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## U.S. Labor Department Finalizes New Independent Contractor Rule

The U.S. Department of Labor (DOL) is modifying Wage and Hour Division regulations to replace its analysis for determining who is an employee and who is an independent contractor under the Fair Labor Standards Act (FLSA). The regulations were published on January 10<sup>th</sup> and are effective on March 11, 2024. The new rule differs significantly from prior DOL guidance and its rule governing independent contractor relationships issued in 2021.

The ultimate test to define an independent contractor is whether, as a matter of “economic reality,” the worker is economically dependent on the employer for work (and is therefore an employee) or is in business for him/herself (and is therefore an independent contractor).

The final regulation rescinds a 2021 rule defining “independent contractor” under the FLSA, and will reinstate a more complex analysis that focuses on the “totality of the circumstances” to determine whether a worker is an employee or independent contractor. In place of the 2021 rule, this final rule adopts a six-factor test focused on the economic reality of the employer-worker relationship. The six factors set forth in the new rule are:

- The worker’s opportunity for profit or loss depending on managerial skill;
- The relative amount of investment made by the worker in comparison to investments made by the potential employer;
- The permanency of the worker’s relationship with the potential employer;
- The nature and degree of the potential employer’s control;
- The extent to which the work performed is an integral part of the potential employer’s business; and
- Whether the worker uses specialized skills indicative of business-like initiative.

In light of the new rule, NESCA members should review their relationships with any independent contractors to see if they are, in fact, employees. Misclassification of employees as independent contractors can result in severe penalties for wage theft, failure to provide workers’ compensation and disability insurance, failure to pay FICA taxes and more.

## OSHA Penalties Adjusted for Inflation

Effective January 16, 2024, civil penalties for violations of OSHA standards and regulations increased to adjust for inflation. In 2015, Congress passed the Federal Civil Penalties Inflation Adjustment Act to advance the effectiveness of civil monetary penalties and to maintain their deterrent effect. In 2016, penalties for OSHA violations were substantially increased as part of the Act. This law allowed OSHA a one-time “catch-up” adjustment for civil penalties, followed by annual increases in penalties based on the Consumer Price Index (CPI). The annual inflation adjustment is required to be published in the Federal Register no later than January 15<sup>th</sup> each year. The cost-of-living adjustment multiplier published by OSHA for 2024 is 1.03241, and the 2024 maximum penalties have been adjusted as follows:

	<u>2023 Penalties</u>	<u>2024 Penalties</u>
• Other than Serious	\$15,625	\$16,131
• Serious Violations	\$15,625	\$16,131
• Repeat Violations	\$156,259	\$161,323
• Willful Violations	\$156,259	\$161,323

### **NESCA Construction Industry Mixer** **Thursday, February 8, 2024** **Revolution Hall, Brown’s Brewing Co.** **425 River Street, Troy, 6:00 pm**

Come to NESCA’s Construction Industry Mixer for two full hours of pure networking with other NESCA members and representatives from the Capital District’s general contracting community. No speaker, no program, no sit-down dinner. Just great food, a beer and wine bar and socializing with the Capital District construction community.

**Food, Bar, Tax & Gratuities - \$70**



## PRESIDENT'S MESSAGE

One month into 2024 and NESCA has already started the year strong. On January 11<sup>th</sup> our membership meeting program was a General Contractor Showcase featuring Bishop Beaudry Construction. This meeting was also NESCA's annual joint meeting with the National Association of Women in Construction (NAWIC). I thought Bishop Beaudry Construction did a great job of letting us know what kind of projects they have completed in the past and what they have in the works moving forward. The management team also allowed us to see their culture and we got an idea of what traits are important for companies they want to do business with. NAWIC had another strong showing and it's great to see their group growing and their continued success. One lucky member won a wheel barrel of "cheer" that looked like a lot of fun!

NESCA's February 8<sup>th</sup> membership event will be a construction industry mixer at Brown's Brewing Co. Instead of a regular membership meeting, we'll instead have two hours of pure networking and socializing with others

within the construction industry. Along with NESCA members, we've invited representatives from the Capital District's general contractor community to attend. Last year over 175 attended the mixer and we are looking forward to another big crowd this year.

On the education front, beginning on January 11<sup>th</sup> the NESCA/AGC/ECA Educational Partnership has been offering a 7-week Supervisory Training Program (STP) on "Leadership & Motivation. From January 30<sup>th</sup> until February 2<sup>nd</sup> an OSHA 30-Hour course will be held. On February 13<sup>th</sup> the Educational Partnership will hold a webinar on "ESOPs for Liquidity and Diversification in the Construction Industry", and on February 29<sup>th</sup> and March 1<sup>st</sup>, an OSHA 10-Hour Course will be held. Please be on the lookout for registration materials for these upcoming education programs.

Speaking of education programs, NESCA's Young Professionals Committee is working closely with the Education Committee to structure a series of professional development seminars specifically targeting NESCA, AGC and ECA young professionals. These seminars will be offered as a series of one-hour programs covering the fundamentals of such areas as Accounting & Financial Management; Banking; Bonding; Insurance; Construction Law; and Employment (Human Resources). We're hoping to offer the seminar series this spring. Be on the lookout for more to come!

In January, NESCA members were sent safety award entry forms for this year's NESCA safety awards. All NESCA subcontractors and suppliers are eligible to apply for a safety award, and the awards will be presented at NESCA's May 9<sup>th</sup> membership meeting.

In January NESCA also sent out information and application forms to members for the Roger H. Jones NESCA Scholarship. Scholarship applications must be completed and returned to NESCA by April 1<sup>st</sup>, and it is expected that determinations for scholarship awards will be made by the Scholarship Committee by June 1<sup>st</sup>.

I hope to see you at the February 8<sup>th</sup> Mixer at Browns.

**Robert L. Kind, President**

## NESCA NEWSLETTER

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## COUNSEL'S MESSAGE

The membership has undoubtedly encountered project contract circumstances when a dispute arises whether a specific scope of work falls within the obligations of the subcontract.

In scope of work disputes the decision frequently revolves around whether the contract document contains a provision granting decision making power on these issues to a specific party. On public work projects, the contract specifications frequently grant decision making authority concerning factual interpretation of the contract, plans and specifications to the project engineer or architect.

On private projects the contract or subcontract may contain a provision that the owner or prime contractor are additionally granted decision making power concerning scope of work disputes.

Some contracts may contain clauses in which the architect or engineer decision is final where it involves the quantity or quality of

materials, classification or amount of work performed or final estimate calculation. So long as the decision is free of fraud, bad faith or is palpably mistaken the engineer's decision is conclusive & binding on the contractor.

Unless the contract expressly provides a designated party with broad arbitration powers or expressly grants a party the ability to determine the legal meaning of a contract, the authority of legal interpretation is generally reserved for the courts.

A contractor, generally speaking, does not have the ability to change the scope of authority contractually granted an engineer or architect under a public work contract. Great deliberation should be undertaken before bidding a project which gives broad, or sole, decision-making authority over the contract to someone other than the court.

On private contracts, members can negotiate sole decision-making authority out of a contract or, at a minimum, exclude language making a decision final & conclusive. Language should also be added which grants the parties the benefit of arbitration or legal review of all disputes arising under the contract.

As mentioned many times in this column, a thorough review and analysis of any contract terms should be undertaken prior to bidding any project so that a risk evaluation can be conducted and knowledgeable determination made whether the risk is acceptable.

*Walter G. Breakell, NESCA Legal Counsel*

## Question of the Month

**Q.** If I perform work as a subcontractor and don't get paid, I know that I need certain information such as the name of the owner and an accurate property description in order to file a lien. Where can I get this information?

**A.** Since 1978, New York State law has required this information to be contained in most private construction contracts and subcontracts. Section 5-322.2 of the General Obligations Law requires private owners (other than for residential projects of less than five families) to include the following information in their written contracts:

- the full name and address of the owner or owners;
- the full name and address of the owner of the land and the owner of the building if the owner of the land and the owner of the building are different persons or entities; and
- a description of the property by street address; or section, block, and lot numbers; or reference to a deed book and page number.

This law further requires every written subcontract executed by a contractor for the performance of any portion of the construction to contain the same information required to be provided to the contractor by the owner.

## Mark Your Calendar!

### 2024 Meet the Estimators/Purchasing Team Event

April 11, 2024 – 6:00 pm

Century House, Latham

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[megc@odelectriccorp.com](mailto:megc@odelectriccorp.com)

Contact: Matthew Canale

## Calendar of Events

### February 1, 2024

*Board of Directors Meeting*  
Century House, Latham, 6 pm

### February 8, 2024

*Construction Industry Mixer*  
Brown's Brewing Co., Troy, 6 pm

### February 13, 2024

*Webinar: ESOPs for Liquidity and Diversification*  
Online via Go-to-Webinar, 9 am

### Feb. 29 & March 1, 2024

*OSHA 10-Hour Course*  
116 Railroad Ave., Albany, 9 am

### March 14, 2024

*Board of Directors Meeting*  
Century House, Latham, 5 pm

### March 14, 2024

*NESCA Membership Meeting*  
Century House, Latham, 6 pm

## Applications for Roger H. Jones Scholarship Available

In 2018, NESCA Past President Roger Jones of Campito Plumbing & Heating, Inc. donated \$20,000 to the association for the establishment of a new college scholarship which has since been named the Roger H. Jones NESCA Scholarship.

We are pleased to announce the NESCA Educational Foundation now has several scholarships (\$750 - \$1,500) available for the 2024-25 academic year for students enrolled in or about to be enrolled in a construction-related program of study at an accredited two-year or four-year college or university. Applicants must have at least a 2.5 GPA, and priority will be given to applicants demonstrating need and a relationship to NESCA (son or daughter of a NESCA member or of a NESCA member's employee). To obtain a copy of the Roger H. Jones NESCA Scholarship Application Form, please contact the NESCA office.

If you are interested in contributing to the Roger H. Jones NESCA Scholarship to help fund future college scholarships, you may make a tax-deductible contribution to the NESCA Educational Foundation, Inc., 6 Airline Drive, Albany, New York 12205.

## NESCA Milestone Anniversaries

Noel J. Brunell & Son, Inc. – 5 Years

Tralongo Precast, Inc. – 5 Years

Ungerman Electric – 5 Years

Upstate Acoustical Corp – 10 Years

BSR – 15 Years

Collett Mechanical – 20 Years

Metal Supermarkets – 20 Years

Wilcox Building Specialties, Inc. – 20 Years

Brunswick Electric, Inc. – 35 Years

Nucor Harris Rebar – 35 Years

Stone Bridge Iron & Steel, Inc. – 40 Years

## NESCA Accepting Applications for 2024 Safety Awards

NESCA's 18<sup>th</sup> annual Safety Awards Presentation will be held at the association's May 9, 2024 membership meeting. This year, safety awards will again be based on two criteria: 1) Your company's lost workday case incidence rate for 2023 (from your OSHA 300 log; and 2) Your company has completed calendar year 2023 with no serious (or above) OSHA citations (that have been fully adjudicated). All NESCA subcontractor and supplier members are eligible to apply and are encouraged to complete and submit a Safety Award Entry Form to be considered for this year's Safety Awards. Last year, 106 NESCA members were presented safety awards. Please contact the NESCA office for a copy of the Safety Award Entry Form. Completed entry forms are due by March 1, 2024.

## Remember to Post Your OSHA Form 300A

All members with more than 10 employees are reminded to post your 2023 OSHA Form 300A (Summary of Work-Related Injuries and Illnesses) in a common area between February 1 and April 30, 2024.



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