CONSTRUCTION EXECUTIVE

CONSTRUCTION LAW

The Top 50 Construction Law Firms™: Forging a Contract for a COVID-Exit World

BY CYBELE TAMULONIS

Vaccination rates continue to rise, mandates are loosening for returning to work and school, and a $2 trillion infrastructure bill is looming on the horizon, but contractors remain cautious and counseled by the legal experts who thrive in the complex field of construction law.

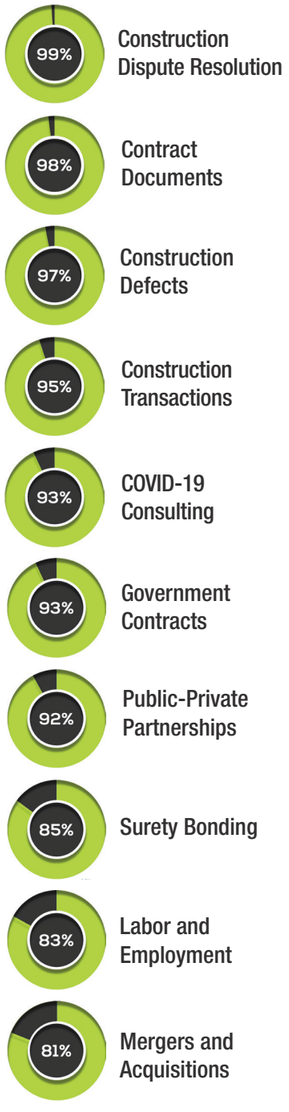
According to the latest report by the Bureau of Labor Statistics, construction employment numbers did not move much in April despite an increased demand for housing and a recovering economy. Due to continued fallout from the pandemic—and what seems like no end in sight for the rising costs of materials—contractors have been turning to construction law firms to navigate delayed projects, interpret contract language, assist in risk mitigation and ensure the road ahead is paved with understandable and protective clauses.

For the 2021 survey for the annual U.S. ranking of *The Top 50 Construction Law Firms*, *Construction Executive's* editorial team reached out to dozens of attorneys at the nation's best construction law firms to learn how the legal landscape is changing, as well as how legal teams are aiding clients with sharpening contract language and pivoting in response to challenges in the wake of the COVID-19 pandemic.

CONTRACT LANGUAGE

While the pandemic has slowed considerably and many states are returning to business as usual, a continued labor shortage, rising materials prices and decreasing availability have continued to be thorns in the side for many project owners and contractors looking to effectively manage risk and avoid profit fade.

The Top 50 Construction Law Firms, Practice Areas



The initial surge to procure materials coincided with a dip in production at the peak of the pandemic, creating a perfect storm of high demand and ever-increasing prices amidst dwindling supply. Steel, lumber and copper remained at historically high prices at the beginning of May and, while they are by no means the only materials experiencing price hikes in recent months, they are a prime example of why contractors need to plan carefully in advance for every project—and why contract language matters.

"Cost escalation and price volatility have led many of our clients to buy materials well ahead of schedule to ensure that they can obtain those materials for a certain price," says Kenneth M. Roberts, the chair of Venable LLP's construction law group.

While planning ahead might ease the pain of unexpected costs in the future, having prices skyrocket during projects left contractors searching for clauses in their contracts that addressed price hikes or sought to renegotiate altogether. "Materials cost escalation has been a very significant financial hit to many existing projects. COVID-19 is one of the top five deal points in every construction transaction today and most projects are grappling with its impacts," says Robert Alfert, partner at Nelson Mullins Riley Scarborough LLP. "I suspect that these issues will continue through 2022, especially on the litigation side."

Successful communication between contractors and owners can ease the challenges of rising costs, delays, materials shortages and keep projects moving toward a profitable end. Contractors should actively seek to have contract provisions in place to protect them and owners should be open to these requests.

"Many owners believe that all construction risks should be borne by contractors. I greatly admire contractors, because they take on tremendous risks in their everyday conduct of business. But some risks can put a contractor underwater. Contract provisions need to be watched carefully to include no damages for delay clauses, indemnity clauses that can't be covered by insurance, and elimination or narrowing of the right to be paid when differing site conditions are encountered," says Joseph C. Kovars, shareholder at Baker, Donelson, Bearman, Caldwell & Berkowitz, PC.

"Owners need to be open to protective contract provisions—such as material escalation clauses—to encourage low competitive bids. Contractors must remain vigilant in providing notice of disruptions to protect rights to equitable relief. And owners need to remain flexible in addressing disruptions beyond the contractor's control, making reasonable adjustments to ensure projects are completed promptly without unnecessary delay or claims," says Anthony L. Byler, partner at Cohen Seglias Pallas Greenhall & Furman PC.

Making the responsibilities of all parties clear in contracts can also stem potential issues. A clear understanding of who is responsible for design completion plays a significant role for construction firms when reviewing contract documents.

"We continue to see a blurring of the lines between design and construction," says Henry Bangert, founding partner of Beltzer Bangert & Gunnell LLP. "It has become commonplace for owners to insert language that ostensibly shifts responsibility for design completion onto the contractor in the general conditions or specifications (or the submittal process)—even on traditional design-bid-build projects. This is a recipe for problems and disputes. If the contractor has design-build responsibilities for portions of the work, such responsibilities should be clear and upfront. It should not be buried in boilerplate," Bangert says.

> *"COVID-19 is one of the top five deal points in every construction transaction today, and most projects are grappling with its impacts.*
>
> - Robert Alfert, *Partner*
> Nelson Mullins Riley Scarborough LLP

Levi Barrett, partner and chair of the contracts, project documentation and risk management practice for Peckar & Abramson, PC, has also witnessed an increase in attempts to shift design-build responsibilities to the contractor. "Contractors have recognized the unreasonable exposures created by this shift and have not been shy about pushing-back on these provisions. Depending on the location of the project, owners have generally been cognizant of these concerns and, with the help of persuasive advocacy, have often been willing to resolve the matter reasonably," he says.

FORCE MAJEURE

Force majeure clauses, which excuse a party with no fault from performing under contract due to unforeseen events, were heavily leaned upon this past year. The success of using force majeure is largely dependent on contract language, state law and the willingness of the parties involved to come to an amenable agreement.

"While parties can fight over it, the smart ones get to the table to craft a sensible business resolution. For example, on one lump-sum deal for a $100 million multi-family project, increased lumber pricing caused a $3 million bust. While the owner could have fought it and made the contractor prove force majeure relief, the owner negotiated for all stakeholders to kick in to make the deal work. Then we dealt with the lender to allow for payment of stored materials so that we could buy all materials before more escalation occurred," Alfert says.

The COVID-19 crisis may not have been a foreseeable event, but

Methodology for *The Top 50 Construction Law Firms*

CE developed *The Top 50 Construction Law Firms*™ ranking by asking hundreds of U.S. construction law firms to complete a survey. The data collected included: 1) 2020 revenues from the firm's construction practice; 2) number of attorneys in the firm's construction practice; 3) percentage of firm's total revenues derived from its construction practice; 4) number of states in which the firm is licensed to practice; 5) year in which the construction practice was established; and 6) The number of AEC clients served during fiscal year 2020. The ranking was determined by an algorithm that weighted the aforementioned factors in descending order of importance. For more information, contact surveys@magazinexperts.com.

Can Contractors Mandate Employees to Provide Proof of Vaccination Against COVID-19?

According to Kevin O'Connor, partner and co-chair of the labor and employment practice, and Lauren Rayner Davis, associate for Peckar & Abramson, PC, a construction firm, as well as employers in any industry, may require employees to obtain COVID-19 vaccinations as a term and condition of employment under federal law, but not without limitation. The lawfulness of a mandatory vaccination policy currently varies widely under state and local law.

Put simply, based on guidance issued from federal regulatory agencies, an employer may mandate that their employees be vaccinated against COVID-19 as long as the employer engages in an interactive process with employees in order to determine whether they may be exempted from the requirement as a result of a disability or a sincerely held religious belief. If an employee presents verification of his or her need to be exempted from vaccination, the employee at issue may be offered reasonable accommodation by the employer, such as the ability to work from home.

But what if the employee seeking an accommodation is a foreman who must be physically present at a jobsite on a daily basis and comes into contact with multiple workers during the course of his or her job? If no reasonable accommodation is possible in light of the employee's job duties and responsibilities, the present federal guidance indicates that it would be lawful for the employer to exclude the employee from the jobsite.

Such circumstances do not necessarily mean that this particular employee may be terminated, as it is also necessary to determine whether the employee must be afforded any other rights under other federal, state and local laws, as well as any applicable provisions of collective bargaining agreements to which the employee may be subject.

The constantly evolving landscape of state and local vaccine laws highlights the importance of carefully engaging in the interactive process with each employee who objects to receiving the vaccine. Analysis of state and local law is therefore vital when firms are deciding whether to require vaccinations, as nearly all states and the District of Columbia have some form of presently pending or recently enacted legislation related to allowing or prohibiting employer-mandated COVID-19 vaccinations.

the word "pandemic" is making its way into contract language going forward—as noted by David Toney, construction team leader for Adams and Reese LLP. "Although most delays arising out of or related to COVID-19 were arguably covered by excusable delay clauses initially, many clients realized a surprising gap both within those clauses and in their contracts—there was no mention of a pandemic. While there is no way to predict the next force majeure event, it is especially prudent to fill the gap by giving mention to pandemics due to the tremendous impacts of COVID-19," Toney says.

"Our clients have used force majeure clauses and defended against force majeure-based claims in response to the COVID-19 crisis. As with most disputes, the results depend on the specific facts, the contract language and the skill of the attorneys who have to combine the two. It takes more than putting COVID-19 and force majeure in the same sentence to have a successful claim," says Jeffrey Hamera, partner and vice chair of Duane Morris LLP's construction group.

RESOLVING CONTRACT DISPUTES

When disputes do arise, careful consideration should be taken on how it will be resolved. Standard American Institute of Architects (AIA) contracts stipulate that mediation is a prerequisite to binding dispute resolution such as arbitration. This can help stave off costly litigation provided there is meticulous documentation and a willingness from all parties involved to correspond with each other.

"Communicate, communicate, communicate. Attempt negotiated settlements early, based upon a well-documented position of written and timely notices, as well as cost and time support. Settlement discussions should be elevated to senior management who may provide a broader overview of the business implications and may have a degree of detached objectivity regarding how the dispute arose," says Claramargaret Groover, counsel at Becker & Poliakoff.

William B. Westcott, president of Andrews Myers PC, agrees that open communication among all parties involved will lead to effective negotiation. "Communicate early and often. You need to establish objective criteria for honest evaluation. In addition, you should work proactively to advance potential outcomes that provide benefits to all parties," he advises.

Facing disputes head on is also key to successful resolution. "I believe it is key to hold weekly change order meetings to resolve the disputes early when the change is fresh in everyone's minds. After time, memories fade and, unfortunately, key people involved in the change leave the company, making it more difficult to resolve claims over time," says Angela Richie, partner and co-chair of Gordon Rees Scully Mansukhani LLP's construction practice group.

Transparency and the sharing of facts and documentation can help both parties reach an equitable outcome by pushing project stakeholders to take a realistic look at all the information to see where the true strength of their positions lie.

"The most important step in resolving disputes is to determine and share the facts," says Joshua Levy, partner at Husch Blackwell. "This means that both parties to a dispute can only resolve matters if they take an authentic view of the facts and records that may determine the outcome. If that hurdle can be overcome, the parties can realistically evaluate their positions and move towards an equitable resolution."

LITIGATION VS. SETTLEMENT

Many courts have pushed civil litigation cases out a year or more due to the pandemic, making litigation a last resort. In addition to a slow-moving court system, litigation is expensive and may not be worth the cost compared to negotiating a settlement.

"Most courts are not going to hold trials for construction disputes, particularly complex disputes, any time in the near future," says Eric L. Nelson, managing partner for Smith Currie & Hancock LLP. "Although arbitrations are starting to move forward, many clients and their attorneys are reluctant to conduct arbitrations remotely because of perceived inefficiencies and difficulties in putting on evidence and handling witnesses. In light of this, for parties that want to get their disputes resolved, they will need to be more focused on mediation or other early neutral involvement, which also means that they may need to be more flexible in their settlement expectations and negotiations." Nelson says.

However, there are simply times when going to court cannot be avoided. Before making that decision, all factors should be analyzed, such as the cost of litigation and its impact on industry relationships, the time involved for management and employees, as well as the potential effect on the company's reputation.

"We had one contractor client who would go to any extreme to avoid a lawsuit or arbitration. That company is no longer in business. Another contractor client was infamous for filing claims at the drop of hat. That company is also no longer in business," says David Pugh, partner at Bradley Arant Boult Cummings LLP. "As with so many things, there is a balance: times when you must stand up for your rights or press an issue, and other times when you may have to take a loss and settle. Good legal counsel can help you decide what is right for the particular issue you are facing."

AVOIDING POTENTIAL CLAIMS

Since the pandemic began, claims for delays, project overruns and material and/or labor shortages have increased, and many contractors are still dealing with the fallout. When defending against such claims, utilizing a law firm that has an inside view of the business of construction is a boon for any contractor.

"We are fortunate to have a construction services group composed of non-lawyer industry professionals experienced in project/schedule/cost management, in addition to claims management and avoidance. They work closely with our construction lawyers and clients to analyze project schedule and cost impacts; assess contract requirements and project documentation; implement enhanced recordkeeping strategies to manage actual claims; and avoid or minimize the risk of potential claims," says Rob Remington, chair of Hahn Loeser & Parks LLP's construction law practice.

"The terms and conditions are the starting points of the contract. We try to work those issues into the contract in a way that is fair for all participants. This is not always an easy task, as different constituents in the construction process have different points of view and bargaining power," says Geoff Bryce, a capital member for Bryce Downey & Lenkov LLC.

MINIMIZING RISK

Contractors have faced challenges this past year that have forced them to rethink how they mitigate risk. Ensuring safety is embedded in a

OLDEST CONSTRUCTION LAW PRACTICE

Foley & Lardner LLP

Est. 1842

NEWEST CONSTRUCTION LAW PRACTICE

Patout Law, PLLC

Est. 2018

FIRMS THAT DERIVE

100%

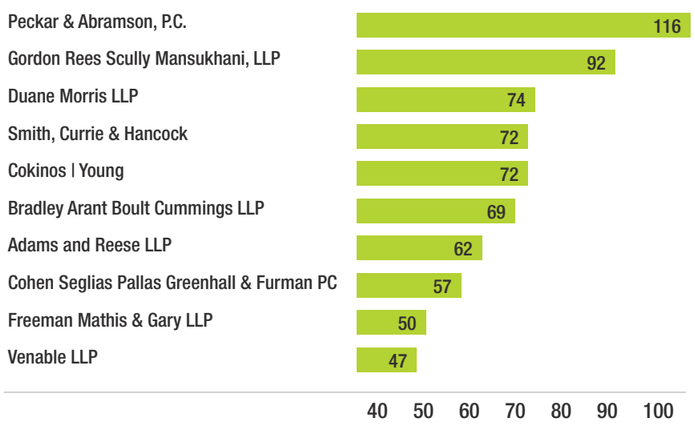
OF REVENUES FROM CONSTRUCTION LAW PRACTICES

Asmar, Schor & McKenna, PLLC
Babcock Scott & Babcock
Beltzer Bangert & Gunnell LLP
Elmore Goldsmith Kelley & deHoll, P.A.
Groff Murphy PLLC
Hendrick, Phillips, Salzman & Siegel, P.C.
Kirwin Norris, P.A.
Long & Robinson, LLC
Sanderford Carroll PC
Spence & Becker, LLC
Watt Tieder
Welby, Brady & Greenblatt, LLP
West Mermis, PLLC
Zetlin & De Chiara

*Includes firms not in the 2021 *Top 50* ranking.

> *While there is no way to predict the next force majeure event, it is especially prudent to fill the gap by giving mention to pandemics due to the tremendous impacts of COVID-19.*
>
> - David Toney, *Construction Team Leader*
> Adams and Reese LLP

Law Firms With the Most Construction Attorneys



> *I believe it is key to hold weekly change order meetings to resolve the disputes early when the change is fresh in everyone's minds.*
>
> - Angela Richie, *Partner and Co-Chair*
> Gordon Rees Scully Mansukhani LLP

company culture can boost morale as well as keep workers safe.

"Every construction professional should preemptively create and maintain good risk management practices. Many of our clients are utilizing disciplined enterprise risk management processes at the project and contract levels. These processes involve identification, assessment, prioritization, response planning, communication, assignment of responsibilities and monitoring. Clients who implement disciplined risk management practices early, and update their plans often, have better and more consistent outcomes," Bangert says.

Training employees to maintain safety procedures, adhere to guidelines from the Centers for Disease Control and document changing project timelines should be rote for any business angling for success going forward. "Fair and market-reasonable contracts are a must, but on the practical level—training, scheduling and holding safety meetings onsite and routine site inspections to maintain compliance are critical," Groover says.

Pugh agrees. "Continually invest in the training of workers, both existing employees and new potential hires. That training should include in-house training, as well as programs available through associations (such as Associated Builders and Contractors)," he says.

As the pandemic steadily slows, contractors need to remain vigilant about the risk allocation they are willing to take on and maintain a strict policy of writing material and labor shortages into their contracts.

KEY: [1]**Number of states** where the firm is licensed to practice law, including all 50 states, Washington D.C. and U.S. territories. [2]**Areas of practice are abbreviated**: Contract Documents (**CD**), COVID-19 Consulting (**CV**), Construction Defects (**DF**), Construction Dispute Resolution (**DR**), Construction Transactions (**CT**), Government Contracts (**GC**), International Construction (**IC**), Labor and Employment (**LE**), Mergers and Acquisitions (**MA**), Public-Private Partnerships (**P3**), Surety Bonding (**SB**). [3]**Percentage of overall firm revenues** that its construction practice represents. **(-)** Not provided.

> *Most prognosticators say that 2021 will be a strong year for the economy, but that possibility comes with many conditions and impacting factors.*
>
> - Claramargaret Groover, *Counsel*
> Becker & Poliakoff

PLANNING AMIDST ECONOMIC UNCERTAINTY

Market demand for construction projects remains high, and contractors certainly aren't lacking for work. "As the composition of urban commercial and mixed-use projects remains in flux, suburban commercial construction, warehouse facilities supporting e-commerce and residential construction have strong activity. Hospitality, recreation, education and entertainment have had a tough year but we see optimism for new facilities and upgrades," Hamera says.

Of course, winning the project and delivering the project are two separate things entirely. While technology has taken some pressure off the industry, when it comes to building, skilled labor still needs to show up to make it happen.

"Most prognosticators say that 2021 will be a strong year for the economy, but that possibility comes with many conditions and impacting factors. Shortages of skilled craft labor, along with materials and equipment, will continue to pose risks even if inflationary forces do not arise. The rule remains that good supervision and construction risk management backed up by proper insurance programs are the best practices," Groover says.

In the current economic environment, contractors would do well to remember the lessons learned from the pandemic when approaching new work. It's always advisable to have skilled construction law counsel review contract documents before signing on that dotted line.

Cybele Tamulonis is a contributing editor for Construction Executive. For more information, email cybele@magazinexperts.com.

THE TOP 50 CONSTRUCTION LAW FIRMS

Rank	Firm	Year Founded	# States Admitted to Practice[1]	# Office Locations	# Firm Attorneys	# Firm Employees	# Construction Attorneys	# Construction Partners	# Construction Clients in 2020	Construction Practice as % of Total Firm Revenues[2]	Areas of Practice[3]
1	**Peckar & Abramson, P.C.** New York, NY	1978	18	10	116	200	116	60	1,210	95%	DF,DF,DR,CT,CV, GC,IC,LE,MA,P3,SB
2	**Cokinos | Young** Houston, TX	1989	14	5	83	145	72	35	6,204	87.92%	DF,DF,DR,CT,CV, GC,IC,LE,MA,P3,SB
3	**Smith, Currie & Hancock** Atlanta, GA	1965	21	8	72	81	72	42	857	95%	DF,DF,DR,CT,CV, GC,IC,LE,MA,P3,SB
4	**Bradley Arant Boult Cummings LLP** Birmingham, AL	1870	35	10	543	900	69	37	7,416	13.17%	DF,DF,DR,CT,CV, GC,IC,LE,MA,P3,SB
5	**Watt Tieder** McLean, VA	1979	12	5	51	83	34	34	269	100%	DF,DF,DR,CT,CV, GC,IC,LE,MA,P3,SB
6	**Gordon Rees Scully Mansukhani, LLP** San Francisco, CA	1974	51	70	1,042	1,770	92	38	5,908	7.72%	DF,DF,DR,CT,CV, GC,IC,LE,MA,P3,SB
7	**Cohen Seglias Pallas Greenhall & Furman PC** Philadelphia, PA	1988	15	8	76	123	57	20	2,352	76.67%	DF,DF,DR,CT,CV, GC,IC,LE,MA,P3,SB
8	**Duane Morris LLP** Philadelphia, PA	1904	40	28	711	1,263	74	52	10,676	4.26%	DF,DF,DR,CT,CV, GC,IC,LE,MA,P3,SB
9	**Andrews Myers, PC** Houston, TX	1990	3	2	55	93	32	14	5,950	73.06%	DF,DF,DR,CT,CV, GC,IC,LE,MA,P3,SB
10	**Venable LLP** Washington, DC	1900	7	10	474	1,488	47	36	9,732	3.52%	DF,DF,DR,CT,CV, GC,LE,MA,P3
11	**Fox Rothschild LLP** Philadelphia, PA	1907	44	27	938	1,883	42	29	21,268	3.56%	DF,DF,DR,CT,CV, GC,IC,LE,MA,P3,SB
12	**Hinckley Allen** Boston, MA	1906	18	7	148	279	25	16	3,175	20.92%	DF,DF,DR,CT,CV, GC,IC,LE,MA,P3,SB
13	**McElroy, Deutsch, Mulvaney & Carpenter, LLP** Morristown, NJ	1983	19	13	216	407	30	20	1,867	20.97%	DF,DF,DR,CT,CV, GC,IC,LE,MA,P3,SB
14	**Husch Blackwell LLP** Kansas City, MO	1916	44	21	622	1,500	37	27	14,406	5.04%	DF,DF,DR,CT,CV, GC,IC,LE,MA,P3,SB
15	**Cotney - Attorneys & Consultants (formerly Cotney Construction Law)** Tampa, FL	2012	25	23	45	76	37	15	1,575	98.70%	DF,DF,DR,CT,CV, GC,IC,LE,MA,P3,SB
16	**Baker, Donelson, Bearman, Caldwell & Berkowitz, PC** Memphis, TN	1888	38	21	645	1,226	31	18	11,287	5.61%	DF,DF,DR,CT,CV, GC,IC,LE,MA,P3,SB
17	**Finch, Thornton & Baird, LLP** San Diego, CA	1987	9	3	32	53	32	15	1,411	97.42%	DF,DF,DR,CT,CV, GC,IC,LE,MA,P3,SB
18	**Carlton Fields** Tampa, FL	1901	26	11	330	654	34	20	2,590	9.72%	DF,DF,DR,CT,CV, GC,IC,LE,MA,P3,SB
19	**K&L Gates LLP** Pittsburgh, PA	1946	26	24	1,104	2,253	47	19	7,517	2.32%	DF,DF,DR,CT,CV, GC,IC,LE,MA,P3
20	**Eversheds Sutherland**	1924	55	8	459	726	24	12	2,842	5.19%	DF,DF,DR,CT,CV, GC,IC,LE,MA,P3,SB
21	**Atkinson, Andelson, Loya, Ruud & Romo** Cerritos, CA	1979	22	9	212	247	28	17	2,327	16.17%	DF,DF,DR,CT,CV, GC,IC,LE,MA,P3,SB
22	**Procopio, Cory, Hargreaves & Savitch LLP** San Diego, CA	1946	10	6	184	343	16	10	3,510	18.85%	DF,DF,DR,CT,CV, GC,IC,LE,MA,P3,SB
23	**Oles Morrison Rinker & Baker LLP** Seattle, WA	1893	12	3	23	42	22	16	430	86.05%	DF,DF,DR,CT,CV, GC,LE,MA,P3,SB
24	**Becker & Poliakoff** Ft. Lauderdale, FL	1973	4	15	125	320	22	16	45,886	25.76%	DF,DF,DR,CT,CV, GC,MA,P3,SB
25	**Zetlin & De Chiara** New York, NY	1992	6	3	26	43	25	12	2,189	100%	DF,DF,DR,CT,CV, GC,LE,MA,P3,SB

SEE KEY ON PAGE 38

THE TOP 50 CONSTRUCTION LAW FIRMS

Rank	Firm	Year Founded	# States Admitted to Practice[1]	# Office Locations	# Firm Attorneys	# Firm Employees	# Construction Attorneys	# Construction Partners	# Construction Clients in 2020	Construction Practice as % of Total Firm Revenues[2]	Areas of Practice[3]
26	**Clark Hill PLC** Detroit, MI	1890	38	23	640	1,165	34	18	15,000	4.88%	DF,DF,DR,CT,CV, GC,MA,P3
27	**Perkins Coie LLP** Seattle, WA	1912	51	17	1,256	1,528	21	11	2,000	1.51%	DF,DF,DR,CT,CV, GC,IC,LE,MA,P3
28	**Foley & Lardner LLP** Milwaukee, WI	1842	55	21	1,037	2,098	15	9	12,491	1.63%	DF,DF,DR,CT,CV, GC,IC,LE,MA,P3,SB
29	**Goldberg Segalla LLP** Buffalo, NY	2001	28	21	388	754	44	33	2,699	8.18%	DF,DF,DR,CT,CV,LE
30	**Hahn Loeser & Parks LLP** Cleveland, OH	1920	14	6	125	267	42	25	31,080	17.65%	DF,DF,DR,CT,CV, GC,IC,LE,MA,P3,SB
31	**Ahlers Cressman & Sleight PLLC** Seattle, WA	2007	5	1	17	37	17	5	636	97.58%	DF,DF,DR,CT,CV, GC,IC,LE,MA,P3,SB
32	**Shutts & Bowen LLP** Miami, FL	1910	1	8	281	320	23	16	5,000	6.8%	DF,DF,DR,CT,CV, GC,IC,LE,MA,P3,SB
33	**Alston & Bird** Atlanta, GA	1893	42	10	807	1,686	17	8	4,590	1.6%	DF,DF,DR,CT,CV, GC,IC,LE,MA,P3,SB
34	**Hanson Bridgett LLP** San Francisco, CA	1958	51	5	182	344	17	10	2,838	10.96%	DF,DF,DR,CT,CV, GC,IC,LE,MA,P3,SB
35	**Thompson Hine LLP** Cleveland, OH	1911	31	8	378	715	13	7	5,000	5.88%	DF,DF,DR,CT,CV GC,IC,LE,MA,P3,SB
36	**Nelson Mullins Riley & Scarborough LLP** Columbia, SC	1897	33	25	802	1,580	24	16	10,001	2.2%	DF,DF,DR,CT,CV, GC,IC,LE,MA,P3,SB
37	**Adams and Reese LLP** New Orleans, LA	1951	29	17	253	478	62	36	3,300	6.89%	DF,DF,DR,CT,CV, GC,IC,LE,MA,P3,SB
38	**Welby, Brady & Greenblatt, LLP** White Plains, NY	1988	4	5	21	40	21	3	200	100%	DF,DF,DR,CT,CV, GC,IC,LE,P3,SB
39	**Dinsmore & Shohl** Cincinnati, OH	1908	32	29	728	1,368	20	15	12,348	4.42%	DF,DF,DR,CT,CV, GC,IC,LE,MA,P3,SB
40	**Fabyanske Westra Hart & Thomson** Minneapolis, MN	1981	11	1	34	55	18	11	1,142	57.21%	DF,DF,DR,CT,CV, GC,IC,LE,MA,P3,SB
41	**Stoel Rives LLP** Portland, OR	1907	34	10	370	700	15	10	5,471	4.44%	DF,DF,DR,CT,CV, GC,IC,LE,MA,P3,SB
42	**Smith, Gambrell, Russell, LLP** Atlanta, GA	1893	19	7	236	403	18	12	1,120	8.03%	DF,DF,DR,CT,CV, GC,IC,P3,SB
43	**Beltzer Bangert & Gunnell LLP** Denver, CO	2017	10	1	16	20	16	9	85	100%	DF,DF,DR,CT,CV, GC,LE,MA,P3,SB
44	**Hudson Lambert Parrott Walker LLC** Atlanta, GA	2013	8	2	18	30	18	12	325	96.51%	DF,DF,DR,CT,CV, GC,IC,LE,MA,P3,SB
45	**SMTD Law LLP** Irvine, CA	2014	4	4	17	25	17	6	75	82.5%	DF,DR,CV,GC,P3,SB
46	**Offit Kurman** Baltimore, MD	1987	13	14	240	500	15	12	2,500	7.26%	DF,DF,DR,CT,CV, GC,IC,LE,MA,P3,SB
47	**Gibbons P.C.** Newark, NJ	1926	14	8	185	314	16	12	1,425	8.53%	DF,DF,DR,CT,CV, GC,IC,LE,MA,P3,SB
48	**Porter Hedges LLP** Houston, TX	1981	5	2	120	120	13	9	1,000	10.08%	DF,DF,DR,CT,CV, GC,IC,LE,MA,P3,SB
49	**Johnston, Allison & Hord, P.A.** Charlotte, NC	1912	11	1	48	81	20	12	2,190	33.33%	DF,DF,DR,CT,CV, GC,IC,LE,MA,P3,SB
50	**Carney Badley Spellman, P.S.** Seattle, WA	1972	14	1	47	57	14	9	1,485	31.22%	DF,DF,DR,CT,CV, GC,IC,LE,MA,P3,SB

SEE KEY ON PAGE 38

EXECUTIVE**INSIGHTS**

What should contractors look for in a law firm when seeking legal representation?

"Success" only comes before "work" in the dictionary. Hard work is the key to successfully negotiating a contract or executing a litigation plan in this complex industry.

GREGORY COKINOS
PRESIDENT AND CEO
Cokinos | Young

Form a cohesive team that can effectively analyze and respond to complex legal issues as they arise, as well as evaluate the practical impacts and potential consequences of decisions.

ERNEST ISOLA
PARTNER
Gordon Rees Scully Mansukhani, LLP

A significant aspect of construction law is understanding the technical side of the legal issues. It is essential that a contractor's lawyer understands the construction issues in play.

HENRY BANGERT
FOUNDING PARTNER
Beltzer Bangert & Gunnell LLP

It is critical that contractors and their legal teams are on the same page with respect to how much of a hands-on, active role each will play in day-to-day management of claims.

TIMOTHY WOODWARD, ESQ.
PARTNER AND CHAIR OF THE CONSTRUCTION PRACTICE GROUP
Shutts & Bowen LLP

What should contractors look for in a law firm when seeking legal representation?

Contractors should look for lawyers who can understand, analyze and predict the outcome of their issues, soon after retention.

ALI SALAMIRAD
MANAGING PARTNER
SMTD Law LLP

Virtual testimony in construction litigation and arbitration has become the new normal. Has the lack of in-person testimony had an impact on the effectiveness of expert witnesses and analysis?

I now believe that virtual hearings are here to stay, even as we emerge from the COVID-19 pandemic that plagued us through 2020.

EVAN BLAKER
COMMERCIAL LITIGATION ATTORNEY
Cohen Seglias Pallas Greenhall & Furman PC

The virtual format is an option we should offer clients and implement where appropriate to enhance the efficiency of our legal services without compromising on quality.

ROB REMINGTON
PARTNER AND CHAIR, CONSTRUCTION LAW PRACTICE GROUP
Hahn Loeser & Parks LLP

Do you anticipate any changes in contract language with respect to force majeure clauses?

It became apparent that the standard terms of the AIA Contract Documents were sufficient to address most, if not all, pandemic-related circumstances.

KENNETH W. COBLEIGH, ESQ.
VICE PRESIDENT AND COUNSEL
AIA Contract Documents

What legal checklist should every contractor make before commencing a new project?

Each project is unique and requires careful review, but any good pre-performance checklist should identify key areas where project risks arise and steps to manage those risks.

SCOTT WALTERS
PARTNER
Smith, Currie & Hancock, LLP - Atlanta, GA

A contractor should not accept it at face value when an owner says 'funding is covered.' [...]The contractor needs to verify funding with a realistic contingency.

JOSHUA LEVY
PARTNER
Husch Blackwell LLP

Provisions should include: allowances, changes, confidentiality, contingency, contract price/sum, force majeure, notices, payments, insurance/ safety, schedule and subcontracts.

ADAM P. HANDFINGER
CO-MANAGING PARTNER
Peckar & Abramson, P.C - Miami, FL

How has the pandemic affected the lien rights of subcontractors?

Pre-lien notices and similar documents are not a poor reflection on a project. If anything, they are indicative of a subcontractor that is on top of details and paperwork.

JASON S. LAMBERT
PARTNER
Dinsmore & Shohl LLP

What advice do you have for contractors when negotiating a contract to provide for increases due to the impact of COVID-19 on job costs and the project schedule?

A typical force majeure provision provides limited (time only) relief to those seeking to be excused from their obligations because of the effects of a force majeure event.

BEN WESTCOTT
CO-MANAGING SHAREHOLDER
Andrews Myers

The two areas of the contract that I find most helpful to contractors on a project, in light of the impact of COVID-19 are the escalation clause and the force majeure clause.

IAN P. FARIA
OFFICE MANAGING PARTNER (HOUSTON)
Bradley Arant

COVID-19-related personal protection equipment is the new normal for the foreseeable future.

MATTHEW T. COLLINS
PARTNER
Fabyanske, Westra, Hart & Thomson, P.A.

A contractor and owner should agree on a contingency fund for additional costs. The contractor can access the contingency fund only for COVID-19 delays.

ANTHONY NICCOLI
PARTNER
Atkinson, Andelson, Loya, Ruud & Romo

Read all the insights these leaders have to share at ConstructionExec.com/ExecutiveInsights

CONSTRUCTION EXECUTIVE

CORPORATE PROFILE:

LEADERS IN CONSTRUCTION LAW

EXECUTIVE COMMITTEE

Steven M. Charney, *Chair*
Stephen H. Reisman, *Vice Chair*
Adrian L. Bastianelli III, *Member*
Robert A. Drucker, *Member*
Jeffrey A. Ford, *Member*
Charles F. Kenny, *Member*
Paul Monte, *Member*
Robert S. Peckar, *Founding Partner*

ADMITTED STATES

OFFICE LOCATIONS

Los Angeles, CA; Oakland, CA; Washington, D.C.; Miami, FL; Chicago, IL; River Edge, NJ; New York, NY; Austin, TX; Dallas, TX; Houston, TX

COMPANY CONTACT

Peckar & Abramson, PC
1325 Avenue of the Americas
10th Floor
New York, NY 10019
jpapantonio@pecklaw.com
pecklaw.com

SPECIAL ADVERTISING SECTION

It's a New World in 2021 – The Ongoing Rebalancing of Efficiencies, Risk Management and Dispute Resolution

A new season is dawning in construction. After navigating the immediate demands of the COVID-19 pandemic—job shutdowns of "non-essential" work, slowdowns of "essential" work, and delays—the industry is experiencing a rebalancing of efficiencies, risk management and dispute resolution. Some are attributable to factors triggered by the pandemic, while others were underway beforehand, such as evolving project delivery methods.

A key question industry participants are asking: "What worked and what didn't?"

Where will the industry continue to employ practices from the past 16 months that led to new efficiencies, and shed others where the "law of unintended consequences" revealed more downside than benefit? How has the trajectory of advances underway before the pandemic been altered?

Efficiencies. When the pandemic struck, contractors almost immediately developed ways to address the wave of regulatory guidance and government mandates while keeping their jobs safely moving forward. Some methods led to new efficiencies. One example is how contractors instituted staggered start times and lunch breaks to achieve social distancing. Contractors have reported resulting efficiency gains.

As many office and management functions—from operations, to legal and more—swiftly transitioned to a more virtual environment, there was a notable divergence of efficiencies. Negotiations or meetings moved to Zoom, Teams and other virtual environments. The transition resulted in savings of time and money, by obviating the need for plane tickets, hotel stays and unproductive travel. The downside, of course, is the reduced effectiveness of virtual engagement, the loss of human interaction and the challenges in maintaining culture and cohesiveness.

Risk Tolerance. Prior to the pandemic, the industry was experiencing shifts in risk allocation, most notably in the growing popularity of alternative delivery methods, i.e., delegated design, design assist, IPD, PPP and design-build. Certain efficiencies that are gained when designers and contractors work collaboratively to achieve a desired result are not seen with the more traditional delivery method of design bid build. To what extent will lessons learned during the pandemic—including virtual engagement—advance means of collaboration, and might those advance or otherwise impact risk allocation and delivery methods?

Before and during the ongoing pandemic, we've seen changes in risk tolerance and added focus on particular concerns, such as pandemics, the supply chain and price escalation. Some parties may be more willing to accept or dismiss increased risk, others are less inclined. Others still sought to find ways to manage these risks, for example through contract terms and shifting to subcontractors or insurers. The role of insurance in mitigating these risks was and continues to be an unclear playing field, as the insurance markets are conducting a similar rebalancing.

Peckar & Abramson, P.C.

Dispute Resolution. The pandemic was a catalyst for a stunning change to our court and dispute resolution system. There were rapid changes as the ability to physically appear in courthouses and mediation rooms was whisked away as we moved to a more virtual world. Many expected an eventual shift to an increased use of technology in courts and other dispute resolution venues, a transition that may have taken years, but it occurred in a matter of months so as to give society access to the judicial system.

Prior to the pandemic, court hearings and conferences typically took half a day or more, necessitated by travel and wait times amongst slews of attorneys as the day's docket was slowly called. Now, hearings and conferences happen much quicker, often taking less than an hour, as matters are scheduled for virtual hearings or meetings at specific times. And they often take place on time! The need for travel and wait times is obviated, leading to new efficiencies.

While it is clear that parts of our new and more virtual world are here to stay, there may be downsides to balance. Do judges, attorneys and mediators have more or less control in a virtual environment? Without parties and witnesses in the same room, to what extent are the dynamics of a proceeding or ability to assess the credibility of a witness diminished? Do parties have the same ability to read and absorb nonverbal cues and body language and subtleties as with in-person litigation?

For practicing litigators, when not in the same room as the judge when arguing a motion, or by not being across the table from a witness, how much is lost? Does virtual mediation work the same way as an in-person mediation? For example, how much is lost when the mediator has no ability to meet with or bring parties physically together in one room?

As courts and meeting rooms across the county start to reopen, we expect to see a rebalancing as the industry works to continue to draw the benefits of a virtual environment, but return to an in-person environment for those certain appearances and meetings that are not best suited for the virtual world.

This rebalancing of efficiencies, risk tolerance and dispute resolution will unquestionably lead to a changed industry once the pandemic is behind us.

Written by Melissa Salsano and Steven M. Charney

> *2020 Chambers USA market commentary refers to Peckar & Abramson as 'the go-to firm for contractors.'*

FIRM PRACTICE AREAS

Construction and Infrastructure
Construction Dispute Resolution
Contracts, Project Documentation and Risk Management
Corporate Compliance and Integrity Counsel
Corporate Construction
Cyber Security and Data Privacy
Environmental Law
Government Contracts
Immigration Law
Internal Investigations
International Construction and Infrastructure
Labor and Employment Law
Power and Industrials/EPC
ProjectNotice® for Construction Projects
Public-Private Partnerships
Real Estate Law
Surety
White Collar Criminal Defense

CONSTRUCTION EXECUTIVE

CORPORATE PROFILE:

LEADERS IN CONSTRUCTION LAW

> *Smith Currie understands my business better than any other law firm and is cognizant of our needs—technical and economic.*
>
> *Client Testimonial*
> U.S. Best Lawyers®
> Best Law Firms

- Depth: The second-largest construction law firm in the United States*, and continuing to grow
- Experience: Handles matters in all 50 states and internationally
- Recognition: Top-tier firm ranked by Chambers, Best Law Firms and Legal 500
- Entrepreneurial: Understands your business and the importance of adding value and improving your bottom line

OFFICE LOCATIONS

Atlanta, GA
Charlotte, NC
Columbia, SC
Fort Lauderdale, FL
Raleigh, NC
San Francisco, CA
Tysons, VA
Washington, DC

smithcurrie.com

SPECIAL ADVERTISING SECTION

SMITH CURRIE & HANCOCK LLP

Construction and Government Contract Law

For more than 55 years, Smith Currie has focused its practice on serving the construction industry and government contractors. The services the firm provides span the entire spectrum of the planning, procurement, contracting, design, construction and dispute resolution process—from the ground up. Smith Currie combines the benefits of geographic, gender, generational and cultural diversity with a thorough knowledge and understanding of the specific industries the firm serves, gained from more than 55 years of successful experience, to help its clients achieve their strategic objectives.

CONSTRUCTION

Smith Currie lawyers represent clients in litigation, arbitration, mediation and other forms of dispute resolution; consult on project development; draft and negotiate design, construction, consulting and other contracts; and advise clients during project design and construction. The firm has broad experience assisting clients at every stage and with every facet of a project, as well as with achieving better outcomes and successful projects. Both domestically and internationally, the firm advises clients on all types of public and private construction projects.

GOVERNMENT CONTRACTS

Smith Currie has decades of experience navigating the complex laws, regulations and procedures governing federal contracting. Smith Currie is equally comfortable assisting clients entering the federal market and advising experienced federal contractors. The firm's lawyers regularly handle complex matters, including bid protests, ethics compliance, cost and pricing data, fraud and false claims, Buy American Act, Davis-Bacon Act, Miller Act bonds, subcontracting and small business teaming arrangements. The firm has extensive experience handling disputes before the various boards and courts, in addition to defending clients against government investigations and claims. Its lawyers have worked on a wide range of federal projects including dams and levees, office buildings, courthouses, hospitals and military facilities of all types.

STRATEGIC ADVANTAGE

We know your industry and the players and risks involved. We can provide invaluable insight for your specific matters and the business decisions that you face. Many of our attorneys come from construction, engineering and architecture backgrounds, making them uniquely qualified to quickly understand, analyze and resolve project disputes. We are not just litigators; we are advisors, too. Litigation is costly, and we work hard to help our clients avoid and efficiently resolve disputes.

* *Construction Executive's Top 50 Construction Law Firms*, June 2020

Helping You Conquer Today's Challenges and Achieve Tomorrow's Objectives

SMITH CURRIE & HANCOCK LLP

CONSTRUCTION AND GOVERNMENT CONTRACT LAW SMITHCURRIE.COM

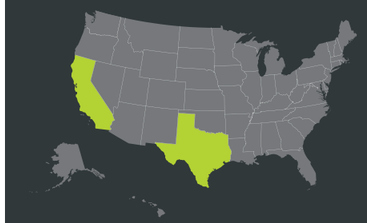
CONSTRUCTION EXECUTIVE

CORPORATE PROFILE:

LEADERS IN CONSTRUCTION LAW

STATEWIDE PRESENCE, NATIONAL COVERAGE.

LOCATIONS IN TEXAS AND CALIFORNIA



COMPANY CONTACT

Cokinos | Young
Houston, TX
(713) 535-5500
gcokinos@cokinoslaw.com
cokinoslaw.com

SPECIAL ADVERTISING SECTION

COKINOS

Over Three Decades of Undisputed Excellence

Well known for leadership and undisputed construction expertise since 1989, Cokinos | Young offers a broad array of legal services that are delivered with a commitment to efficiency, value and client service.

Cokinos | Young attorneys bring years of experience and real-world knowledge to their areas of practice. The firm is highly reputed in construction law, and from that solid base, it has developed and grown to encompass all aspects of corporate law and civil litigation. We approach each matter with a firm grasp of our client's needs and goals. Cokinos | Young strives not only to be an effective legal team but also an invaluable business partner.

In today's complex and constantly changing business environment, Cokinos | Young continues to use practical experience and pragmatic approaches to manage serious legal challenges. As we have expanded our capabilities over the years to a true full-service law firm, Cokinos | Young's commitment to the construction industry has never wavered. Clients benefit from our extensive experience on a wide range of construction projects in both the public and private sectors.

Our commitment to the construction industry includes extensive involvement with many nationwide industry-related associations. These relationships provide us with the opportunity to contribute to the ongoing evolution of issues impacting both the construction industry at large and the clients we represent, making Cokinos | Young one of the most influential firms in the business.

Cokinos | Young has multiple Chambers USA and AV-rated attorneys and handles matters throughout the state of Texas, as well as on a national and global level. Cokinos | Young is proud of the firm's accomplishments and the individual recognitions of our attorneys by some of the most respected national and international legal ranking and review services. When we first opened our doors 30 years ago, Gregory Cokinos and Marc Young committed to providing our clients the highest level of legal knowledge, value, attentive service, excellence and a full commitment to obtaining the best possible outcomes. Today, our firm continues to embody that strong foundation of core values and is why we are proud to continue servicing clients that started on the journey with us in 1989.

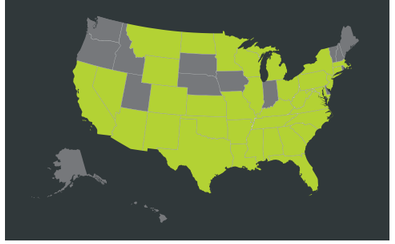
CONSTRUCTION EXECUTIVE

CORPORATE PROFILE:

LEADERS IN CONSTRUCTION LAW

For more information, please visit bradley.com/practices-and-industries/industries/construction

LICENSED TO PRACTICE IN 38 STATES

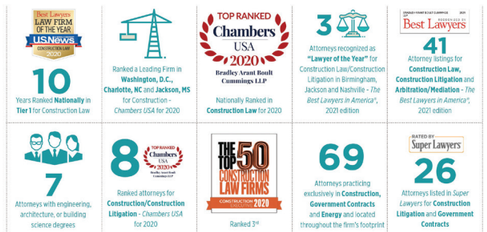


Bradley

Counselors to the Construction Industry

Bradley is a national law firm with a reputation for skilled legal work, exceptional client service and impeccable integrity. We provide business clients around the world with a full suite of legal services in dozens of industries and practice areas.

From initial contract negotiation and bid preparation to project close-out and dispute resolution, our nationally ranked construction attorneys have handled every aspect of large-scale construction projects across the country and around the world. Our broad experience comes from our hands-on approach to managing both the business and legal challenges our clients face every day. We understand the sophisticated dynamics of the construction industry at home and abroad, and we deliver smart, real-world solutions to our clients.



Better Together

At Bradley, we combine experience and knowledge with a sophisticated understanding of our construction clients' unique and complex legal needs. From initial contract negotiation and bid preparation to project close-out and dispute resolution, our clients rely on us to provide innovative solutions, dependable responsiveness and a deep commitment to success.

Named the nation's "Law Firm of the Year" for Construction Law in U.S. News & World Report — Best Lawyers "Best Law Firms" for 2020 and 2018

LAW360 CONSTRUCTION GROUP OF THE YEAR 2020

Bradley

Bradley Arant Boult Cummings LLP

For more information on our Construction Practice Group, visit
www.bradley.com/construction

HAHN LOESER 100

EST. 1920 | MORE THAN A CENTURY OF CLIENT SERVICE

Hahn Loeser's Construction Team Provides Construction Industry Insight and Experience

Hahn Loeser has a long and successful track record helping construction clients minimize risk and reach their business goals.

Hahn Loeser's Construction Team has more than 30 attorneys who craft a legal approach tailored for each client. The work we perform for our clients involves some of the most sophisticated, complex and cutting-edge legal issues facing the industry today. In addition to our experienced construction attorneys, our team includes industry professionals with real-world project experience who provide a critical, value-added resource for our clients, helping them effectively manage construction projects, reduce risk and follow best practices.

We provide counsel on nearly every area of construction law, including contract negotiations, bid disputes, claims management, OSHA requirements, mechanic's liens, bond claims, alternative dispute resolution, litigation and intellectual property. We pride ourselves on providing effective, practical and efficient legal counsel, which begins and ends with a deep-rooted knowledge and understanding of the construction industry. This, together with an unyielding commitment to achieving outstanding results for our clients, is a hallmark of our group.

CONSTRUCTION EXECUTIVE

CORPORATE PROFILE:

LEADERS IN CONSTRUCTION LAW

We pride ourselves on our bench strength, industry experience, track record of success and commitment to client service.

- Rob Remington
Partner and Chair, Construction Team

2021 Labor Law Update: What's Happened and What's Next

BY MAURY BASKIN

On Labor Day 2020, then-candidate Joe Biden promised The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) that he would be the "strongest labor president you've ever had." Not yet halfway through his first year as president, Biden appears to be making good on his promise.

Executive Actions

On day one of the new administration, the president took the unprecedented action of firing the independent general counsel of the National Labor Relations Board (NLRB), whose statutory term was not supposed to expire until November 2021. No previous president had ever fired the NLRB general counsel before the end of his statutory term, but General Counsel Peter Robb was strongly disliked by labor unions. The president appointed Peter Sung Ohr as acting general counsel, a staunch union supporter who immediately began reversing prosecutorial and advice decisions of his predecessor.

> *"Biden ordered OSHA to consider issuing an ETS imposing new COVID-19 safety mandates on employers, long demanded by labor unions.*

Next, the president nominated Boston Mayor Marty Walsh, a career business agent and high official in the union building trades, as his secretary of labor. Another former union official has been tabbed by the president as the new Occupational Safety and Health Administration undersecretary. A long-time union attorney was appointed to head the Department of Labor's Office of Labor Management Standards (OLMS), charged with monitoring union compliance with legal obligations to members. Other recent DOL appointments include progressive officials with long records, favoring increased burdens on employers to provide new employee benefits.

The president fulfilled another campaign promise by issuing an executive order creating a "Task Force on Worker Organizing and Empowerment." As the name implies, this task force is filled with labor advocates whose stated goal is to support "work power, worker organizing and collective bargaining."

The president also issued an executive order requiring government contractors to pay a minimum wage of $15 per hour, although Congress refused to pass legislation more broadly mandating the increased minimum wage on private work. And the president by executive order rescinded the prior administration's order prohibiting "racial scapegoating" in diversity training by government contractors.

In addition, Biden ordered OSHA to consider issuing an Emergency Temporary Standard (ETS) imposing new COVID-19 safety mandates on employers, long demanded by labor unions, even as the administration announced the lifting of many pandemic restrictions due to the dramatic reduction in COVID-19-related illness and widespread vaccinations. The ETS was delayed amidst concerns about its legal justification in the absence of a continuing emergency.

Reversal of 'Business-Friendly' Regulations

The president's appointees moved quickly to undo regulations of the previous administration that sought to provide clearer guidance to employers, but which the new administration deemed to be insufficiently protective of employee rights. Under Biden, the DOL delayed the effective date of the independent contractor rule under the Fair Labor Standards Act (FLSA), then withdrew the rule altogether, though both actions have been challenged in a federal court suit filed by Associated Builders and Contractors and other organizations. The DOL also proposed to rescind the prior administration's "joint employer" rule under the FLSA, though that matter is also being litigated in court.

It remains to be seen whether the administration will attempt to reinstate the so-called "persuader advice" rule or the "blacklisting" rule, both of which were promulgated during the Obama administration, only to be blocked by business groups in the courts, resulting in nationwide injunctions against the rules. Any attempt to reinstate those rules is certain to be again contested by business organizations, including ABC.

Endorsement of the PRO Act and Government-Mandated PLAs

The Protect the Right to Organize (PRO) Act is the most radical proposed rewrite of federal labor law in more than 70 years, including more than 50 major changes designed in every instance to give greater power to unions at the expense of employers. Biden endorsed the PRO Act during his campaign and subsequently included its provisions in the massive 2021 infrastructure bill, along with numerous provisions imposing union requirements known as

project labor agreements (PLAs). The infrastructure bill would also expand the "prevailing wage" provisions of the Davis-Bacon Act, at considerable cost to taxpayers.

The PRO Act would effectively overturn "right-to-work" laws that exist in half the United States. The act would also codify a three-part test that would shrink the number of independent contractors and would greatly expand the concept of joint employment. Plus, it would also greatly restrict the ability of employers to contest union elections or obtain labor relations advice. Perhaps of greatest concern to the construction industry, the PRO Act would remove longstanding protections against "secondary boycotts," allowing unions to coerce neutral customers and jeopardize supply chains essential to construction.

Another important change under the PRO Act would be elimination of class action waivers in arbitration agreements with non-union employees. Many employers currently rely on such agreements to avoid the major expense of class action litigation. Similar language is being supported by the Biden administration in the Forced Arbitration Injustice Repeal (FAIR) Act, also pending in Congress.

These are only a few of the onerous provisions of the PRO Act, which has passed the House and awaits an uncertain vote in the Senate. But the president has made clear that he would sign the bill if it reaches his desk. ABC and the entire business community has strongly opposed the bill.

Changes Coming to the NLRB and EEOC

Aside from replacing the general counsel as discussed above, Biden

> *The current board is expected to undo a number of the Trump board's policies, expanding union access and organizing rights.*

has not yet been able to appoint new members to the NLRB. But that is expected to change upon the expiration of Republican member William Emanuel's term in late August 2021. Sometime this fall, the president will be entitled to gain control of the NLRB with anticipated pro-labor appointments. Once that happens, even without passage of the PRO Act, the current board is expected to undo a number of the Trump board's policies, expanding union access and organizing rights, as well as expanding the protected rights of non-union employees to engage in group activities, while severely limiting the rights of employers to protect their businesses from unwarranted labor attacks.

All of these changes are expected to lead to increases in the number of union organizing petitions and unfair labor practice charges in many industries, including construction.

The Equal Employment Opportunity Commission is also expected to remain in Republican control for at least a year, barring any unexpected vacancies. Eventually, however, the EEOC

is expected to reinstate a number of controversial Obama-era rules including the expanded EEO-1 requirement to collect employee compensation data classified by race, ethnicity, and gender, as well as efforts to regulate "algorithmic discrimination."

Continuing COVID-19-Related Concerns

In addition to the labor changes discussed above, the Biden Administration has remained active in COVID-19-related matters. The expanded unemployment benefits in the COVID-19 relief package remain controversial, hindering the ability of many construction employers to return to full employment. The administration is also pushing for more paid leave requirements, which again will tax the ability of employers to perform projects as they become available.

"The expanded unemployment benefits in the COVID-19 relief package remain controversial, hindering the ability of many construction employers to return to full employment.

The recent abrupt changes in the Centers for Disease Control and OSHA guidance on masks and other safety aspects of COVID-19 have also created concerns, and inconsistent state and federal rulings on vaccination issues have created challenges for employers as well.

Considering how much change has already taken place in the early months of the Biden Administration, the prospects for the coming months and years are daunting for construction industry employers dealing with so many labor law developments. Increased management training and vigilance in monitoring the fast-moving changes in the laws, as well as advocacy push back against the more extreme policy proposals, are called for in order to avoid running afoul of the new federal labor enforcement initiatives.

Maury Baskin chairs the construction industry practice group in the Washington, D.C., office of Littler Mendelson, P.C., and serves as general counsel of Associated Builders and Contractors. For more information, visit littler.com.

New State Marijuana Laws Pose Obstacles to Safety-Sensitive Employer Drug Testing Programs

BY MAURY BASKIN AND NANCY DELOGU

Construction industry employers have long engaged in workplace drug testing as an essential component of their efforts to maintain safe conditions on hazardous construction jobsites. Recent developments in the movement to legalize marijuana pose a challenge to such drug-testing programs, at least with regard to marijuana, which remains an illegal drug under federal law.

Thirty states now permit the use of marijuana and marijuana products for medicinal use, and most of the remaining group have adopted laws permitting the use of cannabis products for a small list of medical conditions. Sixteen states and the District of Columbia have taken steps to legalize marijuana for recreational use. Until recently, with some limited exceptions, most state laws legalizing marijuana did not interfere with the previously recognized right of employers to prohibit employees from working with marijuana (or other drugs or alcohol) in their systems, and to test employees to enforce such prohibitions.

New legislation passed in New York, New Jersey and Montana, however, seeks to create a right to use marijuana outside working hours, and to protect workers from adverse action based on that use, or even following a positive test, with no exceptions for safety sensitive positions. The New York law, which became effective in late March of this year, states that "no adverse action" will be permitted based solely on the "legal use of consumable products including cannabis" outside of work, unless actual "impairment" (narrowly defined) can be shown.

New Jersey and Montana's new laws contain similar, though differently worded, provisions. (New Jersey's new law creates a commission to further define the scope of its terms). Montana's statute was signed into law on May 18, 2021, and the New Jersey law's employment provisions will become effective later this year.

The problem posed by these new laws, and similar proposals in other states, is that the current science underlying drug testing has not yet established a generally accepted standard level of THC in the blood that can be assumed to result in "impairment." Nevertheless, employers have been generally free to prohibit workers from coming to work with alcohol in their systems. Marijuana users in Montana, New Jersey and New York will enjoy greater protections than alcohol users because these new laws require employers to prove that the individual is impaired at work.

As a result, construction industry employers are left to rely on the inherently subjective judgment of supervisors to evaluate employee impairment. Such reliance appears likely to increase workplace drug-related accidents and loss of productivity, as well as new claims of supervisory error or discrimination and fewer opportunities to deter and detect substance abuse before it becomes a problem at work.

Construction employers should monitor continuing developments regarding marijuana legalization carefully and should voice safety-related concerns over the impact of these new state laws on their ability to implement safety strategies, including drug testing programs. Employers who have previously relied on broad, multi-state drug testing policies in particular need to re-evaluate such policies in order to take into account the evolving state laws to ensure compliance in any jurisdictions where the employer performs work.

Maury Baskin and Nancy Delogu are shareholders with the Washington, D.C., office of Littler Mendelson, P.C. Littler serves as general counsel to Associated Builders and Contractors, Inc. For more information, visit littler.com.

Keep Text Messages From Changing Contract Terms

BY JASON LAMBERT

A project manager's cell phone chirps as she is on a busy jobsite. She glances down and sees that it's the electrical subcontractor on the project asking a question about running wire in a different location to accommodate another trade's work. She looks at the plans and texts back that the change is fine and to proceed. The electrician moves forward with the work. The following month, the electrician submits a change order for some additional time and materials required by running the wire in a different location, claiming the change was approved by the project manager. Was it?

Not surprisingly, this story and thousands like it happen daily on jobsites. Cell phones are as common as steel-toed boots and hardhats on construction projects (maybe even more so), and six billion text messages are sent every day in the United States alone. It is impossible to escape the potential impact of text messages on construction projects and, particularly, construction contracts.

> *"Ensure that any construction contract contains terms limiting the effect of text messages.*

How Courts Are Treating Text Messages

Whether a text message can change a contract, or even form a contract, between parties is still up for substantial debate in courts around the United States. Typically, it depends on the terms of the contract, state law, the content of the text messages and the conduct of the parties. That's a lot of "what ifs" that impact a party's responsibilities under a construction contract. And courts across the country have reached many different conclusions:

- In July 2020, a Texas appellate court determined that where the parties' text messages contained an agreed price to purchase the contents of an entire home furnishing showroom, this was sufficient to establish an enforceable contract between the parties that the court could (and did) enforce. The text messages proposed purchasing "an entire showroom" for $30,000, to which the seller ultimately responded "that is fine."
- In a 2017 Florida case, text messages between a hotel employee and guests confirming a specific ballroom for use were accepted by the court to complete the contract between the parties, where the contract only indicated that space would be assigned,

committed and reserved in the future. This resulted in significant damages being awarded against the hotel for changing the space offered to the guest the day of an event.

- In 2017, a Louisiana court found that text messages between the parties discussing price and specifics about a yacht sale were not sufficient to establish or support the existence of an agreement between the parties because they did not reference an agreement to those terms. The text messages involved the purchase of a $150,000 yacht.
- In January 2020, a New York court refused to find that a text message from a consultant to a construction company, stating "I am finished," was sufficient to terminate a contract between the parties, where the evidence of the text messages submitted failed to include information identifying the parties sending the text messages.

How to Manage the Impact of Text Messages on a Project

The only way to gain control over these unknowns is to ensure that any construction contract contains terms limiting the effect of text messages (or other informal communications) on the terms of the contract and/or limiting the scope of authority to make changes to the contract to certain people. Where such terms exist, courts usually find that even clear text message agreements are unenforceable:

- In 2019, a Mississippi court determined that text messages between a buyer and seller of a home, where the seller agreed to install upgraded hardwood on the first floor, were not binding where the contract between them indicated it could not be changed without "mutual written consent" and that the parties were not relying on any representations outside of the written terms of the contract.
- In September 2020, a Nebraska court refused to enforce informal communications between a contractor and subcontractor, where the contract between them expressly stated that informal modifications, including by email, text message or verbally, were prohibited and not binding.
- In 2019, a Florida court refused to find that a contract was extended, despite emails and text messages indicating it had been extended, where the contract prohibited modification through course of conduct between the parties without prior written consent.

While many contracts contain anti-waiver, anti-modification and integration clauses, it can be helpful to update these clauses to specifically reference text messages. It can also be helpful to include provisions limiting the people who are authorized to make changes to a contract on behalf of the company. Both of these can help prevent an informal text message from turning into an expensive dispute.

Finally, it is also important to consider how projects typically are managed or run. If project managers frequently use text messages or internal messaging services to communicate with and direct subcontractors, then contract provisions that allow those messages but dictate their impact would be the best solution.

If project managers rarely use these types of services, then complete prohibitions on them or their impact may be appropriate. The bottom line is that contracts should address them in way that is consistent with project goals and project manager typical practices.

Jason Lambert is a construction attorney representing contractors and subcontractors at Dinsmore & Shohl, LLP. For more information, visit jason.lambert@dinsmore.com.

What OSHA's COVID-19 National Emphasis Program Means for Contractors

BY CURTIS MOORE

On March 12, the Occupational Safety and Health Administration adopted a National Emphasis Program (NEP) on COVID-19, which became effective immediately and will remain in effect for 12 months unless action is taken to renew it.

The NEP signals OSHA's commitment to step up virus-related inspections, and it states that employers may be cited under the Occupational Health and Safety Act's General Duty Clause.

The NEP followed a Jan. 21 Executive Order issued by President Biden directing OSHA to issue a NEP for COVID-19 and to consider by March 15 whether it was necessary to establish an Emergency Temporary Standard for COVID-19.

To date, OSHA has not issued an emergency standard, but it is possible that it still may do so. OSHA state plans were given 60 days from March 12 to notify federal OSHA of whether they will adopt the NEP or rely on existing policies and standards to regulate COVID-19 exposure in the workplace.

Why Construction Employers Should Care About the NEP

The NEP creates two "Master Lists" in Appendices "A" and "B" for programmed inspections in those industries where OSHA has identified a greater risk for COVID-19 transmission.

Appendix B contains "Secondary Target Industries" that OSHA may select for programmed inspections, and also includes: "Construction

> *"The National Emphasis Program signals OSHA's commitment to step up virus-related inspections.*

of Buildings" (NAICS 236XXX); "Heavy and Civil Engineering Construction" (NAICS 237XXX); and "Specialty Trade Contractors" (NAICS 238XXX).

Construction employers in those listed industries could be randomly selected in accordance with the terms of the NEP for a programmed inspection. However, construction employers must also be ready for the expansion, or attempted expansion, of a non-programmed inspection based on the COVID-19 NEP. This could occur anytime OSHA comes to a construction employer's site for an inspection based on a complaint or reportable injury or illness.

It is also conceivable that OSHA may try to open an inspection based on the NEP against multiple contractors on a multi-employer site when OSHA is there for an unprogrammed inspection based on a complaint or report of injury or illness relating to a single contractor.

What an Inspection Might Look Like Under the NEP

Opening Conference

OSHA will begin the inspection with an opening conference but, under the NEP, will conduct the opening conference in a manner to assure the safety of OSHA's Compliance Safety & Health Officers (CSHOs). This might include conducting the opening conference in large conference rooms that have been appropriately sanitized or conducting the opening conference in an outdoor setting where social distancing can be maintained.

CSHOs will expect that employer representatives and employees wear face coverings and maintain social

distance throughout their interactions. The NEP also directs CSHOs, as appropriate, to speak with the employer's safety director, infection control director and/or the person responsible for implementing COVID-19 protections in the workplace as part of the opening conference.

Document Review. OSHA will likely request to review the employer's written safety and health plan, including any portions therein that focus on mitigating or eliminating the hazards posed by COVID-19. OSHA likely will also review:

- the employer's hazard assessments and policies for PPE;
- documentation showing purchases of PPE;
- any policies or administrative controls that the employer has implemented to promote social distancing at the worksite;
- the employer's respiratory protection program;
- medical records and logs related to worker exposure incident(s); and
- employee training records pertaining to COVID-19 policies/procedures and PPE.

Walkaround. Based on the information gathered during the opening conference, document review and any interviews with the employer's safety managers and employees, OSHA will determine what areas of the site it may wish to inspect to determine if there is COVID-19 exposure.

This likely would include areas OSHA believes that employees are either not adhering to social distancing or face-covering requirements or points at the jobsite where employees are within six feet of one another and may pose an increased risk for transmission of the virus.

What Construction Employers Can Do to Prepare for the NEP

To prepare for a programmed or unprogrammed inspection under the NEP, construction employers need to adopt a written COVID-19 policy that covers its controls and strategies for reducing or eliminating COVID-19 exposure in its workplace. The employer will need to train all employees on its COVID-19 policies and procedures, including policies relating to the wearing of facial coverings, use of other PPE and maintenance of social distancing procedures.

The COVID-19 policies and procedures should include protocols for consistently cleaning and sanitizing the workplace. Special attention should be paid to cleaning and sanitizing common and high-touch areas of the worksite (including equipment cabs, steering wheels, restrooms, doorknobs and phones within mobile office trailers and break areas if applicable).

Employers should train employees on the hazards of any chemicals or disinfectants used in the workplace and maintain a written program and applicable safety data sheets to comply with OSHA's Hazard Communication Standard.

Employers should promote social distancing through staggering shift start and stop times and lunch breaks to reduce the contact between employees where possible. Likewise, employers should limit capacity in conference rooms, break rooms, offices and restrooms.

Finally, employers should consider developing planned walking routes around the jobsite that encourage a one-way flow of traffic to reduce head-on or face-to-face contact among employees.

Potential Heat Stress Implications of COVID-19 Programs

For now, it appears construction employers and employees alike will face another summer of wearing facial coverings to mitigate the spread of COVID-19. Some studies have suggested that the wearing of masks can exacerbate heat stress in the workplace.

Employers will need to be prepared to provide additional breaks (potentially in employees' individual cars where they can sit in the shade and air conditioning), and potentially start work earlier in the morning to avoid the worst of the heat and humidity during the day.

Employers should also provide stocks of additional masks and facial coverings so that employees can exchange sweat-soaked masks for a dry mask that may allow better breathability.

While many employers may wonder why OSHA is adopting a COVID-19 NEP at a time where more and more persons are being vaccinated, the Biden administration and OSHA have signaled that protecting workers from COVID-19 during the coming months will be a top priority.

As such, employers must implement policies and trainings and enforce their COVID-19 protocols to protect workers and to avoid being cited under the NEP and the OSH Act's general duty clause.

Curtis Moore is a lawyer in the Charlotte office of national labor and employment law firm Fisher Phillips. For more information, email cmoore@fisherphillips.com.

Managing a Remote Workforce One Year Later: Legal Lessons Learned

BY BENJAMIN E. STOCKMAN, SANDY SCHLESINGER AND AYELÉN R. RODRIGUEZ

At the one-year mark since COVID-19 permeated the world, employers have been forced to make quick and tough decisions about how to keep their workforces safe while preserving their ability to continue operating as productively and successfully as possible. While the transition from in-office to remote work was relatively seamless for some, it presented extreme hardships for others.

Now, with over one year of remote work under many of our belts, employers have generally adapted and determined how best to achieve their goals from home. However, the challenges do not end there. Employers must now think about the legal implications of long-term remote work.

Employee Mobility Presents Tax and Employment Law Exposure
The COVID-19 pandemic forced millions of Americans to stop physically commuting to work and to begin telecommuting. Untethered from the physical workplace, many employees "temporarily" decamped to cities and states away from their offices. As weeks became months, and months became a year, these "temporary" relocations are now permanent for some, or continue to be indefinite for others. Employers are now faced with navigating the tax and employment law implications presented by a far-flung workforce.

Tax Implications: Generally, states require employers to withhold payroll taxes based on where an employee performs services. Unsurprisingly, different states use different rules to determine the situs of work for employees who work in states different from that of their employer.

For example, New York uses the "convenience of the employer rule," which requires employers to withhold income taxes on wages for employees who are assigned to a New York office, yet perform their services out of state for their own convenience rather than the employer's necessity. Essentially, this rule requires non-residents whose primary office is in New York State to pay New York income taxes, irrespective of where they have relocated to work during the pandemic.

Not all states use the "convenience of the employer" rule. For non-residents of California, a California employer must withhold California personal income tax and report wages paid to non-resident employees for services performed within California. However, only the wages earned in California are subject to California state income tax. During the COVID-19 pandemic, some state tax agencies, including the California State Franchise Tax Board, have waived the business nexus requirement for resident employees working temporarily from home because of the pandemic.

State and Local Employment Law Implications: As remote employees continue to telecommute from various cities and states, employers must now comply with the potentially unfamiliar employment laws of the employee's locality. The laws of these localities often differ from those of the employer's designated office.

For example, many cities and counties have passed their own local human rights laws that build on federal and state law employee anti-discrimination and anti-retaliation protections. Employers need to be mindful that the employee's relocation state and local employment laws may grant more expansive protections to employees than the employer's state provides. Whether an employer is subject to a particular state or local law may depend on how many employees the employer has within that state or locality.

Wage and Hour Law Implications: Telecommuting poses compliance challenges related to employee expense reimbursements, meal and break times, wage notices and statements, wage deductions, pay frequency and overtime. State laws differ in their wage and hour requirements, and many provide stiff penalties for non-compliance. Some states also require employers to cover all telecommuting expenses.

For example, California prohibits employers from passing business operating expenses on to the employee, including, in some instances, the cost of internet service. As remote work becomes a permanent fixture of the American workplace, employers must consider wage and hour compliance in the states where employees are located or risk expensive legal disputes.

Continued Remote Work Presents Unforeseeable Family and Medical Leave Complications
Family and Medical Leave Laws: When a large portion of the country's workforce transitioned to remote work in March 2020, newly remote workers with parental responsibilities struggled to manage work and childcare without in-person schooling and daycare. The federal government responded with the Families First Coronavirus Relief Act (FFCRA), which provided paid leave benefits for workers forced to take leave from work for COVID-19-related reasons, including to care for a child whose daycare or school closed as a result of the pandemic.

As of Dec. 31, 2020, employers were no longer obligated to provide FFCRA paid leave. By that time, most employers had found their footing and developed clear telework policies that resolved some of the confusion of the early days of the pandemic. Despite the expiration of the mandatory FFCRA paid leave, the U.S. Department of Labor issued guidance at the beginning of 2021 that employers could continue to provide paid leave under the FFCRA program for employees who did not exhaust such leave in 2020.

Whether through an extension of FFCRA paid leave or not, many employers have continued to provide paid (or unpaid) leave to employees for legitimate pandemic-related reasons because of state law mandates or the desire to maintain a flexible approach to meet legitimate employee needs.

As employers pivot their workforces back to in-person work in larger numbers, employees are increasingly turning to legal recourse under federal, state and local law to create headaches for employers who construe leave laws too narrowly or unthoughtfully.

Reasonable Accommodations: The past year has also presented unique concerns related to reasonable accommodations requests from remote workers under the Americans with Disabilities Act (ADA). The ADA requires employers to provide qualified employees with reasonable accommodations to perform their jobs, unless the requested accommodation would cause an undue hardship on the employer. Prior to the pandemic, many employers denied employee requests to work remotely because of the view that remote work hindered productivity and disrupted business operations.

Last year, when employers made the large-scale transition to remote work, many feared that the temporary suspension of certain core functions of employees' jobs to enable remote work might result in a requirement to provide remote work accommodations indefinitely.

In response to this concern, the EEOC issued guidance in September 2020 that an employer's alteration of an employee's core job duties to enable remote work in response to the pandemic did not necessarily amount to a permanent alteration of the essential job functions requiring a permanent remote work accommodation.

Although this guidance leaves the reasonable accommodation standard unchanged from its

pre-pandemic definition, the EEOC stated that remote work during the pandemic could be viewed as a "trial period" for a more permanent remote work accommodation. This guidance and employees' general preference for remote work will likely result in an uptick in remote work accommodation requests and disputes as employers attempt to transition ADA-qualified workers back to the workplace despite their reluctance to return.

Flexible Working Arrangements Can Imperil Confidential Data

One area that should be top of mind for employers is maintaining the confidentiality of private, non-public and/or privileged information. Loss or exposure of such company data can damage an employer's competitive positioning in the marketplace, which is why companies implement confidentiality and non-competition agreements.

But not all employers' agreements contemplate the types of risky scenarios that are more likely to occur because of widespread remote work. For example, an employee may inadvertently share private financial documents to a personal Gmail account or a public printer at a retail establishment if an at-home printer is unavailable.

While such an event could occur even when working primarily in an in-office environment, the risk level increases when employees work more frequently from home. The key lesson learned from these types of scenarios is that companies need to reevaluate whether their confidentiality policies are sufficiently strong to cover the added risks resulting from the proliferation of remote work.

Benjamin E. Stockman is counsel, and Sally Schlesinger and Ayelén R. Rodriguez are associates in Venable LLP's New York office. *This article has been reprinted with permission from Venable and condensed for space.*