IT'S THE LAW

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SERVING THE CONSTRUCTION INDUSTRY
IN EMPLOYMENT AND LABOR MATTERS
AND CONSTRUCTION CONTRACT CLAIMS

Changes to the Mechanics Lien Act

A. Rental Equipment

As of August 17, 2007, the Illinois Mechanics Lien Act has been amended, and the most significant change is the statutory allowance for liens for rental equipment. This change only applies to the extent that the equipment is used "on or about" the site of the improvement. It also does not apply to rental equipment used for the construction of single family residences or multi-family residences of less than 12 units.

B. Liens Against Public Funds

In addition, several changes were made to the section of the Act relating to liens against public funds. Liens against public funds are now available on both forms and form work (e.g., temporary structures erected to contain concrete during placement and initial hardening). The provisions relating to liens against public funds also now applies to any entity organized for the purpose of conducting public business, or to a not-for-profit corporation owned, operated or controlled by one or more units of local government for the purpose of conducting public business.

Claimants for liens against public funds are advised to be more careful with their lien notices, as sworn statements are required for all public liens, along with identification of the contract (describing work done by claimant) and total amount due. Claimants can also now file subsequent notices for amounts that become due after the filing of a prior notice. In addition, material suppliers are not required to provide proof that the material was actually used in the public improvement - the supplier need only show that the material was delivered to the owner or its agent for the building or improvement or was delivered for the purpose of forms or form work.

There are also several procedural changes related to liens against public funds, clarifying timing requirements in regards to notice and filing suit. The notice is effective when

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received or refused by the public body. Suit must be filed within 90 days of serving notice on the public body, and the public body must be notified of the suit within ten days of filing the complaint. The effect of these requirements is that the public body must hold the money for 100 days (as opposed to 90 days under the previous version).

Company Outings

Employers often times "throw their employees a bone" so to speak and schedule company picnics, golf outings and other types of events on a regularly scheduled workday. While such events provide an employer an opportunity to boost employee morale, it also provides an opportunity for the employees to suffer an injury. Whether it is a phantom injury or legitimate, the employer nonetheless has to defend a Worker's Compensation claim. This article will provide the pertinent section of the Worker's Compensation Act ("Act"), how courts have recently interpreted the Act and what an employer can do to lessen the likelihood of paying a claim.

The Act provides "[a]ccidental injuries occurred while participating in voluntary recreational programs including but not limited to athletic events, parties and picnics do not arise out of an in the course of the employment even though the employer pays some or all of the cost thereof". This exclusion shall not apply in the event that the injured employee was ordered or assigned by his employer to participate in the program. The key question is whether the employee was "assigned" by his employer to participate in the event. The following factual situations and the court's decision regarding liability should provide some insight on interpreting the exception.

The employer sponsored a company picnic on a regularly scheduled work day. The picnic was complete with various activities such as volleyball, touch football, basketball, horseshoes, etc. The employers were informed that they could either attend the picnic or take a personal or vacation day if they chose not to attend or go without pay for the day. Employees who chose not to attend were not subject to discipline.

During a basketball game, an employee suffered a major knee injury and subsequently underwent knee reconstruction surgery. The employee missed three weeks of work and his claim for benefits involved approximately $29,000 for medical care. The employee initiated a worker's compensation claim before the Industrial Commission wherein an arbitrator determined the injuries were not compensable because the employee's decision to play basketball while a the picnic was voluntary and, thus, his injuries did not arise during the course of his employment.

The Appellate Court, however, reversed the arbitrator's decision and concluded that where an employee must either go without pay or give up personal/vacation time in order to opt out of attending a company picnic, the company essentially ordered attendance. The general rule is that if an employee has to choose between attending a company event or giving up a benefit, the employer will be found to have assigned the employee the participants.

Instead of forcing the employee to choose between attending the picnic or taking a personal/vacation day, what if the employer would have provided the employee with the following choice: attend the picnic for half the day and work the other half or forego the picnic and work his regular job all day. In any event, the employee would be paid his regular salary for the entire day. This scenario was addressed recently to which the court determined no compensation was due to an employee who suffered a sever back injury while playing basketball at the company picnic. As expected, the Court reasoned because the employee did not face the prospect of forfeiting

a benefit as a consequence of not attending the picnic, the employer did not assign the employees to attend.

The aforementioned factual scenario may have been decided differently in front of other appellate court judges. There is an old Illinois Supreme Court case which focused its inquiry on whether the employer encouraged its employers to attend the activity. In that case, an employee was killed in a traffic accident on his way home from the company golf outing. The Court determined there was substantial employer compulsion to attend the golf outing because the golf outing was held on a working day and employees who did not attend were required to work at their regular duties. The employees were paid a full day's wages whether they worked or attended. The "significant compulsion" determination was based upon the thought that given the chance of being paid to work or being paid to golf, most would choose the latter. Under these circumstances, compensation was allowed.

The question now becomes what can an employer do to better protect itself from paying a Worker's Compensation claim to your always injured employee who happens to tear his rotator cuff playing boche ball at the company picnic. First, if you plan on creating a flier or email notifying employees of the picnic, avoid stating the outing/event is mandatory or attendance is recommended. Secondly, if you choose to schedule the outing/event on a work day, pay all employees whether they choose to attend or stay home. If you cannot reconcile paying an employee to stay home, schedule the outing/event on a weekend or after hours. Lastly, limit attendance to employees and their families. The presence of clients and/or vendors, both actual and prospective, creates the impression you intend to conduct business or expect your employees to do the same.

It should be noted that prior to scheduling an employee outing/event, you should always consult an attorney or your insurance carrier to determine whether you have taken all the necessary steps to lessen the likelihood of paying a Worker's Compensation claim.

Procedural Changes Under the Illinois Human Rights Act

The Illinois Department of Human Rights ("IDHR") is the agency responsible for enforcing state anti-discrimination laws. The statute enforced by the IDHR is the Illinois Human Rights Act ("Act"). With regards to employment, the Act prohibits discrimination against "protected classes," which would include race, color, religion, sex, national origin, ancestry, citizenship status, age (40 and over), marital status, physical or mental handicap, sexual orientation (as of January 1, 2006), or military status.

Effective January 1, 2008, the Act will provide a claimant with additional litigation options. The current version of the Act allows a claimant to file a charge with the IDHR within 180 days of when the alleged civil rights violation occurred. The employer and the claimant will each have the opportunity to file position statements within 60 days of the charge, and the employer must also file a verified response within 60 days of the charge. These provisions have not changed.

The IDHR will then conduct an investigation of the charge, and determine whether there is substantial evidence. Under the new version of the Act, if the IDHR determines there is not substantial evidence, the charge is dismissed and the claimant will then have the opportunity to either have the Human Rights Commission ("Commission") review the dismissal, or commence a civil action in state court within 90 days of the dismissal. After dismissal under the current version of the Act, the claimant only has the opportunity to seek review of dismissal order before the Chief Legal Counsel

of the IDHR, and could appeal that review to the Illinois State Appellate Court.

If the IDHR determines that there is substantial evidence, under the current version of the Act, the IDHR must then initiate conciliation or settlement proceedings, and if the case does not settle, the IDHR files a complaint with the Commission. Under the new version of the Act, there is no mandatory conciliation attempt, and the claimant can immediately file a complaint either with the Commission or commence a civil suit in state court. These options are exclusive, and if the claimant proceeds through the IDHR, then he or she cannot later commence a civil suit.

Under the new version of the Act, if the IDHR does not complete its investigation within 365 days of the filing of the charge, the claimant will also have the option to pursue its claim with the Commission or commence a civil suit in state court.

The biggest impact of these changes is that it allows for a claimant to commence a civil action in state court, where under the current version of the Act, a claimant could only appeal to the State Appellate Court *after* either 1) a denial of an appeal to the Chief Legal Counsel of a dismissed charge after investigation, or 2) the finding of no violation after a hearing by the Commission. The employer will bear the cost of litigating in state court, and this is especially troubling because the claimant can file in state court even if the IDHR dismisses the charge after an investigation. Note that these changes will not affect an employee's rights under the Federal Law and the Equal Employment Opportunity Commission. An employer is always at an advantage when legal counsel is obtained at the outset of these matters, and if a charge is filed against you, it is advisable that you contact an attorney immediately.

Amendment to the Prevailing Wage Act

As of August 21, 2007, the Illinois Prevailing Wage Act has been amended to include maintenance, repair, assembly, or disassembly work performed on equipment whether owned, leased or rented.

Employee Classification Act Goes into Effect January 1, 2008

Effective January 1, 2008, the Employee Classification Act ("Act") will go into effect. The Act provides that an individual performing services for a contractor in construction is deemed to be an employee of the employer. "Construction" is defined broadly and includes, but is not limited to, construction, alteration, repair, rehabilitation, custom fabrication, remodeling, landscaping, painting, decorating and wrecking. *This Act will dramatically change the relationship between companies and their work force.*

An individual who performs services for a contractor will be considered an employee unless it is shown that: (1) the individual has been and will continue to be free from control or direction over the performance of the service for the contractor, both under the individual's contract of service and in fact; (2) the service performed by the individual is outside the usual course of services performed by the contractor; and (3) the individual is engaged in an independently established trade, occupation, profession or business. The individual will also not be considered an employee if the individual is deemed a legitimate sole proprietor or partnership.
Twelve conditions must be met to be legitimately classified as a sole proprietor or partnership: 1) the sole proprietor or partnership is performing the service free from the direction or control over the means and manner of providing the service, subject only

to the right of the contractor for whom the service is provided to specify the desired result; (2) the sole proprietor or partnership is not subject to cancellation or destruction upon severance of the relationship with the contractor; (3) the sole proprietor or partnership has a substantial investment of capital in the sole proprietorship or partnership beyond ordinary tools and equipment and a personal vehicle; (4) the sole proprietor or partnership owns the capital goods and gains the profits and bears the losses of the sole proprietorship or partnership; (5) the sole proprietor or partnership makes its services available to the general public or the business community on a continuing basis; (6) the sole proprietor or partnership includes services rendered on a Federal Income Tax Schedule as an independent business or profession; (7) the sole proprietor or partnership performs services for the contractor under the sole proprietorship's or partnership's name; (8) when the services being provided require a license or permit, the sole proprietor or partnership obtains and pays for the license or permit in the sole proprietorship's or partnership's name; (9) the sole proprietor or partnership furnishes the tools and equipment necessary to provide the service; (10) if necessary, the sole proprietor or partnership hires its own employees without contractor approval, pays the employees without reimbursement from the contractor and reports the employees' income to the Internal Revenue Service; (11) the contractor does not represent the sole proprietorship or partnership as an employee of the contractor to its customers; and (12) the sole proprietor or partnership has the right to perform similar services for others on whatever basis and whenever it chooses.

The Act also provides that subcontractors or lower tiered contractors are subject to all provisions of the Act. It will be a violation of the Act for an employer or entity not to designate an individual as an employee under the Act unless the employer or entity satisfies the provisions of the Act.

Covered employers who mis-classify individuals as independent contractors will be required to treat them as employees, and the individuals will require payroll deductions for taxes, provision of workers' compensation and unemployment insurance coverage, paying overtime, and other human resource responsibilities. The Act also imposes both civil remedies and civil penalties on contractors that violate the Act.

Allowable Reductions under Illinois Minimum Wage Law

Employers can utilize probationary wage reductions of 50 cents less per hour for employees for a period of 90 days and still be in compliance. In addition, employers can pay up to 50 cents less to employees under 18 years of age. However, employers cannot combine these reductions (e.g., employers cannot pay a 17 year old employee $1.00 less than minimum wage during a 90 day probationary period). Note that the probationary reduction cannot be applied to day or temporary laborers as defined under the Day and Temporary Services Act over 18 years of age, or an employee over 18 years of age whose employment is "occasional or irregular" and would not require more than 90 days to complete.

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