does place an increased burden to either draft limitation of liability clauses more carefully or to price the risk of large potential liability into their contracts, or both.

Limitation of Liability Clauses

Most often, limitation of liability clauses impose a monetary financial limitation on the party’s ability to recover money damages against the other such as limiting liability to one of the following:

- The amount of the professional’s fee or some percentage of the fee;
- The amount of insurance proceeds; or
- A negotiated number appropriate in light of the party’s contribution to the project, its fee, and the possibility for large damages arising from services.

Historical Trends

Over the last fifteen years, courts that have struck limitation of liability clauses were a limited minority or had extreme cases. Courts in Alaska and Nebraska used state-specific anti-indemnity statutes as the sword to pierce the limitation of liability shield. Specifically, the courts determined that it was against the public policy of the state or a specific state anti-indemnity statute to allow a party to contract away responsibility for its own negligent or intentional actions. Naturally, as more states have passed anti-indemnity legislation, more courts have used those anti-indemnity statutes to strike limitation of liability clauses.

Now: Invalidating Clauses

Last year, the Georgia Supreme Court determined that state’s anti-indemnity statute barred a contract clause limiting the liability of an engineer to the amount of the engineer’s total fee for the project. The court determined that Georgia law prohibited a party from contracting away liability for its own sole negligence. The court determined that the limitation of liability clause violated Georgia law because it shifted all liability for damages above the engineer’s total fee to the developer, “no matter the origin of the claim or who is at fault.”

Similarly, last month, a Florida court of appeals ruled that a liability limiting clause did not preclude tort-based negligence claims asserted by a third-party. Accordingly, the court held that while a limitation of liability clause may limit a professional services

company’s exposure, public policy dictates that such a clause cannot limit the remedies available to an aggrieved party against an individual.

Now: Upholding Clauses

Arizona went the opposite direction and upheld a limitation of liability clause despite Arizona’s anti-indemnity statute. The court was persuaded by the business realities of the construction world. Specifically, it stated, “it is possible that a limitation of liability provision could cap the potential recovery at a dollar amount so low as to effectively eliminate the incentive to take precautions.” However, in this case, because the liability was limited to the amount of the consultant’s fees, the firm had a “substantial interest in exercising due care because it stands to lose the very thing that induced it to enter into the contract in the first place.”

North Carolina acted similarly and upheld a limitation of liability clause in a contract between a surveyor and contractor. Specifically, the court found that because the limitation of liability clause was different and distinct from an indemnity provision that North Carolina’s anti-indemnity statute did not apply.

Parties in some states need not worry about the enforceability of limitation of liability clauses because anti-indemnity statutes expressly allow negotiated limitations. In California, for example, the anti-indemnity statute expressly allows parties to agree “to the allocation, release, liquidation, exclusion, or limitation as between the parties of any liability (a) for design defects, or (b) of the promisee to the promisor arising out of or relating to the construction contract.”

Lessons Learned

While it is certainly difficult to predict how courts will view limitation of liability clauses in the future or to identify all of the potential caveats that courts will analyze, lessons learned from these recent cases can help parties draft enforceable clauses. Parties should consider the following:

1. Limitations of liability are more likely to withstand scrutiny than waivers of liability.
2. Limitations based on intentional acts are less likely to be upheld.
3. A clause that expressly excludes indemnity liability is more likely to be enforced (but offers the party less protection).
4. Make the level of limitation proportionate in some meaningful way to the party’s role in the project.
5. Recognize that a limitation may not be enforceable. Price the work or service to reflect the risk of a large potential liability, and consider additional insurance to cover the worst case scenario.

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Recent EPA Action on Climate Change Heats Up the Construction Industry

By: **James A. Holtkamp**
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On April 24, 2009, the EPA published in the Federal Register its much-anticipated proposed endangerment finding regarding greenhouse gas ("GHG") emissions from new motor vehicles and engines.



The proposed finding was in response to the U.S. Supreme Court's April 2007 decision in *Massachusetts v. EPA*. EPA's proposed finding, once finalized and unless Congress intervenes, will potentially subject both contractors and project owners to lawsuits regarding both construction and operation of buildings unless they comply with major source permitting rules under the Clean Air Act.

The proposed finding is issued under the Clean Air Act, which requires EPA to determine whether emissions from new vehicles and new vehicle engines "cause or contribute, to air pollution which may reasonably be anticipated to endanger public health or welfare." In the proposal, EPA broadly concludes that the endangerment analysis may include an assessment of current and future risks rather than being limited to proof of actual harm.

The proposal defines "air pollution" to include six greenhouse gases ("GHGs") – CO₂, methane, nitrous oxide, hydrogenated fluorocarbons, perfluorocarbons and sulfur hexafluoride. The proposal finds that only the first four are emissions from new motor vehicles and engines.

If finalized, the endangerment finding will trigger GHG emission limitations on new vehicles and engines. EPA insists that it would not enforce major source permitting requirements against the many small facilities and buildings that would technically become major sources of GHG emissions and that it will focus its regulation only on fossil fuel-burning power plants, refineries and other large operations. However, the Clean Air Act allows third parties to sue to force compliance with the statute in the absence of EPA enforcement. EPA cannot control how a federal court would rule in the event of a citizen's suit regarding a time-consuming, complex and very expensive pre-construction air permit for a proposed building that has the potential to emit GHGs in excess of the 250 ton-per-year statutory threshold.

The proposed endangerment finding was subject to public comment until June 23, 2009.

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Victory For Design Professionals: The Economic Loss Rule In Nevada

By: **Greg S. Gilbert**
Las Vegas Office



The Nevada Supreme Court recently established a new legal rule that protects design professionals from economic damages arising from their errors and omissions. In the past, in Nevada, design professionals may have been liable in tort for purely economic damages arising from errors or omissions in the design professionals' services. This rule may also extend to defects in the work of commercial construction contractors.

In a Mandalay Resort Group proceeding, Mandalay claimed an engineering firm's geotechnical engineering services for the Mandalay Bay project were deficient and Mandalay sued the engineering firm for associated damages. Specifically, Mandalay claimed that settlement of the soils under the foundation exceeded amounts predicted by the engineering firm and, as a result, Clark County required Mandalay to repair and reinforce the foundation before proceeding with construction. The United States District Court of Nevada, where the case was filed, certified to the Nevada Supreme Court the question of whether Nevada's economic loss doctrine precludes tort-based claims against engineers, architects, and other design professionals in construction defect cases involving commercial property. The federal court had already determined Mandalay's damages were purely economic, as opposed to damages of personal injury or property damage.

The economic loss doctrine is a judicially created rule that shields a party from tort-based liability, including punitive dam-

ages. The rule contemplates that parties in a commercial setting should negotiate and determine their risk of liability arising from their performance of a contract at the time they negotiate the contract.

Further, when the economic loss rule applies, disputes are limited to contract-based claims to enforce the expectations derived from the parties' agreement. The purpose of the rule is to balance the disproportion between contract liability and potential alleged damages. Specifically, the court in its decision stated that "cutting off tort liability at the point where only economic loss is at stake without accompanying physical injury or property damage provides... incentives and disincentives to engage in economic activity or to make it safer." The court determined that the fact that the alleged damages arising from the engineering firm's services were foreseeable did not impact its decision.

Other courts have made exceptions to this economic loss rule for intentional acts and professional negligence claims against attorneys, accountants, real estate professionals, and insurance brokers. The Nevada Supreme Court expressly refused to create a similar exception to allow tort claims for economic loss against design professionals.

Although not the issue before the court, its decision may bolster the implication to apply the economic loss doctrine to commercial construction contractors. The court indicated that when the quality of either work provided by a construction contractor or services provided by a design professional is at issue, remedies are properly addressed through contract law – not tort law. The court specifically stated it was not addressing Nevada's Chapter 40 laws governing residential construction defects.

In this proceeding before the Nevada Supreme Court, Greg Gilbert jointly represented the prevailing party. Contact Greg at (702) 669-4620 or gsgilbert@hollandhart.com.

Are You Ready for Stimulus Act Challenges?

By: **Charles R. Lucy**
Colorado Springs
Office



The American Recovery and Reinvestment Act of 2009 (Stimulus Act) stands as one of the most significant pieces of federal legislation in American history. While most of the attention regarding the Act has focused on its \$212 billion in tax relief and \$575 billion in new federal spending, the Act poses significant challenges for both government agencies and the private contractors who serve them.

Contractors should anticipate a high volume of projects and funding that will strain existing capabilities. The need for reliable subcontractors to absorb these increased demands will be at a premium and contractors will need to employ heightened due diligence procedures to weed out underperformers and comply with government subcontracting standards.

Contractors should also expect RFPs with quick turn around times and more than the normal amount of ambiguity, which will increase the risk of bidding on mostly firm, fixed-price contracts. This will inevitably lead to an increase in bid protest activities as "haste makes waste."

Contractors who do not anticipate this brave new world of government contracting stand to forfeit enormous opportunities and may be unable to sidestep significant minefields. Contractors should be aware of several factors.

Demand on Government Agencies

One of the biggest challenges for government agencies responding to the Stimulus Act will be the enormous workload demands placed on contracting officers, requirements officials, program managers, engineers, cost estimators and contract administrators, who will be expected to turn RFPs at the speed of light (by government contracting standards). In this regard, the Stimulus Act contemplates that funding will be quickly obligated to qualifying projects. Thus, in most cases the money will only be available until September 30, 2010.

Agencies are required to give preferential treatment to projects that can be completed expeditiously, and has set a goal of using 50% of Stimulus Act funding within 120 days of February 17, 2009, the date that the Act was signed into law. Although the government's initial focus will be on "shovel ready" projects in an effort to avoid some of the

problems created by a need for speed, inevitable requirements changes and contract repricing will complicate the normal contracting process.

Increased Federal Oversight

This influx of federal procurement opportunities does not come without substantial pitfalls for the unwary contractor. The level of federal oversight and enforcement will be unprecedented. A few examples are illustrative of the likely problems to be encountered:

1. **Fixed Price.** To the maximum extent practicable, all Stimulus Act contracts will be firm, fixed price and competitively awarded, placing maximum risk on potential bidders. Non-competitive contracts will be summarized and listed on a Government website, increasing the likelihood of GAO bid protests.
2. **Reporting Requirements.** Pursuant to the Stimulus Act, OMB has issued new guidelines that require accountability and transparency for all recipients of Stimulus Act funds. All contractors and grantees will be required to file quarterly reports with their contracting agency and provide detailed information on the expenditure of funds, the percentage of project completion, subcontracting information, and the creation of jobs. The provisions of the False Claims Act will apply, which increases the potential for criminal and civil penalties.
3. **Award Criteria.** The same OMB guidelines also list specific "accountability objectives" that are designed to mitigate the government's risk when entering into Stimulus Act contracts. The guidelines suggest contract award criteria, such as a contractor's ability to finance the work, complete the project on time, and finish the work within budget. All of this suggests that larger, more established companies stand to gain the lion's share of Stimulus Act work, although existing small business and 8(a) programs remain intact under the Act.
4. **Ethics Requirements.** All contracts and subcontracts in excess of \$5 million will be subject to new Code of Business Ethics requirements and all contractors will be required to self-report "significant" contract overpayments and violations of federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations, including False Claims Act violations. Failure to report can result in government-wide suspension or debarment without regard to the \$5 million contract threshold amount.
5. **Buy America.** Subject to standard trade agreement exceptions, no funds appropri-

ated under the Stimulus Act may be used for a public construction project unless all iron, steel and manufactured goods used in the project are "produced in the United States." What constitutes "manufactured goods" is conceivably quite broad.

6. **Prevailing Wage.** All laborers and mechanics employed by contractors and subcontractors on projects funded or assisted under the Stimulus Act must be paid the prevailing wage rate under the Davis-Bacon Act. Violations will be subject to Department of Labor enforcement action.
7. **E-Verify.** The Stimulus Act allows all federal contractors to postpone the use of the E-Verify electronic employment verification system until June 20, 2009. However, after that date, contractors who have their E-Verify operating agreement revoked will be subject to government-wide suspension or debarment.
8. **Accountability.** The Act creates a Recovery Accountability and Transparency Board with broad oversight powers, including the power to conduct investigations, issue subpoenas, conduct direct audits of government contractor records, and interview all officers and employees of any contractor or subcontractor receiving Stimulus Act funds. The Act has budgeted \$84 million for the Board, which will have an independent watchdog role that is separate from existing audit agencies such as DCAA, DCMA, and agency Inspector Generals. This portends much more invasive federal oversight of Stimulus Act projects, with the potential for False Claims Act prosecutions or negative contract price adjustments under standard FAR contract clauses.

Increased Contractor Accountability

A new compliance-driven regime for government contractors will be one of the central pillars of the Stimulus Package. One of the primary lessons that the government took away from the multitude of emergency contracting snafus in Iraq and Afghanistan is the need for enhanced contract oversight.

In a sign of this new emphasis on accountability for government contractors, President Obama has just issued an Executive Order requiring all federal agencies to develop guidance by July 1, 2009 for the review and identification of wasteful or non-essential government contracts. Those contracts falling into either category will be subject to modification or cancellation. The fact that President Obama expects to save \$40 billion per year from this initiative is indicative of its intended scope.

Legislative Summary: How the Law Changed for the Construction Industry

By: **Melissa A. Orien**
Salt Lake City and
Las Vegas Offices



The latest round of the legislature brought changes for the construction industry, passing bills to regulate illegal immigration and to require contractors to provide health insurance to employees. The most notable changes this year are summarized below.

Mechanic's Lien Amendments (HB 154 & SB 230)

We have become accustomed to the Utah Legislature tinkering with the State's Mechanic's Lien Statute. This year, the Legislature did not disappoint. HB 154 and SB 230 changed the law sufficiently and every contractor in the State should take note.

This year's changes are best understood by referring briefly to the statutory *quid pro quo* implemented by Utah's lien laws. Under Utah Law, a Notice of Commencement is intended to be created by the building official that issues a building permit filing with the Utah State Construction Registry (SCR). Past legislative sessions required issuing municipalities to use a uniform numbering system for building permits. However, it also allowed them to utilize a secondary building permit numbering system. Where a proper Notice of Commencement has been filed with the SCR, a subcontractor (including suppliers) is required to timely file a preliminary notice with the SCR. If a subcontractor fails to file the preliminary notice, it waives its lien rights and rights against a payment bond. Furthermore, a lien must be filed 180 days after "Final Completion," a term that is defined in the statute, and 90 days after a "Notice of Final Completion" is filed with the SCR.

HB 154 clarifies various aspects of the lien law that were ambiguous under the prior version of the statute. It changed the law to clarify that the filing of a Notice of Completion may not extend the time to file a lien beyond 180 days after Final Completion. It:

- (1) clarifies the definition of "Final Completion" when a prime contract is terminated and no certificate of occupancy is issued;
- (2) provides that an owner may file a Notice of Commencement with the SCR;
- (3) requires municipalities issuing building

permits to use a standardized numbering system exclusively;

- (4) clarifies that, if a subcontractor begins work before a notice of commencement is filed with the SCR, it has 20 days thereafter to file its preliminary notice; and
- (5) provides that if a preliminary notice attaches to an untimely notice of commencement, and a different notice of commencement is timely, the subcontractor's preliminary notice attaches to the timely notice of commencement.

SB 230 provides additional protection to subcontractors when an owner does not require its general contractor to obtain a payment bond. The statute creates a complicated phased-mechanism that requires a general contractor or owner to file a "notice of intent to file a notice of completion" 45 days before proposed completion. Then, a subcontractor can amend its preliminary notice to provide (1) its cost to complete, (2) downstream subcontractors and suppliers, and (3) a statement of all work in dispute. The subcontractor can also demand a statement of adequate assurance of performance.

This bill is an overly technical scheme and appears to offer no meaningful protection to subcontractors. By the close of a project, if the owner or the general contractor is in financial trouble, it is likely too late for additional financial assurances to offer any real protection to a subcontractor, who will likely be within days of completing its work anyway.

These revisions take effect on October 1, 2009.

Illegal Immigration Takes Effect (SB 81)

Efforts to postpone the effective date of the illegal immigration bill passed during the 2008 session failed. As a result, 2008's SB 81 takes effect July 1, 2009.

Under the bill, contractors on public jobs must electronically verify the immigration status of their workers using the federal E-Verify system. This requirement governs all contracts with public entities for "the physical performance of services within the state."

"Contractors" include subcontractors, contract employees, staffing agencies, trade unions, or any contractors regardless of tier. It does not appear that suppliers are to be included in this definition.

Contractors are not required to verify all workers, but must verify workers who meet the following three conditions:

1. New employees hired on or after July 1, 2009;
2. Who are employed in the state of Utah; and
3. Who work under contractor's supervision and direction

A contractor is only required to verify its own workers. Each lower-tier contractor must verify its own workers and must certify its own verification by affidavit to the higher-tier contractor.

It will also be unlawful for an employer to terminate a lawful employee and replace him with an illegal worker and for employers to transport an alien over 100 miles for commercial advantage.

Contractors Required to Provide Health Insurance (HB 331)

HB 331 requires contractors and subcontractors who work on state contracts to offer employees qualified health insurance. The bill applies to all design and construction contracts issued after July 1, 2009 that exceed \$1,500,000, for the prime contract, or \$750,000 for the subcontract.

An "employee" is defined as a worker who works 30 hours per calendar week and meets the employer's minimum insurance waiting period (a maximum of 90 days). The bill sets forth the requirements for a health plan to be "qualified."

The requirement does not apply if application would jeopardize receipt of federal funds, to sole source contracts, to emergency procurements, or to contracts when change orders raise the contract price above the threshold requirement. A contractor is not subject to penalty for the failure of its subcontractors to comply with the health insurance requirements.

A general contractor that is subject to the new health care requirements (GC Contract over \$1.5MM) must "demonstrate" that subcontractors with subcontracts subject to the health care requirements (Subcontracts over \$750K) are in compliance.

The statute expressly provides that a general contractor is *not* liable for penalties or health insurance costs (see below) for a subcontractor's failure to comply with the statute.

The statute requires the DFCM to promulgate rules, in conjunction with other state agencies that enter construction contracts, that specify compliance-check requirements and impose penalties for non-compliance. In addition, a contractor that fails to comply with the statutory requirements is liable to its employee for the health care costs not covered by insurance.



Lessons Learned from Colorado Decision Recognizing Claim for Impaired Bonding Capacity

By: **Kevin Bridston**
Denver Office



A recent decision made by the Colorado Supreme Court awarding a contractor damages for loss of bonding capacity provides important lessons for both contractors and owners. Virtually all public contracts, and many private contracts, require any contractor bidding for the work to provide a surety bond guaranteeing payment and performance obligations. In order to obtain surety bonds, contractors must demonstrate financial strength and viability. If a contractor lacks sufficient financial strength to qualify for surety bonds, then it is effectively foreclosed from bidding on or being awarded public contracts and at least some private contracts.

Factors Determining Bonding Capacity

There are many factors that go into a contractor's ability to obtain surety bonds. Financial strength can be measured in terms of capitalization of the company, debt, ongoing projects and track record of success. If a contractor is weak or overextended in one or more of these areas, it may find it difficult, or even impossible, to obtain bonding and as a result, obtain work.

Obviously, it may not be anyone's fault if a contractor is financially weak or otherwise unable to bond. But what if a contractor's financial weakness or inability to bond is directly attributable to the conduct of another party? For example, an owner wrongfully withholding payments on a project? Or an owner wrongfully declaring the contractor to be in default, and calling its bond? In those circumstances, can the contractor claim damages from the owner for its impaired bonding capacity?

Claims for Lost Bonding Capacity

These questions are been commonly posed in disputes between contractors and owners in Colorado and other jurisdictions. Until

recently, it was an open question in Colorado. The Colorado Supreme Court decided, in *Denny Construction v. City and County of Denver*, that a contractor can recover damages from an owner for lost profits due to impaired bonding capacity if the contractor can establish the damages with reasonable certainty.

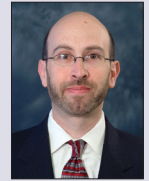
Denny was a contractor for Denver Water on the construction of an office building. Denver Water withheld certain amounts under the contract, claiming that Denny was in default under the contract. Not surprisingly, Denny's surety restricted its access to bonding and ultimately declined to provide any bonds on future projects. This effectively precluded Denny from bidding on any public contracts. Denny claimed that, as a result of its impaired bonding capacity, it had lost over \$1,500,000 in profits over a three-year period during which it was unable to bid on public projects.

The case was tried to a jury, which determined that Denver Water wrongly declared Denny to be in default on a contract. The jury awarded a total of \$1,063,000, most of which were for lost profits attributable to contracts that Denny could not bid due to impairment of its bonding capacity.

The Supreme Court upheld the jury verdict, noting the critical importance of bonding capacity to the construction world. The Court placed significant emphasis on the factual record presented by Denny (including financial statements, lists of contracts, and other documents, as well as testimony from a variety of individuals) that demonstrated that Denny was "an established and generally profitable construction company and... that ... about half its revenues came from public works projects that required bonds." Additionally, Denny's presented evidence that the loss of bonding capacity caused a significant drop in Denny's profits based on its analysis of "data from 2000 through 2005, including market and industry conditions.

Colorado: Governor Signs New Law On Independent Contractors

By: **Mark Wiletsky**
Boulder Office



A new Colorado law imposes significant penalties for misclassifying individuals as independent contractors. HB 1310 was signed into law on June 2. For willful violations, a business may be fined up to \$5,000 *per misclassified employee* for the first offense, and up to \$25,000 *per misclassification* for subsequent violations. This new law only adds to the existing misclassification pitfalls, including potential fines, penalties and liability associated with failure to pay appropriate payroll taxes, minimum wage or overtime, and benefits. Such penalties add up quickly if a large number of individuals were misclassified.

To avoid these risks, organizations should carefully consider whether those they have retained, or might retain, as contractors should instead be classified as employees. If you have doubt about the proper classification, the new law allows employers to seek "advisory" opinions from the Division of Employment and Training. But beware: failure to heed the advice in such opinions will almost certainly be used against the organization if there is a complaint down the road, which can support a finding that the misclassification was willful. Given this new law and the substantial penalties for misclassification, think twice before deciding to call someone a consultant or contractor.

Mr. Wiletsky represents public and private entities in all aspects of employment law, including wrongful discharge claims, Colorado's Wage Claim Act and defamation. Contact Mark at 303-473-2864 or mbwiletsky@hollandhart.com.



Mr. Bridston is the Construction Practice Group Manager and represents clients in a variety of construction, real estate, and commercial cases. You may contact Kevin at 303-295-8104 or kbridston@hollandhart.com.



CONSTRUCTIVE DEVELOPMENTS

THE LATEST INDUSTRY INSIGHTS FROM OUR CONSTRUCTION ATTORNEYS

JULY 2009

NEWS & EVENTS

- The University of Utah appointed Holland & Hart attorney **James A. Holtkamp** to the Advisory Board for Institute for Secure and Clean Energy.
- **Melissa A. Orien** has been appointed to the Consensus-DOCS Advisory Council.
- *Best Lawyers* named **Karen D. Dennison** as the “Reno Best Lawyers Real Estate Lawyer of the Year” for 2009.

CONSTRUCTION CASE ALERTS

Colorado: “Poor Workmanship” Is Not “Occurrence” under CGL Policy

The Colorado Court of Appeals determined that “poor workmanship” does not constitute an “occurrence” under a common CGL policy for purposes of triggering defense of the CGL carrier. Based upon accepted definitions of “occurrence” and “accident,” the court concluded, as a matter of law, that “a claim for damages arising from poor workmanship, standing alone, does not allege an accident that constitutes a covered occurrence, regardless of the underlying legal theory pled.”

General Security Indemnity Co. of Az. v. Mountain States Mutual Casualty Co. (Colo. App. 2009).

Nevada: Order Vacating Arbitration Award and Directing Rehearing Not Appealable Order

The Nevada Supreme Court determined that it did not have jurisdiction to review a district court order that (a) vacated an arbitration award, (b) directed a rehearing, and (c) denied a motion to confirm the award. The Court determined that, even though NRS 38.247(1) (Nevada’s adoption of the UAA) allowed the Court jurisdiction to review a decision vacating an arbitration award, that it did not have jurisdiction to review an order that also directed a rehearing. The Court stated that this result promoted the policy in favor of finality of arbitration awards and was supported by the plain language of NRS 38.247(1).

Karcher Firestopping v. Meadow Valley Constr. (Nev. 2009).

Colorado: Standard AIA Language Does Not Bar Claim for Non-Work Property Damaged by Fire

The Colorado Supreme Court determined that Section 11.4.5 of the AIA A201 General Conditions does not extend to non-Work property. Section 11.4.5 provides that the parties waive claims against each other for damages caused by fire “to the extent covered by property insurance obtained pursuant to this Paragraph 11.4 or other property insurance applicable to the Work.” The Court determined this clause only extended to damages to the contractual Work and does not bar claims for damages to non-Work property such as a ski resort’s claims against the contractor for damages to portions of an existing a ski lodge that were not included within the definition of “the Work.”

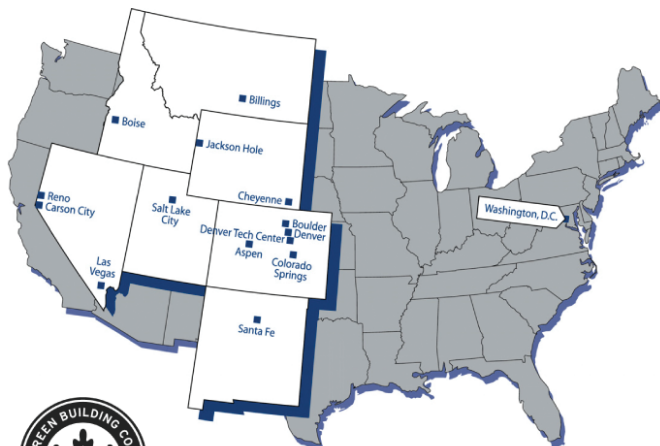
Copper Mountain, Inc. v. Industrial Systems, Inc. (Colo. 2009).

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