Construction News

2012 Issue 2

BAKER DONELSON
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EXPAND YOUR EXPECTATIONS℠

New Risks Without Rewards: More OSHA Liability for General Contractors

Steven F. Griffith Jr.
sgriffith@bakerdonelson.com
504.566.5225

Matthew C. Juneau
mjuneau@bakerdonelson.com
504.566.8621

Over the last two years, OSHA has begun to take a more expansive view of contractor liability for workplace safety. As a result, general contractors should be more cautious than ever in ensuring the compliance of their worksites with government regulatory standards.

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New Alabama Immigration Law Will Impact Employers in the Construction Industry

Stephen Pudner
spudner@bakerdonelson.com
205.250.8318

Alabama's new immigration law, the Beason-Hammon Alabama Taxpayer and Citizen Protection Act (H.B. 56) (the law), has received substantial nationwide publicity since its passage in July 2011. Notwithstanding this publicity, much remains unknown regarding the validity and practical long-term effects of the law. This is particularly true in light of numerous ongoing legal challenges that have prevented many of its sections from taking effect and changes to the law that have been proposed, and in some cases passed, by the Alabama State Legislature during the 2012 session. Businesses and individuals in Alabama must take extra precautions to ensure compliance with the law, even while its final shape remains unknown.

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Alabama's New Retainage Law

Kevin Garrison
kgarrison@bakerdonelson.com
205.250.8333

A new retainage provision in Alabama's Prompt Pay Act became effective on September 1, 2011. Only contracts executed on or after that date are subject to the new law.

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Solis v. Summit Contractors, Inc.: A Cautionary Tale

Summit Contractors was the general contractor for the construction of a college dormitory in Little Rock, Arkansas. Summit subcontracted the entire project and only had four employees at the construction site: a project superintendent and three assistant superintendents. One of Summit's subcontractors, All Phase Construction, was contracted to perform the exterior masonry work on the building.

On a few separate occasions, Summit's project superintendent observed All Phase employees working on scaffolds with no guard rails. The workers also were not using personal fall protectors. Although Summit's project superintendent notified All Phase of these issues, All Phase employees continued their work in the same dangerous manner. Summit did not order them off the project.

During the course of construction, an OSHA Compliance Safety and Health Officer observed All Phase employees working on scaffolds over ten feet above the ground without fall protection or guardrails. No Summit employees were exposed to the hazards created by this dangerous worksite condition, but OSHA issued Summit a citation for this violation based on OSHA's controlling employer citation policy.

The Revival of Broad "Controlling Employer" Liability

In 2007, the Occupational Safety and Health Review Commission (OSHRC) prescribed a limited interpretation of the multi-employer worksite doctrine in Secretary of Labor v. Summit Contractors, Inc. (Summit I). Under the OSHRC's order in Summit I, the limited interpretation of the doctrine provided that, even when multiple employers were involved at a single worksite, the construction employer exercising general supervisory authority over the worksite (the "controlling employer") could not be issued a citation under OSHA when that employer neither created nor exposed its own employees to a condition in violation of OSHA. On appeal in 2009, the United States Court of Appeals for the Eighth Circuit disagreed with the OSHRC's order in Summit I. Solis v. Summit Contractors, Inc.

The Eighth Circuit remanded the case to the OSHRC to be reheard under what they determined was the proper interpretation of the multi-employer worksite doctrine. The Eighth Circuit held that the plain language of OSHA § 1910.12(a) did not preclude the Secretary of Labor's broad interpretation of who could be a "controlling employer." Under the controlling employer citation policy, the Secretary of Labor has now interpreted this provision to permit the citation of contractors that endanger their own employees as well as the citation of contractors that endanger other's employees working at worksites on which the employer employs its own employees. This interpretation applies even if the general contractor's employees are not exposed to the dangerous condition. Further, the new interpretation by the Eighth Circuit allows OSHA to issue safety citations to general contractors even when the general contractor is not responsible for the violation and none of its own employees contributed to the unsafe condition.

In Secretary of Labor v. Summit Contractors, Inc., ("Summit II"), the OSHRC applied the Eighth Circuit's interpretation of the controlling employer citation policy and held that contractors may be liable under OSHA for any unsafe condition at any worksite over which the contractor has control if the contractor has at least one employee on site. This broad interpretation of the controlling employer policy is now OSHA's enforcement policy nationally.

The Aftermath and Potential for Liability

The Eighth Circuit's opinion in Summit I and the OSHRC's order in Summit II create both legal uncertainty and practical difficulty for construction employers. Legal uncertainty exists because

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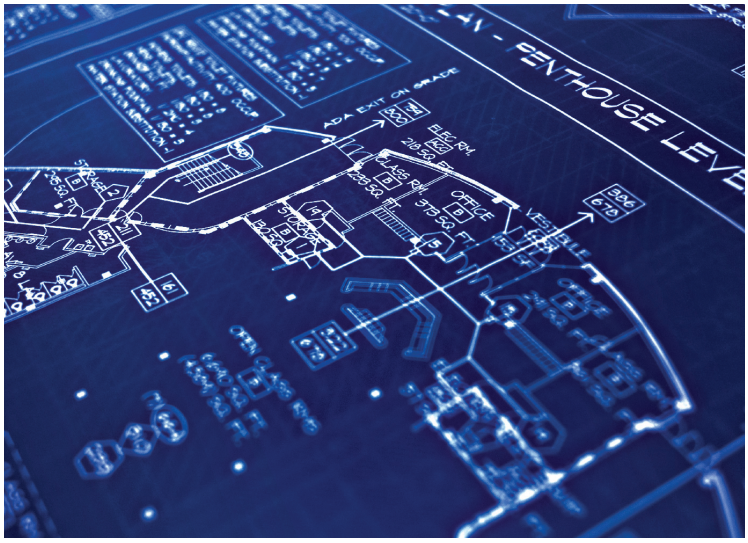
construction employers cannot predict how federal courts outside the jurisdiction of the Eighth Circuit will receive the OSHRC's affirmation of Summit I. It might seem logical that federal courts will follow the lead of the OSHRC on the enforcement of OSHA policy, but the Eighth Circuit's opinion in Summit I disagreeing with an OSHRC order serves as a reminder that predicting the disposition of federal courts, even in cases with apparently obvious outcomes, is never a sure proposition.

The legal uncertainty creates practical difficulties for construction employers that must make difficult decisions: incur the additional costs required to ensure compliance or hope that the federal court of appeals in their jurisdiction will interpret OSHA's controlling employer citation policy differently than the Eighth Circuit. For some, incurring the costs of compliance will be an easy choice; for construction employers on tight budgets hoping for a more favorable interpretation, the risk may at first seem worth it. But the choice to forego the additional expenses required to ensure compliance will not only expose construction employers to potential liability under the controlling employer citation policy; it could also lead to other employer and third-party liability. Certainly, the significance of these risks should not be overlooked.



Mitigating Risks and Preventing Liability

The increased breadth of the multi-employer worksite doctrine and the increased exposure to liability that results both lead unavoidably to increased costs of compliance. But, while one clear option for construction employers is to spend more on supervision, training, and other precautions, another option is to seek creative legal solutions by structuring contracts to account for this new level of exposure.

Through their agreements with subcontractors, general contractors may attempt to address the broader range of risks created by the current interpretation of the multi-employer worksite doctrine. Specifically tailored indemnity clauses that address the scenario in which a general contractor is cited for noncompliance created by a subcontractor's employees or by a subcontractor's worksite would likely be a popular option. Clauses requiring subcontractors to monitor worksites, supervise employees and report on compliance issues would be another option. However, enforcing such obligations may be a difficult and perhaps costly task for general contractors.

One potential compromise would be to identify this new level of exposure to liability and to agree to utilize joint efforts to police for compliance and to assume joint risk for noncompliance. Such an option might be attractive to both parties, especially in the scenario in which a subcontractor hires several subcontractors itself and, as a result, becomes exposed to liability under the multi-employer worksite doctrine. These sorts of complex arrangements are not uncommon, so an agreement to share the burden of compliance could be a straightforward solution. Still, no arrangement is perfect. Ultimately, this new interpretation of the multi-employer worksite doctrine creates complex problems that will require contractors to make difficult decisions and to tailor unique legal solutions.

Conclusion

This development in the law of occupational safety has exposed construction employers to broad liability for unsafe conditions at a worksite under OSHA. Now, no matter how the hazard was created or whose employees were endangered, a construction employer with supervisory authority at a worksite can be cited under OSHA for any dangerous condition at the worksite so long as at least one of its employees is present at the worksite. This significantly increased potential for liability should motivate construction employers that are involved in multi-employer projects to act with even more prudence and vigilance in monitoring worksite safety and addressing unsafe conditions.

New Alabama Immigration Law Will Impact Employers in the Construction Industry, *continued*

Provisions That Have Taken Effect

While the fate of numerous sections of the law remains unclear, most of its provisions relating to employers have taken effect and require the immediate attention of employers. Perhaps most importantly for employers in Alabama, courts have refused to block the provisions requiring businesses to confirm the legal status of all newly hired workers using the federal E-Verify system and imposing stiff penalties for hiring unauthorized aliens. These provisions took effect on April 1, 2012. Also, in order to receive government contracts, grants or incentives from the state or a recognized political subdivision, a business entity must enroll in the E-Verify program; not knowingly employ, hire or continue to employ an unauthorized alien; and attest to both of those requirements by sworn affidavit. All tiers of subcontractors on these projects must also meet the same requirements.

Violations of these provisions are extremely costly under the law and can result in hefty fines and loss of the right to do business in Alabama. Employers across Alabama must vigorously ensure compliance with the provisions to avoid those consequences. Penalties include suspension of business licenses and permits for first offenses, and revocation of licenses and permits for second offenses, as well as hefty monetary penalties.

Additionally, employers must be careful not to run afoul of existing federal law while attempting to comply with the law's requirements. Employers must keep in mind that federal law prohibits the use of E-Verify to pre-screen applicants or for existing employees unless an exception applies. Accordingly, E-Verify should only be used for new hires, after an offer of employment has been accepted, but before the employee starts working. If employers have not used E-Verify for new employees hired after the effective date of the law's E-Verify requirement (January 1 for state contractors, April 1 for other employees), these employers may be in a legal bind, as they are in violation of the law's requirement to use E-Verify, but would likely be in violation of federal law if they attempted to go back and E-Verify these new employees at this point, since they would now be considered existing employees.

Provisions Struck Down by the Courts

The federal courts have temporarily halted enforcement of numerous sections of the law. On September 28, 2011, the Chief Judge of the United States District Court for the Northern District of Alabama, Sharon Blackburn, issued three orders addressing the law. Two provisions that would have proved very costly for employers were enjoined by the federal court: Section 16, which prohibits taking a state tax deduction for wages paid to an unauthorized alien; and Section 17, which creates a state "discrimination" cause of action based on the retention or hiring of an unauthorized alien over a United States citizen or an alien authorized to work in the United States.

Numerous other sections have been temporarily halted by the federal courts, although none of them will have as large an impact on employers in Alabama as Sections 16 or 17. Judge Blackburn also halted enforcement of Section 11(a), which makes it unlawful for an illegal alien to apply for, solicit or perform work as an employee or independent contractor; and Section 13, which makes it unlawful to harbor, conceal or transport an illegal alien. Judge Blackburn also halted the state of Alabama from enforcing Sections 11 (f) and (g) of the law, which make it illegal for an occupant of a motor vehicle stopped on the street to attempt to hire someone to work at a different location if it impedes traffic and for an individual to enter into a motor vehicle for such purpose if it impedes traffic.

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New Alabama Immigration Law Will Impact Employers in the Construction Industry, *continued*

On appeal from Judge Blackburn's orders, the United States Court of Appeals for the Eleventh Circuit halted enforcement of two additional sections of the law: Section 10, which made it a violation of state law for illegal aliens to be present in the state of Alabama; and Section 28, which required public schools to check the immigration status of their students.

In March 2012, the Eleventh Circuit halted enforcement of two more provisions of the law that are relevant for businesses in Alabama. First, the Eleventh Circuit struck down the provision that barred illegal immigrants from engaging in government transactions. This provision had created confusion and delays in routine transactions such as obtaining car tags as state and county workers determined what the law required them to do. The Eleventh Circuit also halted a provision of the law making contracts with unlawful aliens illegal and unenforceable in the courts of Alabama.

Judge J. Scott Vowell of the Circuit Court of Jefferson County, Alabama, had previously entered an order indicating that the bar on enforcement of contracts by unlawful aliens was unenforceable because it violates Alabama's constitution. The Eleventh Circuit's injunction, and the language in Judge Vowell's opinion also raise an interesting question regarding the validity of Alabama's prohibition on the enforcement of contractual rights by contractors that are not licensed as such in Alabama. Courts in Alabama have long held that general contractors and subcontractors working on projects in Alabama without first obtaining a contractors' or homebuilders' license cannot recover for breach of contract or related theories stemming from this work, regardless of how harsh or inequitable this result may appear to be in certain circumstances.

It would stand to reason that, if the section of the law prohibiting the enforcement of contracts by unlawful aliens is unconstitutional, then the law prohibiting out of state contractors from enforcing contractual rights would be unconstitutional for similar reasons. It does not appear that any Alabama court has yet ruled on this issue, but out of state contractors may rely on Judge Vowell's opinion in an attempt to enforce their contractual rights relating to Alabama building projects. It should be noted that the two situations may be distinguishable in a number of ways, including that the prohibition on the enforcement of contracts by out of state contractors implicates the state of Alabama's inherent licensing powers and its great interest in public safety while the prohibition relating to unlawful aliens likely does not. Nevertheless, Judge Vowell's order could have profound implications both for the validity of this section of the law and on the rights of out of state contractors in Alabama.

Conclusion

Alabama's new immigration law has numerous provisions that require the attention of any company doing business in Alabama. While the state and federal courts have prevented certain portions of the law from taking effect as scheduled, many other portions have taken effect or will take effect in the coming months. Additionally, while the state legislature has indicated that it plans to revise the law in some manner, it is unclear what, if any, changes will be made to the provisions that affect Alabama employers. Accordingly, Alabama businesses need to act proactively to minimize their costs and avoid compliance issues.

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Alabama's New Retainage Law, *continued*

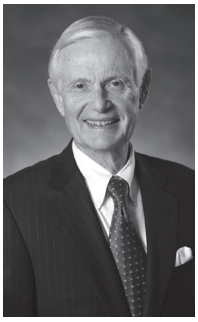
Among other things, the new retainage provision defines the term "retainage" for the first time as "that money, or other security as agreed to by the parties to a construction contract, earned by the contractor, subcontractor or lower tier sub-subcontractor, or supplier for work properly performed or materials suitably stored…which has been retained by the owner conditioned on final completion and acceptance of all work in connection with a project."

The law now caps retainage at 10 percent of the estimated amount of work properly done until the job is halfway complete. Once the job is halfway complete, no additional retainage may be held. Thus, for the first half of the job, the paying party may withhold 10 percent of each pay application. For the second half of the job, the paying party may continue to hold the retainage kept from the work performed in the first half, but it cannot withhold any new retainage for the remaining work. Therefore, the effective cap on total retainage is 5 percent of the contract amount. Also, improperly held retainage by any party is subject to interest at a rate of 1 percent per month (12 percent per annum).

The owner must release retainage to the contractor no later than 60 days after substantial completion (or 60 days after the contractor has completed its work as defined by the contract if that is earlier). The definition of substantial completion now includes a requirement for all necessary certificates of occupancy to have been issued so that the owner may occupy or utilize the project for its intended purpose.

Once the contractor receives its retainage, it must pay its subcontractors their retainage under the same time constraints as any other payment received from the owner (i.e., within seven days unless other payment terms are agreed to). The paying party still has the right to withhold retainage for work not properly performed, payment not earned, any of the reasons listed in Alabama Code Section 8-29-4 if there is a bona fide dispute, or on other grounds set forth by the parties' contract. Finally, for contractors, subcontractors and sub-subcontractors, a provision has been added that states they shall have no lien rights in any construction loan, loan proceeds, or the disbursement or use thereof.

Attorney Spotlight: Fielder Martin



We're proud to welcome Fielder Martin as senior counsel to the Atlanta office of Baker Donelson.

A veteran of the construction industry, Mr. Martin is a strong advocate of "preventive law" and is recognized as one of the early pioneers of alternative dispute resolution. In acknowledgement of his service to the construction industry, he was inducted as a Fellow into the American College of Construction Lawyers in 1999, and served on their Board of Directors from 2007-2010.

For more than 30 years, Mr. Martin has dedicated himself to resolving problems for owners, general contractors, sub-contractors, sureties, design professionals and their professional liability insurers. He has negotiated contracts and handled claims for projects ranging from simple one-story structures to complex projects including luxury resorts, high-rise commercial office buildings, airport terminals and utility infrastructure projects. Mr. Martin stays abreast of construction-industry issues and educates clients by taking an active role in the Georgia Branch of the Associated General Contractors (AGC), Georgia Utility Contractors Association (GUGA) and American Council of Engineering Companies (ACEC/GA).

Louisiana's New Retainage Law

Mark W. Mercante
mmercante@bakerdonelson.com
985.819.8410

Betty Q. Richmond
brichmond@bakerdonelson.com
504.566.8620

Louisiana Senate Bill No. 218 enacted La. R.S. 9:4815, a new section to Louisiana's Private Works Act, establishing mandatory escrow of retainage funds on private projects. This new law applies to private contracts of $50,000 or more that permit the owner to withhold retainage from periodic payments due the contractor. The new law does not apply to public contracts, or to private contracts for single family residences, double family residences, or the construction or improvement of certain types of industrial facilities enumerated in the statute.

Section 4815 provides that the escrow account shall be interest bearing and located at a qualified financial institution selected by mutual agreement between the owner and the contractor.

Upon completion of the work, the funds, including interest, shall be paid to the contractor as follows:

- If there are no claims by the owner, funds are to be released three business days from the date that the escrow agent receives a written release signed by the contractor and owner; and
- If there is a dispute between the contractor and the owner, undisputed amounts shall be released three business days from the date that the escrow agent receives a notarized request from the contractor; disputed amounts shall be released three business days from the date that the escrow agent receives a final order from the court or the arbitrator.

The section provides further that a written release signed by the contractor and owner, or an order issued by a court or arbitrator, shall act as a full release and discharge of the escrow agent. An escrow agent or financial institution cannot be held liable to the owner, contractor or any third party when complying with the new section.

Absent from new Section 4815 is guidance on whether the escrow requirements may be waived, and what, if any, damages or penalties apply for failure to implement the escrow arrangement. We expect that both of these questions will be addressed in the near future by courts attempting to interpret and implement the new legislation, and that the Louisiana Legislature be required to revisit the statute in order to address those issues.

Attorney Spotlight: Ben Shapiro

We're proud to welcome Ben Shapiro as senior counsel to the Atlanta office of Baker Donelson.

Ben Shapiro represents owners, general contractors, subcontractors, suppliers and design professionals in construction disputes in state and federal courts, and in arbitration and mediation. He has been AV® Peer Review Rated by Martindale-Hubbell for 30 years, the highest possible peer review rating for legal ability and ethical standards.

Mr. Shapiro is a co-founder of Georgia Legal Services Program, the state-wide legal service system in Georgia. Mr. Shapiro is also a Fellow in the American College of Construction Lawyers. He is past chair of the Construction Law Section of the Atlanta Bar Association and he served as a Trustee of Emory University from 1990 to 1996. He is also a Fellow of the American College of Construction Lawyers.

Mr. Shapiro attended the United States Naval Justice School and served in the Judge Advocate General Corps in the Naval Reserve.

Georgia Supreme Court Decision Expands Coverage Under CGL Policies

John Hinton IV
jhinton@bakerdonelson.com
404.221.6514

A recent Georgia Supreme Court decision expanded coverage under commercial general liability (CGL) policies to the benefit of parties damaged by the faulty workmanship of a contractor. In *American Empire Surplus Lines Ins. Co. v. Hathaway Development Co, Inc.*, the court held that it is possible for a CGL policy to cover damage to property that is unforeseen or unexpected when it arises from a contractor's faulty work. The opinion gives clear direction on an issue that had resulted in prior inconsistent decisions by lower Georgia courts.

In *Hathaway*, a plumbing subcontractor negligently installed work on three projects for the same general contractor (Hathaway). In addition to Hathaway having to correct the negligent work of its subcontractor, the negligent work damaged other property that Hathaway was constructing. Hathaway sued the subcontractor for damages and obtained a default judgment. Afterward, Hathaway presented the judgment to the subcontractor's CGL insurer, American Empire, for payment.

American Empire denied Hathaway's claim under the subcontractor's CGL policy, arguing that the damages did not arise from an "occurrence." As is typical in CGL policies, American Empire's policy only covered claims that arise from an "occurrence," which it defined as an "accident." As is also typical with CGL policies, American Empire's policy did not define the term "accident." American Empire claimed that Hathaway's damages could not have arisen from an accident because the subcontractor's work was intentional, even though the work may have been negligently performed. If the work was intentional, then the consequences of the work could not be an "accident." Hathaway sued American Empire for coverage under the policy.

Thus, the issue in *Hathaway* was whether unintentional damages that result from an intentional act (i.e., installation of the plumbing) could be considered an "accident." Prior decisions by the Georgia Court of Appeals gave conflicting answers to this question. In *Hathaway*, the Georgia Supreme Court looked favorably upon the line of Georgia Court of Appeals cases holding that an accident could arise from faulty workmanship. The court was also persuaded by what it characterized as a trend among other jurisdictions to interpret the term "accident" in this manner. The following quote in the opinion from the Texas Supreme Court summarizes the *Hathaway* holding: "[A] deliberate act, performed negligently, is an accident if the effect is not the intended or expected result; that is, the result would have been different had the deliberate act been performed correctly." *Lamar Homes v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 16 (Tex. 2007).

Although the *Hathaway* opinion broadens coverage under the CGL policy, it does not result in insurance coverage for all unexpected damages arising from faulty workmanship. The opinion was based solely on the definitions of "accident" and "occurrence," which are part of a policy's insuring clause. The opinion said nothing about the group of CGL policy exclusions known as the "business risk" exclusions, which generally preclude coverage for damages to the insured's own work. Thus, in a future case with similar facts, the subcontractor's CGL policy may cover the damages to the general contractor's other work, but not cover the cost to repair defective work installed by the subcontractor. Likewise, the general contractor's CGL policy may cover none of the damages because all of the work may be considered part of the general contractor's work or products, which may trigger the business risk exclusions of the policy.

Due care should be taken to review the relevant insurance policies for coverage and to make certain that timely notices are given to the insurers to preserve any coverage that exists.

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Baker Donelson *Construction News*

Donald J. Nettles
Editor in Chief
205.244.3828
dnettles@bakerdonelson.com

Stephen K. Pudner
Editor
205.250.8318
spudner@bakerdonelson.com

Vincent G. Nelan
Editor
205.250.8341
vnelan@bakerdonelson.com

Kevin Garrison
Editor
205.250.8333
kgarrison@bakerdonelson.com