WELBY, BRADY & GREENBLATT, LLP
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REPORT

WELCOME

Message to our Readers

Thank you for reading the Fall 2017 issue of the Welby, Brady & Greenblatt, LLP Construction Report. We are pleased to bring you a summary of new legal happenings related to the construction industry.

In this issue, we are pleased to present articles written by our legal staff. Associate Zachary A. Mason discusses How to Comply with the New York City Construction Safety Training Law; and Lester Gulitz, of Counsel, shares Be Aware of Sovereign Immunity.

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How to Comply with the New York City Construction Safety Training Law

By: Zachary A. Mason, Associate

Zachary A. Mason

On October 16, 2017, Mayor Bill de Blasio signed Local Law 196, formerly known as Intro 1447-C, construction safety training legislation sponsored by New York City Councilmen Jumaane Williams (D-Flatbush) and Carlos Menchaca (D-Sunset Park).

The New York City Building Code now requires that "each permit holder at a building site for which a construction superintendent, site safety manager or site safety coordinator is required" (a "Permit Holder") is responsible for documenting that their workers have adequately completed the requisite safety training. The way to comply with Local Law 196 is to document that every worker at the building site possesses an appropriate OSHA Site Safety Training ("SST") Card, and that at least one responsible person at the job site has an OSHA SST Supervisor Card.

New Construction Safety Training Mandates for Workers and Supervisors

The safety training mandates of Local Law 196 are going to be phased in gradually over the course of 2018 and 2019. The ordinance was drafted to authorize the New York City Department of Buildings ("DOB") to have some flexibility in administering rulemaking by establishing a Joint Task Force composed of the DOB Commissioner, representatives from labor unions, unionized contractors, non-union contractors, minority-owned businesses, women-owned businesses, and day laborers. The City Council has delegated authority to the Joint Task Force to determine the content of the safety training, the final safety training hours requirements, and the implementation dates.

If implemented as intended, Local Law 196 mandates will apply to the Permit Holder at every "building site for which a construction superintendent, site safety manager,

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or site safety coordinator is required" (a "Covered Building Site"). Now construction superintendents are required for all "*major construction projects*", including:

1. new building construction
2. full demolitions of existing buildings
3. alterations of over 50% of existing building floor area that requires special structural stability inspection
4. demolitions of over 50% of an existing building floor
5. the complete removal of an entire floor
6. horizontal enlargement
7. vertical enlargement
8. any type of work that requires special inspection for support of excavation or underpinning

The only exception to the 2016 DOB construction superintendent mandate is for 1, 2, and 3 family homes.

In addition, the Local Law 196 construction safety training mandates apply to all Workers at a Covered Building Site. "Workers" include people working in several phases of construction, including renovations, excavation, and demolition. Workers also include all employees of the prime contractor and any subcontractors alike, or anyone acting on behalf of the Permit Holder.

By December 1, 2018 (the "Interim Compliance Date"), Permit Holders will have to ensure that every Worker at every Covered Building Site has completed at least 30 hours of safety training ("the "Interim Worker Safety Training Mandate"). An OSHA-30 card will be the standard during an interim period from December 1, 2018 to the Final Compliance Date. During this interim period, a Worker who has completed the OSHA-10 will be able to obtain a temporary card that will allow them to complete the rest of their OSHA-30 while they are working at the Covered Building Site.

By the Final Compliance Date - which is still to be determined but will most likely be sometime in 2019 - the DOB Task Force will have determined the "Final Safety Training Mandate". According to Local Law 196, the Final Safety Training Mandate must be between 40 and 55 hours. By the Final Completion Date, Permit Holders will have to ensure that each Worker has either an OSHA SST card or a temporary OSHA SST card. Limited SST cards will no longer suffice.

In addition to the Safety Training Card Mandate, by December 1, 2018, the Permit Holder will have to comply with the "Superintendent Training Mandate". The Permit Holder will have to document that at least one person at the job site has a SST supervisor card, specifically every worker who is serving as construction superintendent, or as site safety manager, site safety coordinator, concrete safety manager, or otherwise "a competent person at such site" (the "Superintendent").

Recordkeeping and Reporting Mandates for Permit Holders

Keep in mind that the construction safety training mandates do not apply only to individual workers; Local Law 196 establishes recordkeeping and reporting mandates on every Permit Holder for a Covered Building Site.

By March 1, 2018, each Permit Holder must comply with the "Recordkeeping Mandate" by doing the following:

1. certify that each worker at the job site has complied with the Interim Worker Safety Training Mandate, the Final Work Safety Training Mandate, and/or Superintendent Training Mandate.
2. maintain a daily log at each job site that identifies each Worker and includes a copy of their respective OSHA safety training card;
3. upon request by NYC DOB, provide the safety training log for inspection.

It is imperative that the Permit Holder for every Covered Building Site strictly comply with the Recordkeeping Mandate. Even if everyone working at the Covered Building Site has complied with the training mandates, a Permit Holder found to be lacking proper logs for a given work day is presumed to be noncompliant.

Consequences for Non-Compliance with Local Law 196

Denial of DOB Permits

Going forward, NYC DOB will make granting permits for construction and demolition work conditional on the permit applicant's compliance with Local Law 196. If the applicant for construction or demolition work does not certify that all of the workers will be compliant with the Local Law 196 construction safety training mandates, DOB will deny permits.

Violations for Worker's Failure to Complete Safety Training

If the NYC DOB Commissioner determines "that a worker at a building site is not in compliance" with any of the new training mandates, the Commissioner will issue a notice of violation to the Permit Holder, the non-compliant worker's Employer (if the Employer is different from the Permit Holder), and the Owner of the job site. Even if they

are separate entities, DOB can charge each of the Permit Holder, Employer, and Owner with separate violations and issue separate civil penalties.

In the event that DOB determines that a Permit Holder is in violation of Local Law 196, the Permit Holder will have to pay for the costs of the Worker to obtain the required safety training or "otherwise arrange" for the Worker to receive the safety training at no cost to the non-compliant Worker. The non-compliant Worker will have to remain employed at the Building Site under the same terms and conditions, and must be paid as though he or she were working at the job site 40 hours each week at the same wage.

Violations for Failure to Maintain the Daily Compliance Log

If a Permit Holder at a Covered Building Site has not maintained a daily log recording the names of each Worker at the site and each Worker's respective safety training cards, that is a per se violation of Local Law 196. If DOB determines that a Permit Holder failed to maintain a log, it establishes a rebuttable presumption that each Worker for whom the Permit Holder is responsible for ensuring compliance "is not compliant", and it will result in notices of violation for each unrecorded day worked by each Worker.

Civil Penalties

For "lesser violations" of Local Law 196, DOB can impose a penalty up to $500 for each violation. For "major violations", DOB can impose a penalty up to $10,000 for each violation. To boot, DOB can impose an additional penalty of up to $250 for each month that the "major violation" is not corrected. For "immediately hazardous violations", DOB can impose a civil penalty up to $25,000 for each violation. DOB can also impose an additional penalty up to $1,000 for each day that the "immediately hazardous violation" is not corrected.

At present, the statute is unclear as to what precisely constitutes a "lesser violation" versus a "major violation" or an "immediately hazardous violation" of Local Law 196, and it appears that DOB will have wide discretion in meting out civil penalties.

In Practice

If you have reason to believe that any members of your work force are lacking an OSHA-30 card, it would be wise to start planning for the Interim Compliance Date which will most likely come into effect on December 1, 2018. Also, do not forget that your superintendent, safety supervisor, or another "competent person" will have to comply with the Superintendent Training Mandate by December 1, 2018 as well.

Even if your entire workforce already has their OSHA-30 cards, stay tuned for the Joint Task Force's determination of the Final Worker Safety Training Mandate which may range anywhere between 40 and 55 hours. Also, stay tuned for the Joint Task Force's announcement of the Final Compliance Date. This will be the subject of a future legal alert.

Remember that if you are the Permit Holder for a Covered Building Site, you are responsible for not only your own employees, but also for every one of your subcontractor's compliance with the safety training mandates. Do not expose yourself to risk by hiring subcontractors whom you know are lacking their OSHA cards.

Scan here to learn more about Zackary A. Mason

Be Aware of Sovereign Immunity

By: Lester Gulitz, Counsel to Welby, Brady & Greenblatt, LLP

Lester Gulitz

When the average person hears the expression "sovereign immunity" they may think of situations where foreign diplomats are immune to civil suits and criminal law because of their "foreign diplomate" status. A wise contractor in the construction industry, however, also knows that throughout the state of New York and other states, sovereign nations exist with whom they may transact business. Whether known as "First Nations", "Indian Nations" or "Indian Tribes", doing business with them requires the astute contractor to be aware that he or she is dealing with a sovereign nation, who is not be subject to state judicial dispute resolution proceedings.

Such a situation was faced by Aron Security, Inc. when it performed security service work for the Unkechaug Indian Nation, located in Suffolk County, New York. When the Unkechaug's failed to pay for the services performed, Aron sued them in the Supreme Court in Suffolk County. Judgement was entered in favor of Aron on May 22, 2014, and Aron served an information subpoena on a member of the Unkechaug's. The Unkechaug's made a post-judgment motion to dismiss the action based upon the Supreme Court's lack of subject matter jurisdiction over the Unkechaug's who are sovereign Indian Tribe. Aron also made a post-judgment motion to hold the Unkechaug person served with the information subpoena in contempt of court for failing to respond. The Supreme Court denied the Unkechaug's motion to dismiss and it also denied Aron's motion for contempt, with leave to renew. Both parties appealed to the Appellate Division, Second Department .

The Appellate Court reversed and dismissed Aron's action (including its motion for contempt).

In reaching a determination, the Appellate Court referred to U.S. Supreme Court and other federal court decisions, which held: "[T]hat Indian tribes possess common-law sovereign immunity from suit akin to that enjoyed by other sovereigns is part of this Nation's long-standing tradition"; that, [T]his immunity extends to 'suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation"; that, "[A]lthough a tribe may waive its sovereign immunity, such a waiver, while it need not use the words 'sovereign immunity', 'cannot be implied by must be unequivocally expressed'"; and that, "[W]aivers of immunity are to be strictly construed in favor of the Tribe".

The Appellate Court also noted (citing U.S. Supreme Court and other federal court cases) that unambiguous arbitration clauses in a contract with a tribe, requiring resolution of all contract-related disputes by arbitration and incorporating arbitration rules and state law for enforcement of arbitration awards in a court of competent jurisdiction, are considered as clear waivers of tribal sovereign immunity.

Aron tried to argue that the Unkechaug's waived their sovereign immunity because the contract contained a choice-of-law provision that required the contract to be governed by New York law and, that the contract contained a venue provision that required any claim or controversy under the contract to be resolved in Suffolk County and no other jurisdiction.

The Appellate Court rejected Aron's contentions. As to the contract's venue provision the court held that the "any claim or controversy" language did not require resolution only by a state court. A party could bring a claim before a mediator, an arbitrator, a tribal court, a state or federal court said the Appellate Court.

With respect to the contract's New York choice of law provision, the Appellate Court said that New York law could be applied in other forums besides a state of federal court. To the extent this provision is ambiguous, said the Appellate Court, the ambiguity must be resolved against Aron, who drafted the contract, and against waiver of immunity.

Under these circumstances the Unkechaug's cannot be said to have expressed an unequivocal waiver of sovereign immunity said the Appellate Court.

When doing work for Indian Tribes or other sovereign nations, wise contractors recognize that they are in a situation where the rules of engagement may not be what they are used to operating under. A proposed contract, regardless of who drafted it, should be reviewed by an experienced attorney to provide guidance to the contractor regarding the rules that will have to be followed in the event a dispute arises requiring resolution.

Scan here to learn more about Lester Gulitz