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CONSTRUCTION IN BRIEF

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Workplace Safety

DO YOU KNOW A LEGAL TRAP WHEN YOU SEE IT?

While certainly significant, OSHA standards are not the beginning and end of workplace safety law. In order to effectively minimize exposure to liability, contractors should possess the ability to recognize potential issues arising under a wide variety of federal and state laws. As illustrated by the hypothetical below, many legal issues surrounding workplace safety are far from obvious.

ACT 1

Charlie, who has been one of your best laborers for years, drove a backhoe into ditch. Although no one was hurt, the backhoe was badly damaged. In accordance with your company's substance abuse policy, Charlie was tested immediately. After Charlie's test result came back positive for cocaine, he asked for a second chance and promised to seek treatment at a rehab center. Do you have the right to test Charlie under these circumstances?

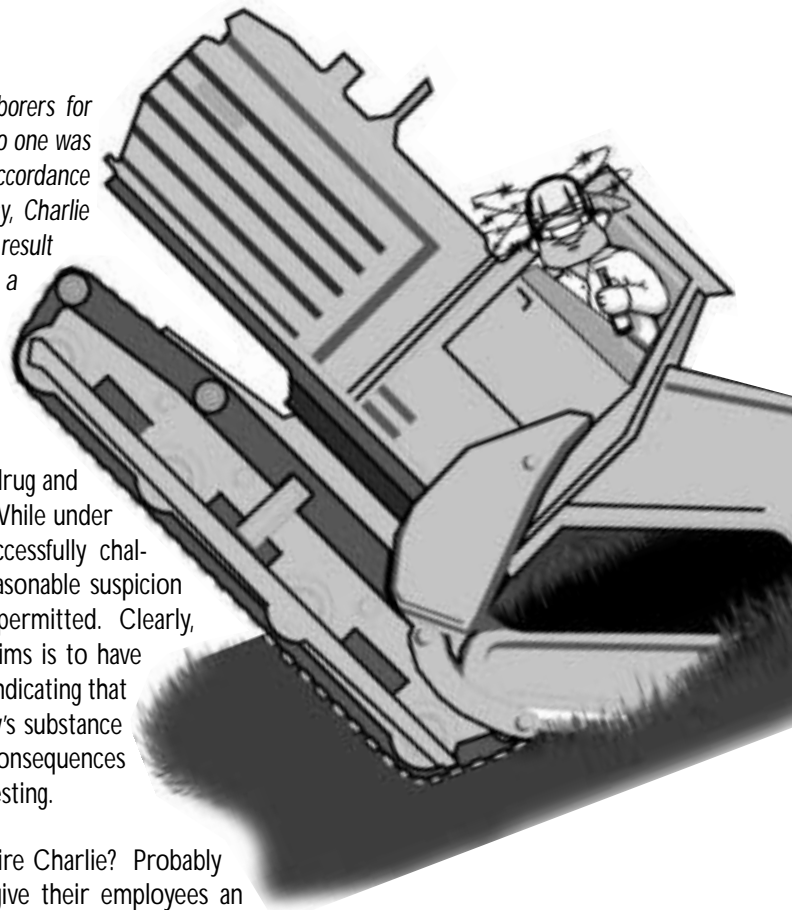
Probably yes. Employees often claim that drug and alcohol tests violate their privacy rights. While under some circumstances employees have successfully challenged random drug testing programs, reasonable suspicion and post accident drug testing is usually permitted. Clearly, one of the best ways to avoid privacy claims is to have employees sign an acknowledgment form indicating that they have received a copy of the company's substance abuse policy, that they understand the consequences for violating it, and that they consent to testing.

Are you buying yourself a lawsuit if you fire Charlie? Probably no. While many employers choose to give their employees an opportunity to pursue rehabilitation, there is no law that requires you to offer rehabilitation in lieu of immediate discharge. Nevertheless, Charlie may have a good reason to sue if your company's collective bargaining agreement or substance abuse policy provides for rehabilitation, or if you have treated Charlie differently from other employees (such as offering rehabilitation to another employee whose test came back positive).

ACT 2

After the "Charlie incident," at the suggestion of one of your project managers, you establish an employee safety committee to give employees a voice in workplace safety issues such as drug testing. The committee and management go back and forth with numerous proposals and counter-proposals. Ultimately, a new workplace safety policy is adopted. Is this proper?

-- (article continued on page 4) --



Don't Squander Your Payment Bond Rights

Some Things To Consider

If a company does not get paid for labor and/or material it provides to a bonded project it should be protected, right? Unfortunately, the answer is "not always" for a variety of reasons. The purpose of this article is to highlight some of the issues that contractors and suppliers should be aware of to protect their bond claim rights. The issues range from determining if your project has a bond to knowing what your deadline for filing suit against a surety. Your ability to negotiate this minefield may be the difference between getting paid what you are due and having to write off the receivable.

So, with different requirements for bonds on public projects in each state and an even greater number of variables for bonds on private projects, how can subcontractors, sub-subcontractors and suppliers keep it all straight? Here are some suggestions:

1. Make it Your Policy to Obtain Copies of Bonds

Get copies of bonds at the beginning of all your projects. Many contractors and suppliers fail to ask for a copy of the bond for their project file. This complicates matters later when you need to determine what you have to do to pursue a claim on the bond. You may be against a deadline and not even know the identity of the bonding company that must receive notice of your claim.

2. Just Because it Is a Private Job, Don't Assume That There Is No Bond

Prime contractors issue payment bonds for the benefit of subcontractors, sub-subcontractors or suppliers on public projects. If your job is private, never assume that it is not bonded because many private owners require general contractors to get bonds to minimize the possibility of subcontractors and suppliers not getting paid. In a private job, the requirements for notification and the institution of

actions must be taken directly from the bond due to the many variations of bond forms and the absence of statutory guidelines for bond rights.

3. Serving Timely Notice of a Claim

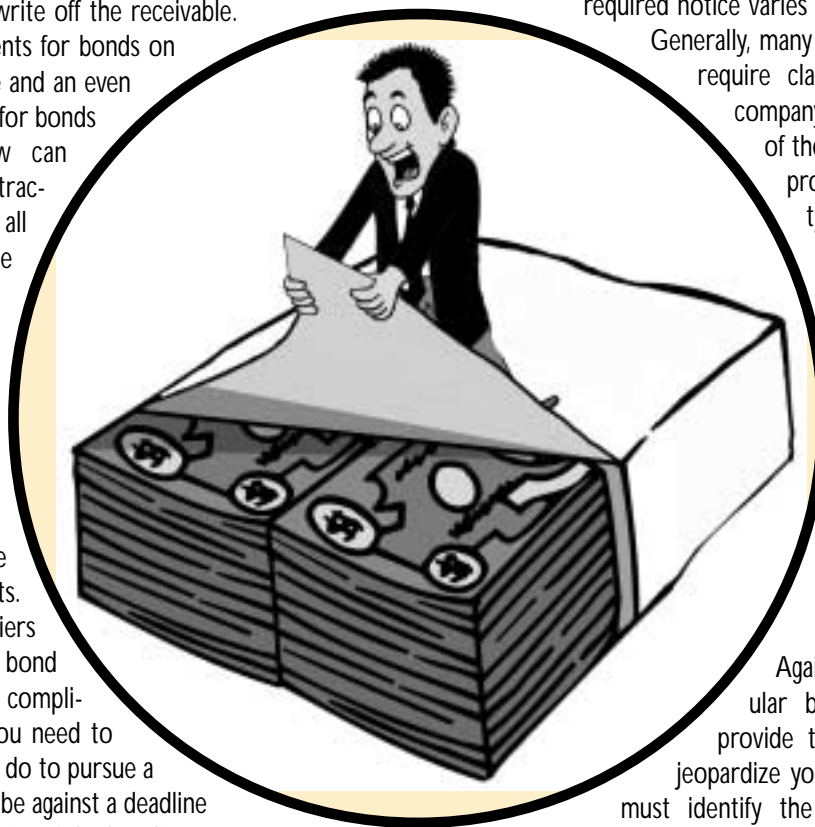
When do I have to notify the bonding company? The timing of any required notice varies between states for public work.

Generally, many public and private bond forms require claimants to notify the bonding company of their claims within 90 days of the last time labor or material was provided to the project. It is also typical for bonds to require suit within 1 year of the date that labor or material was last provided to the project. In any event, it is very important to review the bond form so that proper notice is given and your rights are preserved.

4. Contents of Notice

Again, you must review your particular bond form because failure to provide the required information could jeopardize your claim. In general, the notice must identify the project, bond number, claim amount, principal (contractor on bond) and obligee (owner). The contractor and owner typically must receive a copy of the notice letter which is to be sent via certified mail, return receipt because it is required or simply so that you have proof of your notice.

In summary, review your bond rights on a regular basis by checking on the last time labor and material was provided to a project and the amount owed on the project. Whether the project is public or private, be diligent about obtaining copies of bonds so that if you need them, you will have them! If you have any question about your rights or what you must do present a valid claim to a bonding company, be sure to consult with counsel to get the best possible advice.

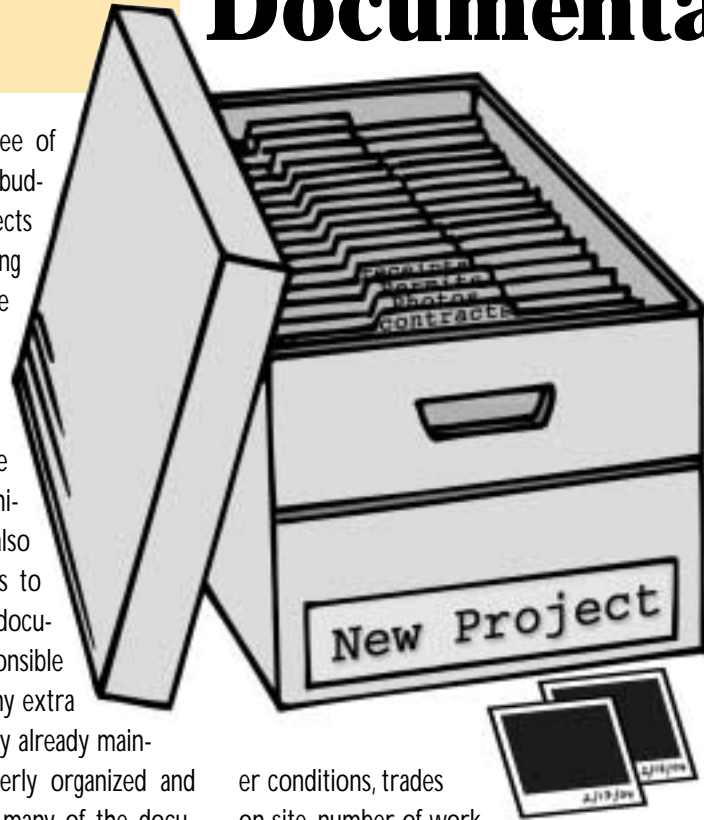


The Importance of Proper Project Documentation

Contractors hope that every project is free of problems and gets done on time and under budget. Unfortunately, in the real world all projects have one challenge or another. As the saying goes, if construction were easy every one would be doing it! In order to effectively deal with problems on projects that may delay the work and cost money, you must maintain good project documentation. The documents will not only be invaluable to minimize the impact of certain problems, but also will be necessary to justify additional costs to which you are entitled. In plain terms, the documents will be necessary to blame the responsible party for the problem and to get paid for any extra work that is needed. Your company probably already maintains a lot of records, but are they properly organized and reviewed regularly? This article discusses many of the documents you might need to have on a project. Please review the list to test see how well you are doing!

ORIGINAL PROJECT ESTIMATE AND COST REPORTS - The original estimate or take-off sheet should be preserved until you have been paid and are ready to close out the project. The estimate should be detailed and cover each cost you anticipate incurring during the performance of your work. This will become very important if you incur any added cost on a project, as it will establish how you originally budgeted the cost for the aspect of the work at issue to justify the added expense. It is also important to track costs on a project by category so you can identify any cost overruns that occur and their cause.

LOG BOOKS - It is very important to have complete logs for requests for information, shop drawings, submittals, change order requests and payment requisitions. Have you ever tried to put a log together after a project is well under way, or have you tried to sort out a delay caused by late submittal approvals? If you have, you know that you cannot live without these logs on any significant project. Properly maintained logs will be your overall key to managing your project, because a quick review will highlight most significant outstanding items.



DAILY PROJECT REPORTS - These are typically kept by an owner's representative, such as the architect or construction manager, and usually include weath-

er conditions, trades on site, number of workers for each trade, equipment onsite, and the work being performed that day. While contractors generally do not have any control over what goes into these reports, you may be able to meet with the owner's onsite representative regularly to request that any significant issues are noted in the reports.

DAILY FOREMAN/SUPERINTENDENT LOGS - Your onsite representatives should be required to maintain Foremen/Superintendent Reports. These reports should contain a record of site conditions, conversations, problems, field directives and any other information relevant to the job. Your daily reports are likely to be the most important records you can maintain, as they are generally made when the event occurred and can carry great credibility in identifying what happened with respect to a particular problem.

TRANSMITTAL LETTERS - It is extremely important to show when things were sent and to whom. This way there can be no claim that you were late with a particular submittal or request for information. It is difficult to identify the number of times clients have been unable to determine when things were sent to the owner or another contractor, because no transmittal letters were used.

-- (article continued on page 4) --

PROJECT CORRESPONDENCE - This is an invaluable way to notify others of problems on a project that may affect your work. A short letter may be all that is required to document that you advised another party of a situation and might even help prevent a problem from becoming unmanageable by causing others to resolve the situation.

MEETING MINUTES - These must be reviewed on a weekly basis for accuracy. Don't forget that if something inaccurate appears in the meeting minutes, you must immediately write a letter to whomever is preparing the minutes, or the records will be deemed to be accurate. The meeting minutes are typically circulated among the attendees for this purpose. Thus, having a company policy on reviewing and revising the minutes is extremely important. This prevents the all-too-familiar situation: "I know the architect said our steel shop drawings were approved at the meeting, but I don't remember when."

PHOTOGRAPHS - Pictures are still worth 1,000 words. Use them to document the progress of the work as often as you think is necessary and to detail a specific event. Just imagine a project with a tight deadline and significant liquidated damages for late completion where your winter construction is delayed for almost 4 weeks by unusually heavy snow in the local area. What could be more convincing than the site covered with snow?

In short, there is no way to anticipate what documents your company will need to establish or defend against a claim. Therefore, the best thing you can do is insure that your company accurately maintains complete job documentation on each and every project. This will go a long way toward minimizing your exposure to claims and maximizing the potential of any claim you have.

-- Dana B. Ostrovsky, *Esquire*

Many contractors have established employee committees to deal with safety and a wide variety of other workplace issues. However, few contractors are aware that such committees may be viewed as illegal employer-dominated unions under the federal labor law. This problem is especially prevalent among non-union contractors.

At a minimum, contractors contemplating employee committees should take the following steps: (1) do not provide extra pay or benefits to committee members; (2) allow the committee to establish its own procedures; and (3) do not pick employees to serve as committee members. Ultimately, however, the question of whether an employee committee constitutes an employer-dominated union must be answered on a case-by-case basis.

ACT 3

Two years after being fired, Charlie applies to be rehired. Along with his application, he submits letters from his pastor about his active church participation and from a drug counselor about his regular attendance at meetings and his recovery. Must the company rehire Charlie?

The Supreme Court of the United States recently addressed this scenario. A former employee claimed that he had been intentionally discriminated against in violation of the ADA, because the employer rejected his application due to his record of drug addiction. The Supreme Court recognized that the employee was covered under the ADA, but ruled that the employer had a legitimate, non-discriminatory reason to reject the employee's application. As such, the Court's decision leaves little doubt that an employer does not commit *intentional* discrimination where it refuses to rehire an individual who had been terminated for illegal drug abuse.

Therefore, discrimination need not be intentional to be unlawful. Facially neutral policies that fall more heavily on protected groups may be unlawful. It is not yet decided if a no-rehire policy constitutes unintentional discrimination which would violate federal law. In this scenario, the decision not to rehire Charlie because of his prior drug use still carries a significant risk of liability for unintentional discrimination.

-- Jonathan Landesman, *Esquire*

A NOTE FROM THE EDITOR



Welcome to the Winter Edition of Construction in Brief. Many contractors have been fortunate to stay busy and profitable this past year while others have struggled. The struggles of some have led to cash flow problems for many. It is impossible to avoid the risk of non-payment completely in construction, but given the difficult times that face many contractors it is a good time to seek additional assurance that you will be paid for the labor and/or material you provide to a project. Avoid the temptation of working for just anyone with a project because many have learned the hard way that it is better to be slow than chasing receivables.

Inside this issue you will find articles on workplace safety, project documentation, bond rights, living trusts, and the latest firm news. We welcome you to submit suggestions for future articles that may be of interest. Please contact me via phone or e-mail at: jcopley@cohenseglia.com

As always, if you have a specific legal concern we recommend that you consult with counsel so that you may receive the best possible advice for your company. See you next issue!

-- Jason A. Copley, *Esquire*
Editor, *Construction In Brief*

A living trust is a trust created during a lifetime which may or may not be funded with assets and is fully revocable by the settlor, who is the person that creates the trust. Much has been written about this estate planning technique and living trusts have been highly promoted as an alternative to the probate process. However, before you replace your will with a living trust, determine whether it is the best estate planning tool for you. As always, there are advantages as well as disadvantages that must be considered.

Most advertisements tout the living trust as a method to avoid probate. Probate is the legal process involved in transferring assets held in the decedent's name to the beneficiaries, and provides a formal mechanism to pay legitimate claims against the estate. This insures that the decedent's assets are transferred to the proper beneficiaries without future attack from creditors of the decedent's estate. Living trusts can avoid the probate process entirely. Because you transfer your assets to the living trust during your lifetime, there are usually no assets to probate. The designated trustee pays expenses of your estate and distributes the assets to your beneficiaries as directed in the trust document. Because most trusts are revocable, you retain as much control as you wish.

There are three parties to a living trust: the settlor creates the living trust and transfers assets into the trust; the trustee, who can be the settlor, manages the trust assets; and finally, the beneficiary receives the assets which are part of the living trust. If the settlor becomes incompetent, and is unable to manage his or her affairs, the alternate or successor trustee named in the living trust then takes over management of the living trust assets. This successor trustee is often a spouse, adult child, or bank trust department. When the settlor dies or becomes incapacitated, then the living trust becomes irrevocable and its terms cannot be changed.

*Is a living trust for everyone?
The answer is that it depends.
Here are some of the more common
factors you need to consider.*

WHAT IS A LIVING TRUST...



AND DO I NEED ONE?

- A living trust provides no income tax advantages. Any income generated by assets owned in the living trust is taxed to the settlor as if the assets were still held in the grantor's name.

- A properly constructed trust can, however, minimize federal estate taxes to insure that your heirs will receive more of your estate.

- With a living trust, you still need a will. Not everyone remembers to transfer all of his or her assets to a revocable living trust; therefore, you must still have a "pour-over" will. This will "transfers" any assets to the living trust that you forgot to transfer during your lifetime.

- A living trust may avoid a will contest. However, a trust is subject to attack on the basis of the settlor's lack of capacity, undue influence or fraud.

- Assets in a living trust are liable to the decedent's creditors. In fact, a living trust would provide the surviving family less protection from the decedent's creditors than even the ordinary probate system.

- A living trust may be helpful in avoiding future guardianship issues with your children, but the same results may be obtained by this use of powers of attorney at a far smaller cost.

A living trust is appropriate for some people and makes absolutely no sense for others. This is a decision that must be made after careful consideration of both tax and non-tax factors. As always, we recommend that you consult with counsel to make decisions that are appropriate for you.

WHAT'S NEW?



Roy Cohen



Edward Seglias



George E. Pallas



John A. Greenhall



Marc Furman

CSPG&F OPENS WILMINGTON OFFICE

On January 1, 2003, we opened our new office in Pittsburgh, Pennsylvania and just eight months later obtained 3,000 square feet of additional space to accommodate our growth in the Pittsburgh area. Since opening our office in Pittsburgh, **CSPG&F** has experienced similar growth in the Delaware area. As such, we are happy to announce the opening of our most recent office located at the Nemours Building, 1007 Orange Street, Suite 205, Wilmington, Delaware. We are pleased to announce that **Robert Beste** has joined the firm and will serve as the firm's managing partner in Wilmington. Robert has practiced as a commercial litigator in Delaware for the last 28 years and brings a wealth of experience to the firm.

CSPG&F is also pleased to announce that **Roy S. Cohen, Edward Seglias, George E. Pallas, John A. Greenhall** and **Marc Furman** have each been named a Pennsylvania Super Lawyer for 2004 by Philadelphia Magazine. The selection process took six months and involved three different tiers of peer review. Ultimately, only the top 5%

of those attorneys licensed to practice in Pennsylvania were chosen for this distinction. Congratulations Roy, Ed, George, John and Marc!

Finally, **CSPG&F** continues to reach out to the community to discuss issues of importance. The Federal Electrical Contractor's Association has asked **Roy S. Cohen** to speak at its upcoming meeting in Philadelphia. FECA is a specialized trade organization comprised of 31 different electrical contractors from around the United States, England and Canada. Roy will discuss legal trends and issues of importance to the electrical contracting industry. **Edward Seglias** will be speaking at an upcoming Pennsylvania Mechanical Contractor's Association event about proper documentation for delay and inefficiency claims. **Tim Woolford's** article "Third Party Insurance Coverage for Mold Claims; Are Construction Professionals Covered by Their CGL Policies?" currently appears on the American Bar Association, Construction Litigation Committee's web site and will appear in the Winter 2004 edition of *Construct!* Magazine. Congratulations to all on their recent accomplishments.

-- Edward T. DeLisle, *Esquire*

Questions regarding a specific legal matter? We recommend you speak with a **CohenSeglias** attorney:

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