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CONSTRUCTIVE DEVELOPMENTS

THE LATEST INDUSTRY INSIGHTS FROM OUR CONSTRUCTION ATTORNEYS

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IN THIS ISSUE

Following the *New* LEED: *Version 3*

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With the roll-out of Version 3, the new LEED certification and professional accreditation systems are in effect.

Vocabulary. "LEED Version 3" is the umbrella of changes to the certification and professional accreditation systems. "LEED 2009" is the new version of the rating system, for example, the successor to LEED v.2.2.

Timeline.

Feb. 28: Last day to register for LEED v.2.2 exam
Apr. 27: LEED Version 3 launches
June 26: Last day for new projects to register under LEED v2.2 system
Fall: Version 3 professional exam available
Oct. 24: Last day for LEED v2.2 projects to convert to LEED v.2009 without a fee

Part 1: Rating System Changes.

Overview. The changes are designed to address concepts raised in credit interpretation requests and rulings, to standardize the point totals between the various LEED systems, to give more weight to the credits that have more significant impact, and to adapt the LEED system to keep pace with changes in design and construction.

Minimum Program Requirements. Now, any new construction project must comply with seven program requirements to be eligible for LEED certification. These requirements are in addition to the LEED credit prerequisites.

1. Comply with environmental laws
2. Be a complete, permanent building
3. Use a reasonable site boundary
4. Minimum of 1000 sf floor area
5. Meet specified minimum occupancy rates
6. Report annual building and water use data
7. Comply with building area to site ratio

Water/Energy Data Reports. A building must report annual water/energy data in one of three ways:

1. Recertify building every 2 years through the operation and maintenance program
2. Provide energy/water data to GBCI annually
3. Sign a waiver allowing GBCI to access utility bills directly

This requirement can be waived on some types of buildings where reporting is not practicable, such as military bases, university campuses, and buildings with central plants.

Point Breakdowns. To standardize the ratings among the systems, all LEED systems are now rated on a 100-point scale. Breakdowns for levels are as follows:

Certified	40-49 points
Silver	50-59 points
Gold	60-79 points
Platinum	80+ points

Reweighing Credits. LEED 2009 gives more weight to credits with greater impact to surrounding environment. More notable increases include:

SS2 Development Density	(1 →5 pts)
SS4 Alt. Transportation	(1 →6 pts)
WE3 Water Use Reduction	(1 →4 pts)
EA1 Energy Performance	(10 →19 pts)
EA2 Onsite Renew. Energy	(3 →7 pts)
EA5 Measmt & Verification	(1 →3 pts)
MR1 Building Reuse	(1 →3 pts)

New Prerequisite. In addition to the six prerequisites under the v2.2 system, v2009 includes a seventh prerequisite mandating 20% water efficiency. Water efficiency is measured below a baseline case calculated by comparing the designed building to a similar baseline building with the same requirements. This prerequisite used to be an available credit, now it is a requirement for all LEED buildings.

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Regional Priority Credits. The system now includes points for "regional priority credits." This change is in response to criticism of LEED for being a one-size fits all approach to building that did not recognize unique characteristics of different climates. The regional credits are not new requirements. Local and regional chapters of USGBC each designated six existing points that are a regional priority for a given area.

Each zip code has six identified points. A building is eligible for up to four additional bonus points, one for each of the first four regional priority credits the building targets and achieves. The LEED Online system will automatically determine the applicable points by the property address listed for the project.

The USGBC website contains a list of all regional credits, by zip code. For example, one Las Vegas zip code includes the following priority credits: SSc6.1, SSc7.1, WEc1, WEc3,EAc2, MRc2. A Denver zip code includes SSc2, SSc6.1, WEc1, WEc3, EAc1, and EAc2.

Part 2: Professional Accreditation Changes.

Overview. The professional accreditation system has been overhauled. The system now recognizes three levels of accredited professionals and imposes continuing education (CE) requirements. The USGBC's goals for the professional system are to (a) stay current with education, (b) differentiate with different levels of accomplishment, and (c) allow for specialization.

Three Levels.
LEED Green Associate (non technical)
LEED AP (technical expertise required)
LEED AP Fellow (advanced and specialized)

Each of these levels must pass the LEED Green Associate exam plus fulfill the requirements of that level.

Green Associate. LEED Green Associate must meet one requirement of (a) documented involvement on LEED project, (b) employment in sustainable field of work, or (c) completion of education program that addresses green building principles. This designation is for practitioners with non-technical experience and denotes basic knowledge of green design, construction, and operations.

LEED AP. The LEED AP reflects advanced knowledge in green building practices and reflects a specialty in a rating system. One must take the green associate exam and take a specialty exam based on one of the LEED rating systems. The specialty exams exist for the following systems:

Operations & Maintenance
Homes
Building Design & Construction
Interior Design & Construction
Neighborhood Development (avail. 2010)

LEED AP Fellow. The GBCI is still establishing the parameters for this level, but has announced that this level is to recognize professionals who are part of "extraordinary class of leading professionals" and who have extensive experience in green building.

Continuing Education. All professional accreditations must be maintained on a 2-year CE cycle. Green Associates must received 15 hours of approved CE every 2 years and LEED AP's must receive 30 hours of CE every 2 years. Courses must be approved by GBCI and will include some self-study options.

Grandfather Option. All LEED AP's accredited before August 3, 2009 are exempted from the CE requirements, unless specifically electing into the new system. Professionals accredited under previous systems will maintain their existing accreditation.

Add a Visual Edge to Your Construction Arbitration

By: Pen Volkmann
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" My impression is that lawyers do not prepare nearly as well for a trial before arbitrators as they do for trial before court... Some lawyers think anything goes. Just back the truck up, dump it all on the arbitrators, and let them flip a coin."

— Former Federal Judge and Current Arbiter James Carrigan

When you find yourself in arbitration, it is tempting to assume that presenting to professionals in the construction field will be much different from trying a case in front of a jury drawn from the general population. But that assumption could lead to communication gaps that adversely affect your outcome. Construction arbitrations can be extremely complex and may hinge on arcane engineering or scientific principles that are out of the arbitrators' area of expertise.

A key element in effective communication is the visual one. Just as your oral argument needs to be tailored to the audience and the facts, so does your visual presentation. The design and display of good graphics can create a favorable tipping point for your arbitration panel. Here are a few ways to add a visual edge to your verbal advocacy in construction cases:

Adobe PDF Files and 3D Models

Adobe's PDF files have become an incredibly robust format to display a variety of multimedia. Although many attorneys only think of PDFs as a text or scanning format, with the professional version of Acrobat, you can embed photos, diagrams, videos and more. Often in construction cases, you will need to reference AutoCAD files from the engineer or ArcView files from the city and county.

Instead of rolling out E-size sheets of these drawings, you can export the files to a PDF, without needing the expensive CAD software or an expert to run it. The Acrobat files can be projected on a screen for everyone to examine at the same time. File layers are retained, and instead of flipping through printed sheets, you can turn the layers on and off to direct the arbitrators' attention to the facts at hand.

In the latest version of Adobe Acrobat, you can now import and display 3D models. Whole subdivisions, as well as individual buildings, can be navigated through and brought to life. Layers or parts can be turned off to view subsurface features. You can go to any point of view, slice and dice through the walls to create cross-sections and dis-

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Managing Risk on California Construction Projects

By: David Zimmerman
Salt Lake City Office

Successful contractors take, and manage, risks. One aspect of managing risk involves gaining a working knowledge of the contractor's protections and risks in the event of non-payment by the owner. While no contractor begins a project anticipating problems, its working knowledge of the protections afforded, and risks created, by state law is one aspect of a contractor's risk management efforts.

Fortunately, significant similarities exist between the laws of many western states with respect to the construction industry. There are, however, significant differences in the laws of the State of California that materially affect contractors' risks on California construction projects. This article briefly describes a few of those risks.

Licensing

While most general contractors have taken care of appropriate licensing matters and generally do not even consider licensing issues as a project commences, they should at least pause to consider licensing issues when working in California. For various business reasons, many contractors form different entities under which they perform services in different states.

Frequently, the name of an entity that is not licensed in California may inadvertently appear in a contract to perform work in California. In most western states, this error would be of little consequence. Because of the draconian nature of California contractor licensing laws, the California Contractors Board will frequently find an error of this nature to be an infraction of California licensing laws and assess a fine. Furthermore, California courts strictly construed the California licensing code provisions against unlicensed contractors, including contractors that are "unlicensed" in only a technical sense because the wrong entity is named in a contract, regardless of the entity that actually performed the work.

The extent of the risk that may be created by a small oversight can be seen in one provision of the licensing code that provides that the owner may bring an action to recover all of the amounts paid to an unlicensed contractor.

Pay-When-Paid and Pay-if-Paid

Under California case law, California courts have held that pay-if-paid clauses are unenforceable in the State of California. Accordingly, all pay-if-paid clauses are construed as pay-when-paid and a contractor is required to pay its subcontractors within a "reasonable time" after its subcontractor has performed its work.

Accordingly, the owner's failure or refusal to pay the contractor is not a defense to a subcontractor's claim for payment for work performed. A new statutory provision allows a contractor to walk from a project in response to non-payment by the owner, but this does little to remedy non-payment by upstream parties when downstream parties must ultimately be paid.

Limitations on Mechanic's Liens

In California—contrary to most western states—a contractor is not entitled to recover its attorneys' fees in connection with recording and foreclosing on a mechanic's lien. This gives increased leverage to irrational owners that seek to extract unwarranted concessions at the end of the project. Furthermore, there are some questions concerning the general contractor's ability to file a mechanic's lien seeking to recover for delay costs.

Also, the California mechanic's lien statute can, in some instances, start the clock for the time when a contractor must record a lien well before the contractor achieves final completion on the project. This may cause lien rights to expire much faster than the contractor anticipates, eliminating a significant protection against non-payment.

Stop Notices

In contrast to many aspects of California law which restrict contractor rights, California law allows contractors to serve stop notices on entities which hold funds identified to pay for work on a construction project. Thus, contractors may serve stop notices on banks and other lenders to preclude further disbursement of funds without ensuring payment to contractors.

Effective use of stop notices requires service of the stop notice before the balance of funds held by the disbursing entity falls below the amount of funds necessary to satisfy contractor claims.

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play your desired elevation. If the arbitration involves a substantial claim, the investment in creating the 3D models can bring big returns.

Digital Photography and Interactive Panoramas

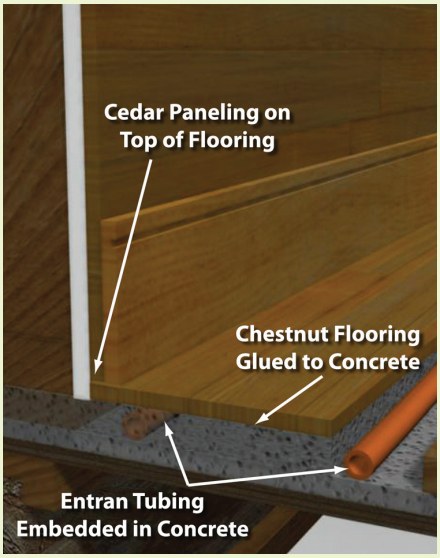
Photos also prove extremely valuable as a source of visually documenting elements of your construction case. Digital cameras are reaching ever higher resolutions, so capturing the necessary details onsite is now much easier than in the film days. Even cell phones from witnesses who might not otherwise be expected to have a camera, can capture photos of sufficiently good quality.

Some cameras also enable you to make interactive panoramas, similar to those seen on real estate websites. For showing the relationship between features in a room or making a walk-through that your witness can pace to his testimony, these virtual reality files can't be beaten.

Technical Illustrations and Animations

And, if you have the budget, technical illustrations and animations can be invaluable in showing features hidden behind walls or embedded in floors or ceilings. Even the economics of damages can be visualized by linking a dollar amount to photos or icons of what needs to be repaired.

So, resist temptation to present your case to arbitrators in a more informal and less visual manner than you would in a trial. Both the arbitration panel and your client will appreciate that you have taken the effort to simplify the presentation of the evidence—making *your* case more efficient, interesting, and persuasive.



TECHNICAL DRAWING BY PERSUASION STRATEGIES

Federal E-Verify in Effect: Be Aware of Differences in State and Federal Rules

By: Charles R. Lucy
Colorado Springs Office

Last year, the federal government added a new requirement for all contractors—the E-Verify Program. The new program, which went into effect on September 8, 2009, requires all contractors and any covered subcontractors to enroll in the E-Verify program within 30 calendar days after a contract or subcontract award date. Contractors must also start sending employment verification inquiries within 90 days of contract award.

The Department of Homeland Security website states that,

> "E-Verify (formerly the Basic Pilot/ Employment Eligibility Verification Program) is an online system operated jointly by the Department of Homeland Security and the Social Security Administration (SSA). Participating employers can check the work status of new hires online by comparing information from an employee's I-9 form against SSA and Department of Homeland Security databases. More than 69,000 employers are enrolled in the program, with over 4 million queries run so far in fiscal year 2008. E-Verify is free and voluntary, and is the best means available for determining employment eligibility of new hires and the validity of their Social Security Numbers."

Since August 2006, Colorado has had a similar law, requiring state contractors to verify the work status of their employees and subcontractors. That requirement was expanded in 2007 to include all Colorado employers.

In addition, while the original Colorado law mandated the use of E-Verify, it was amended last year to permit an employer to participate in a Colorado Department of Labor Program in lieu of the federal system. This amendment, however, will not change the requirement for contractors to use E-Verify on Colorado-based federal projects. The Colorado program is also in addition to the current requirement to file an I-9 for all employees, regardless of citizenship.

In addition, Colorado has proposed rules to implement the statutory requirement that, within 20 days of hiring a new employee, the employer must complete various documentation requirements (i.e. complete a signed affirmation and obtain copies of supporting identity documents) to verify the employment eligibility of the new hire. Employers must maintain these records for the term of employment, pursuant to the existing law.

The proposed rules establish a system of compliance audits based upon complaints, random selection of employers, or in instances where employer compliance is questioned. The audit process is limited to the examination of compliance as to current employees; the examination of historical records of past employees is not contemplated since the law only requires record retention for the term of current employment. The audit examines the existence of employer affirmations and supporting documents for each employee. Random audits may not be conducted more frequently than every two years.

As the rules now stand, a first offense of non-compliance would result in a fine of not more than $5,000. Fines for subsequent offenses could reach $25,000. Offenses include the failure, with reckless disregard, to submit documents required by the employment verification law and the submission, with reckless disregard, of false or fraudulent documents. Reckless disregard is not further defined, although the failure to respond to an audit is presumed to meet that standard.

It is important to remember that compliance with either the Colorado laws concerning public service contracts or employment eligibility verification is currently no substitute for compliance with separate federal verification requirements. Employers still are required to complete an I-9 and retain them for three years after the date of hire or for one year after employment ends, whichever is greater. In addition, federal contractors still must use the E-Verify system to ascertain the employment eligibility of personnel working on a federal contract.

Navigating the Confines of the Economic Loss Rule and Other Property Damage

By: Sean Hanlon
Denver Office

The economic loss rule is a rule frequently invoked in construction disputes that operates to limit the types of damages that can be recovered. Understanding the limits of the economic loss rule requires a party to examine (1) the source of the duty at issue and (2) the nature of the property damage claimed.

Fundamental differences exist between contract and tort law. Obligations in tort generally arise from duties imposed by law to protect citizens from physical harm or damage to their property. And certain tort theories carry the possible imposition of punitive damages. In contrast, contractual obligations arise from promises the parties have made to each other, with the intent that their expectancy interests—created by such promises—are enforced.

Courts created the economic loss rule to enforce the parties bargained-for economic expectations and limit liability to those damage arising from contractual promises. This limit on tort damages allows contracting parties to more accurately allocate risks and build cost considerations into a contract.

But some creative parties wishing to bring tort claims are pleading damages to secondary or "other property" to avoid application of the economic loss rule. The key is to determine the source of the duty owed by the alleged tortfeasor. Does the duty of care flow from the contract, or does the duty truly arise *independently* of any contractual duty existing between the parties?

Economic Loss Rule

The economic loss rule provides, "a party suffering only economic loss from the breach of an express or implied contractual duty may not assert a tort claim for such breach absent an independent duty of care under tort law." *BRW, Inc. v. Dufficy & Sons, Inc.,* 99 P.3d 66, 72 (Colo. 2004). The focus is not on the professional status of the parties, but rather on the contractual relationship between them to determine whether there

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is an independent duty of care. But see *Flagstaff Affordable Housing Ltd. Partnership v. Design Alliance, Inc.,* 212 P.3d 125 (Ariz. App. Div. 1 2009 (economic loss rule did not bar professional negligence claim against architect due to architect's independent duty of care).

Defining "Economic Loss"

Courts generally define "economic loss" as damages other than physical harm to persons or property. If damages—for the cost of repair and replacement of property, structural damage, diminution in value of a damaged structure not repaired, loss of use or delay in utilizing property for its intended purposes—and related lost profits, revenue, and costs *were the subject of the contract*, such damages constitute economic loss damages. If no independent duty exists, the economic loss rule bars recovery in tort for such economic losses.

One frequently recognized exception to the economic loss rule applies in situations where the court finds that a party had a duty to the other party that was independent from the duties stated in the contract. If a duty exists, then a party can recover a damage award in tort based in tort. *See e.g. Parr v. Triple L & J Corp.,* 107 P.3d 1104, 1108 (Colo. App. 2004).

The Key: Determine the Source of the Duty Breached, Not Whether Damages are Physical or Economic

The phrase "economic loss rule" is a bit of a misnomer and implies a primary focus on the type of damages. But the relationship between the type of damage suffered and the availability of an action in tort is inexact at best. At least one court has suggested the more accurate designation for the "economic loss rule" would be "independent duty rule." The key is to focus on the source of the duty. If a duty has been breached that is independent of any contractual obligations, the economic loss rule has no application and does not bar a plaintiff's tort claims because such claims fall outside the scope of the rule. But if a contract specifically imposes relevant duties of care—such as those concerning the contractor's skill and workmanship in performing its services—those contractual duties of care will provide the basis for a cause of action, and may trump other independent common law duties of care not contemplated in the contract.

When Damage to Property Is Not an Economic Loss

While the proper focus is on the source of the duty, the type of damages suffered may assist in determining the source of the duty underlying the action. A Utah court stated that under the economic loss rule "economic damages are not recoverable in negligence *absent physical property damage* or bodily injury." *SME Indus., Inc. v. Thompson, Ventulett, Stainback & Assocs., Inc.,* 28 P.3d 669, 680 (Utah 2001) (emphasis added) (finding that application of the economic loss rule is particularly applicable in the construction setting where all parties to a construction project resort to contracts and contract law to protect their economic expectations. *Id.* at 681.).

But damage to property that is the subject of the contract is an economic loss—and does not qualify as "damage to other property"—while damage to secondary property is not an economic loss. *Hughes Custom Building, LLC v. Davey,* --- P.3d ---, 2009 WL 1260171 (Ariz. App. Div. 2 2009). Determining secondary property damage is unclear. In some construction cases, and for the purposes of the economic loss rule, courts have treated the house and its component parts as a single property. *Id.*

Consequently, when a defect of a particular part of the house results in damage to the whole, no negligence action is permitted for that additional property damage. *Id.*; *see also Steineke v. Russi,* 190 P.3d 60, 66 (Wash. App. 2008) (holding that persuasive authority and common sense dictate that a building constitutes a single "product" or "property," not a series of component parts, for the purposes of the economic loss rule).

The Hughes Custom Building case, however, lists other circumstances where secondary property damage was found, and tort claims seeking relief for such secondary property damage were allowed as being outside the scope of the economic loss rule:

- Owner assembling pre-fabricated cabin contracted with insulation installer; economic loss doctrine did not bar claim against installer when faulty insulation damaged rest of cabin;
- Court declined to apply economic loss doctrine to bar claim for damage caused to home by defective installation of stone façade.

In other words, property that was not encompassed in the bargain, i.e., not the subject of the contract, constitutes "other" or "secondary" property. Damages to such other or secondary property is not an economic loss.

And when the nature of the defect is sudden, accidental, calamitous, and exposes others to harm, the economic loss rule will likely not bar tort recovery for resulting damages to property outside the scope of the contract. *See e.g. Valley Forge Ins. Co. v. Sam's Plumbing, LLC,* 207 P.3d 765, 766-67 (Ariz. App. 2009). But when the duty not to cause damage to the property, or the duty to pay for damage caused is derived from the contract, the economic loss rule operates as a bar to tort claims seeking relief for those damages.

The Court of Appeals for the Fourth Circuit addressed a situation where a party asserted a tort claim, alleging damage to "other property" for the purpose of evading the scope of the economic loss rule. *Palmetto Linen Serv., Inc. v. U.N.X., Inc.,* 205 F.3d 126 (4th Cir. 2000). The Fourth circuit explained:

Although the economic loss rule generally does not apply where other property damage is proven, courts have tended to focus on the circumstances and context giving rise to the injury in determining whether alleged losses qualify as "other property" damage. Specifically, in the context of a commercial transaction between sophisticated parties, injury to other property is not actionable in tort if the injury was or should have been reasonably contemplated by the parties to the contract. In such cases the failure of the product to perform as expected will necessarily cause damage to other property, rendering the other property damage inseparable from the defect in the product itself.*Id.* at 129-30. While the above analysis from the Fourth Circuit stemmed from a sale of goods, its application and reasoning may be even more suited to a construction project particularly when defects to the work would lead to foreseeable and inseparable damages that were contemplated and bargained for—or should have been—in the underlying contract.

Conclusion

Property damage will be subsumed as an economic loss if such property was the subject of the contract at issue. Courts will honor the terms of the parties' bargain to accept and allocate risks associated with the construction project. If the damage to the property was unforeseeable or not properly addressed in the contract, it would likely be categorized as "other" or "secondary" property damage to which relief for such damages would be available in tort.

The proper inquiry focuses on whether the source of the duty alleged to have been breached is derived from the contract (or derived from inter-related contracts of a construction project) or derived from a duty imposed by law that arises independently of any duties imposed under the contract. If the duty derives from the contract, the economic loss rule should work to bar tort claims for such resulting property damage.

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Nevada's New Domestic Partnership Law: How It Impacts Your Policies and Procedures

By: Anthony Hall
Reno Office

With a new law effective October 1, 2009, Nevada has now joined a number of states that formally recognize domestic partnerships as a binding social contract between two persons and an alternative to marriage.

Key Provisions of the Act

The law gives domestic partners, gay or straight, largely the same rights as those already available to married couples. Domestic partners who register their relationship with the Secretary of State will be entitled to receive benefits such as hospital visitation, funeral planning, and community property rights.

Even with this law, employers may have a choice as to whether to provide benefits to domestic partners. It states that the Act does "not require a public or private employer in this State to provide health care benefits to or for the domestic partner of an officer or employee."

The Act goes on to state that it "does not prohibit any public or private employer from voluntarily providing health care benefits to or for the domestic partner of an officer or employee upon such terms and conditions as the affected parties may deem appropriate."

Another question left open by the Act is whether domestic partners are considered the legal equivalent of a married spouse, a key factor in applying federal laws. On the one hand, the Act clarifies that a "domestic partnership is not a marriage" for purposes of the Nevada Constitution but simultaneously states that "domestic partners have the same rights, protections and benefits…, as are granted to and imposed upon spouses."

Whether to Implement Domestic Partner Benefits In Your Company

If you elect to change your company policies to voluntarily provide coverage to domestic partners pursuant to the Act, you should conduct a thorough review of (and make necessary changes to) your benefit plan documents. Under federal law, neither same-sex spouses nor domestic partners are generally recognized as spouses for whom favorable tax benefits apply. Specifically, consider the following:

- COBRA: Currently, domestic partners and same-sex spouses are not entitled to continuation coverage under COBRA. Only qualified beneficiaries are entitled to continuation coverage, and under federal law, a qualified beneficiary can only be either an opposite-sex spouse or a dependent child.
- Flexible Spending Accounts: In most cases, an employee's flexible spending account (FSA) money may not be used to reimburse health care for a same-sex domestic partner, even if you do provide other domestic partner health benefits.
- HIPAA: HIPAA protects the portability of employee health coverage. But whether domestic partner benefits are portable if an employee changes jobs all depends on whether the new employer offers such coverage, and on state insurance laws. Nevertheless, because your company's health plan is likely covered under HIPAA, the act's non-discrimination rules apply to domestic partners to the same extent that a spouse or dependent covered under your plan would be.
- FMLA: Under the FMLA, an employee may only take family leave to care for a spouse, child or parent with a serious health condition. It is unclear whether Nevada's Domestic Partnership Act intends to distinguish, in any substantive manner, a domestic partner from a married spouse. Until courts have an opportunity to interpret the new law, the safe approach would be to treat validly registered domestic partners of your employees as the legal equivalent of a spouse through marriage.

Other Policies May Need Updating

In general, any reference to an employee's spouse anywhere in your handbook or policies now should be revised to refer to "spouse and/or domestic partner." Some examples includes nepotism policies, domestic violence or workplace violence policies.

Bottom Line

Under Nevada's Domestic Partnership Act, employers who offer benefits to their employees and spouses will need to carefully evaluate each benefit and determine if they are required, or if they elect, to include domestic partners. Employers should also update their handbooks and other company policies to reflect the additional category of domestic partner wherever a policy may impact an employee's spouse.

Although distinct from marriage under Nevada's Constitution, domestic partners should, in most cases, be treated as the legal equivalent of spouses in any applicable situation. Until the provision is clarified, employees can be safe by treating domestic partners the same as spouses when applying policies.

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New Academic Leave Law in Nevada

By: Dora Lane
Reno Office

Effective August 15, 2009, Nevada employers must comply with expanded academic leave provisions.

What Did Nevada's Old Academic Leave Provisions Require?

The old law prohibited employers from firing a parent, guardian or custodian of a child enrolled in a public school who appears at a conference requested by an administrator of the school or who is notified, during work hours, of an emergency regarding the child. This law applied to all employers and does not specify a particular duration of leave required.

Further, the old law stated that employers who violate the statute are guilty of a misdemeanor. The statute also allows a private right of action and an award of lost wages and benefits, reinstatement, and attorney's fees.

What Do the New Academic Leave Provisions Require?

The new law alters the old law in several important respects.

1. **Private Schools.** It expands the applicable leave protections to parents, guardians, or custodians of children attending private schools, instead of just public schools.
2. **50+ Employees.** The new leave provisions, however, apply only to employers who have 50 or more employees for at least 20 weeks in the current calendar year. This is a notable difference from the Family and Medical Leave Act, which applies to employers who have had 50 or more employees for at least 20 weeks in the current or preceding calendar year.
3. **Four Hours Per Child.** The bill specifies that employers who are subject to its provisions (i.e., have at least 50 employees) must allow eligible employees up to 4 hours of leave per school year per child to attend parent-teacher conferences and school-sponsored events, as well as now adding school-related activities during regular school hours.
4. **Mutual Agreement.** The leave is unpaid and must be taken in increments of at least 1 hour at a time and the employee and the employer mutually agree upon the time when leave is taken.
5. **Written Request Required.** Employers may request that the employee provide a written leave request at least five school days before taking leave, and that the employee supply documentation demonstrating that the employee actually attended the school activities.
6. **Collective Bargaining Agreement.** The expanded leave provisions do not apply if a collective bargaining agreement already affords the employee similar academic leave benefits.
7. **Expanded Protections.** In addition to prohibiting termination, the new bill expands the protection by also prohibiting demotions, suspensions, or other discrimination against an eligible employee who takes leave under the statute. While the leave provisions apply to employers with 50 or more employees, the prohibition against terminations, demotions, suspensions, and other discrimination against persons who appear at a conference requested by a school administrator or are notified of an emergency during work hours applies to all employers regardless of size.
8. **No Private Right of Action.** The new law eliminates the employee's private right of action against the employer for violations. Instead, employees who assert violations of their academic leave rights may file a complaint with the Nevada Labor Commissioner. Employers are responsible for providing employees with the requisite forms to submit a complaint to the Commissioner. After notice and a hearing, the Commissioner may award the aggrieved employee lost wages and benefits, liquidated damages in the amount of the employee's lost wages and benefits, and even order reinstatement. Employees are not, however, entitled to recover attorney's fees.
9. **Misdemeanor Offense.** A violation of the new academic leave provisions is a misdemeanor, which may have significant consequences for, among others, businesses seeking to obtain financing.

Bottom Line

First and foremost, employers should review and amend policies and procedures to reflect the new academic leave requirements and train supervisors to properly administer these policies and procedures. Consider specifying the reasons for which leave can be taken, and the total amount of available leave.

Specify that employees desiring leave must request leave in writing at least 5 school days in advance, that the leave is to be taken at a mutually agreeable time, and the documentation an employee must provide to substantiate his or her leave request. Also, indicate that the leave is unpaid (unless employees choose to use paid leave concurrently).

Another related consideration is the Fair Labor Standards Act, which provides that an employer can't deduct from an exempt employee's salary for personal absences lasting less than a full day. Employers may, however, offset partial day absences due to personal reasons by diminishing the employee's accrued paid leave.

Dora Lane practices primarily in the field of employment and labor law. Her experience includes counseling clients on wage and hour, retaliation, and other employment related issues. She may be reached at (775) 327-3045 or dlane@hollandhart.com.

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CONSTRUCTIVE DEVELOPMENTS

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NOVEMBER 2009

NEWS & EVENTS

SPEAKING ENGAGEMENTS

- December 10, 2009: **Building Your Foundation: The Five Pillars of a Persuasive Construction Case** presented by Dan Frost and Shelly Spiecker at the Construction Superconference in San Francisco
- January 6, 2010: **The Jury is Out on Your Project Records** presented by David W. Zimmerman at ABC of Utah in Salt Lake City
- February 4, 2010: **The Business Case for Building Green** presented by Melissa A. Orien at the ABC National Conference in San Diego

CONSTRUCTION CASE ALERTS

Colorado: Economic Loss Rule Extends to Bar Fraud Claims

The Court held that the economic loss rule extends to bar claims for alleged fraud where the acts complained of took place during performance of the contractual duties. The Court also explained that alleging that fraud occurred prior to execution of a contract may not be sufficient to avoid dismissal, since a duty might not exist as a matter of law.

Hamon Contractors, Inc., v. Carter & Burgess, Inc. (Colo. App. 2009)

Nevada: Economic Loss Rule Bars Claims for Misrepresenting Intent to Perform

The Court determined that an intentional misrepresentation claim premised on the theory that a party intentionally misrepresented its agreement to perform the contract is barred by the economic loss rule. Because the misrepresentation is not a duty under law that is extraneous to the agreement, the economic loss rule barred the tort claim.

WMCV Phase 2, LLC v. Hamilton, & Spill LTD. (D. Nev. 2009)

Arizona: Architect Owes Independent Duty under Tort Law

Reaching a directly opposite conclusion than the Nevada Supreme Court did earlier this year, an Arizona court determined that a design professional owes an independent duty under tort law. As a result, professional negligence claims against a design professional are not barred by the economic loss rule.

Flagstaff Affordable Housing Ltd. Partn. v. Design Alliance, Inc., 212 P.3d 125 (2009)

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