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(518) 869-9800

October 2009

Prompt Payment Law Amended

On September 8, 2009, Governor David Paterson signed amendments to bolster Article 35-E of the General Business Law, the so-called “private construction prompt payment law.” The original law was enacted in 2002 and provided prompt payment standards for private commercial construction projects.

Unfortunately, the prompt payment protections enacted in 2002 were somewhat ambiguous and left open to varying interpretation whether certain provisions were mandatory or merely “default” provisions to be relied upon in cases where the contract was silent about a particular issue. For example, the original law required the owner to pay the contractor no later than 30 days after the owner had approved the invoice *unless otherwise agreed to by the parties*. The amended law removes this language making it clear that the payment period shall be no longer than 30 days. The payment provisions between the contractor and subcontractor have not been amended and continue to require payment to subcontractors 7 days after the contractor has received payment from the owner. Other amendments to the law include:

- The cost threshold for commercial projects above which this law applies has been lowered from \$250,000 to \$150,000.
- The aggregate size threshold for residential projects above which this law applies has been lowered from 9,000 square feet to 4,500 square feet.
- The size threshold for applicable residential public housing units above which this law applies has been lowered from 150 to 75 units.
- Authorizes a system of protocols for the use of binding arbitration to resolve payment disputes.
- Makes void any contract clause which would deny the use of expedited arbitration to resolve payment disputes.
- Makes void any contract clause which provides for payment provisions which differ from those established in the law.

The prompt payment amendments also contain an amendment to Section 196-a of the Labor Law, which allows employees and unions to complain to the Labor Commissioner in cases where the failure to pay employee wages may be caused by a violation of the prompt payment law.

29th Annual NESCA Trade Show To Be Held On October 8th

Business owners, managers and supervisors involved in the commercial construction industry who wish to learn about the latest in construction products and services will have the opportunity to engage in some one-stop shopping when NESCA hosts its 29th Annual Trade Show on Thursday, October 8, 2009 at the Century House in Latham. The Trade Show, which will be held from 4:00 - 8:30 p.m., will expose subcontractors, general contractors, design professionals, manufacturers, and owner/developers to a wide variety of products and services in virtually every trade category. Rigging products, water & sewer products, power tools, aerial lifts and scaffold, acoustical products, insulation systems, concrete accessories and products, insurance and bonding services, fire alarm & security products, building materials, fasteners, and equipment rentals are among the many products and services which will be on display at the Trade Show.

All available exhibit space has been sold out for the Trade Show, and total attendance is expected to top 500. Those NESCA members who have attended the Trade Show in the past know that it is much more than just a trade show, it is an industry event calculated to bring the various segments of the commercial construction industry together for an evening of business networking. While taking in the exhibits, attendees will be treated to a variety of hors d'oeuvres, carving stations and other great food at the International Food Bazaar. Door prizes will be given away by exhibitors, and a “Super 50/50” drawing will be held, with a **guaranteed payout of at least \$1,000 to the winner!**

NESCA’s condensed 4 1/2 hour format, unlimited food and bar, exciting prizes, the best construction industry networking event of the year and the chance to see the most complete line-up of commercial construction products and services available in Northeastern New York is sure to make this event one that NESCA members will not want to miss. The admission fee for the Trade Show is \$25 per person for advance registrations and \$30 at the door. To register to attend the trade show, contact the NESCA office at (518) 869-9800.



PRESIDENT'S MESSAGE

I am very pleased to announce the adoption of NESCA's latest member benefit, a member-only program offered through Concentra Occupational Health Center of New York. As most members know, NESCA has long offered its members a variety of programs and services intended to provide value-added benefit to your membership in the association. Several months ago we were approached by Concentra who asked us to consider a proposal to offer members a discount program for drug testing services, DOT physicals and pre-employment physicals. Last month, NESCA's Board of Directors approved Concentra's proposal for these member-only discounts. We know that many members are mandated by regulation or contract requirements to engage in employee drug testing and DOT physicals for certain employees. Other members may have voluntarily adopted drug testing policies and/or policies for pre-employment physicals. This discount program will enable NESCA members to save money on these services. Concentra is the nation's

leading occupational health provider, and delivers primary and rehabilitative care, including the diagnosis, treatment and management of work-related illnesses. Concentra also offers a full complement of non-injury, employment-related health services, including physical examinations, substance abuse testing, job-specific return-to-work evaluations, and other related programs. Concentra has extensive experience serving clients within the construction industry and currently provides services to over 200,000 employers. I encourage you to take advantage of this new discount program for your employment physicals and drug testing needs. Please contact Tracy Louttit at Concentra for additional information at (518) 452-7030.

Coming up on October 8th NESCA will hold its 29th Annual Trade Show at the Century House from 4:00-8:30 pm. Close to 50 members will have exhibits at the Trade Show, where they will display a wide variety of commercial construction products and services in virtually every trade category. As most of you know, the NESCA Trade Show has become an industry-wide event where members have the opportunity to not only visit with our exhibitors, but to also network with general contractors, designers, developers, public work officials and others connected to the commercial construction industry. I highly encourage all members to attend the Trade Show. If past Trade Show attendance is any indication, over 500 people, all with a solid connection to our industry, are expected to be there. This is a unique event because it is the only event in upstate New York each year where all components of the construction industry get together for one evening.

Please consider coming to the Trade Show, particularly if you have never attended in the past. I promise you won't be disappointed!

Ben Lauletta, President

NESCA NEWSLETTER

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6 Airline Drive, Albany, New York 12205
(518) 869-9800 www.nesca.org

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85% of NESCA's members have already paid their 2009-10 membership dues. We thank the early payers and ask those who have not yet remitted your dues to do so as soon as possible. Thank you.

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NYS Court of Appeals Addresses Another Labor Law §241(6) Claim

On May 12, 2009, the New York State Court of Appeals decided *Igor Misicki v. Salvatore Caradonna, and 430-50 Shore Road Corporation*. The plaintiff in this case was a worker who was injured on the job when a hand-held electrically-driven angle grinder “kicked back” and the grinding wheel struck his face. Prior to his accident, plaintiff had warned the contractor’s representative that the grinder’s side handle was missing. Plaintiff sued the owner and the architect claiming a violation of New York Labor Law §241(6) based on an alleged violation of 12 N.Y.C.R.R. 23-9.2(a), a safety regulation covering specific kinds of power-operated heavy equipment or machinery. The Court addressing the issue stated that Labor Law §241(6) requires owners and contractors to provide reasonable and adequate protection and safety for workers and to comply with specific safety rules and regulations promulgated by the Commissioner of the Department of Labor. The Court further stated “In order to support a claim under §241(6), the particular provision relied upon by a plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles.” The Court noted that in similar cases, the First, Second and Third Departments had ruled that §23-9.2(a) does not support a claim under Labor Law §241(6) and the Fourth Department had ruled otherwise.

The Court in analyzing §23-9.2(a) focused on the regulations first three sentences which stated:

- (1) “All power-operated equipment shall be maintained in good repair and in proper operating condition at all times.”
- (2) “Sufficient inspections of adequate frequency shall be made of such equipment to insure such maintenance.”
- (3) “Upon discovery, any structural defect or unsafe condition in such equipment shall be corrected by necessary repairs or replacement.”

The Court concluded “In our view, the first two sentences of §23-9.2(a) which employ only such general phrases as ‘good repair,’ ‘proper operating condition,’ ‘sufficient inspections,’ and ‘adequate frequency’ - - are not specific enough to permit recovery under §241(6) against a non-supervising owner or general contractor. We reach the opposite conclusion about the third sentence, however. This portion of the regulation imposes an affirmative duty on employers to correct by necessary repairs or replacement, any structural defect or unsafe condition in equipment or machinery

upon discovery, or actual notice of the structural defect or unsafe condition. As a result, the third sentence of Section 23-9.2(a) mandates a distinct standard of conduct, rather than a general reiteration of common-law principles, and is precisely the type of concrete specification that is required. In sum, an employee who claims to have suffered injuries approximately caused by a previously identified and unremedied structural defect or unsafe condition affecting an item of power-operated heavy equipment or machinery has stated a cause of action under Labor Law §241(6) based on an alleged violation of 12 NYCRR 23-9.2(a).”

It should be noted that this was a four-three split decision of the Court of Appeals, with three of the Judges dissenting.

Terence J. Burke, NESCA Legal Counsel

Federal E-Verify Rule Now in Effect

A rule requiring federal contractors and subcontractors to use the U.S. Citizenship and Immigration Services E-Verify system to verify their employee’s authorization to work in the United States is now in effect. The rule became effective for all federal solicitations and contract awards made on or after September 8, 2009.

The rule applies only to employers with direct contracts with the federal government and, via a flow-down requirement, to their subcontractors. It does not apply to federally funded projects or to other projects not under contract with a federal agency. The rule requires the insertion of an E-Verify clause in all covered contracts. Prime contracts below the simplified acquisition threshold of \$100,000 and those with performance terms of less than 120 days are excluded. The clause requires the contractor to use E-Verify to confirm the employment eligibility of all new employees hired during the contract term and all current employees assigned to work on the federal project.

Federal contractors also have the option of verifying their entire workforce, which includes other company employees regardless of whether they are assigned to a federal contract. Companies not performing federal contracts or performing federal contracts that do not include the E-Verify clause may only use E-Verify to verify new employees.

For more information about the federal E-Verify requirements, NESCA members may go to the U.S. Citizenship and Immigration Services website at www.uscis.gov and click on the E-Verify home page.

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Contact: Mike Almond

Stone Industries, LLC

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Contact: Richard Marriott

Calendar of Events

October 1, 2009

Board of Directors Meeting
Century House, Latham, 6 pm

October 8, 2009

29th Annual Trade Show
Century House, 4 pm

October 5-7, 2009

National Subcontractors Alliance
Eaglewood Resort, Chicago

October 8, 2009

Educational Program
STP Unit #7 Begins
Building Industry Center, 6 pm

November 10, 2009

Educational Program
Notary Public
Building Industry Center, 12 noon

Question of the Month

Q. Some subcontracts I receive from general contractors are so unfair and one-sided that I simply refuse to sign them. Unfortunately, many of these same general contractors are not willing to accept any changes to their subcontract forms. What would happen if I began performance of my work without a signed contract?

A. A simple refusal to sign an unsatisfactory subcontract document will not negate its adverse terms and conditions. By starting jobsite work without acting on the subcontract, a subcontractor ordinarily will be considered to have accepted the obligations of the unsigned subcontract. To make matters worse, a general contractor will often demand a signed document before it will make progress payments for work performed. Thus, a subcontractor usually faces a no-win situation by beginning work without a signed subcontract agreement.

Thank You to All Golf Sponsors

NESCA wishes to thank all Sponsors for your generosity in connection with the 25th Annual NESCA Golf Outing held on September 14, 2009 at Shaker Ridge Country Club. Our sponsors were:

Lunch – Fast Trek Steel **Course Beverages** – Stone Bridge Iron & Steel
Cocktails & Dinner – AWESCO and Teal Becker & Chiaramonte, CPAs
Hole in One Contest – Cool Insuring Agency
Putting Contest – Marshall & Sterling Upstate
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