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November 21, 2022

Welcome to the 11th issue of 2022 of *The Site Report*.

In this edition, our team weighs in on a wide variety of issues relevant to the construction industry, ranging from OSHA's increased focus on elevated work safety and anti-bias clauses in construction contracts to protecting construction projects with adequate insurance. We again bring perspectives the greater Appalachian region, as well as commentary on national and international issues. Feel free to [contact us](#) to share your views on these and other issues important to you.

In addition we are extremely pleased to share that Spilman was named to the 2023 "Best Law Firm by *U.S. News-Best Lawyers* in 61 areas of law throughout our firm's footprint. The rankings are based on a rigorous assessment process that involves the collection of client and lawyer evaluations, peer reviews from leading attorneys, and review of additional information provided by law firms. You can learn more [here](#).

We wish you and yours a wonderful Thanksgiving holiday. We hope it is filled with thanks and gratitude.

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

[Emissions from Buildings and Construction Hit an All Time High](#)

"In 2021, investments in building energy efficiency increased by 16 percent to \$US237 billion, but energy use in floor space outpaced efficiency efforts."

Why this is important: As of 2021, the construction industry is responsible for more than 34 percent of energy demand and approximately 37 percent of energy and process-related carbon dioxide emissions according to the 2022 Global Status Report for Buildings and Construction. This is significant because the construction industry will be forced to alter how construction projects are completed to meet global climate change goals. Moreover, in the United States, the push by the federal government, through [Executive Order 14057 \(the "Federal Sustainability Plan"\)](#) and some state governments to reach net zero carbon emissions by 2050 does not overlook the impacts the construction industry has on climate change. As a result, the industry as a whole, particularly on public projects, must implement more widespread use of electric vehicles and equipment, use technologies like 3D printing to reduce construction time and material usage, and incorporate more "green" and recycled materials into their construction projects. These changes will require collaboration among the contractor and subcontractors and suppliers, as well as more focused planning and management of construction projects that can require upstream reporting to document carbon reduction measures. --- [Stephanie U. \(Roberts\) Eaton](#)

[6 of the Biggest OSHA Fines of Q3 2022](#)

"An Ohio roofing contractor's alleged repeated violation of fall protection standards led to a fine of \$1 million."

Why this is important: This quarterly report is a great window into the issues drawing OSHA's attention and is one we regularly track in the Spilman Construction Group. Q3's six biggest fines all related to fall protection and elevated work safety and continue to highlight OSHA's focus on elevated work safety.

work safety and the importance of staying vigilant when it comes to jobsite safety in these areas. If related injuries have been and remain high profile cases in the industry both because of the severity of the injuries and because of OSHA's crackdown on fall hazards, one of the four largest causes of fat accidents in the industry. The severity of these fines, all exceeding \$200,000 and one being over a million dollars, also drives home the importance of proper OSHA compliance, appropriate protection of employees, and properly responding to OSHA complaints, inspections, and notices. Having representation available during investigation of OSHA complaints, on-site during a complaint-related inspection, and assisting with responses to notices of violations can help mitigate the impact on your business and ensure you preserve all of your rights to contest complaints and notices of violations. --- [Steven C. Hemric](#)

[NC Law Makes Mandating Affordable Housing Hard – Did Asheville Find a Solution?](#)

"And while the city didn't call what happened next 'inclusionary zoning,' the game plan did achieve something similar."

Why this is important: Dealing with local zoning boards, county commissions and city councils can be a tricky but necessary step when developing a new project. The zoning laws, incentive programs and requirements can change from county to county and city to city. This article highlights one such example of a unique incentive program in the city of Asheville, a points-based system for hotel developers that incentivizes developers to: 1) pitch a hotel project that revamps and reuses a historic building; 2) contribute to the city's affordable housing or reparations fund; 3) agree to pay workers a higher, livable wage; 4) contract with women or minority-owned businesses. Being able to properly navigate the local zoning and incentive programs of a given municipality can be a critical step in a project's development, so you should contact Spilman Thomas and Battle's Construction Group to help you with the legal implications of such programs for your project. --- [Matthew W. Georgitis](#)

[Pennsylvania's Contractor Registration Law May Not Provide Protection Consumers Need](#)

"Pennsylvania's Home Improvement Consumer Protection Act went into effect July 1, 2009."

Why this is important: In theory, Pennsylvania's contractor registration system under the Home Improvement Consumer Protection Act ("HICPA") is designed to protect consumers and allow them to confidently select a contractor. In reality, HICPA needs more work to be effective. Under HICPA, all home improvement contractors are required to register with the Attorney General's Office ("AG") and the registration process requires contractors to report any criminal offenses related to a home improvement transaction, fraud, theft, a crime of deception or a crime involving fraudulent business practices. Contractors are also required to provide a statement as to whether the contractor has ever filed a petition in bankruptcy or received a final civil judgment related to a home improvement transaction. Consumers are provided "public access" to this information by calling a toll-free telephone number, as well as looking at the AG's website. Be that as it may, the information available to the public is limited.

Specifically, the information on the AG's website is limited to the contractor's name, phone number, address, business name, and the expiration date of the registration. Similarly, even if a consumer calls the toll-free number and receives a contractor's business report, the information regarding a contractor's crimes, bankruptcy, and civil judgments is not necessarily accurate and the AG lacks funding to verify. Consumers are therefore left to undertake their own research to ensure confidence in their contractor selection. As such, HICPA fails to provide consumers adequate protections by placing the burden of diligence on the consumer, and exposes consumers to the risk of expensive contractor dispute litigation. -- [Victoria L. Creta](#)

6 Things Every Contractor Should Know about Insurance

"The hazardous construction materials, sharp objects, steep drops and heavy equipment make it difficult for contractors to work hassle-free."

Why this is important: Insurance in construction is crucial, and evidence of appropriate policies and limits is required on almost every project. Knowing the types and limits of coverage you have, what policies exclude from coverage, and your notice obligations when making an insurance claim are critical. Not much is worse than having an insurance claim denied simply for failure to comply with the policy notice requirements, and construction businesses should be sure to have good reporting mechanisms in place to ensure no claims that could be covered by insurance fall through the cracks. Ensuring your business has the right types of insurance is also critical. Creating a coverage gap by purchasing the appropriate coverages for your type of work can result in devastating out-of-pocket costs when a claim comes up. A good insurance agent is a construction business's number one resource in the front, but speaking with an experienced construction attorney that has litigated insurance coverage disputes can also help you identify areas where your coverage or internal claims reporting procedures may be lacking. --- [Steven C. Hemric](#)

How to Include Anti-Bias Clauses in Construction Contracts

"With the recurrence of racist and sexist incidents on jobsites receiving increased attention in the construction industry, contractors have developed playbooks for responding to these events."

Why this is important: General contractors are now including anti-bias clauses and zero-tolerance policy language within agreements with subcontractors in an effort to promote diversity and accountability. The language used within these provisions requires the subcontractor to agree to be bound by the policy, with suspected violations constituting a failure to perform under the agreement. General contractors are increasingly adopting these policy provisions as state and federal departments require a percentage of diversity participation on government contracts. It is important that once implemented, anti-bias or zero-tolerance policy must be followed and enforced to avoid potential liability for a subcontractor's breach of the policy. --- [Kelsie A. Wiltse](#)

Pandemic-Era Construction Pricing Challenges 'Far from Over'

"Cost increases and volatility continue in materials, labor, and technology."

Why this is important: The pandemic has left the global economy with more issues than devastating medical news and challenges. Supply chain issues and forced labor stoppages, layoffs, and reduced production left many industries, including the construction industry, facing increased prices for materials and when materials became available again, and a shortfall in the labor force. This situation is important to address at the earliest stages of contract negotiation, and throughout the construction process, so that each party involved in the project is able to meet contractual, workmanship, and warranty obligations. Contractors need to consider upfront whether labor shortages at the prime contractor level down to the lowest tier subcontractors may impact the contract time and durations if so, negotiate for more time to complete the project and/or for change orders to allow contract time to be adjusted if certain factors exist. Contractors should also consider negotiating with owners for price escalation clauses that can apply to increase or decrease prices, if specific circumstances arise. In addition to daily jobsite meetings, contractors and owners should schedule regular meetings or call to address short-term or unexpected labor shortages and back-ordered or delayed delivery of materials. The parties can discuss how to handle the situation before the contract is terminated for reasons that may be outside the contractor's control. At the end of the day, it is wise not to over-promise and under-deliver, which very often leads to claims and litigation. --- [Stephanie U. \(Roberts\) Eaton](#)

Late Payments Cost Construction Industry \$208B in 2022

"The figure is a 53% increase from 2021's total of \$136 billion."

Why this is important: Late payments have always been a major issue that costs the industry hundreds of millions of money each year, but the past year has been exceptionally hard on the industry from a payment perspective. The industry costs from late payments are up 53 percent from 2021, in part due to rampant inflation and interest rate hikes. Floating payments for long periods of time create financial hardships that can lead to work stoppages and project delays that only exacerbate the problem by leading to claims and disputes. The survey in this article showed that some contractors are boosting bid prices to help absorb the costs of payment delays, but even with increased bids, the cash flow created by delayed payment can cripple a small business. Setting up projects for "collectability" by properly documenting your projects, getting payment applications submitted on time, following up on slow payments, and ensuring your contracts include remedies for delayed payments from upstream parties are crucial to help mitigate the potential impacts of delayed payments. These are all particularly important in states where "pay-when-paid" and "pay-if-paid" clauses in contracts are unenforceable. Your business could be on the hook to pay subcontractors and suppliers, even if you do not receive payment from upstream. --- [Steven C. Hemric](#)

Featured Attorney Profile

[Clifford F. Kinney, Jr.](#)

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Cliff Kinney is a Member in our Charleston office. Cliff defends and pursues construction claims; litigates cases of employer deliberate intent, wrongful death and catastrophic injury; and represents clients in insurance coverage dispute including declaratory judgment actions for determination of coverage and claim against payment and performance bonds. He is a trained neutral for American Arbitration Association. Cliff has served as an Arbitrator in numerous construction arbitrations throughout West Virginia.

Cliff is Distinguished™ Peer-Review rated by Martindale-Hubbell and was nominated by his peers for inclusion in The Best Lawyers in America in the areas of Litigation – Construction and Mass Tort Litigation/Class Actions – Defendants.

Cliff is a member of a variety of organizations including Co-Chair of the Products Liability Litigation Committee, American Bar Association; Past Chair of the Membership Diversity & Inclusion Subcommittee and Chemical Products Subcommittee of the American Bar Association, Products Liability Committee former member of the American Bar Association Forum on the Construction Industry; and member West Virginia Bar Association and Virginia Bar Association.

He received his B.A., with honors, from American University and his J.D. from the University of Virginia School of Law. He is admitted to the United States Supreme Court, United States Court of Appeals Fourth Circuit, Virginia State Bar, West Virginia State Bar and the United States District Courts for the Northern and Southern Districts of West Virginia.



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