Barley Snyder

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Pennsylvania Construction Contractors Under The Gun For Misclassifying Employees As Independent Cont

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Related Practice Areas: Real Estate and Employment
Related Industry: Construction

Pennsylvania has been sending a strong message to contractors that it is enforcing a law penalizing contractors that knowingly misclassify an employee as an independent contractor.

The Construction Workplace Misclassification Act, or "Act 72," went into effect in 2011, and the Department of Labor & Industry's Bureau of Labor Law Compliance has seen administrative penalties of the infractions of the act greatly increase since then.

The number of cases seen went from an average of about 28 the first four years to an average of 238 in 2015 and 2016, the latest data available. Administrative penalties from an average of $3,800 per year the first four years to an average of more than $300,000 per year in 2015 and 2016.

Already, the department anticipates 2017's collections will pass 2016's amount of more than $380,000. And in 2018, the department has made enforcement of the act more of a priority with four fully staffed investigative offices across the state.

The bureau will continue to visit construction job sites and audit contractors in violation of Act 72 and continue to work collaboratively with the Office of Unemployment Compensation Tax Services and the Bureau of Workers Compensation to accept referrals and conduct joint investigations.

This Q&A will give you a basic understanding of the law and how it works:

What is it?

The Construction Workplace Misclassification Act makes it both a civil and a criminal offense for a contractor

to knowingly misclassify an employee as an independent contractor. Pennsylvania is one of several states that have taken similar measures to penalize employers that improperly classify workers as independent contractors to avoid paying certain taxes and other employee benefits.

Which Employers Are Covered Under Act 72?

Construction industry employers that are already subject to the Pennsylvania Workers' Compensation Act and the Pennsylvania Unemployment Compensation Act are covered by Act 72. The act also extends individual liability to officers or agents of the employer. Construction is defined broadly as the "erection, reconstruction demolition, alteration, modification, custom fabrication, building, assembling, site preparation and repair work done on any real property or premises under contract, *whether or not* the work is for a public body and paid for from public funds."

What Are The Criteria For Independent Contractor Status?

• The individual must have a written contract to perform construction services.

• The individual must be free from control or direction over the performance of those services, both under the contract and in fact.

• The individual must be customarily engaged in an independently established trade, occupation, profession or business.

Act 72 also sets forth six criteria to determine whether an individual is "customarily engaged in an independently established trade, occupation, profession or business."

• The individual must possess the essential tools, equipment and other assets necessary to perform the services, independent of the employer.

• The individual arrangement with the employer is such that the individual must realize a profit or suffer a loss as a result of performing the services.

• The individual must perform the services through a business in which the individual has a proprietary interest.

• The individual must maintain a business location separate from the location of the employer.

• The individual must:

• Have previously performed the same or similar services for another person, meeting the criteria 1 through 4 above, and while free from direction or control over the performance of the services; or

• Hold him or herself out to others as available and able to perform the same or similar services meeting the criteria of 1 through 4 above, and while free from direction or control over the performance of the services.

• The individual must maintain liability insurance of at least $50,000 during the term of the contract.

What Penalties May Be Imposed For Violations Of Act 72?

Act 72 misclassification subjects employers to civil penalties of up to $1,000 per misclassified employee for a first violation, and up to $2,500 per misclassified employee for each subsequent violation. Importantly, Act 72 also allows the Secretary of the Department of Labor & Industry to petition a court for a stop-work order

requiring the cessation of work by those individuals who are misclassified, or if a majority of individuals at a worksite are misclassified, to petition for a cessation of all business operations of the employer at each site where a violation occurred. The stop-work order remains in effect until the court issues a release order.

Act 72 also allows criminal penalties for employers that violate the act and those who intentionally contract with such an employer *knowing the employer intends to violate the act*. An intentional violation is a misdemeanor of the third degree for a first offense and a misdemeanor of the second degree for a subsequent offense. A negligent violation is a summary offense subject to a fine of not more than $1,000.

Does The Act Prohibit Retaliation?

Yes, Act 72 prohibits an employer from discriminating or taking an adverse action against any person who in good faith files a complaint or informs any person about an employer's non-compliance. An adverse action within 90 days of the person's complaint raises a rebuttable presumption of retaliation.

How Have Contractors Fared Under the Act?

In 2016 (the most recent year reported), the department collected $383,033.78 in administrative penalties from Act 72 enforcement efforts - a 76 percent increase in penalties collected from the previous year. The Bureau of Labor Law Compliance (BLLC) has 27 investigators in offices across Pennsylvania.

Potential violations come to BLLC primarily three ways:

- Complaints filed with the bureau
- Findings made during construction job site visits
- Referrals from its Office of Unemployment Compensation Tax Services (OUCTS). The bureau works with both OUCTS and with the Bureau of Workers Compensation to identify potential violators of Act 72 for prosecution under Act 72.

What's Ahead?

Workplace injuries and layoffs happen in the construction industry, and the department is seizing these events as opportunities for enforcement. The attorneys in Barley Snyder's Construction Law and Employment Law practice groups can assist companies in assessing whether their independent contractors should be classified as employees, and in preparing independent contractor agreements to reduce the risk of non-compliance with Act 72.

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Good Archiving Can Save You Money

By: John J. Sylvanus
Related Industry: Construction

Have you ever searched for a specific email in your firm's database?

If not, give it a try. Don't ask IT or someone else to do it for you. Open the files and search for yourself. If your system administrator has saved everything in PDF format, it is searchable. Use a keyword and find the

specific email you want. Then read the rest of this article. If everything is saved in what is called "native" format, good luck.

How a company archives its electronic documentation could save it tens of thousands of dollars in major construction litigation. Federal courts require agreements on electronic document production which can stretch to 10 or 12 pages of details on how and in what form documents are exchanged.

Construction is a complicated process. Every decision involves multiple people emailing each other. Gone are the days when these matters were handled in site meetings and telephone calls, with a typewritten letter commemorating the decision.

Today there are email chains. While you are in your email archives, search for the emails related to a specific matter you recall as being a difficult negotiation and resolution. See how many times an individual email is repeated. For each individual in your organization, there is a separate email chain each time that person sent or received an email relating to that issue. At the close of the process, an email saying "I concur" can add an additional 100 pages to the electronic files.

When a dispute arises and I get involved, the "rubber meets the road." Well-organized and searchable files make locating relevant documents easy and inexpensive. What constitutes "well-organized" to the person charging you by the hour to find things?

First and most important is **completeness**. Make certain everyone is dedicated to the process. A missing email can be problematic. If it favors your opponent, you can be certain they have it. If you don't, I don't and I can't help prepare you to respond to the claims in that email.

Next is **labeling** and **organization**. Remember the days of paper files with file labels? Documents are no good to me if I can't locate them. If I'm looking for a specific submittal, the return stamped copy and resubmittals, it's much easier if they are all in a submittal file, with a subfile properly labelled to that submittal than if all submittal documents are saved chronologically as produced.

Searchability is worth mentioning again. If documents aren't saved in searchable PDF or other form, they are worthless.

An often overlooked element is **size**. Save emails by months, not years. Save submittals in separate subfiles rather than as a whole. The same goes for change order requests and change orders, job conference reports, daily reports and all documents. The smaller the file the easier it is to search.

Finally is **format**. All documents should be converted to PDF format. It is easy to open and, most importantly, searchable. Searchability is critical to locating documents.

In a real sense, your archival procedures can save you thousands of dollars in the event of litigation. Making sure your construction lawyer can find documents is critical to success or failure. Spend some time, and perhaps money, to make certain your files are litigation-ready, or prepare for the cost of not doing so.

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Five Commercial Real Estate Due Diligence Considerations You May Be Forgetting

By: Reilly S. Noetzel
Related Practice Area: Real Estate
Related Industry: Construction

The due diligence phase is crucial to any real estate transaction. When properly drafted in an agreement of sale, it can allow buyers to obtain ample information about a property. Perhaps most importantly, it could give buyers additional negotiation leverage. An unforeseen issue exposed during a due diligence investigation can create an opportunity for a reduction in purchase price or additional purchase incentives. Here are five due diligence items to consider:

1. **Access**. Consider whether the property you are purchasing has sufficient legal access. Some easements and access agreements may not be recorded, in which case it is important to speak with the sellers regarding the property's current access arrangements.

2. **Stormwater Management**. Storm water management facilities may implicate various maintenance and repair obligations set by state environmental agencies. In Pennsylvania, the existence of a property's post-construction stormwater management facility could mean numerous state maintenance obligations, as well as specific notice and consent requirements for subsequent property transfers.

3. **Zoning Overlays**. Although a property's zoning classification is a common due diligence consideration, municipalities often enact overlay zones which impose additional land development and permitting requirements. These overlays may increase a buyer's requirements or impose additional conditions related to the subdivision and land development approval process.

4. **Condominium and Planned Community Concerns**. A property may be subject to a condominium or planned community declaration. Some hallmarks of these ownership structures include common areas shared by owners of each property within the condominium or planned community, as well as unit owners' associations charged with administering the properties and enforcing any regulations. It is important to review any declarations (and accompanying plats) affecting the property to determine the obligations of each owner within the community containing the property. Ask about items like signage permission, shared access, parking and potential amendments or additions to the planned community or condominium.

5. **Leases**. A lease encumbering a property can be a due diligence nightmare. Leases often contain hidden clauses and rights. A tenant's right of first refusal could be detrimental for a buyer in any transaction, especially if the right is initially undisclosed and the tenant later refuses to consent to a waiver of that right. It is important to obtain an estoppel certificate from any tenant at the property you are purchasing. These certificates help to ensure the lease you are assuming is valid and enforceable. In the event that a buyer is obtaining financing for its purchase, a tenant, in connection with an estoppel certificate, may also request a subordination and non-disturbance agreement (SNDA). SNDAs subordinate the tenant's leasehold interest to the buyer's mortgage, but assure the tenant will not be "disturbed" in its occupancy of the property in the event of a foreclosure of the mortgage. These items require additional negotiation, so be sure to adequately review them during any due diligence phase.

In order to review any of these due diligence items, it is important at the outset of a transaction to ensure the seller discloses all available information and documentation related to the property. Additional investigation

may include searching the local recorder of deed's office, obtaining a zoning compliance letter or engaging an appraiser to appraise the property.

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Mechanic's Liens Laws Between the States: Know the Differences

By: Derek P. Dissinger
Related Practice Area: Real Estate
Related Industry: Construction

The Mason-Dixon Line not only is the imaginary border dividing the land of Pennsylvania and Maryland, but also often is the boundary between differences in laws. Buyers, sellers, developers, contractors and banks doing business in both states should be aware of some of the basic differences.

As banks, title companies, buyers and sellers and contractors know, mechanics liens and the threat of mechanic's liens can create uncertainty and cause problems in purchase, refinance and construction loan situations.

The key difference between the treatments of mechanic's liens in different states is when the lien attaches to the real estate. In Pennsylvania, a mechanic's lien has priority from the date the contractor "commences construction." From that date, the contractor has six months to file a claim and then there are certain steps to enforce the lien. This creates problems for title insurance agencies insuring title to the property because of the uncertainty in determining whether every contractor who has done work in the last six months has been paid.

For loan policies, Pennsylvania has enacted laws to protect banks. The state created exceptions to the priority of a mechanic's lien for purchase-money mortgages and "open-end" construction mortgages. However, there is still an issue for owner's policies where the seller built the building being sold or did substantial renovations in the six months prior to the sale. For example, if I buy from you and you stiffed workers, the contractor can still file a mechanic's liens on my house after closing. In this case, title companies need to obtain lien waivers, construction budgets, proof of payment and indemnities from sellers and general contractors.

But in Maryland and other states, the lien has priority from the date the lien is filed, not when the work was done. For title insurance companies in Maryland, it is fairly easy to insure through mechanic's liens because the title company does a title search, and if there are no liens filed before closing, it can issue insurance over mechanics lien. In Pennsylvania, it is an issue because the lien would relate to the date the work is done, not when the notice of claim is filed.

Familiarity with these issues when entering into agreements of sale can make a future closing much easier. Obtaining lien releases and waivers from contractors and having construction budgets available for review can make it much easier to insure through mechanic's liens. Also, working with a title company that understands the ins and outs of the mechanic's lien law can make a transaction much easier on all of the parties to the transaction. Uncertainly regarding what requirements are needed to insure through mechanic's liens can delay closing for the buyer and seller, and in some cases, cause financing approvals or settlement

dates in agreements of sale to expire.

If you have any questions about the differences - obvious or subtle - in the laws between Maryland and Pennsylvania, or if you know of a big difference that has caused issues for you that I didn't write about, please feel free to reach out to me.

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How the 2017 Changes to the AIA Construction Contract Documents May Affect You

By: Reilly S. Noetzel
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With the release of the 2017 AIA construction contract forms in April 2017, all 2007 AIA construction contract forms will expire on October 31, 2018. Typically, the updates to the AIA contract forms occur once every ten years. These changes not only reflect the latest developments in the industry, but also seek to remedy key issues that stemmed from the previous iteration of construction contract forms.This article is the first part of a three-part series addressing the 2017 changes to the AIA contract forms. It will highlight the significant changes to the AIA Owner-Contractor contract forms, with changes to the Owner-Architect and Contractor-Subcontractor contracts discussed in later articles.

A101 (Stipulated Sum) and A102 (Cost Plus) Forms

1. **New Options for Contract Time Provisions**

The AIA replaced rigid contract time provisions in the A101 and A102 forms with open-ended contract time provisions, allowing the agreement to be tailored to the specific time requirements of both the owner and contractor. Parties now have the ability to select when the work should be completed, and are given choices for the completion timeframe(based on calendar days or by a specific date). Additionally, the forms now provide suggested language addressing earlier substantial completion of portions of the work.

2. **Simplified Payment Provisions**

A101 and A102 now contain user-friendly payment provisions that better explain the application of each progress payment to the contract sum. Both A101 and A102 first list the items that each progress payment includes, followed by each reduction to progress payments. The changes make the forms easier to read and understand. In addition, the A101 form no longer contains set calculations to determine the percentage of completion of the work for price allocation purposes. Rather, it now contains a general provision that progress payments include the "portion of the Contract Sum properly allocable to completed work."

3. **Standardized Termination Fee**

The A101 and A102 forms now provide a suggested remedy to the contractor in the event of an owner's termination for convenience. A new provision has been added, which introduces a termination fee to be paid to the contractor. The provision leaves open the amount of the fee, and reminds the parties to insert an appropriate formula for calculating the termination fee.

Major Changes: A201 Form (General Terms and Conditions)

1. **Expanded Financial Arrangement Provisions**

The 2017 A201 adds bolstered language that requires owners, upon a contractor's written request, to provide evidence of financial arrangements sufficient to fulfill the owner's contract obligations. The prior language was more permissive. It only allowed the contractor to request such information, but did not obligate the owner to furnish it.

2. **Addressing the Use of Building Information Models (BIM)**

Perhaps in an attempt to address issues arising from unauthorized use of BIMs, the new A201 contains a provision related to use of and reliance upon BIMs as well as electronic transmission of data. In particular, the A201 creates a standard requirement in Article 1.7 that the parties agree upon "protocols governing the transmission and use of" digital information. This provision also references AIA E203, the BIM and Digital Data Exhibit, as the appropriate means to establish such protocols. Where a party uses or relies upon BIMs without any set protocols in the AIA contract documents or in the AIA E203, it is done at that party's sole risk.

3. **Termination Fees**

Similar to the A101 and A102, the A201 provides language addressing termination fees to be paid to the contractor where an owner terminates the contract for convenience. These fees include costs attributable to termination of subcontracts, as well as any additional termination fee agreed upon in the contract. The inclusion of specific costs attributed to termination of subcontracts within the termination fee leaves less room for fee contests.

4. **Protections for Contractors in Dispute of Minor Changes**

The new A201 provides additional protections to contractors in the event of a dispute about minor changes in the work. While an architect may order minor changes under certain circumstances, the contractor may contest any minor change if it could affect the contract sum or contract time. In disputing the minor change, the contractor is obligated to notify the architect of the dispute and cease work on minor change ordered by the architect.

5. **Warranties**

The A201 now requires all warranties required by the contract documents to be either issued in the name of the owner or transferable to the owner.

Major Changes: A105 Form

Many of the changes introduced to the A105 form mirror those changes made to the A101 and A102 forms. Although the new Insurance Exhibit does not apply to the short-form AIA contracts such as the A105, the AIA added specific insurance provisions directly to Article 5 of the A105 that resemble the requirements set forth in the new Insurance Exhibit. The new insurance provisions allow the parties to fill in the amounts of policy limits for each type of insurance coverage required by the contract.

New Form: A101 - Exhibit A: Insurance and Bonds Exhibit

The A101 - Exhibit A Insurance and Bonds ("Insurance Exhibit") is a new addition to the AIA

Owner-Contractor forms, to be provided as an attachment to the A201 and designed to accompany Article 11 of the A201. In fact, many of the insurance requirements originally in Article 11 of the A201 form have been relocated to the Insurance Exhibit. The Insurance Exhibit specifies certain insurance obligations of the owner and contractor. The provisions within the Insurance Exhibit contain blanks to be completed with the insurance policy limits for particular projects. The Insurance Exhibit also contains optional insurance provisions, which may be selected within the contract when parties wish to include them. The major insurance requirements include:

- Owner's general liability insurance and property insurance
- Contractor's commercial general liability insurance (with specific limits), automobile liability insurance (with specific limits), worker's compensation insurance at statutory limits, employer's liability insurance (with specific limits,) certain maritime liability insurance (where applicable).

Interestingly, many of the contractor's insurance obligations within the Insurance Exhibit are not listed as optional. However some of the insurance - such as maritime liability insurance - is applicable only in limited situations. The required and optional insurance coverage listed in the Insurance Exhibit reflect an overall goal by the AIA to give contracting parties more flexibility to tailor their contracts in accordance with each project and the insurance needs implicated by each project.

Industry Trends Reflected by AIA Changes

The addition of the Insurance Exhibit, as well as more specific coverage language in the abbreviated forms such as the A105, indicates a policy objective to encourage parties to include insurance provisions at the outset of the construction project. The new insurance provisions prompt both the owner and contractor to determine adequate coverage amounts prior to the commencement of work, leading to fewer surprises during the project.

The 2017 updates also reflect the technological advances within the industry. Provisions for electronic receipt of notice, as well as bolstered language regarding protocols for digital exchange of information and the use of BIMs, has brought the AIA contract forms up to current industry standards.

Perhaps most significantly, the AIA has added numerous opportunities for contractors and owners to "tailor" the contract to fit individual project needs and requirements. The ability to select whether and how certain contract provisions apply will afford parties the ability to truly customize the AIA contracts.

Once the 2007 AIA contract forms expire on October 31 only the new 2017 AIA contract forms will be available. To bring your contracts to compliance with the 2017 forms, or if you have any questions regarding the 2017 AIA changes, please contact any of the attorneys in Barley Snyder's Construction Industry Group.

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