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Construction Industry Newsletter for February 2019

Five Construction Litigation Trends for 2019



Firms could see more claims and higher legal costs this year, says BUILDER blogger Jeffrey Kozek

Proactive planning and management is key when it comes to avoiding legal issues in construction projects. The start of a new year is a good time to reflect on challenges and weaknesses in order to prevent litigation. With that in mind, here are the top five construction litigation trends I see for 2019.

1. Cost of Litigation will Continue to Increase: In today's litigious environment, it is not uncommon for parties to submit construction claims and/or file lawsuits before performing simple due diligence to ensure that good money is not being wasted on needless litigation. While it was more common in the past for a legal action to be initiated only when large dollar value claims were in dispute that is no longer the case. Alternative forms of dispute resolution provide the appearance that disputes of all values can easily be adjudicated in a timely and efficient manner. The reality is that the time it takes to resolve construction disputes will always take more time than initially envisioned, and increases in relation to the complexity of the construction issues involved. The general rule to follow is only to proceed to litigation after exhausting all other alternatives. This should include exchanging a factual and complete analysis of the issues in dispute to allow for a more meaningful and informed discussion of areas of disagreement. Getting all sides on the same page and working out as seamlessly as possible the low-hanging fruit will permit all to focus on the larger and more contested issues.

2. Tighter Labor Force Could Lead to More Claims: The pace of construction is picking up, but there remains a shortage of experienced workers. According to a national survey from the Association of General Contractors, 80 percent of contractors report difficulty finding qualified craft workers to hire. As a result, firms are making do with either less skilled laborers or smaller teams. This will likely lead to an influx in construction defect and inefficiency claims as construction firms continue to grapple with the influx of inexperienced workers. An issue often in contention is whether there are a sufficient number of workers on site to perform the work as planned. Whether or not this is a valid argument depends on the particular conditions and issues on a project, but not having experienced workers only contributes to the problem.

3. Trend Toward More Mediation Over Litigation: As we've seen over the past several years, fewer cases actually reach the litigation/arbitration stage where a third, independent party renders a final decision. While trials take time, expense and the commitment of resources, especially that of senior officials, and fact witnesses who may be prevented from moving on to

their next project assignment, mediation preserves the right for the party to decide its fate, and not someone else. Resolving disputes quickly allows everyone to get on with the next project and continue to perform their primary function - *construct*.

4. Fewer Workers' Comp Claims: The good news is that construction sites are getting safer, which means 2019 is predicted to bring fewer workers' compensation claims in the industry.

Data

from the Bureau of Labor Statistics shows a steady decline in the number of employer-reported workplace injuries and illnesses. Technological advancements will make it easier to predict and identify hazards on the job.

5. More Disputes Over Overtime Pay: More construction companies will be faced with wage and hour lawsuits related to alleged violations of the Federal Labor Standards Act (FLSA). However, due to ever-changing exemptions of who qualifies for overtime pay, this will not necessarily lead to more payouts.

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