

FASA's

THE CONTRACTOR'S



APRIL 2020

Compass

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COVID-19 Changing the World

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THE CONTRACTOR'S Compass

FEATURES

EDITORIAL PURPOSE

The Contractor's Compass is the monthly educational journal of the Foundation of the American Subcontractors Association, Inc. (FASA) and part of FASA's Contractors' Knowledge Network. The journal is designed to equip construction subcontractors with the ideas, tools and tactics they need to thrive.

The views expressed by contributors to The Contractor's Compass do not necessarily represent the opinions of FASA or the American Subcontractors Association, Inc. (ASA).

MISSION

FASA was established in 1987 as a 501(c)(3) tax-exempt entity to support research, education and public awareness. Through its Contractors' Knowledge Network, FASA is committed to forging and exploring the critical issues shaping subcontractors and specialty trade contractors in the construction industry. FASA provides subcontractors and specialty trade contractors with the tools, techniques, practices, attitude and confidence they need to thrive and excel in the construction industry.

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The Contractor's Compass is a free monthly publication for ASA members and nonmembers. For questions about subscribing, please contact communications@asa-hq.com.

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EDITORIAL SUBMISSIONS

Contributing authors are encouraged to submit a brief abstract of their article idea before providing a full-length feature article. Feature articles should be no longer than 1,500 words and comply with The Associated Press style guidelines. Article submissions become the property of ASA and FASA. The editor reserves the right to edit all accepted editorial submissions for length, style, clarity, spelling and punctuation. Send abstracts and submissions for The Contractor's Compass to communications@ASA-hq.com.

ABOUT ASA

ASA is a nonprofit trade association of union and non-union subcontractors and suppliers. Through a nationwide network of local and state ASA associations, members receive information and education on relevant business issues and work together to protect their rights as an integral part of the construction team. For more information about becoming an ASA member, contact ASA at 1004 Duke St., Alexandria, VA 22314-3588, (703) 684-3450, membership@ASA-hq.com, or visit the ASA Web site, www.asaonline.com.

LAYOUT

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PRESIDENT'S LETTER



Dear ASA Members,

It's hard to believe that it was just over a month ago that we all met together in Las Vegas for SUBExcel 2020, and today many of us are quarantined within our homes to prevent the spread of COVID-19. These truly are unprecedented times, and I have no doubt that the members of ASA are strong enough to handle this storm. The strength and resilience of our members never ceases to amaze me.

If you are still able to be at your workplace, I urge you to take all of the necessary steps to stay safe and healthy. If you are able to work from home, please know that you are making an impact in stopping the spread. Both sets of individuals are doing what is needed to keep this country going, and I personally want to thank each and every one of you. We will get through this together.

We in the subcontracting industry know the importance of a firm foundation. These are the days when the steps are being taken to make our tomorrow stronger than ever, and the core of that is being built right now. If you are on the front lines setting that foundation, I want to especially thank you. Tomorrow will be stronger because of what you are doing today.

Even in these difficult times, I firmly believe that our future is brighter than ever. The day will come when COVID-19 will be part of our past, and we will all be able to shake hands in collaboration again. As America's doors fly open once more, ASA will be here to support all of its members. While getting back to normal might require a "new normal," never forget that the American Subcontractors Association is here for you. Our focus has always been to serve the needs of the subcontracting community, and that will never change. ASA will always be stronger when its members are stronger, and I look forward to growing together as we put these difficult days behind us.

Thank you for all that you are doing.

Anthony Brooks

ASA President 2019-2020



CONTRACTOR COMMUNITY

ASA Wins for Subcontractors in Critical "Pay When Paid" California Case

The American Subcontractors Association is pleased to report on a significant win for the Subcontractor community in *Crosno Construction, Inc. et al v. Travelers Casualty and Surety of America*. Last year, ASA produced a friend-of-the-court brief affirming a California Superior Court's judgment regarding "pay when paid" provisions used to withhold payment from a subcontractor. On April 17, 2020, the California Court of Appeals ruled in favor of subcontractors to limit enforcement of "pay-when-paid" clauses that delay those payments to subcontractors. [Read the full press release.](#)

OSHA Guidance on Recording COVID-19 Cases

OSHA states that in areas where there is ongoing community transmission, employers may have difficulty making determinations about whether workers who contracted COVID-19 did so due to exposures at work. Until further notice, **OSHA will not enforce its recordkeeping requirements to require these employers to make work-relatedness determinations for COVID-19 cases, except where: (1) There is objective evidence that a COVID-19 case may be work-related; and (2) The evidence was reasonably available to the employer;** however, employers of workers in the healthcare industry, emergency response organizations and correctional institutions must continue to make work-relatedness determinations pursuant to 29 CFR Part 1904. OSHA's guidance takes effect immediately and remains in effect until further notice, which is intended to be time-limited to the current national public health emergency. [Please read the April 10 announcement.](#)

Under OSHA's recordkeeping requirements, COVID-19 is a recordable illness, and employers are responsible for recording cases of COVID-19, if the case:

- is confirmed as a COVID-19 illness;
- is **work-related** as defined by **29 CFR 1904.5**; and
- involves one or more of the **general recording criteria** in 29 CFR 1904.7, such as medical treatment beyond first aid or days away from work.

CDC Fact Sheet: Prepare Your Small Business and Employees for the Effects of COVID-19

CDC recognizes the importance of small businesses and developed guidance to help businesses limit the economic and community impacts of an outbreak of COVID-19. This **new guidance** provides steps that are recommended to protect employees and prepare small businesses for disruption. The **fact sheet** also outlines 10 steps small business employers can take now to protect their employees' health.

Furthering the Essential Infrastructure Definition

On April 6, 2020, ASA, along with the Construction Procurement Industry Coalition, sent a letter to President Trump and the U.S. Department of Homeland Security urging further guidance to clarify "essential Infrastructure" and "essential businesses and services." Per the letter, "as the nation and your Administration contend with the real threats presented by COVID-19, we want to encourage the issuance of exemptions for operations and maintenance of 'essential infrastructure' that allows individuals to provide such services that are impossible to perform from home. Such infrastructure should include essential design, construction and related services of public works,

including airport operations, roads and highways, public transportation, energy, and of critical importance today, expanding, retrofitting, and rehabilitating structures to meet healthcare and other systems and facilities related COVID-19 production needs."

Finally, the letter respectfully urged the broadest definition of the services, occupations, and projects our organizations represent so that we serve our fellow citizens, operate in a safe manner in accordance with CDC and other relevant protocols, contribute to the effort to combat COVID-19, and sustain our economy in these difficult times.

ASA Coronavirus Resource Guide

The Center for Disease Control (CDC) is responding to an outbreak of respiratory disease caused by a novel coronavirus (COVID-19) that was first detected in China and has now emerged in almost 90 locations internationally, including 500 confirmed cases within the United States as of March 9, 2020. With the complete clinical picture of COVID-19 not fully known along with the CDC's expectation that the number of confirmed cases will continue to rise, members of the American Subcontractors Association (ASA) may have concerns regarding the disease and how to handle employment matters during this outbreak. As the situation is emerging and continually evolving, ASA will monitor all federal agency developments and guidance to supply our members with the most up to date information available. The ASA has collected numerous materials from a wide variety of sources and developed this Coronavirus Resource Guide to provide our members with a comprehensive resource to best prepare for employment disruptions as COVID-19 cases continue to be discovered.

[Click Here to Download the Full ASA Coronavirus Resource Guide](#)

ASA has also put together the **ASA Coronavirus Employer Guide**. To access the MEMBERS ONLY ASA Info Hub:

1. Go to the Member Login Page.
2. If you need a Username and Password, create an account.
3. Once logged into the Info Hub, choose "Resources" from the left-hand menu.
4. Choose "COVID-19" from the drop-down menu at the top of your screen.

COVID-19 Resources Available from ASA National Sponsors

These ASA sponsors have provided resources (sometimes free or at deep discounts) to companies at this time. Click on the company name to be directed to their COVID-19 resources.

- **[CNA](#)**
- **[Rhumbix](#)**
- **[Foundation Software](#)**
- **[Tradesmen International](#)**
- **[Raken](#)**
- **[eSUB](#)**
- **[Smith Currie](#)**
- **[Commerce Bank](#)**
- **[NCS](#)**
- **[Surety One](#)**

CPWR Shares Tips to Help Shield Construction Workers from Exposure

By: **[Safety and Health Magazine](#)**

The Center for Construction Research and Training (CPWR) has released **[guidance](#)** for employees and employers.

CPWR collaborated with North America's Building Trades Unions, as well as partners in research and government, to develop the **[guidance](#)**. The center said it plans to update its COVID-19 webpage regularly as information becomes available.

Tips for workers include:

- Don't go to work if you're feeling sick.
- Don't shake hands when greeting others.
- Stay at least 6 feet away from others on the worksite, if possible, including during meetings and training sessions.
- Avoid contact with sick people.
- Avoid touching your eyes, nose or mouth with unwashed hands.
- Cover your mouth and nose with a tissue when coughing or sneezing, or do so into your elbow.
- Wash your hands often for at least 20 seconds. Use soap and water or an alcohol-based hand sanitizer that contains at least 60% alcohol.

For employers:

- Plan for office staff to have the ability to work from home.
- Provide soap and running water – and hand sanitizer, if possible – on all worksites to allow for frequent hand washing.
- Wipe down interiors and door handles of machines or construction vehicles, and the handles of equipment and tools that are shared, with disinfectant prior to entering. **[CDC has issued disinfection recommendations here.](#)**
- If a job involves working at a health care facility, provide workers with Infection Control Risk Assessment training.

SLDF Process Guidelines

We want to ensure that all ASA Chapters are updated on the latest processes and procedures for the approval of SLDF cases requesting amicus support.

The SLDF Task Force and ASA National Leadership carefully vet each application for assistance to ensure the maximum legal impact for the subcontracting industry with these funds. Approved cases are offered to

ASA member law firms to serve as amicus counsel. Approved counsel accepts a capped and reduced retainer below standard rates, as a service to the ASA community, and in recognition of the far-reaching impact of these Appellate decisions. We are proud of our record of success in these cases.

Please spread the word about the service that SLDF provides our subcontractors, and we also need your support to keep this fund replenished to fight new cases each year. Information on the Fund can be found at **www.sldf.net**. There is a new link at this site that will connect you to an informative presentation on the history and workings of the Subcontractor Legal Defense Fund as well. Please feel free to use this information as a resource, and do not hesitate to reach out to us with any questions!

Factors and Considerations for SLDF Involvement:

ASA's Board of Directors requires the SLDF Task Force to consider the following factors:

(a) Is the issue of specific interest to construction Subcontractors and suppliers?

(b) Are the issues focused and clearly presented?

(c) Is there a consensus among ASA members on the issue(s)?

(d) Could ASA have a meaningful impact in the judicial proceedings?

(e) Is the proceeding likely to result in setting favorable judicial precedent (or avoiding the setting of unfavorable judicial precedent) primarily in appellate level court proceedings or other reported formats?

(f) Are the issue or forum of high visibility from a public relations standpoint?

(g) Is the party seeking ASA's intervention willing to indemnify ASA for its expenses if the case settles before a final decision on the appeal?



FEATURE

Employers Scramble to Understand and Comply with COVID-19 Legislation

by Jamie Hasty, Vice President, SESCO Management Consultants



On March 18, 2020, President Trump signed the Families First Coronavirus Response Act, an economic stimulus plan aimed at addressing the impact of the COVID-19 outbreak on Americans, and introducing paid sick leave and an expanded family and medical leave act to the nation's employers. Less than 10 days later, on March 27, 2020, President Trump signed into law the Coronavirus Aid, Relief, and Economic Security (CARES) Act, intended to stimulate the national economy in the wake of the COVID-19 pandemic. The bill provides direct financial assistance to Americans, eases access to loans and other economic assistance to businesses of all sizes and provides aid and support to healthcare providers.

The regulations, swiftly passed by legislators, left employers scrambling to understand the complex legislation

and the direct impact it will have on their business operations. Furthermore, the Department of Labor (DOL), Internal Revenue Service (IRS) and other government agencies were seemingly not fully prepared for the new legislation and continue to push clarification, formal fact sheets, employer guidance etc. With rapidly changing information, employers were often left frustrated and searching for answers from professional sources during this unprecedented pandemic. To summarize the more recent clarification from the DOL, consider:

- Families First Coronavirus Response Act (FFCRA)
- Shelter-In-Place and Shutdown Orders

The new DOL rule states that a quarantine or isolation order broadly

includes "quarantine, isolation, containment, shelter-in-place, or stay-at-home orders," that cause the employee to be unable to work, even though the employer has work for them. The DOL states that this also includes when such orders advise categories of citizens (such as of certain age ranges or of certain medical conditions) to shelter in place or stay at home.

As the DOL explains, the key question in this analysis is "whether the employee would be able to work or telework 'but for' being required to comply with a quarantine or isolation order.

For many employees currently unable to work because their place of employment has closed – even as the direct or indirect result of a shutdown order, this DOL rule means they will

not be eligible for Emergency Paid Sick Leave under this qualifying reason.

Health Care Provider/ Emergency Responder Definition

The FFCRA permits an employer to exclude Health Care Providers and Emergency Responders from receiving EPSL and EFMLA. Employers should consider the language of the DOL's Temporary Rule, issued on April 2, 2020, which explains that a **"Health Care Provider"** is:

Anyone employed at any doctor's office, hospital, health care center, clinic, postsecondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity. This includes any permanent or temporary institution, facility, location, or site, where medical services are provided that are similar to such institutions.

An **"Emergency Responder"** is:

Anyone necessary for the provision of transport, care, healthcare, comfort and nutrition of such patients, or others needed for the response to COVID-19. This includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, child welfare workers and service providers, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency, as well as individuals who work for such facilities employing these individuals and

whose work is necessary to maintain the operation of the facility. Again, this includes any individual whom the highest official of a State or territory, including the District of Columbia, determines is an emergency responder necessary for that State's or territory's or the District of Columbia's response to COVID-19.

Intermittent Leave

Employees who seek to take EPSL or EFMLA intermittently must come to an agreement with their employer regarding intermittent leave as well as the increments of time in which the leave may be taken. Without such an agreement, no leave under the FFCRA may be taken intermittently. While best practice is to reduce the agreement to writing, it is not required by rule.

Required Documentation

The DOL's new rule goes beyond its previous question-and-answer guidance, and clarifies what records employers may request from employees and are required to keep under the FFCRA. Documentation supporting an employee's request for EPSL or EFMLA must include an employee's signed statement with:

1. the employee's name;
2. the date(s) the employee is requesting leave;
3. the COVID-19 qualifying reason for leave; and
4. a statement that the employee is unable to work or telework because of the COVID-19 qualifying reason.

Depending on the COVID-19 qualifying reason for leave, additional documentation may be required. Finally, normal FMLA certification requirements still apply for leave taken for an employee's own serious health condition related to COVID-19, or to care for the employee's spouse, son, daughter, or parent with a serious health condition related to COVID-19, under the FMLA.

Regular Rate of Pay Issues

The "regular rate" under the FFCRA applies typical Fair Labor Standards Act (FLSA) principles, but in a slightly different context – since it amounts to pay for hours not worked. Instead, the regular rate should be representative of the employee's regular rate from week to week. This should be calculated using an average weighted by the number of hours worked each workweek. Specifically, the employer must look at each preceding, full workweek that the employee has been employed during the six-month period ending on the date on which the leave is taken.

Put most simply, applying the usual regular rate principles such as how to address tip credit, incentive pay, and other non-hourly compensation, an employer would total the compensation earned across the relevant (full) workweeks and divide it by the total hours worked during the same period.

Effect On FMLA/Other Paid Sick Leave

The new DOL rule confirms the statutory language and previous DOL guidance regarding the interaction of the new leave requirements with existing leave laws or employer policies. With respect to EPSL, the DOL rule confirms that emergency paid sick leave is **"in addition to,"** and not a substitute for, other sources of leave which the employee has already accrued, was already entitled to, or had already used, before the law became effective on April 1, 2020.

However, employers in states with their own versions of "mini-FMLA" laws should be mindful that the new eFMLA leave will not run concurrently with those state family and medical leave entitlements, as those state laws generally do not cover leave related to COVID-19 school or child care closures. This may change in

the future, as many states are already moving to amend their state family and medical leave laws to include leave for this same purpose.

Smallest Businesses Receive Partial Carveout

A new development announced in the rule provides a partial carveout for the smallest businesses in the country. Employers with fewer than 50 employees will not have to provide EPSL or EFMLA to employees who need to care for their son or daughter whose school or place of care is closed, or child care provider is unavailable, for COVID-19 related reasons, if one of three factors exist:

- doing so would raise expenses and financial obligations above available business revenue such that the employer would cease operating at a minimal capacity;
- the requesting worker's absence would pose a substantial risk to the employer's financial health or operations because of their specialized skills, knowledge of the business, or responsibilities; or
- the employer can't find enough able, willing, available, and qualified workers to perform the work of the employee requesting an absence.

In such cases, the rule notes that employers must document the facts and circumstances that justify the denial and retain those records for their own files (not to be submitted to the DOL).

The CARES ACT

On April 10, the U.S. Department of Labor (DOL) provided states with operating, financial and reporting instructions for Pandemic Emergency Unemployment Compensation (PEUC) and other unemployment provisions of the act. The DOL explained that PEUC authorizes states to provide up to 13 weeks of federally funded unemployment benefits to people who:

- Have exhausted all rights to regular compensation under federal or state law for a benefit year that ended on or after July 1, 2019.
- Have no rights to regular compensation for the week in question under any other federal or state unemployment compensation law or to compensation under any other federal law.
- Are not receiving compensation for the week in question under the unemployment compensation laws of Canada.

Are able and available to work and actively seeking work (although states must offer flexibility on the "actively seeking work" requirement when there are COVID-19-related constraints).

Notably, states may not charge employers for the PEUC benefits they pay, because such benefits are fully funded by the federal government.

Who Is Eligible for the Additional \$600 a Week?

The Federal Pandemic Unemployment Compensation (FPUC) program, which provides an additional \$600.00 weekly payment to certain people who are receiving state unemployment compensation. Under the FPUC, individuals must first apply for and be approved to receive regular state benefits. The department confirmed that anyone who receives an unemployment benefit from the state, whether full or partial, may receive the additional \$600.00 a week. The DOL noted that "if the individual is eligible to receive at least one dollar (\$1) of underlying benefits for the claimed week, the claimant will receive the full \$600.00 FPUC." However, people who are not entitled to an underlying benefit for any given week will also not be eligible for FPUC benefits for that week.

Displaced workers should contact their state's unemployment office as soon as possible after becoming

unemployed, and they should generally file their claim with the state where they worked (rather than where they live). Although eligible individuals will receive the additional \$600.00 a week from the federal program, they should note that the underlying state benefits vary by location.

In Summary

Employers should review all regulations, documentation/forms and posting requirements to ensure full compliance with the FFCRA. If necessary, develop and adopt policies and procedures to ensure the health and safety of their workers during times of unprecedented uncertainty. Furthermore, explore any financial assistance resources available under the CARES Act as funds become available. Lastly, management, employees and other industry experts should communicate regularly to ensure that everyone is complying with all state and federal COVID 19 and employment law regulation.

SESCO Management Consultants will continue to monitor and report on developments with respect to the COVID-19 pandemic and will post updates in the firm's COVID-19 Resource Center as additional information becomes available. As a reminder, ASA members receive free telephone and email consulting for HR related matters with SESO Management attorneys and consultants.

Ms. Jamie M. Hasty is a Vice President with SESO Management Consultants, Richmond, Virginia. She regularly conducts management training for clients and serves as guest speaker for state and national associations. Jamie is a certified trainer for Vital Learning Corporation, John Maxwell and SESO Leadership Institute. Jamie can be reached at jamie@sescomgt.com.



FEATURE

Protecting Payments During the Pandemic: How Contractors Can Deal With COVID-19

by Patrick Hogan, CEO, Handle.com



As one of the pillars of the economy, the construction industry is largely affected by economic upswings and downturns. The state of the economy affects the decision-making of families, companies, and investors when it comes to investing in real estate. These patterns then dictate the level of demand that contractors and suppliers see. A strong economy means more disposable income for consumers to spend and a boost to entrepreneurship for aspiring business owners. On the other hand, a weak economy translates to more conservative spending, and entrepreneurs are discouraged from starting new businesses.

Now that the world is currently experiencing the COVID-19 pandemic, how will construction contractors fare in the face of another global recession on top of the industry's existing payment issues?

How COVID-19 Is Affecting the Construction Sector

Like all industries, the construction sector is not immune to the COVID-19

crisis. Many of the steps enacted by the federal and state governments, especially the widespread shutdowns to slow down the coronavirus, have a negative impact on construction operations. Before the coronavirus became a full-fledged pandemic, the construction industry was already reeling from a **1.3% drop in construction spending** in February. Economists are forecasting further declines as stay-at-home lockdown measures are in place.

Whether construction projects move forward or not depends on whether local governments consider construction "essential." Several states generally allow construction activities only if they are related to other essential products and services, especially if they are needed for COVID-19 relief efforts. For construction projects that do proceed, project owners, managers, and contractors need to prepare for several challenges ahead.

The current pandemic will see longer completion times for projects, largely due to disruptions to supply chain and capital markets as well as reduced labor

availability. The lockdowns of states and communities to curtail the pandemic also slows down the flow of materials from manufacturers and warehouses to construction sites. Social distancing and quarantines on a mass scale affect personnel availability and productivity. On big projects typically done by groups of people, construction workers need to find ways to distance themselves from one another while managers need to enact measures that ensure proper health and safety protocols to combat the coronavirus are in place. Workers who are sick or have concerns about being sick need to stay at home. Community lockdowns also limit the movement of people to just the essentials.

How to Protect Payments During the Pandemic

The current coronavirus crisis, as well as the supply chain issues and economic uncertainty that come with it, will inevitably cause payment disputes. On a typical construction project which follows a hierarchical system of payments,

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Leading in Times of Disruption

by Eva Sage-Gavin, Sr. Managing Director, Accenture

Imagine we're sitting in your office, talking, leader to leader. I ask you if you can identify your company's employee "supergroup." Would you be able to, broadly? Would you know what I was asking?

If so, you're in a select group of C-suite leaders. Many leaders I speak with clearly say their company is in the middle of disruption from shareholder activism, technology impacts, consumer expectations, competitive threats and more. But when I ask them if they're harnessing their supergroup of select employees to help turn that disruption into opportunity, it gives them pause.

We call this supergroup Pathfinders. They are not just the people who work for your organization (51%), but also include your customers (49%). But let's focus on the workforce side of it. You can engage Pathfinders' energy and talents to help move your company forward. But if they're not engaged in helping your organization's cause, they have equal power to topple it. That's why we call them a supergroup—they're powerful stakeholders with high influence. Based on global research—interviews with 200 C-suite executives and a survey of more than 11,000 employees and consumers—Pathfinders exist in every company, regardless of geography or industry. But some companies excel at working with them.

Partnering with Pathfinders has always been key to success, but as leaders, we know that in times of disruption, the stakes are multiplied. Engaging these employees is critical because they are at least two times more likely to be on the fast track to leadership and possess critical

skills. They also come with very clear, and very different, expectations of leadership than those that employees have traditionally held. Currently, in most companies, a gap exists between what the C-suite feels is important for leadership and the leadership standard Pathfinders demand. Pathfinders are looking for leaders to excel not only in traditional left-brained skills like results orientation and data analysis, but also in the right-brained skills so essential to truly human leadership—skills like creative thinking, empathy and self-awareness. Leaders who bring this more whole-brain approach to their companies maximize their chances of lighting up Pathfinders in the very best way: harnessing their energy to help further a shared purpose.

I know you'll be tempted to think of these employees in generational terms, but you shouldn't, because they defy those expectations. Pathfinders are spread evenly across generations and gender.

The numbers show whole-brain leadership brings business results and bolsters competitive agility—and I'd surmise it has a lot to do with engaging your Pathfinder supergroup. Companies that have already adopted a whole-brain approach see a positive bottom-line impact and realize, on average, 22% higher revenue growth and 34% higher profitability. That's a burning platform for something I've talked about before—new-skilling. But in this case, it's new-skilling the C-suite with the critical right-brain skills that will help them better lead not only Pathfinders, but employees of all types.

To me, Pathfinders can represent hope. They are independent thinkers

who will align to a cause they believe in—and they'll keep their leaders true to that cause. Some companies see that so clearly that they've built a hiring system that is Pathfinder-friendly. Mark Levy, an employee experience advisor, has worked for a few of these companies. He pioneered the role of chief employee experience officer at Airbnb and Allbirds, as a former chief talent officer, and was a colleague of mine during my Gap, Inc. days. Mark talks about how Airbnb leaders not only interviewed job candidates for technical and functional skills, but also for shared core values. These core values served as behavioral anchors for the company employees and created their incredible culture of belonging. Core-value interviewers, from functions outside of the area a candidate interviewed for, did not see a person's résumé during an interview; that was handled separately. Rather, they had a values-centered conversation to see if the candidate wanted to join the company for the right reason—to bring the mission to life and further company values. The company was looking to keep out mercenaries, in favor of missionaries.

Mark has become adept at identifying Pathfinders, via years of experience. "At Allbirds, we described these people as high horsepower, low ego," he explains. "That's how I would define the people who really move the needle. They are mission-driven, they act curiously, they live intentionally. They're looking beyond their job to how their company and brand show up in the world. And they feel they can influence the direction and the trajectory of the company. But to lead them, you can't do things 'to' them,

you have to do things 'with' them. It's all about co-creation and co-design. This group is highly passionate and that can be used for so much good."

So much of what we read about disruption today is negative. I believe there are paths forward that can turn disruption, dissent and destruction into positive forces of change and opportunity. Pathfinders are key to solving that equation for your company—they solve paradoxes without thinking twice about it when they're on board with your cause.

Now, let's go back to where we began—our imagined conversation in your office. Let me ask you again:

"Do you know who your Pathfinders are? And are you engaging their energy and passion to move through disruption and into a future they help create?" I am sure after knowing more about what makes a Pathfinder, you can already start to name some of them.

I envision a future in which those questions won't be difficult to answer. It's a future our Pathfinders are already helping to create. Here's to all of us embracing whole-brain leadership as we work with our people to not only do the right thing, but to make doing the right thing and commercial success synonymous.

HR Leadership columnist Eva Sage-Gavin is a distinguished HR thought leader and former CHRO with more than three decades of broad experience in Fortune 500 global consumer, technology and retail corporations. She currently serves as the senior managing director for Accenture's global talent & organization consulting practice and as a technology Board Director. She can be emailed at hreletters@lrp.com.

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Hogan article, continued

the challenges echo down the ladder, with the contractors and suppliers at the bottom of the chain feeling most of the pressure. These disruptions, delays, and disputes are expensive, especially for small contractors, and can mean the difference between sinking and keeping the business afloat.

As the pandemic goes underway, it is time to **review your contracts**. In contracts, there are *force majeure* clauses that either defer or release parties from the obligations stipulated due to circumstances that are beyond the control of the breaching party. While these provisions are easily overlooked in ordinary situations, the current economic uncertainty due to the COVID-19 crisis highlights their significance. Depending on the language of a contract, you may be entitled to more time to complete the job or even void the contract altogether. Consult a construction attorney and learn more about your rights.

It also helps to talk to the other parties of the contract and simply create a new agreement. The circumstances brought by the pandemic are unprecedented, and a compelling reason to get ahead of potential work and payment disputes, and agree on reasonable provisions.

Finally, it is important now more than ever to protect your right to file a lien. The mechanics lien has always been the tool that helps contractors and suppliers seek recompense for unpaid work, even before the COVID-19 crisis. But with the effects of the pandemic felt by all construction businesses, contractors need to be doubly strict in complying with the requirements of mechanics liens.

Always **send preliminary notices** for every job that you take, to ensure that your lien rights are well-protected. If before you were a bit lax in contacting clients for payments, you should now be strict with deadlines and readily send **notices of intent to lien** in case they need a little push. If you fully complied with the requirements, you will be able to file a mechanics lien to compel payment.

As the COVID-19 crisis is still growing, the extent of its effect on the construction industry is currently unknown. Like the great recession of 2008, it will surely have lasting consequences not just for the industry but for the global economy. While this is indeed a huge challenge for construction businesses, you should know that there are ways to protect your payments and ensure the survival of your business.



Patrick Hogan is the CEO of Handle.com, where they build software that helps contractors, subcontractors, and material suppliers with late payments. Handle.com also provides funding for construction businesses in the form of invoice factoring, material supply trade credit, and mechanics lien purchasing.



FEATURE

Construction Trades Hold Opportunities for Today's Workforce

by Mike Brewer, Founder & CEO, Brewer Companies and Benjamin Franklin Plumbing; and Todd Sanders, President and CEO, Greater Phoenix Chamber of Commerce

A wise man once said, "If someone offers you an amazing opportunity and you're not sure you can do it, say yes- then learn how to do it later." That's why now is the time for hardworking Arizonans with a commitment to showing up on time and a strong desire for a great career, to seize the day and enter the construction trades.

As the Founder and CEO of Benjamin Franklin Plumbing and the Brewer Companies, Arizona's largest plumbing company, with over 350 hard-working team members averaging annual wages of \$55,000 each, and the President of the Greater Phoenix Chamber, Arizona's largest Chamber of Commerce representing over 2,400

businesses, we know that those in the construction trades are well positioned to take care of their families and navigate the economic challenges ahead for our nation.

With all that is unfolding due to COVID-19; public school closures, take-out-only restaurants, and travel-related industries struggling due to health and safety concerns, many hard working Americans are now asking, "where can I get a job that allows me to work, make a great living, take care of my family, and stay employed during this impending economic crisis?" The answer is clear... the construction trades!

Arizona Governor Doug Ducey issued a declaration describing "essential services," on businesses that may remain open even with a stay at home order declared. The construction trades are on the list. Arizona continues to attract more people to our state, which will produce a demand for housing and commercial projects in the future. It's a great place to live and raise a family.

Construction continues to be a key economic driver for Arizona. We continue to see demand for roads and infrastructure, office and industrial space, and housing. Construction is key to stabilizing our economy during this time of uncertainty, providing stable employment across the state.

Whether plumbing, painting, dry-wall, or roofing, the largest crew on the average new home construction site is just five workers. That means not only are the construction trades



Alan Jones, Division President of Lennar Homes Arizona asking Lennar Trade partners to join Lennar Homes as financial supporters of Build Your Future Arizona.

a great career for those who enjoy sunshine and being outdoors, but it's also an ideal career path for a new reality where our government and policymakers are asking us to practice "social distancing."

Arizona currently has tremendously more demand on housing sales than the labor to fill it. Interest rates are at an all-time low, providing many families the opportunity to take advantage of homeownership with low mortgage rates—many for the first time. One leading homebuilder in the AZ market recently opened a new model home complex and had 95 potential buyers show up for nine



A framer continues work building homes while maintaining proper social distancing.



Students at the Brewer Craftsman Academy learning the basics of plumbing installation. The program pays students to learn in both classroom and hands-on settings before deploying them to Brewer Companies jobsites.

available homes. The subdivision had over 100 lots to build on, but due to labor constraints, they were only able to offer 10% of them for sale.

Arizona currently has a HUGE backlog of sold homes, which has

builders metering the homes they have available to sell. Builders are now setting expectations for both the buyers on delivery time, but also their trade partners, slowly feeding them a steady flow of work. Even in

today's "new" environment, if half the buyers stayed home, we would have more demand than finished homes available to sell.

Arizonans need opportunity and the homebuilding industry needs workers. No college degree is required, just simply a commitment to arrive on time, work hard, and learn.

If you know someone who is interested in learning about a career in the skilled trades, ask them to visit BYFAZ.org (Build Your Future Arizona) to find out about the great careers available in the industry.

About the Authors:



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Todd Sanders is the President & CEO of the Greater Phoenix Chamber and may be reached at tsanders@phoenixchamber.com.



LEGALLY SPEAKING

Protecting Your Rights for Coronavirus Impacts

by Timothy J. Woolford, Esquire, Woolford Kanfer Law, P.C.



Many subcontractors have been severely affected by the coronavirus and have legitimate questions concerning their ability to obtain time extensions as well as their entitlement to recover additional costs. Most states have severely limited business activity since mid-March. In some areas, construction has been shut down altogether. In other locations, construction was exempted from the closures. In still

other places, construction on projects deemed essential or life-sustaining are permitted. Where construction is permitted, required compliance with CDC and OSHA guidelines has changed work conditions, and in many cases, severely reduced productivity. Depending on the trade, certain tasks cannot be performed without violating social distancing requirements or at least requiring additional precautions and protective equipment. Tasks

that can be performed often take more time. Where a project has been completely shut down, delays are easier to establish, at least for the period during which all work was stopped. However, on projects where work was permitted to continue, impacts from diminished productivity, delays at manufacturing and fabrication plants, shortages of building materials, and delays in transportation are equally real but

more difficult to prove. This article is designed to assist subcontractors in protecting their rights and maximizing their ability to obtain relief for the impact of the coronavirus.

Subcontracts

Review the Subcontract. The first step in determining your rights for additional time and compensation is to carefully review the subcontract to identify and understand provisions that address delays and the relief to which you are entitled for delays. Some subcontracts state that the subcontractor is not responsible for delays caused by events or conditions beyond its control or for delays caused by unforeseen conditions or circumstances. These provisions often state that the subcontractor is only entitled to additional time for delays. Such provisions are often referred to as *no damages for delay* clauses, and if your subcontract has one, then your only remedy for coronavirus delays and impacts may be a time extension. Some subcontracts contain *force majeure* clauses providing relief in the event of catastrophes or Acts of God. They often list the types of events that constitute *force*. If there is a *force majeure* clause in the subcontract, carefully review it to determine whether the coronavirus is among the types of events that are listed as a *force majeure* event, and determine what relief the clause affords.

Flow Down Clauses

Many subcontracts contain *flow down clauses*, which provide that the terms and conditions of the prime contract flow down into and are incorporated by reference in the subcontract. If your subcontract contains such a provision (and it likely does), the prime contract should be carefully reviewed to see what it says regarding delays beyond the contractor's control or for other events. There may be a *force majeure* provision in the prime contract that flows down into the subcontract.

With a flow down clause, you may be entitled to the same relief from the contractor which the contractor is entitled to obtain from the owner. The AIA A401 Subcontract, which is widely used in the construction industry, does not specifically address delays beyond the subcontractor's control. A401 Subcontract contains a flow down clause at Article 1.1. Thus, a subcontractor that has entered into one of these agreements, must carefully scrutinize the prime contract for provisions regarding delays in order to determine the relief to which it is entitled. If the prime contract includes the AIA A201 General Conditions, there are provisions stating that the contractor (and hence the subcontractor) is not responsible for delays, and may be entitled to additional compensation as well. (See Articles 8.3.1 & 8.3.3)

Notice Provisions

Follow the Notice Provisions. Review the subcontract carefully to determine the precise requirements for giving the customer notice of delays and additional costs and comply with them. Most subcontracts contain time limits for giving notice and often require that the notice contain specific information about the delay, its cause and impact on progress. They frequently dictate a specific manner and format in which the notice must be given. Since the coronavirus epidemic began impacting construction projects, many of our subcontractor clients have asked us to assist them in drafting a standard form letter that can be used to give notice of coronavirus delays on all ongoing projects. While the desire to develop a single notice form is understandable, subcontractors are well-advised to customize the notice letter for each project, to ensure that it complies with the particular notice requirements of the applicable subcontract. Make sure that the notice is transmitted via the exact method required by the subcontract. Some subcontracts permit email, while others require

first class mail, certified mail or overnight delivery (FedEx, UPS). They sometimes require that the notice be directed to a specific individual and/or that certain individuals receive a copy. Make sure these requirements are strictly followed, and do not assume that a *one size fits all* notice letter will be sufficient.

Subcontracts often contain harsh provisions stating, in one form or another, that the subcontractor's failure to strictly comply with the notice requirements results in a waiver or forfeiture of the claim. Do not assume that your customer will accept anything less than full compliance with all requirements. The coronavirus is likely to be the most significant event to impact construction costs since the steel shortage in the last decade. We predict that many owners will be looking for reasons to reduce, limit or reject claims for additional time and compensation caused by the coronavirus. Some will seize upon technical non-compliance to reject claims. Take extra care to ensure that your notice strictly complies with the requirements of each individual subcontract, so that you do not provide a basis to reject your claim due to a technical flaw.

Do not avoid or delay giving notice simply because you do not know the exact number of days you need, or cannot precisely quantify your additional costs. Inform the customer in the notice letter that you are presently unable to identify the time and cost impact, but you will update them as soon as they can be better assessed. Make sure the tone is professional and cooperative. Do not be discouraged if your customer responds to your notice letter by criticizing it or telling you that it is insufficiently specific. Such pushback is to be expected whenever a subcontractor requests additional time or money, where the GC is not yet sure whether it will obtain similar relief from the owner. Many prudent general contractors will forward delay notices

from subcontractors to the owner in support of their own requests for an equitable adjustment under the prime contract. Give them the ammunition they need to get relief from the project owner.

Cost and Schedule Impact

Document the Cost and Schedule Impact. The mere fact that the coronavirus required a shut down or modification of work activities, methods and sequences to comply with OSHA, CDC and other guidelines will not, in and of itself, entitle you to time and/or money. **Subcontractors will need to prove the delays and impacts to their work.** You must be able to precisely demonstrate how the coronavirus delays impacted you. You will need to show clearly that the delay was caused by the coronavirus rather than other factors, and you will likely need to show how the critical path of the project was delayed. Supporting the additional costs with precision is frequently overlooked by subcontractors who often find it easier to just estimate the added costs rather than compile actual costs. Identifying your actual costs will be crucial. Consider setting up a cost code to track additional time that activities are taking. If compliance with OSHA and CDC guidelines are reducing productivity (which is likely), make sure it is noted in your daily logs and other similar documents. Consider adding a section to your daily logs specifically noting coronavirus impacts. For example, if certain work requires two or more workers to be in close proximity to one another, note that the activity must be postponed, that it will require additional setups or mobilizations, and the impact that the postponement of that activity will have on other construction. These contemporaneous records will be critical later if dispute resolution becomes necessary.

Familiarize yourself with the concept of the “**measured mile**,” which is a method of quantifying claims based on lost productivity. While this short article cannot begin to address the measured mile method in detail, the measured mile method compares the cost of “impacted” work with the cost incurred to perform the same or similar “unimpacted” work on the same project. Subcontractors may be able to identify areas of a project constructed before the coronavirus outbreak which were on budget, and compare their costs incurred on a similar portion of the project where work was not as efficient, due to the new social distancing requirements that had to be followed. The difference between the two is the amount of the claim. Of course, you will have to address any other factors that could have caused the additional costs and show that they did not cause the reduction in efficiency.

Future Contracts

Subcontractors that are bidding on or negotiating for future projects should insist on the inclusion of provisions that provide relief for impacts of the coronavirus. Even after the coronavirus restrictions ease there are likely to continue to be impacts, such as delays in procurement of materials due to shortages and the like. The exact language will need to be tailored for the particular project, but such a subcontract provision could look something like the following:

Notwithstanding any provision(s) of this Subcontract, if as a direct or indirect result of any virus, disease, contagion, including but not limited to COVID-19 (individually or collectively, “Epidemic”), Subcontractor’s work is delayed, disrupted, suspended, or otherwise impacted, including, but not limited to, by (1) disruptions to material and/or equipment supply; (2) illness of Subcontractor’s workforce and/or unavailability of labor; (3) government quarantines, shelter-in-place orders, closures, or other mandates, restrictions, and/or directives; (4) Owner or Contractor restrictions and/or directives; and/or (5) fulfillment of Subcontractor’s contractual or legal health and safety obligations associated with an Epidemic; then Subcontractor shall be entitled to an

equitable adjustment to the Subcontract schedule and duration to account for such disruptions, suspensions, and impacts. To the extent COVID-19 and the impacts thereof result in an increase in the price of labor, materials, or equipment used in the performance of this Subcontract, Subcontractor shall be entitled to an equitable adjustment to the Subcontract price for such increases, provided Subcontractor presents satisfactory documentation of such increases and evidence of Subcontractor’s reasonable efforts to find alternative sources of material or equipment supply and/or labor at the original/non-impacted prices and/or estimates.

Absent a specific subcontract provision in future subcontracts, it will be difficult to obtain relief because the coronavirus and its impacts are now foreseeable, and customers faced with future claims will likely reject them on the basis that the coronavirus and the issues it presents were foreseeable at the time the subcontract was signed.

Conclusion

The impacts of coronavirus are still not known, as the situation remains very fluid. It is certain, though, that the financial consequences of the virus to the construction industry will be enormous. Subcontractors need to protect their economic interests by following the requirements of the subcontract and carefully tracking extra costs. Good recordkeeping will be essential as is the case in every potential claim situation. Subcontractors following these recommendations will maximize their chances of obtaining equitable relief to help them get through this predicament.

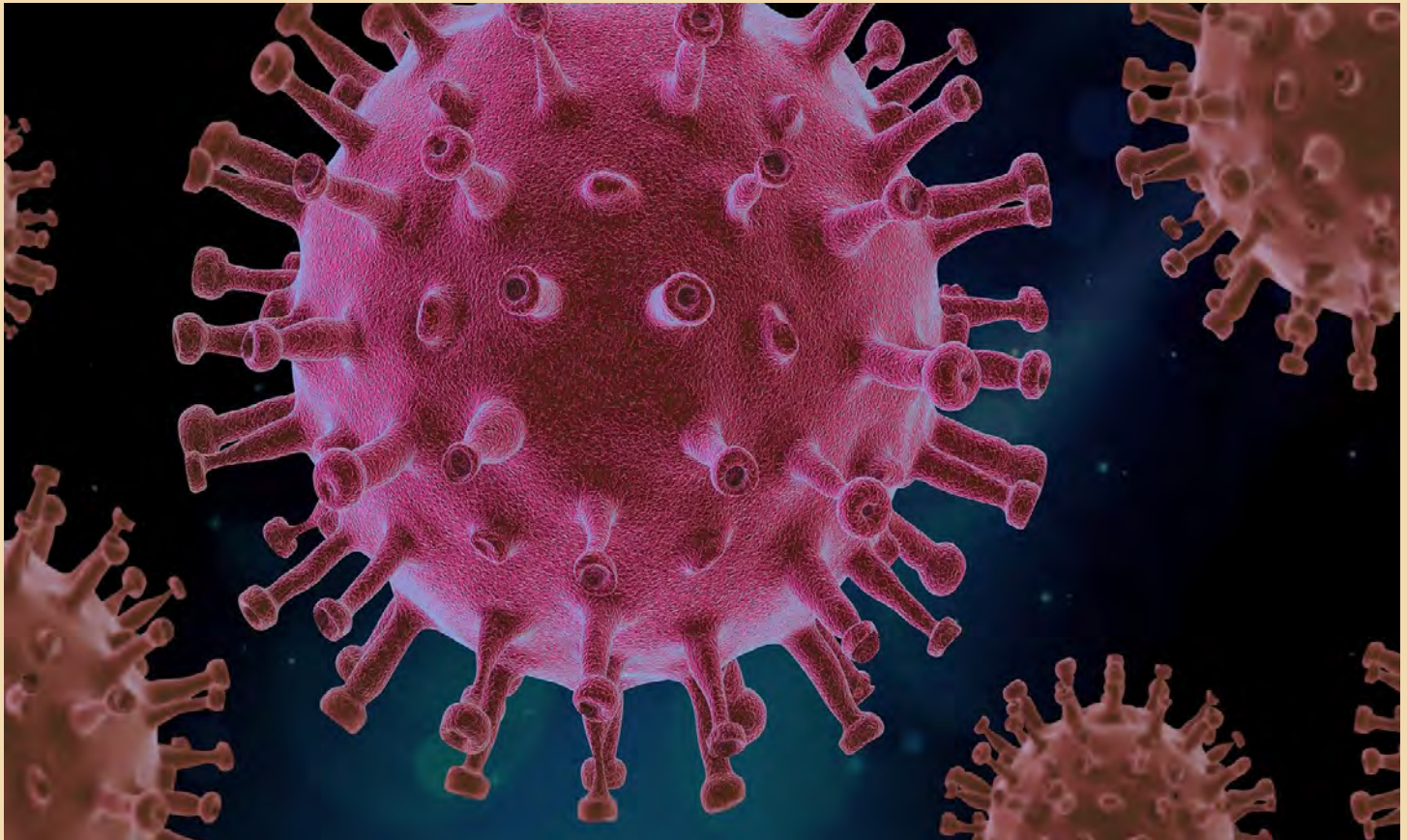
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LEGALLY SPEAKING

Screwed Because of Virus. Are There Any Silver Linings?

by Mark A. Cobb, Esquire, The Cobb Law Group



Since the Shelter-in-Place Orders began several weeks ago, the business landscape has been significantly altered. There are so many sources purporting to know the future, however, that taking in this information is akin to drinking from a firehose. It is just too much! As with all disasters, some businesses are thriving while others suffer. This article is designed to help you find the silver-linings where they exist and provide practical suggestions for addressing some of the problems suffered by subcontractors during these uncertain times.

Tackling Payment Issues:

Fortunately, most of our subcontractor clients are not experiencing any out-of-the ordinary payment issues yet, but we believe that we will see more.

Those contractors who are stressed financially may divert their funding and fail to timely pay their subcontractors. When this happens, we believe that being aggressive with seeking payment remedies will pay off more than ever. Rather than waiting for a deadline to approach, subcontractors may want to be more proactive, and consider some of the following ideas:

1. **File materialmen and mechanics' liens as well as their payment bond claims sooner.** As many know, the liens generally provide subcontractors with a type of collateral that they will receive payment. From a practical sense, the filing of liens alert project owners and lenders about subcontractor issues, and they may assist in getting payment.
2. **Contact the project owner directly and ask for a joint check** to insure that payments intended to go to the subcontractor are not diverted to the contractor's other project.
3. If state law allows, a subcontractor may be able to **make a claim against the retainage** which the project owner may be holding against its funds owed to the general contractor.
4. Subcontractors may **agree to a structured payment plan** with the general contractor. Some plans are weak, while others may allow the subcontractor to obtain an enforceable judgment against the general contractor with little additional costs or time.
5. **Know each contract, and comply with the notice provisions** in the

event of a contractor default; comply with all of the notice provisions and consider sending the notice to multiple parties within an organization or a lender, as it may land on a decision-maker's desk.

Courts and Deadlines:

The pandemic has caused many local governments and states to issue various emergency orders and executive orders. In addition to the popularly discussed administrative orders, courts, too, have issued less-discussed judicial orders which impact many aspects of business.

Statutory Deadlines: Many states' courts have declared a judicial emergency which may impact statutory deadlines to make a claim or file a lawsuit, which may give you "extra" time to complete a claim. For example, a recent client had a March deadline in which to file a lien. A day prior to the deadline, the jurisdiction where the lien was to be filed extended all statutory deadlines until May; thus, a lien claimant who was about to fail to timely file its materialmen's lien, got a reprieve and the lien was able to be filed despite the expiration of the statutory deadline.

Litigation: Similarly, the judicial orders are impacting litigation. In many instances, it is effectively staying the civil process. This allows the parties who are involved in litigation (or threatening to be involved in litigation) an opportunity to negotiate or otherwise resolve their disputes without the costs and delays of going through a lawsuit.

Mediation: In those areas where the courts are effectively closed, clients who need a construction issue resolved more quickly are turning to alternate means to resolve their disputes. Mediation is easily accomplished virtually, and it generally saves the participants a great deal of time and money, rather than the customary letter-writing campaign championed by many attorneys or the astronomical costs of litigation.

Permits and Legal Requirements:

In many locations, permitting and inspections have become an issue. In order to keep construction going, we have seen many jurisdictions include an alternative to traditional permitting and inspections. For example, some locations allow a licensed engineer to act as a substitute for municipal employees who are unable to timely meet the demands of their jobs.

In addition, simple tasks such as notarizing have become easier as some of the stringent rules regarding witnessing documents have become relaxed.

Our experience has shown that most local officials want to do their best during this pandemic. Thus, if you make a good suggestion, a city manager, mayor, constable, or whomever is allowed to make these decisions, may be willing to issue an executive order. Recently, in a large city, an executive order was issued permitting "construction public works," to continue as essential. It caused confusion as to whether private construction could continue; thus, the Mayor added a clarifying comma allowing "construction, public works,...." to be considered essential.

Changing Business Attitudes:

Many subcontractors are delighted to have more work than ever; however, there are others who are less fortunate; furthermore, everyone should be a bit more wary of non-payment. Therefore, this may be a great time to reevaluate a business plan and, more importantly, the types of contractors with whom a subcontractor works. A subcontractor may, for example, consider some of the following items when considering taking on a new project:

1. Vetting New Projects:

Subcontractors need to establish procedures for vetting owners, general

contractors, and specific projects for profitability. Some overlooked ideas include checking to see if any liens had been placed against a certain owner or the general contractor. A thorough job may require a subcontractor to find other business entities involving the same or similar officers. In addition to researching the lien docket, it is recommended that the litigation docket also be reviewed.

2. Strengthen Your Contracts:

Subcontract agreements can always be made better and more subcontractor friendly. This process can take a little bit of time, but the improvements that may be made may save you headaches in the future.

3. Obtain Personal Guarantee:

Subcontractors may consider using personal guarantee with contractors who may be a high-credit risk. Of course, it is wise to obtain an idea of the assets owned by the potential guarantor.

3. Joint Check Agreements. If you have concerns about starting a new project with a particular contractor, do not be afraid to ask for a joint check agreement between the project owner, contractor, and subcontractor to help increase the odds of getting paid.

During these uncertain times, there is not any one-size-fits-all solution; however, working together, exercising wisdom, and working for fairness will help the entire construction industry to thrive well into the future.

A leader in Georgia construction law for over 25 years, the Cobb Law Group brings expertise, experience and knowledge to your team. Focusing on project development, construction contracting, construction litigation, and payment issues including materialmen's liens and payment bond claims, our firm understands your goals and needs. For more information, email: mark@cobblawgroup.net or visit <http://cobblawgroup.net>

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FEATURE

Technicalities and Tautologies: Interpreting Construction Statutes in Kansas

by Lee Brumitt, Dysart Taylor

We've all heard it: "they got out on a technicality." A recent case out of Kansas reminds us that what may look like a technicality is, in fact, a court properly applying the plain language of a statute, as enacted by the legislature. In *Drywall Systems, Inc. v. A. Arnold of Kansas City, LLC*, Arnold entered into a commercial lease of a building in Olathe. Wanting to separate itself from other tenants in the building, Arnold entered into a contract with Drywall Systems to build a partition wall. Drywall constructed the wall, and Arnold defaulted on payment.

The trial court found that Arnold had indeed breached the contract and entered judgment for Drywall for the contract amount only. The court denied Drywall's request for prejudgment interest and attorneys' fees under the Kansas Fairness in Private Construction Act, K.S.A. 16-1801, et. seq. The Act's goal is to promote prompt payment through the various construction tiers - from owners to subcontractors. The Act sets standards for promptness. In the case of an "owner," the Act requires payment to a contractor within thirty (30) days of submission of an undisputed amount. If the "owner" fails to pay within that time frame, it is required to pay 18% interest and attorneys' fees.

Interpreting the Act, the trial court decided that Arnold, as a mere tenant, was technically not an "owner" and thus not subject to the prompt payment rules. Drywall Systems appealed. The appeals court found that the Act specifically defined an "owner" as one "who holds an ownership interest" in the property--a tautology (the saying of the same thing twice in different words) and perhaps a technicality. But, because a tenant does not have an ownership interest in the property, the court reasoned that the legislature did not mean for the Act to apply to Arnold.

I wish I had a nickel (ok, maybe a dollar) for every contractor which has described

its business as "TI" or tenant improvement work. If you fall in that category, how do you overcome this potential problem? Make sure there is a written contract with the tenant which provides for payment of 18% interest and attorneys' fees in the event of default or contract directly with the "owner."

Let's say the contractor is headquartered in Goodland, Kansas and its lawyer works overtime on the contract including, among other things, a forum selection clause whereby the parties agree to litigate any dispute arising from the contract in the District Court of Sherman County located in Goodland, a forum perhaps more favorable to the client. Subsequently, a dispute arises 400 miles away in Johnson County where the customer's construction project is located. Can the contractor with the hometown lawyer cause the customer to litigate in Sherman County? Does the Act have anything to say about this scenario?

In *Wheatland Contracting, LLC v. Jaco General Contractor, Inc.*, Jaco's subcontract with its plumbing subcontractor, Wheatland, stipulated that any dispute arising under the subcontract would be litigated in the District Court of Sedgwick County. Wheatland performed plumbing work on a Kentucky Fried Chicken restaurant in Johnson County, Kansas and sued Jaco in the District Court there for failure to pay the amount owed under the subcontract. Jaco moved to dismiss or, alternatively, transfer venue to Sedgwick County. The trial court denied Jaco's motion holding that the Act requires the venue to be in the county where the project is located. K.S.A. 16-1806.

On appeal, the court conducted an in-depth review of the Act and noted how broadly it compels prompt payment of amounts due under "all tiers" of construction contracts. In addition, the court noted that the Act "voids" all contract provisions attempting to waive

the rights and duties created by the Act. K.S.A. 16-1801(b). The court stated, "parties cannot avoid the application of this law by contract."

Nevertheless, Jaco argued that the Act could not supersede the parties' freedom to contract and determine where their disputes would be resolved. The court noted that although federal law does enforce forum selection clauses and some Kansas federal district court have indeed honored forum selection clauses on projects located in Kansas, where the parties are Kansas companies governed by the Kansas law, the exclusive venue is set by the Act. Therefore, the Court of Appeals upheld the trial court's decision that the dispute must be heard in Johnson County, the location of the project.

Two seemingly disparate determinations under the Act are resolved by the Court of Appeals by simply giving plain meaning to the language in the Act. Contractors and their scriveners will be well-served to know what the Act says when drafting contracts.



Dysart Taylor Shareholder/Director **Lee B. Brumitt** focuses his practice in construction law and litigation, representing owners, contractors, subcontractors, suppliers and design professionals on public, commercial and residential projects. He can be reached at lbrumitt@dysarttaylor.com or 816-714-3027.



2019 was a busy year for ASA and it's legislative team. While we have touted our accomplishments, and the hard work our team and ASA members have logged, here it is in one fell swoop. And if you're NOT an ASA member, here's your chance to get your voice heard on ASA legislative priorities and goals for the future.

2019 LEGISLATIVE ACCOMPLISHMENTS

- S. 1434: **Banning reverse auction in construction services** unanimously passed in the Senate 100-0.
- Cadillac Tax: President Trump signed the law for the **full repeal of the 40% excise tax on high-cost health plans** (the "Cadillac Tax").
- **529 Apprenticeship Savings Accounts:** Setting Every Community Up for Retirement Enhancement (SECURE Act), which takes effect on January 1, 2020: expands 529 education savings accounts to cover registered apprenticeships; homeschooling; up to \$10,000 of qualified student loan repayments (including for siblings); and private elementary, secondary, or religious schools.
- **2020 National Defense Authorization Act (NDAA):** ASA supported the following NDAA provisions included in the Act:
 - Sec. 806 - Standardizing data collection and reporting on use of source selection procedures by federal agencies
 - Sec. 873 - Accelerated payments applicable to contracts with certain small business concerns under the Prompt Payment Act
 - Sec. 872 - Reauthorization and improvement of Department of Defense Mentor-Protege Program
 - Sec. 874 - Post-award explanations for unsuccessful offerors for certain contracts

2020 LEGISLATIVE PRIORITIES

- H.R. 5247: SUBS Act – Bid Listing
- H.R. 2344: Change Orders
- S. 1434: Reverse Auction in the House (H.R. 5644, Reps. Meadows (R-NC) and Khanna (D-CA))
- H.R. 5329: Freedom from Government Competition Act
 - In the 115th Congress, H.R. 4671, the Small Business Protection Act, was introduced by Reps. Huizenga (R-MI) and Maloney (D-NY) and is expected to reintroduce this legislation in the 116th Congress.
- Miller Act – Bonding Requirements
- P3 Bonding Requirements in TIFIA (Transportation Infrastructure Finance + Innovation Act)
 - Rep. Lynch (D-MA) is expected to introduce legislation on this subject.
- Miller Act – Bonding Requirements
- Congressional Caucus (Construction Procurement Caucus) Introduced on March 5, 2020: ASA Founding Member

BE PRO BE PROUD

BEPROBEPROUD.ORG

Be Pro, Be Proud Update

by Mary Klett, ASA Communications Team

Twenty school visits, a trip to DC, a month's worth of education and training...canceled due to the coronavirus circling the globe. The Arkansas "workshop on wheels" simulator trailer is at home in Little Rock, sterilized and waiting to get back on the road. Eventually.

In early March, the Be Pro, Be Proud workshop trailer was the star of the ConExpo show in Las Vegas, getting students to explore and sample 12 professional trades in a virtual environment. But the show closed early as a safety precaution against the novel coronavirus that was spreading in the U.S., and the Arkansas employees - with trailer - had to head home.

Those employees are now working hard to fundraise for the next iteration of the Be Pro, Be Proud education system - virtual tours a student can experience at their school via computer.

The Arkansas State Chamber of Commerce is working with a video game developer to make these experiences as realistic and informative as possible. The Chamber is also working with the Department of Commerce and Department of Education to get every 7th - 12th grader a virtual experience via an Internet link - as a carpenter, welder, lineman,

truck driver, or any of the 12 occupations that are represented in the actual trailer.

While the trailer is limited to where time and the roads can take it, the Internet is an alternative route to reach every student in the state, on their own schedule.

With the need for skilled workers growing every year, the virtual experience via the trailer comes to you. Or if you search it out on the Internet, Be Pro, Be Proud is a perfect match for anyone to sample a future fulfilling career.

To learn more about Be Pro, Be Proud, please visit www.beprobeproud.org, or contact Trey Lamberth at 501-372-2222.





The Power of Personal Branding in Construction

by Tracy O-Shaughnessy, founder, Branding & Beyond

I've been helping frustrated commercial construction firms look and sound as credible online as they are offline since 1999 and it's safe to say our industry's seen some tough times before - but nothing quite like this.

You might think I'm here to tell you that you need to rebrand yourself and that now is the perfect time for you to change up your entire brand: overhaul everything from the logo to the messaging on your website to your marketing.

But I'm not.

Now is not the time to rebrand.

Right now is the time to take stock of what is working and what is not. And focus on what you can do to help your business and your career in the long run.

When this whole pandemic nightmare is over and the dust settles, you can circle back and evaluate if you need a rebrand, a brand refresh, or just a tweak here or there.

LinkedIn guru Goldie Chan recently wrote: "Creating the right personal brand will not only help you be known in your field and consistently land work, but it could be the difference between "Who are you?" and "Thank you for being here" in your career."

So, for the moment - let's take a look at your personal brand and how it can help you connect with clients through the tough times.

What does your current personal brand say?

In its most basic form, personal branding is essentially long-term reputation management. In many ways, personal branding is a lot like business branding, it's a mix of reality and perception.

A brand is the definition people hold in their minds about you or your company. It's a collection of emotions, senses, and memories. A brand is built in two

ways: by what you tell people (or they hear from others) and by what they experience themselves.

Your brand reputation is either created and managed with intention or it grows organically over time (sometimes not in the direction you want).

To have a brand, you need to be known. To be known, you need to be remembered. To be remembered, you need to be memorable. To be memorable, you need to be visible and clear on the value you create and who you create that value for.

Clarity sounds simple but it's not. Clarity is subjective. What is clear to one audience is complete irrelevant gibberish to another.

To be clear, you need to know who you are talking to and what they give-a-damn about. To be clear, you need to know why people buy what you are selling. To be clear, you need to get rid of jargon and be direct.

A brand, personal or business, is rooted in being known for something, in the industry or market you work. If you want to intentionally build a personal brand, you must first ask, what do I want to be known for? What would someone like that do to get that reputation? How would that person need to be in the world to maintain that reputation?

Do you want to be top-of-mind and known for:

- your expertise in the market?
- a strong point of view and being outspoken?
- as a champion for a cause in your industry?
- your creativity and ingenuity?
- your thought leadership?
- making a difference in your community?
- delivering amazing customer service?
- being the best salesperson on the team?

- successful marketing and social media campaigns?

This isn't about popularity. It's about clarity, visibility, and consistency in your market.

So, what's the state of your current personal brand? It's time for a little soul searching and some (possibly uncomfortable) honesty.

The ultimate goal of personal branding is to build a reputation as a go-to authority in your field. You need to be THE authority, not just AN authority.

Being seen as an authority is how you go from being hired as a service provider to being hired as an expert, and being hired as an expert is how you go from commodity pricing to charging based on value - multiplying your price and profitability.

If you are seen as the best choice for X in X industry, and there aren't viable replacements because of how you do what you do in a way only you do them, then you have done your job of positioning your personal or business brand successfully.

We all know the secret to loyal customers and happy colleagues is personal connection - they need to feel like we have their best interests at heart. Personal branding can promote and encourage this relationship for you.

Here's a quick exercise: think of one person in your company or friend group that you wish you could clone. Think of all the reasons and traits they have that you would love to have more of in the world. All those reasons boil down to one thing: that person has a great personal brand, that's made up of delivered value in their own unique way.

When someone gets to know you through your personal brand, you're already a step closer to winning them over. What does that mean? Better

working relationships, easier sales and ultimately, more job satisfaction.

How to improve your personal branding

When you have discovered who you need to be, it's time to figure out what you need to do to uncover the sustainable personal brand you want

Branding, personal or business, is not about fabricating. It is about finding what already exists and enhancing it. Deciding what you want to be known for and creating a plan that requires your A-player self to show up.

To get clear on what you want your personal brand to be, you need to take a deep look at a few things:

- Where you are now
- Where you want to be
- **The value you provide**
- What you want to be known for
- How you are going to be known for that
- What does that type of person do
- What does that type of person act like

When you know the answers, it's time to magnify and promote those qualities for your whole industry to see.

Promoting your personal brand

Promoting your personal brand online pretty much has one goal: to get you seen by the right people, at the right time, in the right light.

Try Googling yourself. What comes up? An impressive LinkedIn profile? An outdated company website? Drunk holiday photos on Facebook? There's no judgment from me - we all need to let our hair down once in a while - but how we present ourselves online matters in our careers.

Imagine a huge referral heads your way - they Google you to see what the deal is... and they're greeted with a rant on Twitter you posted 5 years ago. Not good.

But, if you promote your personal brand with an optimized LinkedIn page, a professional website and maybe even a guest article in a well-respected niche magazine - you're going to make the right impression.

Make sure you're seen - by the right people. In our industry, trade shows are huge. The American Subcontractors Association provides plenty of

opportunities to get your face in front of the industry through its annual conference, plus numerous committee activities, give you an ideal forum to become better known.

Depending on what you specialize in and the clients you want to attract, consider getting on stage and speaking. Do interviews on the radio and podcasts. Share that expert knowledge with the world you work in.

Yes, times are tough right now - but they won't be forever. Now's the time to put the effort in behind the scenes and reap the benefits when the world opens up again.

The moral of the story? Stop blending in. Stop sounding like everyone else. Be 100% you - that's the power of personal branding in construction.

*Tracy O-Shaughnessy is the founder of **Branding & Beyond** and creator of *The 5 Layers of Brand Alignment™*. With over 25 years in branding strategy, Tracy and her team help construction companies break through the noise and stand out in a cluttered marketplace by discovering, developing and consistently marketing their brand.*

Cleaning, sanitizing and disinfecting do not mean the same thing.

It's important to understand that these three terms aren't interchangeable when talking about precautions to prevent exposure. **Cleaning** gets the dirt out. **Sanitizing** gets down to a certain level of bacteria, sometimes 95% is killed. **Disinfecting** kills everything. That's where you want to aim to protect yourself against COVID-19.



COVID-19: PROTECT YOURSELF.

Complimentary Webinars

TUESDAY, MAY 12, 2020, NOON TO 1 PM

Practical Subcontractor Solutions to Common Legal Disputes in Construction

Presenter: Jason Ebe

Jason Ebe will review and provide practical advice for subcontractors facing legal disputes common to construction projects, including recommendations on what to do when:

- Actual site or work conditions don't match the representations in the plans and specifications
- The owner or GC orders changes in the work or the schedule without written acknowledgment
- The subcontractor's performance is hindered or disrupted by the owner, contractor or other subcontractors
- Payment is delayed by the owner, lender or contractor
- The GC issues a default notice, suspends work or terminates the subcontract
- The contractor or owner tenders a claim for defense or indemnity

Jason Ebe serves as co -chair of Snell & Wilmer's nationally ranked construction industry practice. Jason frequently represents subcontractors in all aspects of construction transactions and disputes in Arizona and abroad. He is a frequent counselor, negotiator, litigator, author and speaker on a wide range of construction issues and topics, is active in the ASA and has served as past chair of the ASA National Attorneys Council.

[Register here.](#)

TUESDAY, JUNE 9, 2020, NOON TO 1 PM

Setting the Table for Effective Contract Negotiations by Using ASA Bid Conditions

Presenter: Dan McLennon

Conditioning your bid can be a powerful tool for negotiating and securing your preferred contract terms and conditions. In this workshop, you will receive suggested bid condition language and tips on how to negotiate using them. Presented by Dan McLennon, Smith, Currie & Hancock LLP.

Daniel F. McLennon is a Partner in the San Francisco office of Smith, Currie, representing public entities, general contractors, subcontractors, suppliers, premises owners, manufacturers, professionals, corporations, and individuals. He practices in the areas of commercial and construction litigation.

[Register here.](#)

For all upcoming ASA events, go to www.asaonline.com

Coming Up

in the May 2020

Issue of ASA's



Theme:

Employer/Employee: Let's Talk

- Open Communication and Employee Retainage Strategies
- How Employers and Employees talk about COVID-19
- Workforce development in times of disruption

Look for your
issue in May.

To access past issues
of The Contractor's Compass,
please [click here.](#)

For questions about
subscribing, please contact:
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SUBCONTRACTORS LEGAL DEFENSE FUND

ASA's SLDF supports critical legal activities in precedent-setting cases to protect the interests of all subcontractors.

**FIGHTING FOR THE RIGHTS OF THE
CONSTRUCTION SUBCONTRACTOR
COMMUNITY NATIONWIDE**

ASA underwrites the legal costs of filing "friend-of-the-court" briefs to inform the Court regarding the broader impact of relevant cases throughout the country. We have won dozens of these cases since 1997, vindicating subcontractor rights today and into the future!

WE NEED YOUR SUPPORT

Funding YOUR Legal Defense

Each year, courts across the country hand down hundreds of decisions on federal and state laws, as well as court-made or "case" law, that apply to subcontractors' businesses. Many of the decisions impacting subcontractors interpret the contract provisions of subcontract agreements—provisions like pay-if-paid, hold-harmless, duty-to-defend, and no-damages-for-delay. Some of these decisions are precedent-setting and carry significance for subcontractors across state lines.

ASA's Subcontractors Legal Defense Fund supports ASA's critical legal activities in precedent-setting cases to protect the interests of all subcontractors. ASA taps the SLDF to fund amicus curiae, or "friend-of-the-court," briefs in appellate-level cases that would have a significant impact on subcontractor rights.

From its inception, the SLDF has been involved in many landmark decisions, starting with its first case in 1997, Wm. R. Clarke Corporation v. Safeco Ins., which prohibited pay-if-paid clauses in California.

Your financial support keeps the SLDF in operation - PLEASE DONATE TODAY

To make a contribution to this vital fund, visit <http://www.sldf.net> or send an email to soscar@asa-hq.com for more information!

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