WELBY, BRADY & GREENBLATT, LLP
ATTORNEYS AT LAW

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REPORT

WELCOME

Message to our Readers

Thank you for reading the Spring 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 as well as highlight the impact Firm Partners and Associates are making on the Legal Industry and the markets we serve.

In this issue, we are pleased to present articles written by our legal staff. Thomas S. Tripodianos, Partner, shares the New York Paid Family Leave program; John J.P. Krol, of Consel, discusses, Do You Know About the Notice Provisions in Your Contract?; and Zackary A. Mason, Associate, introduces the first of a series of Legal Alerts, When can a Contractor Suspend Work for Non-Payment?

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New York Paid Family Leave

By: Thomas S. Tripodianos, Partner

Thomas S. Tripodianos

On April 4, 2016, Governor Andrew M. Cuomo signed into law the legislation enacting New York's Paid Family Leave program, the most comprehensive paid family leave program in the United States. Commencing January 1, 2018, all eligible employees will be able to take time off, while still being paid a portion of their income, to bond with a new child, care for a family member or handle personal matters arising from an immediate family member being called to active duty in the Armed Forces of the United States.

All employers are required to participate in the New York Paid Family Leave program. Upon the renewal of a business's statutory disability benefit, employers will be automatically billed for the New York Paid Family Leave program. Employers have the option to pay for these costs themselves, or they can issue a deduction from their employee's gross incomes. If an employer elects to delegate payment to its employees, the deduction will appear on the employee's pay-stub, which will look similar to a tax deduction. An employer may continue to deduct a qualified employee's contributions while the employee is on family leave.

Under the New York State Administrative Procedure Act, the proposed regulation is open for a second round of comments from the public. This 30-day comment period will close on **June 23, 2017**.

Below are the highlights of the current proposed regulation:

• **A "covered employer" is any employer who employs one or more employees.** Sole proprietors and members of limited liability companies are considered "individual business owners," so long as they are entitled to keep all

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the profits after taxes, are liable for all losses and do not have any employees.

• An employee of a covered employer who works 20 or more hours a week becomes eligible for benefits after 26 consecutive weeks of employment. Any employee of a covered employer who regularly works less than 20 hours a week becomes eligible for benefits after the 175th day of employment.

• Any employee taking weekly leave, regardless of their hours worked, is eligible for the maximum number of weeks of leave in a 52-consecutive week period.

• Beginning in 2018 PFL will allow for a qualifying individual to receive 8 weeks off and 50% of their salary during their paid time off. In 2019, this number increases to 10 weeks and 55%. In 2020, the numbers will increase to 60%. Finally, in 2021, the numbers increase to 12 weeks and 67%.

• However, in all of these circumstances, the employee may not take home more than the maximum percentage of the NY State Average Weekly Wage. This time off can be used in consecutive weeks or spread out throughout a 52 week period.

• **PFL benefits are limited to family, and do not cover the employee's own illness**. It provides for leave for bonding with a child in the first 12 months after birth, placement in foster care or adoption, or to care for qualified family members who have a "serious health condition." This means that some FMLA leave will not qualify for PFL, but PFL will most likely qualify for FMLA leave.

• If an employee takes a designated FMLA leave for their own serious health condition, **it does not reduce the amount of paid family leave an employee is eligible for**.

• If an employee refuses to apply for benefits for a qualified family leave under both FMLA and PFL, the employer and the carrier may charge the leave against the maximum duration of leave allowed, so long as the employer has notified the employee of their eligibility for both leaves.

• An employer covered by the FMLA that designates a concurrent period of family leave under this regulation may charge an employee's accrued paid time off "in accordance with the provisions of the FMLA".

• When an employee takes intermittent leave, the employer is permitted to require that the employee provide notice before each day of leave taken.

• **Disability benefits do not run concurrently with PFL benefits**. In essence, an employee can take short-term disability leave before PFL followed by using their PFL benefits.

• The employer must continue to provide health insurance benefits while the employee is on leave if the employee receives their benefits through the employer. The employer also must reinstate the employee upon their return from PFL.

• Any dispute brought by an employee, employer or carrier is settled through an arbitration system that is on a strict timeline to settle the disputes quickly.

Scan here to learn more about Thomas S. Tripodianos

When can a Contractor Stop Work for Non-Payment? (Connecticut)

By: Zachary A. Mason, Associate

Zackary A. Mason

A recurring question for construction contractors is whether they can stop work if they have not been paid on time. Contractors need to be very careful about suspending performance due to non-payment. If contractors strictly follow the rules, and the terms of the contract, they can protect their rights. However, if contractors stop work prematurely without providing proper notice, or otherwise fail to comply with any applicable laws, they can expose themselves to liability for breach of contract.

When determining whether you have the right to stop work, the first place to look should be the terms of the contract. In many instances, the contract may be the only applicable law.

General Contractor Agreements based on form AIA A201 should include Paragraph 9.7, which provides the following:

[I]f the Owner does not pay the Contractor within seven days after the date established in the Contract Documents … then the Contractor may, upon seven days' written notice to the Owner and Architect, stop the work until payment of the amount owing has been received.

Subcontractor Agreements based on form AIA A401 should also include Paragraph 4.7, which states as follows:

If the Contractor does not pay the Subcontractor through no fault of the Subcontractor, within seven days of the time payment should be made as provided in this Agreement, the Subcontractor may … upon seven days written notice to the Contractor, stop the Work of this Subcontract until payment of the amount owing has been received.

Even if the construction contract is based on an AIA model, it is quite common for parties to modify the terms of Paragraphs 9.7 and 4.7. For example, the notice requirements might be adjusted; the drafting party might tack on additional requirements, or they may remove the provisions altogether. Every contract needs to be analyzed on a case-by-case basis.

The Connecticut Statutes

Section 42 of the Connecticut General Statutes ("CGS") requires prompt payment to construction contractors. Specifically, upon receipt of an invoice from a prime contractor, an owner must tender payment within 30 days. Likewise, the general contractor must pay its subcontractors within 30 days of being paid by the owner, subcontractors must pay their sub-subcontractors within 30 days of being paid by the prime contractor, and so forth down the line. A different section of the CGS, § 4(a)-71, requires the State of Connecticut and its subdivisions to make timely payments to contractors within 45 days of their receipt of the invoices.

We must caution, however, that although CGS sets forth timelines for payment, it does not grant construction contractors a right to stop work. Rather, CGS only grants unpaid contractors a statutory right to pursue claims against the non-paying party. Accordingly, unpaid contractors will only have a right to suspend performance if that right is contained in their respective contracts, whether based on forms AIA A201, A401, or otherwise. If that right is not in the contract, it does not exist.

In Practice

It is crucial that contractors fully understand their contracts. A well-written contract may protect your rights, while a poorly-written contract might be unenforceable—or worse. While many contracts will refer to the AIA language, parties can always agree in writing to different standards for prompt payment, and different procedures for the unpaid contractor to stop work. In that regard, always make sure to consult with an attorney before stopping work because of non-payment, or for any other reason. Even if you have a contractual right to suspend, it is absolutely imperative to give proper notice and take proper steps before doing so. If you do it the right way, you can be in the clear. If you do it the wrong way, you can be found to be in breach of contract and potentially liable for damages.

Scan here to learn more about Zackary A. Mason

Do You Know About the Notice Provisions in Your Contract?

By: John J.P. Krol, Esq., of Counsel

John J.P. Krol

There are many provisions in a construction contract which must be adhered to. However, few of these provisions are so easy to overlook—and so costly when you do—as the provisions requiring you to notify your upstream contractor or owner of any claims you have relating to the contract. The case of *Adonis Construction, LLC v. Battle Construction, Inc.* (103 AD3d 1209 [4th Dept 2013]) serves as a warning to those who fail to pay attention to those provisions.

Adonis Construction was a subcontractor to Battle Construction, the prime contractor on a building renovation. During the course of the work, Adonis was directed by Battle's superintendent to remove certain walls (which were not included in the plans for removal). The removal of the walls was in error, which error was discovered at a meeting several weeks later. Adonis was not aware at the

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time that it removed the walls that the construction plans showed that those walls were to be left intact. Approximately six weeks after Adonis learned that the walls were removed in error, and following Battle's notice to Adonis that it would back-charge Adonis for the cost of replacing the walls, Adonis submitted a claim to Battle requesting payment for removing the walls. The claim also requested payment for extra work related to a concrete floor and the removal of light fixtures.

With respect to the work on the concrete floor and the removal of the light fixtures, the court noted that Adonis' subcontract provided that it was bound by the terms of the prime contract. The prime contract required approval of extra work before it was commenced, "but in no event any later than three days from the event giving rise to the claim." Because of Adonis' failure to timely notify Battle, Adonis was barred from pursuing the concrete floor and light fixture portion of its claim.

With respect to the wall removal portion of the claim, the court looked to the subcontract. The subcontract provided "Subcontractor shall, within five days of receiving a direction or encountering a condition, it regards as a change, alteration or extra work, submit to Contractor a written cost or credit proposal; otherwise, Subcontractor shall be bound by such increase or credit as Contractor is able to obtain from Owner. Subcontractor waives any claim against Contractor for compensation law equitable adjustment for any claims, changes or extra work, except to the extent the same is allowed and paid to Contractor by the Owner." The court found that where the parties have set down their agreement in a clear, complete document, a writing should be enforced according to its terms. Since the subcontract governing demolition work requires strict compliance with the notice provisions, such compliance is a condition precedent to recovery in an action seeking compensation for extra work. The court concluded that Adonis was obligated to seek compensation for the extra work pursuant to the terms of the contract when it learned that a removal of the walls constituted extra work, and that Adonis failed to do so in a timely manner. Because conditions precedent will be strictly enforced, the clear direction by Battle's superintendent to Adonis with respect to removal of the walls was not sufficient to excuse Adonis' failure to comply with the notice provisions of the contract.

CONCLUSION:

Your contract (and any contracts incorporated into that contract) can contain a number of provisions that can be easily overlooked, including crucial notice provisions. It is important that you read all of the contract documents and be knowledgeable of the deadlines they impose. If you have any questions about your obligations under the contract, or how best to preserve your rights, you should consult with counsel.

Scan here to learn more about John J.P. Krol