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Construction Law Report

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Bye Bye Baby Boomers!

Replacing Supervisor Skills

As the American society ages, the economy (and employers) must prepare for the imminent departure of approximately 78 million workers in the "Baby Boom" generation. Currently, these employees are retiring at the rate of over 8,000 per day or more than 300 per hour. Because many of these individuals are senior employees and members of management, the departure of their knowledge, experience and work ethics will have a significant impact on the workplace, perhaps especially so in the construction industry. This article will discuss what employers should consider to respond to this phenomenon in order to continue to comply with federal and state safety and health and employment laws, particularly as it regards the loss of supervisors.

Legal Status of Supervisor

In the workplace, the supervisor occupies a unique role. Because the employer is typically a corporation, it must act through its employees. Those employees who are designated as supervisors (typically employees who have the authority to hire, fire, enforce discipline or enter into contractual relationships) are considered under the law to be "agents" of the employers with authority to create legal liability against the employer for their actions, including their negligent or intentional acts which may constitute violations of employment or other laws.

Unfortunately, many supervisors do not realize that they occupy this status or the extent to which their actions (either their affirmative actions or their failure to take actions when necessary) can create legal liability. More importantly, many supervisors are totally unaware of their own exposure to personal liability (for monetary judgments against them and their financial assets, or, worse, personal criminal liability).

Duty to Train Supervisor

Obviously, if the workplace is not being directed by skilled supervisors, chaos is a likely outcome. So, just as it is necessary to train the supervisor to supervise the production of the actual work, it is necessary to provide training regarding the operation of several laws that will be intimately involved with the supervisor's day to day interaction with employees, including:

- Worker's Compensation
- Occupational Safety and Health Act (OSHA)
- Civil or Tort Liability
- Employment Discrimination Laws (Title VII, ADA, FMLA, employee privacy rights)
- Whistleblower Laws

In This Issue

Worker's Compensation

Supervisors must be trained to have a basic knowledge of an employee's right to receive benefits for injuries and illnesses that may occur at work and know it is a violation of the law to refuse to hire or to fire an employee who has exercised their rights under the worker's compensation laws, including filing a claim or receiving benefits.

This training must include basic awareness of how to report a worker's compensation claim, how to investigate it, and what documentation may be required to be filed with the appropriate state Industrial Commission. Conversely, supervisors must also be aware of the potential for a fraudulent claim being made and how to participate in defending such a claim while maintaining confidentiality.

Occupational Safety and Health Law

From the outset, supervisors must be made aware of their role as the primary enforcer of the employer's safety and health policies, through walkarounds to identify hazards and violations and written or verbal discipline to employees who have violated the policies. In order to perform this function, the supervisor must have also received prior in-depth training to identify hazards and the OSHA regulations or employer policies which are applicable. It is crucial that the employer document this training in order to establish that it has a competent supervisor fulfilling this role.

The training obligation imposed on the supervisor is further complicated by the fact that the supervisor may not have the ability to communicate with employees because of a language barrier. If this barrier is not bridged, the supervisor cannot train subordinates as to the required safety or health matters (*e.g.*, hazard communication, LOTO, fall protection, etc.) nor effectively communicate disciplinary action either verbally or in writing. Bilingual face-to-face training and written materials should be utilized to meet this obligation.

In addition, supervisors must be clearly made aware that their failure to identify hazards and to enforce the safety and health policies can lead to the issuance of civil citations by OSHA with, in some cases, significant monetary penalties against the employer. More importantly, the supervisor's training must include potential employer and supervisor criminal liability under federal law for fatalities due to the supervisor's action in causing violations of regulations because of conduct which is intentional or indifferent in nature. Under state law, there may be additional criminal liability facing a supervisor which far exceeds those under federal law.

Another area of concern is the supervisor's role in responding to an OSHA inspection. The supervisor is most likely totally unaware of the rights of the employees, the employer, and OSHA during an investigation and how to assert the rights of employees and the employer. Moreover, the supervisor must be aware of criminal liability for obstructing the inspections and the duty to provide truthful responses to the agency.

Civil or Tort Liability

Whenever an accident occurs at the workplace, in addition to a worker's compensation claim, there is a potential for a third party action by the injured employee against a manufacturer of the equipment or service provider who may be responsible for the accident, in whole or in part. In this event, the supervisor must be trained to know when and how to preserve accident evidence (including physical artifacts, documents or site conditions) against "spoliation." If this is not done, the employee may have a potential claim directly against the employer because of the loss of the employee's claim against the third party due to the loss or destruction of the evidence.

If the employer decides, as it should, to conduct a "root cause" analysis of the incident, the supervisor must also receive training in how to participate in a meaningful fashion without generating documents that may create liability against the employer because the documents contain unsupported factual conclusions about employer liability, constituting "admissions" that can be utilized to establish liability in a subsequent court or regulatory proceeding.

Employment Discrimination Laws

Federal and state employment discrimination laws pose significant liability. Yet, many supervisors have no meaningful knowledge of the wide scope of these laws. While supervisors may not need to develop in-depth experience in these laws, they should receive competent, continuing awareness training of the following:

- the various protected employee categories under such laws (*e.g.*, age, race, sex, national origin, ethnic background, religion)
- the various protected employees' rights under such laws (*e.g.*, disability (ADA), serious health conditions (FMLA))
- the duty to protect employees against violation of these rights and communicate promptly with Human Resources when an employee complaint of discrimination occurs
- the duty to participate in a timely, confidential investigation of employee complaints to determine whether there has been a violation, and if so, to take prompt, effective remedial action

Another related area of liability is that of employee retaliation claims. Supervisors must be made aware of the potential for an employee to claim retaliation for any adverse employment action (*e.g.*, termination, demotion, loss of overtime) taken by the supervisor that may occur sometime after an employee has previously made a complaint or filed a discrimination claim.

Supervisors must be trained to document the rationale for the subsequent adverse employment action and the reason(s) why it is not related to the prior employee discrimination complaint or claim.

Whistleblower Laws

Finally, supervisors may be unaware of whistleblower laws, which protect employees against adverse employment action when they complain about certain protected activity. A key example involves the right of an employee to contact a federal or state agency to complain about matters such as workplace safety and health, workplace violence, environmental violations and the like. Again, a supervisor must be made aware that any such complaints made to the supervisor must not be used as a basis for negative action against the employee, despite the supervisor's belief that such complaints are factually incorrect or are being made to embarrass, or worse, to cause the supervisor to be subject to negative job action by the employer.

Conclusion

Newly minted supervisors will face many challenges as they assume the obligations of the departing Baby Boomer supervisors. An employer can greatly reduce its potential liability, if it develops a credible program to train the incoming supervisors about the critical legal issues in the workplace.

Mark A. Lies II

Dealing with Damages in Construction Contracts

When owners, developers, contractors, construction managers, design professionals, consultants or subcontractors negotiate a contract, they frequently confront several provisions related to "damages." In many cases, the contracting parties wish to establish, at the outset, how much compensation must be paid, and under what circumstances, if the contract is breached.

There are, however, different types of "damages," and it is critical for the parties to understand exactly which types of damage the contractual provisions cover. Thus, for example, when a contract provides for liquidated damages, the provision typically applies only to "direct" damages resulting from delay. The contractor, however, may still be liable for other types of non-delay related "direct" damages as well as for non-delay related "consequential" damages, over and above the liquidated damages.

Similarly, the contract may provide for a waiver of "consequential" damages, following the AIA model as discussed below. The waiver of consequential damages, however, does not preclude an award of liquidated damages, if allowed under the contract, or of non-delay related direct damages.

It is essential, therefore, for parties to construction contracts to understand the different types of damages that such contract terms cover.

Direct Damages are those immediately connected with the work. When a contractor fails to perform, the owner's cost of completing the contract is a form of direct damages. For example, in a case involving a claim by an owner for faulty construction of a roof, direct damages will include the labor and materials to repair or replace the roof. When a contractor is liable for delay, direct delay damages recoverable by the owner can include all direct costs incurred as a result of the contractor's delay, such as penalties on existing lease, existing rental payments, cost of construction financing, cost to warehouse equipment and materials that cannot be installed on schedule, payments for mortgage and taxes on unoccupied building, etc. Direct damages related to delay may be very different than those direct damages related to faulty or negligent work.

Consequential Damages are costs that are one step removed from direct costs. Depending upon the facts of a particular case, consequential damages may include lost profits, loss of bonding capacity, loss of business reputation, loss of use, diminution in value, lost rental income or unabsorbed or underabsorbed home office overhead resulting from delay. To determine which consequential damages are recoverable, courts apply a test of foreseeability. Those consequential damages that the party breaching the contract knew or reasonably should have foreseen would result from a breach (at the time of contract formation) are recoverable; those the party did not know and should not reasonably have foreseen are not recoverable. Damages that are not reasonably foreseeable are often referred to as "remote" damages.

In the oft used AIA A201-1997 contract form, Section 4.3.10 expresses a waiver of consequential damages by both the contractor and the Owner. That waiver, though, does not preclude recovery for direct damages and should not be considered in lieu of, and does not take the place of, a liquidated damages provision. To avoid any argument that the delineation of specific consequential damages may limit the universe of recoverable consequential damages, a careful draftsperson should make it clear that a delineation of specific damages is not meant to limit the broad effect of the waiver. Others argue that certain damages, while "consequential" in one situation are "direct" in another.

Punitive Damages, when awarded, are intended to punish the defendant for wanton, malicious or egregious conduct, extreme bad faith or fraud. Punitive damages are generally not awarded in contract cases no matter how egregious the breach. Such damages can be assessed against an insurer or surety, however, if its refusal to pay on a policy is found to be have no basis in law or in fact. (e.g., if its refusal is totally unbelievable, the surety or insurer has engaged in a frivolous or an unfounded refusal to pay.)

The following chart illustrates the different types of damages.

Event Triggering Recovery of Damages	Direct Damages	Consequential Damages	Remote Damages
Contractor constructs office building for Owner and causes two year delay in substantial completion and occupancy of building. Owner sues:	1) penalties on existing lease and existing rental payments; 2) cost of construction financing; 3) cost to warehouse equipment and materials that cannot be installed on schedule; 4) financing costs for warehouse; 5) payments for mortgage and taxes on unoccupied building; 6) costs of telephones, cable and other utilities; and 7) costs to heat or air condition unoccupied building.	1) loss of rental income of office space.	1) hospitalization of Owner for nervous breakdown suffered over construction problems with office building and dealing with lawyers handling possible law suit against contractor.
Owner delays performance of contractor's work to build and install all millwork for office building. Contractor sues:	1) lost profits; 2) escalation costs of labor and materials; 3) costs to warehouse equipment and materials; 4) financing costs for warehouse; 5) reduced labor efficiency; 6) extended utilization of equipment; and 7) extended home office overhead expenses.	1) salaries of estimators kept on payroll who could not estimate other work because Contractor's bonding capacity at maximum.	1) loss of bonding capacity; 2) lost profits on jobs that contractor could not bid upon because he was still working on this job for an extended and unplanned period of time; and 3) emotional distress suffered by contractor's wife, children and parents because of worry and aggravation created by Owner caused delay.
Performance bond surety unreasonably fails to pay owner completion costs after contractor defaults on strip mall construction project. Owner sues:	1) cost to complete the work.	1) extended financing costs; 2) loss of rentals; and 3) liquidated damages paid to a tenant per special terms of lease.	

Provisions to Limit Damages

Contracting parties can maximize recovery for damages (or minimize exposure to damages) in several ways, including use of a waiver of consequential damages and/or a liquidated damages provision. Keep in mind, however, that there may be direct damages that are **not** included within the purview of a liquidated damage provision and, of course, fall outside the waiver of consequential damages.

Consequential Damages

The most effective way to limit liability for consequential damages is to insert a clause barring their recovery. Limitation of liability provisions are likely to be enforced if not deemed by a court to be unconscionable. Such clauses should be drafted in the positive rather than the negative. For example, "in the event the roof leaks, we will pay for all labor and materials necessary to repair the roof, but in no event will we be responsible for damages to personal property, office furnishing, loss of rentals or other consequential damages."

By setting forth specifically the consequential damages that are waived, many uncertainties regarding the awarding of damages upon breach of contract are eliminated. Waivers of consequential damages give the owner and contractor the benefit of knowing that, in the event of breach, they will be responsible only for the more easily quantifiable direct damages caused by that breach. A broadly written consequential damages waiver can include loss of goodwill to a company, resulting in loss of other business contacts or clients, loss of other business opportunities, or any other consequential damages that may arise based upon the facts at issue.

Liquidated Damages Provision

When damages are not predetermined or assessed in advance, the parties must look to a court or other tribunal to determine the amount of damages recoverable upon breach of the contract. Consequently, it is quite common for an owner and contractor to agree to a "liquidated damages" clause in which the parties stipulate, at execution of the contract, the amount of damages recoverable for certain breaches.

These clauses are generally upheld notwithstanding that the stipulated sum may be less than the actual damages allegedly sustained by the injured party. A liquidated damage provision will not be upheld unless i) the amount so fixed is a reasonable forecast of just compensation for the harm caused by the breach and ii) the harm caused by the breach is one that is incapable or very difficult of accurate estimation. Further, if the sum quantified and agreed upon by the owner and contractor at execution of the contract far exceeds the actual loss, such liquidated damages clause may be regarded as a penalty and may not be upheld. Then, the owner is relegated to proving its actual damages. Finally, if no evidence shows that the amount of agreed upon delay damages bears any relation to the harm that was anticipated or that occurred, the clause may be deemed a penalty, particularly if it deviates from any customary *per diem* charge.

Sarah Biser
Robert Rubin

Construction Practice News

Sarah Biser and Robert Rubin will speak on "Creating Successful Design Professional Agreements-Dealing With The Hot Button Issues" at a Lorman Education Services program on March 30, 2007.

Sara Farabow, a representative for the Construction Owners Association of America, Inc., will speak about the new model form contracts for the construction industry at the COAA Spring Leadership Conference in New Orleans on May 9-11, 2007.

Mark Johnson, Vice-Chair of the Mechanics Lien and Construction Subcommittee of the Chicago Bar Association, was featured at a seminar entitled "Mechanics Liens and Construction Claims," sponsored by the Chicago Bar Association on December 7, 2006.

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