

Construction Law Update August 2010

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New Health Care Law's Small Business Tax Credit Available to Contractors and Small Businesses

By: Mark A. Smith

To encourage small employers to offer, or continue offering, health care coverage to their employees, the recently enacted Patient Protection and Affordable Care Act (PPACA) creates a new federal tax credit that could help such employers cover part of the employer cost of the health care coverage. This tax credit was available beginning in 2010, so eligible small employers can begin to benefit almost immediately if they qualify for the credit. This summary focuses only on how the credit will apply to taxable small businesses, but special rules under PPACA also extend this credit to small, tax-exempt employers.

What tax-exempt businesses are potentially eligible for a credit?

To be potentially eligible for a credit, the business must

- (1) have fewer than 25 full time equivalent (FTE) employees for the year;
- (2) have average annual wages that are less than \$50,000 per full time equivalent employee; and
- (3) pay all or part of the health care plan premiums for employees under a "qualifying arrangement." A qualifying arrangement, in general terms, is one where the employer pays a uniform percentage of the health care premium cost and that uniform percentage is at least 50%.

What is the maximum credit available to a small taxable employer?

The maximum annual credit available for years 2010 through 2013 is 35% of the employer's premium expenses that count toward the credit; this 35% is the credit level that can be claimed by an employer with 10 or fewer FTE employees and average annual FTE wages of \$25,000. As the number of FTE employees ranges upward from 10 to 25, or the FTE annual wages range upward from \$25,000 to \$50,000, the size of the available credit reduces proportionately.

How does the taxable employer actually claim a credit, i.e., how does it get access to credit dollars it is entitled to receive?

A taxable small employer claims the tax credit it is entitled to for a given year on its federal tax return for that year. For taxable employers, however, this is not a "refundable credit," meaning that it can only be taken as an offset against what is otherwise the business's income tax liability. If a small business is eligible for the credit in a year when it has no, or not enough, income tax liability, to fully use up the credit, the unused credit can be carried forward for up to 20 years, or back one year (but not before 2010), to give the business an opportunity to realize a tax savings from the credit.

Is there as yet any published IRS guidance giving more details or examples to help a small taxable employer determine its eligibility for, and the potential amount of, this tax credit?

The IRS has posted on its website 22 Frequently Asked Questions about the small business health care tax credit. These FAQs deal with both taxable and tax-exempt businesses, which are subject to somewhat different rules, but they are nevertheless a helpful resource a tax exempt employer can look to for some further, more detailed guidance. Included are some specific numerical examples about how the available credit reduces when the FTE employee count is above 10 or the average annual FTE wage is above \$25,000, how to convert part-time employees into FTE employees, and how to compute FTE average annual wages when there are part time employees. The web address for the IRS FAQs is: <http://www.irs.gov/newsroom/article/0,,id=220839,00.html>.

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PA Extends Expiration Dates of Development Permits and Approvals

By: Caroline M. Hoffer

In July, Governor Edward G. Rendell signed into law Act 46 of 2010 (the Permit Extension Act) which extends the expiration date of certain development and land use approvals. This Act directly benefits owners, developers and contractors whose real estate projects have not proceeded on schedule and whose permits have expired or who were at risk of having the permits and approvals expire. When development permits and approvals expire, substantial additional expense is incurred to re-apply for these permits and approvals; and in some cases, changes in applicable zoning, subdivision and other development laws and regulations preclude the development as proposed.

To what date are the permits and approvals extended?

Expiration dates of approvals and permits in effect on and after January 1, 2009 are suspended until July 1, 2013. If an approval or permit had "time left" on July 10, 2010, that additional time is tacked on after July 1, 2013. If a permit or approval expired between January 1, 2009 and July 6, 2010, that permit or approval is reinstated.

Is the extension automatic?

The Permit Extension Act applies automatically to covered permits and approvals, except in the City of Philadelphia. Accordingly, no confirmation of the extension of the permit or approval is required. However,

one may request verification of the permit or approval and the new expiration date from the issuing municipality or agency. The issuing municipality or agency must respond within 30 days or face a deemed affirmation of the approval and the new expiration date included in the written request.

Is the extension free? The Permit Extension Act permits the issuing municipality or agency to charge a fee for extending the permit or approval of up to 25% of the original application fee, but not more than \$5,000. The City of Philadelphia may charge up to 50% of the original application fee.

What permits and approvals are extended?

Approvals are defined broadly in the Permit Extension Act, and include development and subdivision approvals under the Municipalities Planning Code, building permits, soil erosion and sediment control plan approvals and approvals issued pursuant to a number of statutes. The time period for creating additional units and common elements out of convertible real estate in a condominium or planned community is also extended.

What permits and approvals are excluded?

There are a number of exclusions to the extension provided by the Permit Extension Act, including certain NPDES permits, enforcement actions, Keystone Opportunity Zone approvals or benefits, PA "one call" determinations, certain DEP approvals relating to high quality waters or exceptional value waters and PennDOT approvals. There is a provision that PennDOT highway occupancy permits will be extended, upon submission of an application, for one-year intervals during the time of the extension period, subject to modifications based on changed circumstances.

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Integrated Project Delivery Systems Under the Most Recent AIA Contract Documents

By: Ronald H. Pollock

The 2007 AIA contract documents include an approach to construction management known as an integrated project delivery system. Integrated project delivery (IPD) is a collaborative team approach to project delivery in which key participants contribute expertise to every phase of the project and share risk and reward. Team success is tied to project success. IPD's goals are to maximize efficiency for all phases of design, fabrication and construction.

Typically, the primary team participants are the owner, general contractor and the architect. Consultants and subcontractors are also key supporting participants. The primary team participants enter into a multi-party contract or form a single purpose entity. The team is heavily involved from the beginning to the end of the project and agree to a shared decision-making process as well as sharing risks and rewards and compensation based upon outcome.

The contemplated benefits of IPD are streamlined project communications, thorough planning, controlled costs and reduced disputes.

This concept encompasses any number of challenges, including the need for trust and cooperation above the standard in a typical project. Participants must accept non-traditional roles and the concept requires new contractual relationships.

The AIA contract documents provide forms of contracts and multi-party agreements as a starting point. A careful structure, both legally and with respect to project management, could present an innovative approach to construction projects. Like all innovative approaches, it requires a thoughtful, constructive approach. For discussion of the contractual requirements for such a project, feel free to contact us.

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EPA Delays Enforcement of New Lead Paint Rule for Renovation, Repair and Painting Projects

By: Sarah Yocum Rider

In the January 2010 issue of Construction Law Briefs, we reported that the Environmental Protection Agency (EPA) instituted a new rule that would affect renovation, repair and painting projects on homes and child-occupied facilities built before 1978. The new rule aims to reduce the amount of lead dust created during the renovation and repair of homes and child-occupied facilities. The rule requires that contractors, subcontractors and landlords who perform these renovation, repair and painting projects be properly trained and certified and follow specific work practices to prevent lead contamination. The rule also requires contractors, subcontractors and landlords to provide the EPA pamphlet, Renovate Right: Important Lead Hazard Information for Families, Child Care Providers, and Schools, to homeowners and occupants of child-occupied facilities built prior to 1978. Ignoring the new rule could lead to fines of up to \$37,500 per day.

The new rule was originally scheduled to take effect in April 2010. However, the EPA recently decided to delay the enforcement of the new rule following pressure from the construction industry and members of Congress. The EPA announced that it will not fine renovation/repair workers if they enroll in or apply to enroll in a certified renovator class by September 30, 2010, and complete training by December 31, 2010. The EPA's memo of the announcement can be found at http://www.epa.gov/lead/pubs/giles_RRP_memo.pdf.

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PA Proposed Legislation on the Use of E-Verify for the Construction Industry

By: Silas M. Ruiz-Steele

On June 7, 2010, certain members of Pennsylvania's House of Representatives have proposed passing legislation, aimed at the construction industry, requiring contractors and subcontractors to confirm the legal work authorization of new hires using a federal government program. If passed, it would place additional burdens on those affected employers, requiring them to verify a new hire's work authorization through the E-Verify program.

E-Verify is an Internet-based system administered by the U.S. Citizenship and Immigration Services (USCIS) that allows employers to verify the employment eligibility of their employees, regardless of nationality or citizenship, based on information provided by the employee on his or her Form I-9. E-Verify checks this information electronically

against records contained in Social Security Administration (SSA) and Department of Homeland Security (DHS) databases. Currently, E-Verify is a voluntary program for most employers; however, some companies may be required by state law or federal regulation to use E-Verify. For example, E-Verify became mandatory for employers with federal contracts or subcontracts that contain the Federal Acquisition Regulation (FAR) E-Verify clause.

The Department of Homeland Security has made worksite enforcement a high priority, and as a result, it is important for U.S. companies to maintain properly completed I-9 forms or risk severe legal and financial consequences for noncompliance. The Immigration Reform and Control Act of 1986 (IRCA) requires employers to verify that all employees, hired on or after November 6, 1986, are authorized to accept employment in the U.S. In order to avoid liability for failure to comply with the duty of employment eligibility verification, the employee and employer must correctly complete the Form I-9 on a timely basis. In addition, employers should have in place a corporate compliance policy addressing the necessary procedures and training on employment eligibility verification.

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The Effect of Green Building on Construction Contracts

By: Ronald H. Pollock

Green building, which generally involves an increase in environmental responsibility and efficiency in the building process, has become a significant factor to the construction industry. Green building is estimated to account for \$60 billion worth of construction in 2010, and green building is becoming more and more a favorite of governmental regulations. Green projects, however, involve numerous contractual issues that are not specifically addressed by most form contracts or standard agreements.

For example, green projects involve numerous terms that the parties should define in the construction contract, in particular the specific standard or law that is chosen by the parties to govern the green process. Further, there are specific issues regarding instruments of service, permits and approvals, tests and inspections and other compliance with the law unique to green projects. Further, contracts must be cognizant of substitutions and the impact on possible credits under the U.S. Green Building Council's LEED rating system. Further, many green activities associated with a sustainable project should be included in the project schedule. Further, if LEED certification is contemplated, there are many issues of substantial completion, contract term and final completion and LEED certification coordination.

Finally, at the back end of a project, there may be issues of project warranty as LEED certification may not be complete during a typical one year warranty period. There may also be issues of consequential damages if green building certification is not achieved. It is also important to pinpoint allocation of responsibility for the LEED certification project. In short, green projects will benefit from a well-crafted contract provision which specifically addresses each party's responsibility with regard to LEED certification.

Each of these areas may or may not be relevant to a specific contract, and an in-depth analysis of each is beyond the scope of this article. However, we would encourage parties to think carefully about the impact of green building on a project and exercise foresight with respect to an orderly contractual analysis of the rights and responsibilities of the owner, contractor, subcontractor and engineer/architect.

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