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August 2023

Court Issues Temporary Restraining Order on DOL's 50-Mile Radius Rule

On June 26th, a New York Supreme Court Judge issued a Temporary Restraining Order (TRO) which prohibits the New York State Department of Labor (DOL) from enforcing the '50-Mile Radius Rule' of the recently adopted regulation requiring payment of the prevailing wage for the hauling of aggregates. This followed a June 23rd petition seeking to enjoin enforcement of the 50-Mile Radius Rule filed with the Supreme Court by the Associated General Contractors of New York State (AGCNYS), the New York Construction Materials Association (NY Materials), Suit-Kote Corporation, and the Town of Windham.

The petition specifically seeks to block implementation of Section 222(c) of the regulation which arbitrarily expands the application of prevailing wages for aggregate hauling to encompass a 50-mile radius of a project worksite, including deliveries from a plant or quarry. This arbitrary provision is also in direct conflict with the legal authority granted to the Labor Department by the Governor and the Legislature in the underlying statute.

In December 2021, legislation was signed into law by Governor Hochul that requires payment of the prevailing wage and supplements for any work involving the delivery to and hauling from public projects "aggregate supply construction materials", as well as return hauls, whether empty or loaded, and any time spent loading and unloading. Governor Hochul signed this bill pursuant to an agreement with the Legislature to clarify that prevailing wages will be paid only at the worksite itself and for travel between the worksite and a designated central stockpile where aggregate materials are delivered. On February 24, 2022 a chapter amendment was signed by the Governor.

Shortly after the Chapter Amendment was enacted, the Department of Labor announced its intent to file a proposed regulation in accordance with the NYS Administrative Procedure Act for the purpose of defining key terms in the new law. While definitions of "worksite", "central stockpile" and "aggregate supply construction materials" contained in the proposed (now adopted) regulation provide needed clarification, the inclusion of the 50-Mile Radius requirement expanded the applicability of the law beyond what is found in either the original statute or the chapter amendment.

The TRO secured by the plaintiffs stipulates that the Labor Department had until July 14, 2023 to submit arguments in opposition to extending the TRO or issuing a preliminary injunction while the case is heard. The plaintiffs had until July 20th to respond to DOL's filing. The judge permanently assigned to handle this case will hold oral arguments at a date to be determined. In the meantime, for the duration of the TRO or subsequent preliminary injunction, the Department of Labor is precluded from enforcing the 50-mile radius portion of the regulation.

Help NESCA Grow – Win Big!

If you've benefited from your membership in NESCA, then there must be other commercial, industrial and public work subcontractors and suppliers you know who would also benefit by becoming a member. NESCA is renewing our annual membership recruitment drive that will run through the end of our fiscal year on June 30, 2024. This campaign gives every member of NESCA the opportunity to win cash while helping the association to grow stronger!

Rules of the Campaign

- For each and every new member you sponsor, you'll win \$100 cash!
- For every new member your sponsor after three new members, you'll win \$200 cash!
- All members who sponsor three or more new members will also be eligible for a special prize drawing at the end of the year!

The next time you are on a jobsite, please talk to subcontractors or suppliers who are not currently members of NESCA, let them know about all the things membership in NESCA has to offer, and see if you can get them to consider joining. If you would like a membership information packet to be sent to a subcontractor or supplier you believe should become a member of NESCA, please contact the NESCA office at 518-869-9800. Remember, when they join, you win!



PRESIDENT'S MESSAGE

Time flies when you're having fun! I can't believe we are already into August. I hope all the heat, rain (and smoke) we've had hasn't delayed your projects or hurt your margins too badly this past month. My advice? Make sure you do something nice for your employees to show your appreciation for their hard work in difficult weather conditions – there is nothing like an old-fashioned picnic or bar-be-cue to spend some time with your employees and their families. In this labor market where we are all struggling to find and retain good help, it's the relationships you form that keep people with you.

Regarding your membership in NESCA, we would like to thank all members who have already sent their 2023-24 dues payment to the association and ask those who haven't yet remitted their dues payment to do so as soon as possible. During the last month or so we have seen some solid activity with multiple new members joining NESCA. Thanks to everyone who has helped to get the word out and keep the new members coming.

NESCA committees continue to stay active this summer. On July 27th, the Trade Show Committee met to begin planning for the October 12th Trade Show at the Century House. And on August 8th NESCA's Program Committee will meet to address membership meeting program topics and speakers for the coming year. I'm sure they will put together a great schedule of programs. Finally, on August 15th, the joint NESCA/AGC/ECA Education Committee will meet to begin discussing the types of educational seminars and courses that will be offered over the next 10 months.

As I write this newsletter message, I have my DRF forms out studying and getting ready to meet up with 300+ members at NESCA's Day at the Races in Saratoga on July 20th. And as you read this message, I'm sure some of our members are still boasting about their winnings, while others walked away without cashing any winning tickets. Hopefully the Kind family luck was with all our members, and either way, I hope everyone who attended enjoyed the day and the opportunity to socialize with other NESCA members.

This fall, NESCA and our state affiliate, the Empire State Subcontractors Association (ESSA), will focus efforts on convincing Governor Hochul to sign our 5% retainage bill which both houses of the Legislature passed before the session ended in June. This bill will prohibit owners of private commercial construction projects from holding more than 5% retainage from prime contractors, and prime contractors, in turn, will be prohibited from holding more than 5% from their subs. When the legislation is sent to the Governor for her consideration, NESCA may well ask members to send letters of support to the Governor. If NESCA makes this ask,

please take the time to send a support letter. It really does help.

NESCA's next event will be our annual golf outing on September 18th at Troy Country Club. We literally sold this tournament out in a matter of weeks, and roughly 250 golfers will participate. Now we just need to hope for a dry, sunny day. Thank you to all our participants and sponsors for signing up and supporting our golf outing.

Robert L. Kind, President

NESCA NEWSLETTER

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COUNSEL'S MESSAGE

It has been requested that my August legal column address the ramifications evolving from a 2019 Appellate Division decision entitled *Vega vs CM & Associates Construction Management, LLC* which addressed the issue whether a claimant retains the authority to individually, or through a class action lawsuit, privately seek to enforce the penalty provisions of the NY Wage Theft Law (Labor Law §198 (1-a)).

The Vega decision held that payment of wages to “manual” workers, other than on a weekly basis (e.g., biweekly payment), is subject to a private right of action along with the substantial penalties reserved for wage theft, even when workers were otherwise fully paid the wages owed. Other than referencing a “mechanic, workingman or laborer” the law does not clarify what work performed falls within those categories.

The wage theft statute provides the New York State Department of Labor with authority to investigate and issue penalties for violation of the law. The

law also provides specific factors that must be considered in imposing such penalties. The law does not authorize an individual to privately seek to enforce the penalty provisions of the statute.

It is important to understand this case did not involve wage theft. It involved wage payment on a bi-weekly rather than a required weekly basis. All wages owed were paid.

The logical question now consists of what penalties are employer’s exposed resulting from an untimely wage payment. Be mindful the wages owed were paid but not on the lawfully mandated weekly basis.

The Vega decision held that the penalties for violating timely wage payment are liquidated damages equal to 50% of all untimely paid wages up to 6 years duration plus interest and attorney fees.

Depending upon the time for payment non-compliance, and the number of employees involved, the monetary liability exposure for employers could easily reach more than \$500,000.00.

Since 2019 there have been more than three hundred (300) representative class action cases filed seeking recovery on behalf of thousands of employees as well as their attorney fees. It can be safely surmised that many more cases have been settled for unspecified sums prior to litigation being commenced.

It is in every member employers’ interest to become familiar with the provisions of the NY Wage Theft Law and immediately become compliant with the weekly wage payment requirements for manual workers. Under some circumstances, smaller employers may be granted a waiver by the NY Department of Labor of the weekly employee payment requirement, but it must be made prior to changing the weekly payment requirement.

Walter G. Breakell, NESCA Legal Counsel

Question of the Month

Q. How can I find out if a general contractor has been paid for work my company has performed on a private construction project?

A. One avenue could be Article 3-A of the NYS Lien Law. Article 3-A provides that monies paid by the owner to a general contractor are trust assets held by the contractor as a trustee to be used for payment to those performing work or supplying materials on their behalf on the project. The purpose of the trust fund is to assure that payment of project funds is properly made for all labor and materials furnished in connection with the project before any other disbursements are made. Under these trust fund provisions, a trust beneficiary, such as a subcontractor or material supplier, may examine the books and records of the contractor, or in the alternative, demand a written statement under oath setting forth an itemized accounting of all monies received and every expenditure made on the project, identifying the purpose of each payment, to whom it was paid, and when it was paid. The beneficiary may demand such an inspection or itemized statement every month, and that demand must be complied with within 10 days from receipt of the demand. If the trustee refuses or fails to comply with the demand to inspect the trustee’s records within 10 days, the beneficiary may seek a court order to compel the production of these records.

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Calendar of Events

August 3, 2023

Board of Directors Meeting
Century House, Latham, 6 pm

September 7, 2023

Board of Directors Meeting
Century House, Latham, 6 pm

September 18, 2023

39th Annual Golf Outing
Troy Country Club, Troy

October 5, 2023

Board of Directors Meeting
Century House, Latham, 6 pm

October 12, 2023

42nd Annual Trade Show
Century House, Latham, 4 pm

November 9, 2023

Board of Directors Meeting
Century House, Latham, 5 pm

November 9, 2023

NESCA Membership Meeting
Century House, Latham, 6 pm

Milestone Member Anniversaries

Shepherd Communications & Security – 5 Years

Couch White, LLP – 30 Years

John M. Mullins Rigging & Hauling, Inc. – 45 Years

WELCOME NEW MEMBERS

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Catskill, NY 12414
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allen@tbogc.com

Contact: Allen Austin

Schindler Elevator Corporation

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Albany, NY 12205
838-221-0839
samantha.woolford@schindler.com
Contact: Samantha Woolford

Sure Temp Co., Inc.

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Binghamton, NY 13905
607-729-6800
emillerjr@suretemp.com
Contact: Ed Miller, Jr.

Tri State Drywall and Acoustical, Inc.

183 Jersey Avenue
Port Jervis, NY 12771
845-856-8400
cvanhorn@tristatedrywall.net
Contact: Charlotte Van Horn

Turnpike Glass & Closet Solutions, LLC

3223 Guiderland Avenue
Rotterdam, NY 12306
518-895-2026
jim@turnpikeglass.com
Contact: Jim Marx

Roger H. Jones Scholarship Award Winners Announced

The NESCA Educational Foundation has announced that Roger H. Jones NESCA Scholarships have been awarded to each of twelve deserving students enrolled in construction-related programs of study at accredited two-year or four-year colleges or universities for the 2023-24 academic year. As follows are this year's scholarship winners.

Name	College or University	Major
Ashley Boyd	SUNY Buffalo	Civil Engineering
Thomas Clarke	Hudson Valley CC	Electrical Construction
Justin Ely	Union College	Engineering
Luke Hughston	Broome CC	Engineering Science
Eamonn Kelly	East Carolina University	Construction Management
Michael Mancini	Penn State University	Architectural Engineering
Michael Mancusi	Monmouth County Votech	Electrical Construction
Gregory McCauley	Clarkson University	Engineering
Michael Miciotta	Queens University Ontario	Mechanical Engineering
Seamus Noon	Hudson Valley CC	Electrical Construction
Victoria Rommel	Utica University	Construction Management
Garrett Wardwell	SUNY Cobleskill	Diesel Tech Power Systems

Congratulations to all twelve scholarship winners! Scholarship applications for the 2024-25 academic year will be made available in January 2024. NESCA members are encouraged to contribute to the NESCA Educational Foundation to help fund scholarships for future applicants.



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