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The Site Report

Construction Law Insights

October 31, 2022

Welcome to the 10th issue of 2022 of *The Site Report*.

Our Construction Practice Group has been busy this fall identifying issues that are important to our construction industry clients and colleagues. As you will see in this edition, we are providing insights into the revised AAA Commercial Arbitration Rules and Mediation Procedures, protection of personal data collected by smart technologies on job sites, the significance of cost escalations and resultant disputes on construction projects, the impact of OSHA's Severe Violator Enforcement Program, and the intersection of current labor shortages with increased demands for construction industry jobs because of the Infrastructure Investment and Jobs Act.

We would also like to introduce you to one of our new colleagues in Spilman's Pittsburgh, PA, office: [Shane P. Riley](#), an intellectual property and patent lawyer. His primary areas of practice are corporate law, patent law and intellectual property law. Shane assists clients in the areas of technology and data privacy law. Shane has extensive experience advising on data privacy issues, including compliance with

HIPAA/HITECH, FERPA, GDPR, CCPA, and CPRA, along with other institutional concerns, such as confidentiality, export control, risk management, and conflict of interest. Shane also has extensive experience advising clients on intellectual property ownership, protection, and licensing issues across a broad range of disciplines. He drafts and negotiates various corporate and research related agreements, clinical trial agreements, confidentiality and nondisclosure agreements, material transfer/use agreements, and collaboration agreements. He also guides researchers and inventors through the legal processes and best practices necessary to protect the integrity of their work. Prior to joining Spilman, he served as Assistant Director for Clinical/Corporate Contracts at the University of Pittsburgh. He earned his undergraduate degree in biological sciences and his law degree from the University of Pittsburgh as well.

As always, thank you for reading!

[Stephanie U. Eaton](#) - Co-Chair, [Construction Group](#); Vice Chair of Southern Offices, Litigation Department; Editor, *The Site Report*

and

[Julian E. Neiser](#) - Co-Chair, [Construction Group](#); Vice Chair of Northern Offices, Litigation Department

[New and Revised AAA Rules that May Affect Your Construction Contracts](#)

By [Stephanie U. \(Roberts\) Eaton](#), [Julian E. Neiser](#), [Steven C. Hemric](#) and [Kelsie A. Wiltse](#)

Does your contract contain a dispute resolution section that refers to the American Arbitration Association ("AAA") rules, mediation and/or arbitration proceedings? If so, then you need to be aware of some changes that took effect last month. The AAA revised its Commercial Arbitration Rules and Mediation Procedures to revise some existing rules and to add some new rules.

According to AAA, these changes were intended to standardize the AAA's longstanding practices and improve processes through which disputes are resolved. Click [here](#) to read a brief summary of some of the key changes.

[Collecting Personal Data Improves Safety, but Increases Contractor Liability](#)

"As more contractors adopt safety technology that collects and stores personal data, including CCTV monitoring, GPS location tracking and weight sensors on drivers' seats, maintaining privacy and protecting sensitive information about workers—who are concerned that their personal data could be misused, sold to third-party vendors or stolen by hackers—has become a crucial responsibility."

Why this is important: Worker safety on the jobsite is always a priority on every construction project. To establish the safest possible working environments, construction companies have turned to technology to monitor their workforces and workplace safety. This technology includes a system in which the worker signs in each morning and answers a simple question: Why do you want to be safe today? Answers are generally thoughtful, and sometimes include uploads of pictures of workers' families. The goal is to get the workers to have safety in the forefront of their minds and to remind them about why safety is so

important. Other safety technology includes wearables, sensors, CCTV monitoring, AI tools and extended-reality platforms.

This personal data that construction companies collect from their employees through these technologies in an attempt to promote a safe work environment is valuable and must be protected. Concerns regarding data theft and sale are warranted because the construction industry is a big target of ransomware. That is because the construction industry has traditionally been lax in protecting its data. Additionally, workers also have reason to be concerned about the sale of their personal data that is collected through these new safety technologies because a lot of the vendors that are providing these products are selling the data they are collecting to third party advertisers.

Wearables and other safety devices that collect biometric data also open up construction companies to liability. Workers are concerned about how that data may be used, and if that data can be used against them in the future. States like Illinois have strict laws regarding the collection of biometric data. The Illinois Biometric Information Privacy Act ("BIPA") requires employers who collect employees' biometric data to follow a number of protocols. These protocols include (1) maintaining a written policy about the collection and storage of employee biometric data, (2) providing employees with written notice of the data collection and storage policy, and (3) obtaining informed consent from employees to collect biometric data. Biometric data goes beyond safety-related technology, and extends to fingerprint and retina readers for time systems and building access, as well as face recognition systems.

Safety is paramount on every construction project, but so is data security. If your company is going to use safety technologies to monitor employees, be sure that you adequately secure the data that those technologies generate; that you review your contracts with safety technology vendors to ensure that your employees' data is not being sold; and that you abide by state and federal laws regarding protocols for data security, biometric information collection, and data breach notification and response. If you would like assistance in formulating a data security and data breach plan, or have questions regarding implementing safety technologies on your next project, please contact Spilman's Data Privacy and Cyber Security Practice Group. --- [Alexander L. Turner](#)

Cost Escalations Lead to More Disputes

"Construction lawyers say price increases for labor and materials are causing friction between GCs, subs and owners."

Why this is important: There is no doubt that both labor and material prices have surged in the construction industry this year compared to a year ago. Pressures caused by labor and material price increases are compounded when specified materials are in short (or no) supply. Increases in prices, delays and supply chain issues are important because, in combination, completion of construction projects on time and within the original budget may become impracticable and/or impossible. Whether a contracting party has to absorb the price increases and/or has to accept project delays often depends on the contract terms. Some, but certainly not all, contracts contain price escalation and force majeure clauses that may address price increases under certain circumstances. Some, but certainly not all, contracts address what happens if project completion will be delayed, and if so, who pays for that delay, such as assessment of liquidated damages against the delaying party. With all of these pressures intensifying, the stage is set for a potential increase in construction litigation – whether through an arbitration process or in court. If litigation does occur, it is in the litigating parties' best interests to preserve information and documentation to support their respective positions. However, before your project reaches the litigation tipping point, it is important to communicate – early and often – with the other parties about price increases and material delays or shortages that will impact the project's expected scope, price and duration. Often, even where the contract falls short in addressing the current economic pressures, the parties can reach an agreement about how to handle the situation so that the

entire project is not abandoned or so costly that a party goes bankrupt. To facilitate long-term collaboration among the contracting parties on future projects, it is in every party's best interest to explore whether there is a middle ground that can be reached to address the economic realities without endangering the project or those working hard to complete it. --- [Stephanie U. \(Roberts\) Eaton](#)

[OSHA Set to Tag More Firms as Severe Violators Under New Criteria](#)

"At least one labor union sees the changes as a boost to workers' safety, but an attorney representing employers thinks there are now too many hazards identified by OSHA that could put a company in the program."

Why this is important: Reasonable minds would aptly call an annual average of only two workplace incidents at a steel fabrication plant an overall success. For OSHA however, it warrants placement in its Severe Violator Enforcement Program. This was the case of Kyoei Steel Ltd., a steel fabricator located near El Paso, Texas. In April earlier this year, OSHA placed Kyoei Steel in the Program and proposed \$364,000 in fines after counting 10 incidents at the company's plant, including a burned hand in October 2021 and an amputated finger in January 2022, in the past five years. Kyoei Steel's case however is emblematic of the fact that more companies, including many construction firms, could soon be labeled as severe violators as OSHA has since relaxed its criteria for classifying such employers.

In September of this year, after more than a decade since the Program's initial establishment, OSHA expanded the Program placement criteria to include "high gravity hazards." Previously, employers could be placed into the Program for two or more willful or repeat violations related to a set of standards representing "high emphasis hazards" such as fall hazards, amputation hazards, or excavation/trenching hazards. OSHA however has since eliminated this element. As a result, to fall into the Program now, an employer simply needs to receive two or more "high gravity" violations. In determining the gravity of a violation, OSHA will assess the severity of the injury resultant from the alleged violation, classified by low, medium, or high, and the probability that an injury could occur as a result of the alleged violation, classified by lesser or greater. Accordingly, OSHA will find a "high gravity" violation when there is a high severity hazard, i.e. one that poses a risk of death or permanent disability, and there is a greater probability that the injury will occur.

Considering this change, employers should consider increasing communications between their related facilities about OSHA activity at any of their facilities and proactively work to correct any OSHA-cited condition at all locations after single citation in an effort to reduce the likelihood of a repeat violation. Employers should also be ready to challenge and vigorously defend citations that might otherwise result in being placed in the Program in order to prevent these citations from becoming a Final Order.

--- [Jonathan A. Deasy](#)

[Labor Crunch Could 'Rob the US' of Critical Infrastructure](#)

"The federal Infrastructure Investment and Jobs Act is expected to create hundreds of thousands of new job openings over its roughly five-year duration, but worker shortages in construction and related industries could stymie the effort."

Why this is important: Three recently enacted federal investment acts—the Infrastructure Investment and Jobs Act, the CHIPS Act, and the Inflation Reduction Act—represent a cumulative \$1.952 trillion investment into the U.S. economy over the next few years. A large percentage of this staggering sum (in particular, the Infrastructure Investment and Jobs Act) will be dedicated to the construction industry, and could potentially create hundreds of thousands of jobs to help refresh America's aging infrastructure and

roads. Unfortunately, alarms are being sounded about projected labor shortfalls that could prevent these programs' expected benefits from being realized. While there are a variety of methods to address this issue, the theme is clear: find ways to incentivize workers to join the construction industry, and once they have joined, to retain them. --- [James E. Simon](#)

Featured Attorney Profile



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Matthew Georgitis is a Member in our Winston-Salem, North Carolina office where he is a trial lawyer. In addition to construction law, Matt has extensive experience defending medical professionals and facilities for malpractice claims, experience in complex commercial litigation, insurance defense and trucking litigation. He has tried more than 50 jury trials to a successful jury verdict. He represents clients in commercial litigation covering all aspects of contract and commercial disputes; represents clients in virtually all substantive areas of civil litigation, including partnership disputes, lender liability, foreclosures, estate disputes, personal injury defense and property disputes; advises and represents businesses on employment law matters; and represents employers with regard to workers' compensation matters.

Matt is Vice-Chair of the Construction Defects Specialized Litigation Group for the DRI Construction Law Committee; a member of the Marketing Board of the DRI Construction Law Committee; and a member of the North Carolina Bar Association. He is AV® Preeminent™ Peer-Review Rated by Martindale-Hubbell, is listed in The Best Lawyers in America for Construction Law, and is a Fellow with the Litigation Counsel of America, which is exclusive honor society for trial lawyers who have successfully completed more than 50+ jury trials.

Matt received his B.A. from Appalachian State University and his J.D. from University of Memphis. He is admitted to the North Carolina State Bar.



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