

Construction Conference Insights: How to Lower Legal Risk

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Three Ward and Smith attorneys provided detailed advice on how firms in the construction industry can lower their legal risk in the opening panel at the 2019 Ward and Smith Construction Conference.

Attorneys Devon Williams, Jason Strickland, and Brad Evans opened up this year's conference, Framing Your Business for the Future, with legal updates focused on compensation, contracts, and government investigations.

Piece-rate Best Practices

Williams, a Ward and Smith labor and employment attorney and litigator, opened the session with a discussion of piece-rate compensation, a common construction industry practice.

Piece-rate compensation pays employees or contractors based on the number of units or pieces they complete. For example, Williams said, a window installer might be paid \$10 per window installed, rather than an hourly wage.

For employers, piece-rate can motivate workers to be more productive. And for workers, piece-rate may allow them to earn more if they work efficiently. But, Devon said, piece-rate compensation doesn't allow companies to avoid minimum wage and overtime rules.

"The Fair Labor Standards Act still applies," she said. "You still need to keep track of minimum wage obligations based on the hours worked [and] overtime compensation."

Workers who put in more than 40 hours a week are eligible for overtime. Those calculations are a bit more complicated. For example, if a window installer works 45 hours putting in 45 windows at \$10 each and earns \$450, that person's pay rate is \$450 divided by 45, or \$10 per hour.

To calculate the overtime owed, take the number of overtime hours (5) and multiply it by one-half the effective hourly rate of \$10. In this case, the window installer would be eligible for an extra \$25.

An alternative way to calculate overtime is to pay the installer one and a half times their piece rate during the overtime hours; in this case, though, the employer and employee have to agree to that before the work is done.

In addition to tracking units of work completed, companies must also record hours worked each week. If employees don't make enough on the piece rate to earn minimum wage — even if that's because they're slow or inefficient — employers still must pay them at least minimum wage by adding to their paycheck.

“The keys are going to be accurate record keeping,” Williams said. “Without accurate record keeping, when the Department of Labor comes knocking because the employee has complained they have an unpaid wage, you're not going to be able to demonstrate that you complied with your obligations under the Fair Labor Standards Act.”

5 Ways to Lower Your contract risks

Jason Strickland, a construction litigation attorney at Ward and Smith, talked about ways project owners, general contractors and subcontractors can lower the risk associated with contracts. He listed five areas to focus on.

1. “Liens are not the most exciting thing in construction,” Strickland said, “but they are important.” For owners, it's important to designate a lien agent at the start of a project. General contractors and subcontractors should provide their notices to the lien agent from the beginning, he said.
2. **Good contracts.** Good contracts are clear, Strickland said. Most important, he said, are the price for the work, how long the work should take place and the scope of the work. But other details, such as insurance, indemnity and change orders, can help keep disputes civil if a project goes bad.
3. **Proper documentation.** A solid contract isn't worth much if you're not “papering it” — filing copies of correspondence and other documents that show you've followed the contract terms. “Those are the kinds of things that need to be in the record before the dispute,” Strickland said.
4. **Money management.** A strong balance sheet supports your business during times when a dispute cuts into cash flow. “When you get into a dispute, wherever you are in the contracting chain, having a strong balance sheet — having cash — gives you flexibility,” he said. “It also gives you the ability to weather the storm.”
5. **Your attorney.** Finally, Strickland noted that engaging an attorney early in a dispute can save time and money. “Bringing your attorney in sooner is going to allow your attorney to help you find the best course to take early on when you have more flexibility and have more options,” he said. “Over the long term, on multiple projects, it is going to save you time and energy.”

Handling government investigations

Brad Evans, a commercial litigation attorney and Ward and Smith's Co-Managing Director, gave advice about handling a situation no company wants to face: Government investigators at the door.

Given the potential of state or federal agencies reviewing government-funded projects or looking into antitrust concerns, every company should know what to do.

Know who to call. If a government investigator showed up in your office, would your receptionist know who to call? Knowing who to call — whether it's you, your company's attorney, or both — will help your company and your employees.

Have your documents organized and follow a document retention policy. Investigators often

seek documents first. Having those well organized, so investigators can get what they're entitled to without having to rifle through other papers, helps limit how much time they'll spend in your office and reduces the chances of them finding something they're not entitled to.

Following a document retention policy ensures that older documents don't cause unnecessary problems.

Understand what subpoenas and search warrants really mean. Investigators may appear with subpoenas or search warrants; each works differently.

Subpoenas usually ask for documents, but don't require them to be produced right away. Search warrants, on the other hand, give investigators the power to search and seize items within the scope of the warrant.

"The good news is when thinking about government investigations, you can really just invest a relatively small amount of time and be as well prepared as you can be for that situation," he said.

"You can't obstruct the execution of a search warrant in any way," Evans noted. "You're also not obligated to assist them. It is their job to go in and figure out what they have to do."

In those situations, Evans said the best thing to do is to send employees home for the day. While you and employees typically aren't obligated to speak to investigators, employees also can't be prevented from speaking to the government. And talking to an investigator, even with good intentions, can create more problems than it solves.

"You need to exercise appropriate judgment, usually in consultation with your counsel, on whether or not you talk to the agents," he said. "Understand that it's very risky. You might give incomplete information without even intending to."

And that, Evans said, can sink a future legal defense strategy.

Here's how you should invest that time.

This is one of a series of articles summarizing key takeaways from Ward and Smith's 2019 Construction Conference. See additional article:

- Industry Expert Lays Out Prospects for Growth
- Industry Leaders Lay the Foundation for Success
- Minimizing Liability When Accidents Happen

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