

SHARE:

[Join Our Email List](#)

[View as Webpage](#)



September 26, 2022

Welcome to the ninth issue of 2022 of *The Site Report*.

We are pleased to sponsor the 2022 DRI Annual Meeting October 25–28, in Philadelphia, Pennsylvania. You can join DRI, the largest international membership organization of attorneys defending the interests of business and individuals in civil litigation, to connect with the most influential civil defense attorneys and in-house counsel from across the country, expand your knowledge base with cutting-edge education, engage with a passionate legal community, celebrate past achievements and future goals with friends, and explore historic Philadelphia. You can learn more [here](#). We hope to see you there!

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

[Biden-Harris Administration Announces New Buy Clean Actions to Ensure American Manufacturing Leads in the 21st Century](#)

"The Initiative ensures that federal financing and purchasing power are creating good-paying jobs,

protecting public health, enhancing American competitiveness, and strengthening national security."

Why this is important: The White House has announced a new "Buy Clean" initiative to both strengthen American manufacturing and advance the use of construction products that produce low levels of greenhouse gas emissions. Among other things, the federal government will significantly expand the use of low-carbon and low-emission products, work to increase state involvement with these objectives, increase the tracking and reduction of emissions, and embark on a federal procurement program to purchase "clean" construction materials. With the assistance of the USDA, DOT, EPA, DOD, and other federal agencies, the Biden administration intends the Buy Clean initiative to have significant impacts in the American construction and manufacturing industries. While many parts of this plan sound promising, time will tell if the execution pays off. --- [James E. Simon](#)

North Carolina's Assumed Business Name Law

"Expiration of certificates filed under Article 14; transition provisions."

Why this is important: Assumed business names or "DBAs" are names that a business uses other than its official name. For instance, "General Contracting, Inc." may also have a DBA for "Great School Construction" that it uses for specific types of projects. This can be a great way to differentiate between different types of specialty work and lines of business. DBAs are also used when an individual does business as a sole proprietorship (i.e. when the business owner does not form an LLC or a corporation). This can be risky, since the individual's personal assets might be on the line when disputes come up on a project. In 2017, North Carolina passed the new Assumed Business Name Act, which created a statewide database of assumed names, a major transition from the former county-by-county indexing system. If you use an assumed business name—a "DBA"—and filed that DBA before December 1, 2017, your assumed name may expire on December 1, 2022. Every business using an assumed business name should check the status of its filing to ensure it does not lose its assumed name this December. If your construction business is not incorporated or formed as an LLC, you should consider whether creating a corporate entity to help shield your personal assets from project liabilities may be right for you. --- [Steven C. Hemric](#)

Operate with Care: Navigating Marijuana in the Workplace

"But restrictions on other workers — such as those working at heights or in confined spaces — are more vague."

Why this is important: Recent years have seen major shifts in the legal landscape governing marijuana. Nearly all states have passed varying levels of legalization, for medical and/or recreational use, with prohibitions against discrimination by employers. For construction industry employers, the challenges are particularly difficult because they must balance compliance with conflicting federal and state laws while maintaining a safe work environment and protecting the rights of employees.

The federal stance on marijuana remains clear, it is a Schedule I substance under the federal Controlled Substances Act. The federal government does not recognize any medical uses and considers marijuana as having a high potential for abuse and dependence. In contrast, the list of states allowing medical and recreational use of marijuana continues to expand. While legalization of marijuana generally has not required employers to accommodate its use among their workforce, that may be changing. Some states do have statutes that include protections for medical marijuana users, and some have pre-employment drug testing bans in place or soon going into effect. In addition, many states have workers' compensation laws that require post-accident drug and alcohol testing, leaving it to employers to sort out these conflicts.

Drug Testing Limitations

An employers' jurisdiction will dictate whether they are permitted to test job applicants or employees for drug use and if any action can be taken. For example, Nevada law prohibits employers from denying employment to those who test positive for marijuana, with some exceptions for particular occupations and safety-sensitive roles. In addition, the District of Columbia, New York City, and Philadelphia are among the municipalities that have adopted rules prohibiting employers from requiring prospective employees to take a test to detect marijuana use before they can be hired. Although Atlanta forbids employers from requiring prospective employees to undergo a post-employment offer marijuana test, it is illegal to use marijuana for any reason in Georgia.

Workplace Safety

The Occupational Safety and Health Act's general duty clause requires employers to maintain safe workplaces. OSHA specifically includes impairment by drugs, whether legal or illegal, as a potentially avoidable workplace hazard. Therefore, any employee who is impaired must be prevented from injuring himself, co-workers, or members of the public, especially with a motor vehicle. Employers must identify all safety-sensitive jobs in the workplace, such as those working with moving machine parts or driving company vehicles, and barring medical marijuana users from those jobs, even if they show no signs of impairment and do not use the drug during working hours.

OSHA also requires employers to have a valid safety-related reason for performing a post-accident drug test, such as contributing to a root cause analysis. If drug testing is used to investigate and determine the root cause of an incident, then all employees whose conduct could have contributed to the incident should be tested, not just the employee or employees who reported injuries.

Employer Compliance

Some jobs are specifically regulated by state and federal drug testing rules, but most fall into a gray area that leaves the interpretation of the rules up to employers and the courts. This contributes to a greater risk of exposure for employers through wrongful termination suits or by alternatively allowing an unsafe work environment. Employers should develop a well-defined policy on marijuana use in order to minimize the risk of harm to persons and property, and decrease the likelihood that drug testing and disciplinary action arising from marijuana will open the door to liability for adverse employment decisions.

Considerations for a company drug policy:

- Clearly define the terms "marijuana," "cannabis," or any other product related to the drug.
- Describe the drug testing procedures including penalties for failing a drug test.
- Educate management and employees on clinical issues relating to marijuana along with the potential impact on workplace safety and performance.
- Include information in recruiting and new-hire materials.

Consistency is key in applying employment policies. Failure to do so can subject an employer to liability for discrimination claims that arise from adverse employment actions. If an employee tests positive for marijuana, the recourse available can vary greatly under federal and state laws. Some states require an employer to accommodate an employee's use of medical marijuana and prohibits an adverse employment action for a failed drug test for marijuana use. Employers should be mindful of the potential for conflict between their own drug testing policies and requirements mandated by federal or state laws. In addition, multistate employers must comply with marijuana, drug testing, and disability discrimination laws in each applicable location.

For assistance with the review and update of employment policies related to marijuana in the workplace, contact a member of Spilman Thomas & Battle's labor and employment practice group. --- [Heather M. Garrison](#)

Construction Costs Projected to See Largest Increase in Years Due to Supply and Demand Pressures

"According to CBRE's new 2022 U.S. Construction Cost Trends report, nationwide industry price levels have posted the largest increase in years, driven by labor shortages, inflation, supply chain disruptions, the ongoing impact of the pandemic, and the war in Ukraine."

Why this is important: Specifically, CBRE's report forecasts a 14.1 percent year-over-year increase in construction costs by the end of 2022, which is the largest increase since CBRE began tracking cost projections since 2007. This level of cost increase is significant within the construction industry because, for projects that are ongoing in 2022 and for which equipment, labor and materials were procured during 2022, cost increases of this magnitude can result in breach of contract, delay and cost overrun claims, as well as lien filings and even contractors walking off the job. If the contracting parties have not already discussed with the owner the impact of these cost increases on the overall project cost and schedule, so that change orders could be issued to address the impacts of the cost increases and supply chain issues, then those discussions need to occur before the completion of the project for the contractors, subcontractors, and suppliers to avoid absorbing impacts that may exceed their ability to operate their respective businesses. The price increases of 2022 are likely to continue to impact projects next year, especially for materials procured in 2022 for 2023 construction, despite the more positive CBRE prediction that cost increases will decline back to the historical range of 4.3 percent in 2023 and 2.9 percent for 2024. While demand for new construction projects remains strong, it remains crucial for design professionals, general contractors, subcontractors and suppliers to communicate effectively with

project owners regarding realistic price impacts, supply delays and shortfalls, potential for incorporation of available and/or less expensive alternative building products and timing project completion to take advantage of the anticipated future pricing decreases. If your company is being adversely affected by existing price increases within the construction industry, our Construction Practice Group is happy to review your contract and identify ways in which the impacts may potentially be mitigated. --- [Stephanie U. \(Roberts\) Eaton](#)

[How Developers and Lenders Can Mitigate Legal Risk in a Downturn Economy](#)

"Statistically, there are more construction-related litigation matters than any other loan litigation claims in any given year, and during a recession, these numbers increase even more."

Why this is important: Recent downturns in the market have signaled that a recession is either coming or already here. As anyone doing business during the last recession knows, these market changes can trigger additional legal risks that are different from the issues construction businesses encounter during market upswings. Planning ahead to mitigate the risks is important, and this article gives 10 great tips/action items for construction businesses to consider taking as we navigate the changing market. Most important are revisiting any form documents you use and firming up policies and practices on jobsite communication and documentation. Getting a fresh set of eyes on your contract forms, payment-related forms (e.g. pay app forms and lien waiver forms), and daily report forms is an excellent first step to ensure your forms are up-to-date with the most recent changes in the law and are consistent between financing, owner contracting, and subcontracting documents. Ancillary to this review is evaluating which contract provisions you need to negotiate on new projects and seeking those contract modifications. Re-establishing effective jobsite communication and reinforcing record keeping and written communication policies will also help your projects run smoothly and position your business better in the event of a dispute. Engaging the assistance of an attorney that specializes in construction law can help make this process easier and more effective, and if you do not have a go-to construction attorney, building a relationship with one can help you navigate changing markets and the disputes that could come up on your projects. --- [Steven C. Hemric](#)

[Construction has a \\$3 Trillion Waste Problem. Can Drones — and Digital Twin Tech — Solve It?](#)

"Rather, they'll fly the entire construction site continuously and autonomously, mapping 3D space and uploading the visual data to BIM platforms — building information modeling systems — to ensure that everything stays on track."

Why this is important: Cutting down waste on construction job sites preserves resources and is more cost effective. Much of the waste associated with large construction projects is the result of bad information. In Japan, Exyn Technologies is trying a pilot project to cut down on construction waste by providing real-time information regarding the status of the project. Typically on large construction projects, the general contractor, engineers, and architects walk through the project to personally map the progress of the project, and schedule when certain trades start their portion of the project. This is very time consuming and not possible to perform in real-time. Exyn has a possible solution to this. Exyn plans to use aerial drones to continuously 3D map a construction site, and then upload that visual data to Building Information Modeling ("BIM") platforms. However, Exyn has considerable challenges to overcome. Construction sites are an ever-changing environment where the drones need to be able to navigate changing and moving obstacles. These drones will likely need to use various sensors and possibly AI to be able to operate as intended. But if Exyn is able to overcome these challenges, then it will be able to save construction companies, engineers, and architects a tremendous amount of hours managing a project.

While this would be an incredible advancement in the construction industry, there are legal considerations that need to be contemplated before this technology can be deployed in the U.S. First, since these are aerial drones, the operation of these drones must first comply with Federal Aviation Administration ("FAA") regulations that govern small unmanned aircraft. Contractors or owners will need to obtain waivers from the FAA before they are able to operate these drones on their job site, and this process can take months. The drones must first be registered with the FAA and be operated by an individual who has been issued a remote pilot certificate by the FAA. These regulations are continuously

evolving as technology continues to advance, so it is unclear at this time if the FAA would allow autonomous drones to operate on an active worksite. The altitude of the drones is also limited to 40 feet, unless it is within 400 feet of a structure, so the drones should be able to be operated close to structures that are being built higher than 40 feet. The biggest complication for the use of drones on a worksite is that the FAA will not allow the drones to be flown over people who are working on the jobsite unless the FAA grants a waiver. Additionally, the FAA will only permit drone flights during the day. The drone also has to stay in the sight of its controller, and cannot enter restricted airspace.

In addition to FAA regulations, there are additional legal considerations that need to be taken into account before drones can be flown over an active job site. State and local laws need to also be considered before deciding to fly drones over the project. For example, in California, anti-paparazzi laws create invasion of privacy liability if the drone is knowingly flown without permission into another property's airspace in order to capture images. Similar privacy concerns are present related to construction workers and visitors to the jobsite. This is because the movement of the drones to capture images may support an argument that they are infringing on the workers' and visitors' reasonable expectation of privacy. Therefore, before a drone is used to surveil a jobsite, notice must be given to, and consent received from, the workers and visitors on site. Finally, the use of drones has its risks, including possible injury to those working or visiting the project. If there is an accident on-site involving a drone, and it causes \$500 or more in damage, then an accident report must be filed with the FAA.

Before deploying aerial drones on your next project, the American Bar Association has outlined a few suggestions for inclusion in contracts, policies, and procedures related to drone operations on jobsites:

- Review national, state and local laws and regulations applicable to the job site;
- Create/update site visit release forms, employee materials and job site signage to facilitate notice and consent regarding drone flights and imagery;
- Develop procedures for drone accident reporting and response;
- Incorporate provisions for obtaining and preserving drone imagery, data and other records into litigation hold memos, document collection checklists, and discovery requests; and
- Develop contract provisions or a drone rider allocating costs of using drone technology and responsibility for complying with applicable laws. Such provisions might address:
 - Who may use drones at the site and under what conditions?
 - Qualifications and vetting for pilots and drone companies and who contracts with them and coordinates their services.
 - Who oversees drone planning and operations, provides notice to and collects releases from neighbors, workers and site visitors as needed?
 - Allocation of costs for drone operations, software and data storage.
 - Indemnities and limitations of liability.
 - Insurance requirements.
 - Safety and communication plans and training requirements.
 - Cybersecurity measures.
 - Intellectual Property rights.
 - Who will process, distribute and store the data, who may access it, by what means, and for what purposes may it be used?
 - Who will keep flight logs and records, for how long, and who can access them?
 - Post-project retention and archiving requirements for imagery, data and records.

While drones can be a tremendous time and cost saver, their implementation does add complications to the management of a construction project. Spilman's construction practice group is available to assist you if you want to utilize drones, or if the general contractor or owner wants to utilize drones, on your next project.--- [Alexander L. Turner](#)

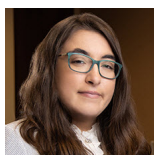
[Montana Becomes First U.S. State to Approve 3D Printing in Construction](#)

"Codes allow 3D printed walls as replacement for concrete masonry units or standard cored concrete block."

Why this is important: Montana's approval of building codes to allow 3D printing to replace CMU and block walls is important because it legitimizes the use of 3D printing, sets standards for manufacturers to follow, and establishes codes that other state regulators can adopt to further expand the use of 3D printing nationally. Why does this matter? Anyone who regularly reads *The Site Report* may recall that I have written a lot about the transformative nature of 3D printing for the construction industry because of its introduction into the market during current conditions facing the construction industry. What

conditions am I referencing? According to a 2020 housing report published by Harvard University’s Joint Center for Housing Studies, the supply of homes in 2021 was the lowest it has been since 1982. The housing shortage is further hampered by the overlapping shortage of labor in the construction industry. Moreover, the pandemic and related supply chain issues, coupled with inflation and interest rate hikes, layer in affordability issues for those seeking to purchase and even rent homes. Thus, the benefits of 3D printing for the construction industry become apparent: reduced cost of construction, reduced time for construction, reduced waste, and reduced number of laborers required to construct a building. Construction of homes using 3D printing has the potential to provide low cost housing to first-time buyers, homeless populations, and to those displaced following natural disasters. The use of the 3D technology has expanded to the extent that the global market for construction using 3D printing methods is expected to reach \$114.4 million in 2023, according to 3Dnatives. As the use of 3D printing in construction expands, we expect more states to adopt codes regulating the materials and processes in an effort to set standards that will likely exceed traditional construction methods, and the acceptance of 3D printing will become more widespread. --- [Stephanie U. \(Roberts\) Eaton](#)

Featured Attorney Profile



[Alyssa M. Zottola](#)
Associate
Pittsburgh, PA
412.325.1118
azottola@spilmanlaw.com

Alyssa Zottola is an Associate in our Pittsburgh, Pennsylvania office. Her primary area of practice is litigation, with a specific interest in construction law. Alyssa assists in various types of litigation matters; conducts research and drafts memoranda, pleadings and discovery; and assists in depositions and trial preparation. She received her B.A. in European History and Italian Studies, *magna cum laude*, from the University of Pittsburgh and her J.D. from the University of Pittsburgh School of Law. She is admitted to the Pennsylvania Bar.

[Share This Email](#) [Share This Email](#) [Share This Email](#)

This is an attorney advertisement. Your receipt and/or use of this material does not constitute or create an attorney-client relationship between you and Spilman Thomas & Battle, PLLC or any attorney associated with the firm. This e-mail publication is distributed with the understanding that the author, publisher and distributor are not rendering legal or other professional advice on specific facts or matters and, accordingly, assume no liability whatsoever in connection with its use.

Responsible Attorney: Michael J. Basile, 800-967-8251

Spilman Thomas & Battle | 300 Kanawha Blvd., E., Charleston, WV 25301

[Unsubscribe tfridley@spilmanlaw.com](mailto:tfridley@spilmanlaw.com)

[Update Profile](#) | [Constant Contact Data Notice](#)

Sent by news@spilmanlaw.com powered by



Try email marketing for free today!