

Construction Law Update August 2012

PUBLISHED ON
August 1, 2012

TABLE OF CONTENTS

[Good News for Builders and Developers!](#)

[E-Verify Mandated for Public Works Contractors in Pennsylvania beginning January 1, 2013](#)

[Construction Workplace Misclassification Act - An Independent Contractor or Not an Independent Contractor - That is the Question](#)

[Assurances of Quality May Provide a Basis for Personal Liability](#)

[Practice Pointer - Protect Yourself from Personal Liability](#)

Good News for Builders and Developers!

By: Caroline M. Hoffer

In July of 2010, then Governor Ed Rendell signed into law Act 46 of 2010 (the Permit Extension Act) which extended the expiration date of certain state and local building and land use permits and approvals until July 2, 2013. This directly benefitted owners, developers and contractors whose real estate projects had not proceeded on schedule due to the sudden downturn in the real estate market and whose permits expired beginning on January 1, 2009 or who were at risk of having the permits and approvals expire on or after that date.

The Permit Extension Act was recently amended to extend the expiration date of the identified permits and approvals for an additional three years, until July 2, 2016. Governor Tom Corbett signed into law Act 87 of 2012 on July 2, 2012 which included this amendment to the Permit Extension Act. This recent amendment provides further relief to builders and developers who have delayed proceeding on their projects until the real estate market recovers.

There has been considerable controversy over the issue of whether the Permit Extension Act was intended to be interpreted as (i) an extension of the permits and approvals to July 1, 2013, which would mean that all permits and approvals that would have expired during this extension period would expire on July 2, 2013 (now 2016) , or (ii) a "tolling " period, which would mean that the time period remaining on the permit stopped running on December 31, 2008, and would begin to run again on July 2, 2013(now 2016) . There has been one case on this issue, in Lancaster County, that held that the Permit Extension Act "tolls" the expiration of a permit during the extension period. Accordingly, the time remaining on the permit at issue in the case was deemed to be tacked on after July 1, 2013. This decision was not appealed, and to date, this issue has not been before the Commonwealth Court or the Supreme Court of Pennsylvania.

The Lancaster County Court decision may not be followed by all municipalities or state agencies. To determine the municipal or state agency position on the expiration of a specific permit or approval, it is possible to request a

confirmation of the expiration date. The extension provided by the Permit Extension Act is automatic and 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.

Remember to thank your legislators for extending the Permit Extension Act benefits to July 1, 2016!

[Back To Top](#)

E-Verify Mandated for Public Works Contractors in Pennsylvania beginning January 1, 2013

By: Silas M. Ruiz-Steele

Effective January 1, 2013, Pennsylvania will require certain public works contractors and their subcontractors to participate in E-Verify. E-Verify is a free, Internet-based system that allows businesses to determine the eligibility of their employees to work in the United States. Gov. Tom Corbett signed The Public Works Employment Verification Act into law on July 5, 2012.

The law affects public works contractors and subcontractors who will work on certain projects (i.e., construction, reconstruction, demolition, alteration and/or repair work) with an estimated value of at least \$25,000, which are funded partially by a public body. These contractors and subcontractors will be required to participate in the Department of Homeland Security's (DHS) E-Verify (electronic I-9 employment verification or EVP) program, which is managed by Immigration and Customs Enforcement (ICE).

The new law requires employers to certify that they have completed E-Verify paperwork for each newly hired employee. The Pennsylvania law includes audit provisions and sanctions for failure to use E-Verify to confirm the employment eligibility of new employees. Employers who fail to submit the E-Verify certification form are subject to a written warning following the first offense. Willful violators (as determined by a court) may be debarred for up to three years. There are also monetary penalties under the state law ranging from \$250 to \$1000 for each violation.

Public works contractors and subcontractors should familiarize themselves with E-Verify requirements at this time in preparation of mandatory participation in E-Verify.

For additional information or questions regarding E-Verify and how the above information may affect your business, please contact Attorney [Silas Ruiz-Steele](#), Chair of Barley Snyder's [Immigration Law](#) Group, at 610-898-7153 or sruizsteele@barley.com.

[Back To Top](#)

Construction Workplace Misclassification Act - An Independent Contractor or Not an Independent Contractor - That

By: Ronald H. Pollock

October will mark one year since the Construction Workplace Misclassification Act was signed into law. As most are undoubtedly aware, the Act makes it both a civil and criminal offense for a contractor to knowingly misclassify an employee as an independent contractor.

The Act establishes criteria particular to the construction industry under which employees can be classified as independent contractors. We have found that the Act can have a significant impact on construction businesses who need to deal with the reality of an employee-dominated workforce as opposed to an independent contractor system. On the other hand, this levels the playing field for those who have not relied upon an independent contractor work status for individuals perhaps more appropriately classified as employees.

As a recap, test factors for independent contractors are:

- Need written contract; Must be free from the control or direction over the performance of its services by the contracting party;
- Must be customarily engaged in an independently-established business as shown by the following:
- must possess his/her own tools;
- must operate on a profit/loss basis, not a salary;
- must perform services through a business in which he/she has a proprietary interest;
- maintain a separate business location; and
- must have worked for somebody else and held him or herself out as available to others.
- Finally, the independent contractor must maintain liability insurance.

[Back To Top](#)

Assurances of Quality May Provide a Basis for Personal Liability

By: Matthew M. Hennesy

In the course of completing a contract, a party to the contract may have worries or express uncertainty about the final result of the project. Actions and statements made in response to such worries and expressions of uncertainty can have significant legal implications.

Statements that assure the quality or outcome of work may present a basis for personal liability. Typically, an individual acting on behalf of a company as an agent is not personally liable on a contract between the company and a third person. However, a person acting as an agent may assume personal liability on a corporate contract where they voluntarily undertake a personal responsibility. In a recent Pennsylvania case, the Superior Court upheld a jury verdict finding the owner of a construction company personally liable for his company's breach of contract. The Court reasoned that although the owner was acting as the agent of his company, he voluntarily assumed personal liability on the building contract when he made statements intended to calm the owner's fears about building deficiencies that reasonably led them to believe he would personally ensure the completed home was built properly.

When worries or uncertainty about a project lead to changes, the parties must evaluate whether such changes should be, or are required to be, in writing. Generally speaking, parties to agreements can orally modify written agreements even if the agreement specifically states that it can only be changed in writing. With certain construction contracts, however, written change orders signed by the contractor and purchaser are required. Where signed change orders are required, failure to obtain them can prevent a contractor from recovering for non-payment of work performed as a result of the agreed upon change.

Being aware of the potential pitfalls of responding to doubts and worries about a project will allow a thoughtful response that permits the completion of the project while minimizing adverse legal consequences.

To learn more about practical ways to avoid personal liability, see this issue's [practice pointer](#) by [Maria Elliott](#).

[Back To Top](#)

Practice Pointer - Protect Yourself from Personal Liability

By: Maria Di Stravolo Elliott

In our February 2011 Construction Law Briefs, I wrote a practice pointer about choosing the right entity for your construction business. Once you have chosen the right entity for your construction business, you will then need to correctly identify this entity in construction contracts and refer to this entity during the construction job in order to protect yourself from personal liability.

When you prepare your construction contracts (or any contract for that matter), be sure that you identify your entity in both the beginning paragraph or section of your contract and on the signature page. Even though you may sign the contract on behalf of your entity (either as president or managing member), be sure that you are not named individually as the contractor or subcontractor. If you do, a court will find you personally liable for the contract, which means that your personal assets (like your home) will be subject to any judgments that may be entered against you.

More importantly, even if your entity is correctly identified in the contract, you may still be exposed to personal liability depending on your individual conduct during the construction job, that is, whether you assume personal liability as the agent for the business. For example, be careful not to say, "I personally guarantee that the job will be done right" or "I will take care of it and will take care of you". Statements like that, depending on the circumstances, can expose you to personal liability if an owner sues you (and your entity) for construction defects.

In one case, a Pennsylvania court found that a managing member of a construction business, acting as the agent for the business, was personally liable since he used similar statements to assure his clients that the jobs would be done correctly. Such statements were made during several meetings with the homeowners since there were recurring building deficiencies during the construction jobs. See *Bennett v. A.T. Masterpiece Homes*, 2012 PA Super 60, 40 A.3d 145 (2012). The court noted that such statements were made with the goal of securing the homeowners' continued performance on the contract and the managing member voluntarily made the promises, without ever distancing himself from such statements until he was sued!

[Back To Top](#)