

Breaking Ground

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An aerial photograph of a city, likely Wheeling, West Virginia, featuring a prominent suspension bridge crossing a wide river. The city is built on a hillside, with various multi-story buildings and a dense forest in the background. A billboard for 'The Wheeling West Virginia' is visible on one of the buildings. The bridge has a stone tower on the right side.

SPOTLIGHT ON NORTHERN WEST VIRGINIA



MBA

LEGAL PERSPECTIVE

CONSTRUCTION LAW 2023 – THE YEAR IN REVIEW

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On Thursday October 5, 2023, the Construction Law Group of the law firm of Burns White LLC held its annual Year in Review Seminar. Throughout this seminar, Burns White Attorneys provided attendees with a summary of 2023's most important legal issues impacting the construction industry, addressing the implications of each topic in detail.

The Ever-Evolving Cybersecurity Liability Risk

Over the past several years, cyber-attacks have become an omnipresent hazard across every industry, and in every household, worldwide. The legal and financial consequences of becoming a victim of such an attack are significant, complex, and ever-changing.

Cyber-attacks come in a variety of forms. In the construction industry, the most common types of attacks are phishing and ransomware. A phishing attack occurs when an attacker gains access to the credentials of the victim, often through a malicious link or query, and masquerades as the victim to obtain payments from a second source who believes the request to be originating from the unsuspecting victim. Contractors are prime targets for these attacks; in fact, in September of 2023, Moss Construction and the City of Fort Lauderdale became victims of such a phishing attack. The City received an email request from Moss for payment of \$1.2 million which included all the required paperwork, properly completed, and a blank check matching the City's records. The City paid the \$1.2 million only to learn that Moss had made no such payment request. Though an investigation is ongoing, the money is, for now, gone and presents a significant loss for the City. Preventing phishing attacks requires diligence and an understanding of what a phishing attempt looks like. Employee training, security evaluations, and response plans are all important, but not 100% effective, measures for avoiding phishing attacks.

Ransomware attacks present a more stereotypical form of cybersecurity breach, occurring when an attacker gains access to a victim's computer system and locks all or part of the system down, preventing access and stealing sensitive data. The attacker then demands money (ransom) in exchange for unlocking the system and returning or destroying the data. In a recent, high profile breach, on September 25, 2023, Johnson Controls International (JCI) reported a massive ransomware attack, leading to loss of access to significant portions of its systems. The attackers sent a ransom note as a part of the breach claiming they had stolen 27 terabytes of data and demanding \$52 million in exchange for the key to unlock the system and a promise to destroy the stolen data. Of particular concern for JCI, and its government clients, is the possibility that the stolen data contains sensitive government information. JCI is now faced with the options of either dealing with an untrustworthy bad actor and paying

the ransom or attempting to regain control of its systems and risk the release of 27 terabytes of potentially sensitive data. The risk of disclosure of this sensitive data could lead more government agencies to require cybersecurity insurance for contractors submitting construction bids or proposals to those agencies. To prevent being faced with the lose-lose choice presented to JCI, it is important to properly evaluate your cybersecurity measures (including cybersecurity insurance) to ensure you are prepared to stop or respond to a cyber-attack if and when it occurs.

In the event of a cybersecurity breach, victims must comply with the legal requirements of all applicable jurisdictions. Depending on the type of data involved, a breach may need to be reported to multiple state attorney's general as well as employees, clients, and other effected entities. Though some states have breach reporting laws in place, most are still catching up, with numerous laws pending throughout the United States. At the federal level, the law is likewise actively developing, including a new SEC rule requiring annual disclosure of cybersecurity governance. Given the ever-evolving nature of the cybersecurity field and the increasing frequency of cyber-attacks in the construction industry, ensuring you and your business are protected and prepared for an attack has never been more important.

Proposed Pennsylvania Legislation

The Pennsylvania legislature has been busy this year; proposing a number of bills directly and indirectly affecting the construction industry. Of particular interest are HB 1164, SB 763, and SB 359.

Similar to prior proposed legislation regarding indemnity, HB 1164 would void all indemnity provisions in construction contracts which indemnify a party for damages resulting from its own negligence as a matter of public policy. HB 1164 was referred to committee on May 18, 2023 and, should it become law, would cause a fundamental shift in construction contract standards and contractual liability balancing.

Continuing the theme of shifting liability, SB 763 proposes a revision to the Pennsylvania Wage Payment and Collection Law making a general contractor "jointly and severally liable" with a subcontractor who violates the Wage Payment Law. The revision would thus make a general contractor liable for the unpaid wages of the employees of its subcontractor. A general contractor's liability under the proposed revision would extend to all tiers of subcontractors. The liability implications of SB 763 are greatly concerning and general contractors should pay close attention to the bill's status. Should it pass, general contractors, in conjunction with their legal counsel, will need to consider how best to address this new, potentially significant, source of liability.

Finally, SB 359 responds to the escalation of material prices throughout the Covid-19 pandemic by permitting the Secretary of General Services to adjust the prices of construction material line items within eligible contracts. The law would apply to public contract bids between March 15, 2020 and the effective date of the statute and for which material acquisition costs have increased "in

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excess 5% since the time of the contract award." To obtain a price adjustment, eligible contractors would be required to apply to the Department of General Services through a yet to be determined application process. Passage of SB 359 is uncertain but would provide relief, late though it may be, to eligible contractors who remain uncompensated for significant material price increases during the Covid-19 pandemic.

Davis Bacon Act - Final Rule Update


In 2022, the Department of Labor's proposed changes to the Davis Bacon Act (DBA) took center stage for many in the construction industry. On August 23, 2023, the Department published its Final Rule updating the DBA. The Rule is effective as of October 23, 2023 making significant changes to the DBA, including, among many others, prevailing wage determination methodology and the definitions of "Prime Contractor" and "site of the work."

The Final Rule returns to the DBA's pre-1983 prevailing wage standard. Under the new standard, where no majority wage rate exists, the prevailing wage is set at the rate earned by the greatest number of workers so long as at least 30% of

workers earn that rate. The Department has provided no timeline for the rollout of new wage rates under this rule and has indicated the new rates will be developed over time, not all at once. Once rollout begins, it is important that all contractors participate in the wage determination surveys to ensure their wage data is counted. Nonparticipation, particularly by smaller contractors, could result in wage rates driven by larger, higher rate companies, potentially forcing out smaller operations from DBA-covered projects.

Equally as significant are the changes to the DBA's definitions for "Prime Contractor" and "site of the work." The revised definition of "Prime Contractor" now includes joint ventures and partnerships holding a prime contract, and controlling shareholders or members of the entity holding the prime contract, as well as any contractor delegated responsibility for overseeing the prime contract. Though the intention is to prevent the use of single purpose entities to avoid DBA liability, there is the potential for individuals to have personal liability for DBA violations, though the extent of this liability is unclear at this time.

The definition of "site of the work" has been expanded to include any site where a "significant portion" of a building or work is constructed, provided that the site is established for or dedicated exclusively or nearly exclusively to performance of a single DBA-covered project for a "period of time." On its face, this expanded definition is concerning for businesses performing offsite construction activities and prefabrication; however, the Department has explained that only sites which exclusively, or nearly so, perform work for a covered project for a period of more than a few days will be considered a "site of the work." In fact, the Department has expressly excluded sites, such as fabrication facilities, performing work on multiple projects at once, each of which may or may not be subject to the DBA. Additionally, the requirement that exclusive work be for more than a few days excludes facilities performing rush jobs in order to meet a tight deadline.

Whether you are a general contractor, subcontractor, or operate a fabrication facility, delivery service, or other business in the construction sector, understanding how the DBA's updated rules will affect your business is key to avoiding liability down the road. If you have any questions regarding the DBA or any of the above topics, the attorneys at Burns White are prepared to provide assistance to you and your business. 

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