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David R. Johnson

Weed In The Workplace: Considerations For Crafting Employee Drug Use Policies In The Age Of Legalized Marijuana

by David R. Johnson and Jared M. Sechrist, Partners

Jared M Sechrist

In 1996, the first registered medical marijuana dispensary in America opened in Fairfax, California. Now, just twenty-one years later, more than half of the states have legalized at least some use of marijuana. Attitudes, policies and laws concerning marijuana use continue to change rapidly across America. In fact, just last November, California, Massachusetts and Nevada each passed laws legalizing recreational marijuana use, joining four other states and Washington, D.C. in doing so. As is often the case, policies and procedures have struggled to keep pace with the new laws. Further complicating matters, cannabis use for any reason - medicinal or recreational - remains illegal pursuant to federal law. The interaction of the unchanged federal prohibition, disparate treatment by the states, and evolving social mores concerning marijuana is uncertain. It is, therefore, prudent for companies to reassess their existing marijuana use policies for work on federal, state and private jobs to consider and reflect on that interaction.

Continued Federal Prohibition

Despite the shift toward legalization in many states, cannabis continues to be classified as an illegal Schedule 1 drug under the Controlled Substances Act of 1970. This is the same designation given to hard drugs, such as heroin, cocaine or LSD. Because of this, workers on federal projects are generally subject to rigorous drug use policies that include zero tolerance testing requirements for all illegal drugs, including marijuana. For instance, the Department of Transportation responded to the recent passage of recreational marijuana laws by reiterating that it forbids any employee engaged in "safety-sensitive" positions (e.g. pilots, school bus drivers, truck drivers, train engineers, subway operators, aircraft maintenance personnel, transit fire-armed security personnel, ship captains, and pipeline emergency response personnel, etc.) from using any Schedule 1 drug, including pot. Additionally, the Drug-Free Workplace Act of 1988 requires some federal contractors to represent that they will provide a drug-free workplace and to identify and implement steps to prevent drugs (including marijuana) in the workplace.

Accordingly, it remains advisable for employers on federal projects to articulate and communicate drug use policies that prohibit the use of marijuana for any reason - medical or recreation - regardless of the legal status of marijuana use in the state.

State Laws Vary

The legality of marijuana use varies among the states, ranging from a complete prohibition in twenty-four states, to twenty-six states that authorize medicinal use, and seven states that permit medicinal or recreational use. Further, in evaluating whether a drug use policy is in compliance with state law, there are two types of laws that legalize cannabis use that must be considered: (1) those that decriminalize marijuana use (that is, provide protection from state law criminal prosecution) and accommodate its use (provide employee protections); and (2) those that just decriminalize its use. Yet there are limits to these simple generalizations. For instance, even in many of those states in which marijuana is legalized, laws often permit employers to maintain their strict "no tolerance" policies against their employees' use of marijuana, including medical marijuana, and state owners may similarly persist in their prohibition against marijuana use on some or all projects.

Because of their recent development and the variance between states, it is uncertain how marijuana legalization laws will be applied. For example, Colorado is on the forefront

of marijuana legalization, pulling in nearly $270 million in annual tax revenue. Yet even Colorado's law includes contradictions. Recently, the Colorado Supreme Court refused to apply state law, relying instead on the federal prohibition of marijuana use in determining an employer's right to maintain zero tolerance policies. In *Coats v. Dish Network, LLC*, 350 P.3d 849 (2015), the court held that a private employer had the right to fire an employee who tested positive for marijuana even though the employee was approved for medical use under state law and was not impaired at work. It is unclear whether the *Coats* decision would similarly permit state actors to terminate legal marijuana users.

Due to the wide variety of marijuana laws and regulations among the states, a one-size-fits all marijuana use policy for work on state projects is probably impractical. Rather, companies should monitor the changes and be prepared to implement and communicate marijuana use policies that comply with the law, and do not jeopardize the project or owner relationship. This can be a delicate balance. For instance, of all twenty-six states that have approved medical marijuana use, only a few, such as Arizona, Connecticut, Delaware, Illinois, Maine, Michigan and Rhode Island, have adopted laws protecting employees who legally use medical marijuana from workplace discipline for testing positive. Considering the changing political landscape and the incongruous relationship between state and federal marijuana laws, court intervention is almost certain, and will either permit movement toward federal enforcement and increased restriction or confirm the states' authority to administer their own marijuana laws.

Balancing Employees' Rights And Contractors' Needs

The rapid growth of the marijuana industry has brought commercial opportunities to contractors related to the construction and renovation of facilities for the production, distribution and sale of marijuana, but it also has created legal uncertainties for them. For example, as is the case with public projects, it is important for a contractor to carefully evaluate the laws of the jurisdiction in which it is operating in order to determine what types of protections, if any, the jurisdiction's marijuana laws afford its employees. In this regard, the use of medical marijuana raises potential privacy issues. While it may be useful from the contractor's perspective to obtain detailed medical evaluations regarding its employees (including such documentation as the state registration for medical marijuana, accommodation needs, and similar information), it may be illegal under state and/or federal law to require that it be provided.

Similarly, denying access to medical marijuana in a jurisdiction in which it is permitted by state law might be interfering with an employee's treatment. Federal law, such as the Americans with Disabilities Act, cannot be relied upon by affected employees, but state laws and protections are evolving. Considering the recent political shift in Washington, D.C., federal policies concerning the enforcement of existing laws is uncertain.

More relaxed marijuana laws may help contractors attract and maintain key or qualified workers. However, construction projects are, by their nature, full of hazards. The use of marijuana on a project site is both undisputedly dangerous and increases the risk of poor and inefficient work. Accordingly, even taking into account state laws that permit medical marijuana, a zero tolerance policy that affords the employer broad discretion in fashioning the responsive discipline may be, at least for now, the best policy for a contractor to have in response to legalized marijuana.

Conclusion

Legalized marijuana use creates a difficult challenge for construction companies. Worker and project safety must remain paramount considerations and nothing in the evolving landscape of legalized marijuana should alter a prohibition of impairment on the job. Further, companies performing work on public projects (state or federal) where an owner mandates a zero tolerance policy for drug use, including marijuana, should educate their employees of the need to avoid cannabis even if it is legal in the jurisdiction. Finally, regardless of the project type (federal, state or private), the rapidly changing needs need to be followed closely and policies reevaluated to avoid legal problems or human resources difficulties.

Documenting With Drones: How Part 107 Of The Federal Aviation Regulations Effectuates New Controls On Commercial Drone Use

by Mariela Malfeld, Associate

Drones have revolutionized the way the construction industry can monitor the progress of a project from precarious heights or treacherous locations. They can also be used to track equipment and materials, and deliver materials to workers in hard-to-reach areas. Thermal drones, for example, offer the user the ability to record infrared images of a project, which may be used to detect water intrusion and sources of a leak. The advantages of drone use may seem rather clear, but ensuring best practices is more opaque. And, despite that drones have now been used for several years to monitor projects, the law has taken some time to catch up and provide a regulatory framework for their proper use.

The Federal Aviation Administration (FAA) refers to drones as "Unmanned Aircraft Systems" and, as the name suggests, the FAA considers drones to be a form of aircraft. On June 21, 2016 the FAA released Part 107 of the Federal Aviation Regulations (the "Regulation" or "Part 107") which regulates the use of drones when operated for commercial purposes. If the drone operator will be receiving any form of compensation for use of the drone, the use will be considered commercial and Part 107 applies.

Federal Restrictions Upon Use Of Drones

The Regulation largely restricts *who* may operate an Unmanned Aircraft System (UAS) and *where* it may be operated. For example, only a certified drone pilot may commercially operate a drone. The most significant imposition is that the user may only operate the drone in Class G airspace.

Figure 1

Class G is uncontrolled airspace, but it is also likely that in a dense urban environment, the project will be located in regulated airspace. Figure 1 displays the airspace over Southeastern Florida. The circled areas are examples of regulated airspace.

There are also visual flight rules and visibility requirements which must be met in class G airspace. These regulations are set forth in lengthy detail in the Aeronautical Information Manual published by the FAA. Fortunately, the FAA also has a smartphone application named "B4UFLY" that helps drone operators determine whether there are any restrictions or requirements in effect at the location where they want to fly a commercial drone. Once the drone operator has determined what airspace restrictions, if any, apply to the project site, the next step is to obtain any available waivers.

If the location in which the operator would like to use the drone is within five miles of an airport, it is incumbent upon him or her to notify the airport tower and obtain authorization. Other venues over which the airspace is restricted include national parks, nuclear power plants, NOAA marine sanctuary areas, military bases, prisons, stadiums and areas where large crowds of people are present. Depending on the classification of the restriction, a waiver may be available upon request from the FAA website (https://www.faa.gov/uas/request_waiver/). It is highly suggested that appropriate waivers be sought without delay since the FAA may take several weeks to grant one.

Local Regulations

The new Regulation does not address privacy issues that may arise through the use of drones, but the state in which the drone is being operated may have enacted such rules or regulations. By way of example, in Florida the Freedom from Unwarranted Surveillance Act was enacted in 2015 and amends section 934.50 of the Florida Statute. The regulation prohibits a person, state agency or political subdivision from using a drone to capture an image of privately owned property

or those on the property – including an owner, occupant or invitee – with the *intent* to conduct surveillance.

Under this law there is a presumption that a person has a reasonable expectation of privacy on his or her privately owned real property if he or she is not observable by persons located at ground level in a place where they have a legal right to be. Individuals have a private right of action to seek compensatory damages, punitive damages, attorneys' fees, and injunctive relief for violations of the surveillance prohibition.

As noted above, there must be the intent to conduct surveillance. Moreover, the law does not prohibit the use of a drone by a person or an entity engaged in a business or profession licensed by the state, or by an agent, employee, or contractor thereof, if the drone is used only to perform reasonable tasks within the scope of practice or activities permitted under such person's or entity's license. As such, it is not likely that the operation of a drone for the purpose of monitoring a project will violate the regulation. However, the drone operator should be mindful of whether the drone will be incidentally capturing images or video of private property while surveying the project.

Practical Considerations

The most important takeaway from this article is to find a certified drone pilot to perform the surveying, because use of the drone will undoubtedly be considered commercial. The next is whether the possibility exists to infringe on someone's right of privacy during the course of the surveying. If yes, then the company retaining the drone operator might consider obtaining a waiver from the affected person(s), when possible.

There may be other avenues of liability that arise from hiring an outside vendor to perform drone surveying. As a precaution, consider including an indemnity provision in the agreement with the drone operator. The FAA classification for small drones includes those weighing up to 55 pounds. In the event of an accident, the drone could cause serious injury or property damage. If there is such an accident, it must be reported within 10 days to the FAA.

Furthermore, *any* unsafe occurrence or hazardous situation that involves the use of the drone should be reported to the Aviation Safety Reporting System (ASRS), which is run by NASA. First, reporting is confidential. Second, although the incident may constitute a violation of an FAA regulation, neither a civil penalty nor certificate suspension will be imposed if four criteria are met: the violation was inadvertent; it does not disclose a lack of competency or qualification; the operator has not been found to have committed a violation in the preceding five years; and, the operator can prove that within 10 days of knowing of a violation, it was reported to NASA through ASRS.

Finally, the entity hiring the drone operator should verify that the insurance at the project covers drone use. Many commercial general liability policies and owner controlled insurance programs exclude coverage for aircrafts. ISO form CG 21 09 titled "Exclusion – Unmanned Aircraft" is an endorsement that excludes bodily injury, property damage, and personal and advertising injury arising out of the ownership, maintenance, use or entrustment to others of an unmanned aircraft.

Accidents can happen and liabilities arise, but proactive measures can insulate those who wish to take advantage of the benefits of drones and sophisticated technologies which monitor the progress of construction projects.

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The Framework For Acceleration Claims And Pitfalls In Proving Claims

by John E. Sebastian, Senior Partner and Erica Del Aguila, Associate

John E. Sebastian

Erica Del Aguila

Today, increasing complexities in construction projects and the building of state of the art facilities with advanced technology has resulted in increased claims for acceleration and delays. Although acceleration claims are more common among large scale projects, all owners and contractors should be aware of: (i) the provisions and notice requirements relating to delays and acceleration in their contracts; (ii) the elements of acceleration; (iii) the damages recoverable for acceleration; and (iv) the difficulties in proving acceleration claims. This article provides an overview of acceleration claims and certain difficulties contractors may face when establishing acceleration claims.

Types Of Acceleration

Voluntary acceleration occurs when a contractor performs the contract schedule ahead of the completion date by its own initiative and without any direction by the owner. Claims for voluntary acceleration are not typically common, as in most instances, the contractor is not entitled to damages for additional costs incurred as a result of its own initiative. Voluntary acceleration may occur when a contractor has caused delays on the project and is attempting to mitigate damages and timely complete the project.

Directed acceleration occurs when an owner expressly directs a contractor to perform the original scope of work under the contract in a time shorter than provided by the original schedule. In most instances, directed acceleration is easier to prove and less contentious because the owner has specifically requested acceleration. Generally, an owner who directs acceleration is liable to the contractor for the costs incurred to accelerate the schedule. Further, directed acceleration is often contemplated by virtue of an agreement between the parties, whether it be conditioned in the contract or by a separate agreement or change order.

Constructive acceleration claims are the most highly litigated acceleration claims. Constructive acceleration occurs when a contractor has made a reasonable and legitimate request for contract time extension, including compliance with any contractual notice requirements, and is forced to complete the project by the original completion date provided in the contract. Constructive acceleration claims are often contested because owners and contractors may disagree as to which party was responsible for a given delay, or they are difficult to quantify when both parties are responsible for delays on the project.

Elements Of Proving Constructive Acceleration

To succeed on an acceleration claim, a contractor must establish the following elements:

1) *The occurrence of an excusable delay.* These factors are beyond the control of the contractor, such as unforeseen site conditions, adverse weather, design defects or other owner caused delays. This is the most significant element in proving that a contractor is entitled to additional contract time and/or compensation. Contractors must consider whether a contract has a valid no damages for delay clause, whether the delay was owner-caused or a concurrent delay, and whether the delay was not contemplated by the parties in the original agreement (i.e., unforeseen site conditions).

2) *A contractor's timely notice of the delay to the owner and reasonable request for contract time extension.* Contractors should be cognizant of the applicable notice provisions in their contracts, so as to avoid a waiver or defense to an acceleration claim.

Contractors must ensure that they are adequately documenting all aspects of the project. A contractor should promptly provide the owner with a written notice of impact when it discovers new items or activities that may impact the project schedule and/or cause delays, such as unforeseen site conditions and adverse weather. The notices of impact should provide (i) a detailed account of how the impact will affect the contractor's (and subcontractors') work; (ii) what the contractor has done to mitigate any damages resulting from the discovered impact; (iii) whether the contractor is issuing any requests for information; and (iv) propose a recovery schedule for the time needed to complete the additional work required.

3) *A reasonable time extension request to the owner, which was denied (or the owner refused to provide a sufficient extension of time).*

4) *The contractor actually accelerated the work and incurred additional costs in meeting the accelerated schedule.* The costs for non-impacted or non-accelerated phases of the work must be separately established.

Recoverable Damages

Contractors are entitled to recover the increased costs incurred for excusable delays and in meeting the acceleration schedule, including costs for mobilization or demobilization, re-sequencing of activities, additional labor and supervision, increased overhead, premium time paid, trade stacking, expediting material and equipment deliveries, productivity loss, and other costs associated with acceleration of the project schedule.

Difficulties In Proving Acceleration Claims

For contractors, one of the most difficult factors in proving an acceleration claim occurs when an owner grants a time extension that is not sufficient or adequate to offset excusable delays encountered by the contractor. A contractor should promptly notify the owner in writing stating the reasons the time extension is inadequate, provide a detailed description of the required work and costs anticipated, and reserve its right for additional compensation as a result of the inadequate time extension, and additional work, including any labor inefficiencies or lost productivity. It is important for a contractor to memorialize the reasons it believes a time extension, if granted by the owner, is inadequate. Failure to do so may constitute a waiver of the contractor's acceleration claim, since it can be argued that the contractor assented to the time extension provided by the owner, regardless of whether the contractor believed it to be insufficient.

In most instances acceleration will require laborers to work premium hours, which may adversely impact productivity rates. Establishing labor inefficiencies and lost productivity often poses problems for contractors since they are difficult to quantify. Some methods such as the "Measured Mile Method" calculate lost productivity by measuring the contractor's performance during an impacted period with the contractor's performance during an un-impacted period on the same project. If a contractor establishes a valid claim for acceleration, the courts generally allow for the recovery for lost productivity. Therefore, if a contractor believes it is suffering from labor inefficiencies or lost productivity, it should give notice to the owner and reserve the right to claim those costs. Contractors should always maintain an adequate record keeping system for each of their projects in order to facilitate any analysis that may be necessary for pricing the acceleration claim.

In many cases, especially for large and complex construction projects, it is recommended that contractors retain a professional to perform a time impact analysis early on in the project, when a contractor has encountered numerous excusable delays. Obtaining a time impact analysis during the project may be beneficial in giving the contractor leverage, as well as a basis for obtaining an adequate extension of contract time from the owner.

Conclusion

Although it may be time consuming and burdensome, the complexity in proving damages in acceleration claims emphasizes the need for contractors to adequately document every aspect of the project. As previously explained, contractors must substantiate all delays encountered, including notices of impact explaining how the delay is impacting the contractor's work and the proposed recovery schedule to address the impact. Contractors must also maintain records of all communications with the owner (as well as architect and subcontractors), daily reports and job logs, meeting minutes, change orders, budgets and estimates, job cost information, and other documents relating to the project

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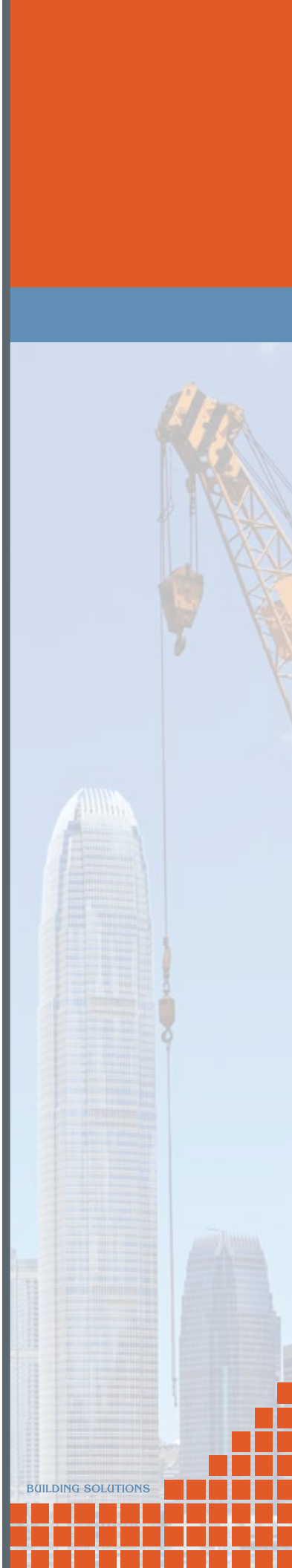

schedule. Contractors should supervise their subcontractors and ensure that subcontractors are also properly documenting all work performed and any setbacks they encounter on the project. By familiarizing themselves with the elements of acceleration claims and maintaining adequate records, contractors can be better equipped in establishing valid acceleration claims against owners.

BANKRUPTCY

Pre-Bankruptcy Waiver Provisions And Promises To Consent To Relief From The Automatic Stay – Are They Really Enforceable When Doomsday Hits?

by Jennifer L. Kneeland, Partner

I am often asked to review waivers and other bankruptcy-related language in loan modifications, forbearance, tolling and other types of agreements and answer what appears to be a very simple question: "Are these waivers enforceable in bankruptcy?" Regrettably, although the inquiry is simple enough, the answer can be quite murky. Often times, the prevailing school of thought in one jurisdiction is rejected and not followed by another bankruptcy court in a different jurisdiction. In addition, bankruptcy law is always evolving with new trends emerging regularly.

Thankfully, there are several types of bankruptcy-related waivers that have relatively clear answers concerning enforceability. Specifically, three types of pre-petition waivers are generally unenforceable and not upheld. They are: (1) waiver of the right to file a bankruptcy case; (2) self-executing provisions that purport to provide that no automatic stay arises in a bankruptcy case; and (3) self-executing clauses that purport to vacate the automatic stay. These waivers are generally unenforceable because they are reminiscent of contracts of adhesion. Because bankruptcy courts are courts of equity and strive to give a debtor a fresh start, they disfavor contractual provisions that interfere with these policies.

Bear in mind that simply because these provisions are *generally* not upheld, they are by no means "extinct." Indeed, these bankruptcy-related provisions are commonly included in agreements day after day. Given that the law is not settled and bankruptcy court decisions are sometimes inconsistent, a convincing lawyer and a compelling set of facts could prompt a bankruptcy court to enforce the provision. If it is your corporate policy to ask for such bankruptcy-related waivers in agreements, there is no reason to discontinue the practice. Generally, however, nine times out of ten, the three types of waivers listed above will not be enforced by a bankruptcy court.

Moving from the easy questions to those that present greater difficulty, there is one particular bankruptcy-related waiver provision that causes a significant difference in opinion among bankruptcy courts throughout the country. This vexing waiver provision is an agreement whereby a debtor consents to relief from the automatic stay or agrees not to contest a motion for relief for the stay. Bankruptcy court decisions regarding enforceability of these types of pre-petition agreements span the gamut of potential outcomes.

In Maryland, for example, several bankruptcy judges view a pre-petition consent to relief from the stay or a pre-petition agreement not to oppose a motion for relief from the automatic stay as only a factor in determining whether cause exists for relief from the stay. *In re Shady Gove Tech Center Assoc. Ltd. Pship*, 216 B.R. 386 (Bankr. D. Md. 1998), opinion supplemented on remand from district court, 227 B.R. 422 (Bankr. D. Md. 1998). Other factors that are considered in determining whether to lift the automatic stay are: (1) the sophistication of the parties negotiating the waiver; (2) the risk incurred by the lender or other party who wishes to benefit from the waiver; (3) the level of consideration given to the debtor by the lender or other party seeking the waiver; and (4) the number of other creditors affected if the automatic stay is lifted. *Id.* The

approach taken by Maryland bankruptcy courts is gaining ground, as bankruptcy courts in Florida and Vermont have adopted the view that a pre-petition waiver is only a factor to consider in whether or not to lift the automatic stay for cause.

On the other hand, the bankruptcy court in Puerto Rico, after noting that "stay waivers were long thought to be unenforceable as against public policy, as increasing number of courts are now enforcing them," upheld a debtor's pre-petition waiver of the automatic stay. *In re Triple A & R Capital Inv., Inc.*, 519 B.R. 581 (Bankr. D. P.R. 2014). Courts that enforce these waivers place importance on encouraging out-of-court restructuring and settlements. *In re Atrium High Pt. Ltd. Pship*, 189 B.R. 599 (Bankr. M.D. N.C. 1995). Finally, other courts, such as the bankruptcy court in Nebraska, reject stay waivers as unenforceable per se and reason that they are against public policy. *In re Pease*, 195 B.R. 431 (Bankr. D. Neb. 1996).

There is a saying among bankruptcy practitioners that if you are looking for bankruptcy case law to support a position, simply look carefully and you will find a case that fits the bill. As evidenced by the wide range of outcomes in resolution of the same inquiry - "*Is my bankruptcy-related waiver enforceable?*" – the answer truly depends on the specific court and the fine tuning of the waiver language.

TRADE SECRETS

Has Your Company Recently Had A Trade Secret "Check Up?"

by Mark Rosencrantz, Partner

For many companies, trade secrets are a core business asset. Things such as customized bidding software, methods to perform work faster, secret recipes, computer algorithms, customer lists, and a wide variety of other items can all, under the right circumstances, qualify as trade secrets. Yet, despite the importance of trade secrets, they appear to be more at risk than ever before. As a recent article from Corporate Counsel reported, "U.S. companies own an estimated $5 trillion in trade secrets, roughly $300 billion of which are stolen every year."

Many factors are at play - from the increased use of computers, smart phones, tablets, USB drives, and other electronic devices, to the ease of employee mobility – and contribute to increased risk of trade secrets being stolen. This reality was recently underscored by the repeated public disclosure of emails Russian hackers allegedly stole from the Democratic National Committee during the recent presidential election. The risk of computer hacking is significant enough that in a recent survey carried out by Vanson Bourne, 400 Chief Information Officers ("CIOs") from large companies in the U.S., the UK, and Germany claim that they are "losing the battle against cybercriminals." Some of the "key results" from the survey include:

- 60% of CIOs surveyed feel they are losing the battle against cybercrime;
- 85% say that end users – human beings – are the weakest link in security, ignoring or forgetting the education, policies and procedures enterprises have put in place to prevent risky behavior;
- 68% believe that because attackers have become more sophisticated, endpoint security tools are less effective.

Of similar concern is a 2012 global survey published by the security firm Symantec, which found that when employees leave a company, regardless of whether they voluntarily resign, are terminated, or laid off, approximately 50% "steal corporate data and don't believe it's wrong" and 40% "plan to use the data in their new jobs." The survey covered thousands of employee responses in countries such as the United States, the United Kingdom, France, Brazil, and Korea.

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In light of the above, it is unsurprising that statistics from an often cited study conducted in 2010 and published in the Gonzaga Law Review explained that: "trade secret cases doubled in the seven years from 1988 to 1995, and doubled again in the nine years from 1995 to 2004. At the projected rate, trade secret cases will double again by 2017." Those statistics are even more significant than they sound because until last year, trade secret law was primarily based on state laws, which meant that many trade secret cases had to be filed in state courts, and accordingly were not considered in the study.

Given the increasing rise in the danger that trade secrets will fall into the wrong hands, it is more important than ever that companies proactively deal with such issues on a regular basis. New tools and strategies continue to be made available, but their effectiveness is frequently dependent on companies taking actions and adopting policies in advance.

Trade Secret Tools Every Company Should Keep In Mind

In 1979, the Uniform Trade Secrets Act ("UTSA") was first published. Since then the District of Columbia, Puerto Rico, the U.S. Virgin Islands, and 48 states have adopted a version of the UTSA. The only states not to adopt the UTSA are New York and Massachusetts.

Most versions of the UTSA offer a variety of remedies to stop the misappropriation of trade secrets. The most important are: injunctive relief, which allows a court to order a person or company to immediately stop using trade secrets and to return all copies to their rightful owner; monetary damages for lost sales and other harm, which in egregious cases can be doubled; and awards of attorneys' fees. However, because these laws are adopted at the state level, lawsuits based on UTSA violations must be filed in state court, not federal court, unless the parties involved are from different states. So, for example, if a company wishes to sue a former employee or a competitor for misappropriating trade secrets under the UTSA, state courts are the only venue unless the former employee and/or competitor are citizens of different states than the company filing the lawsuit.

In May of 2016, however, President Obama signed into law the Defend Trade Secrets Act of 2016 ("DTSA"), which for the first time established laws governing the theft and misappropriation of trade secrets that apply nationwide and allow lawsuits to be filed in federal courts. This can provide key advantages since federal lawsuits often progress more quickly than state actions, and materials can be subpoenaed from third parties more easily in a federal lawsuit.

The DTSA is similar to most states' version of the UTSA, but contains some important differences:

- The DTSA, unlike the UTSA, allows for *ex parte* orders – meaning orders issued without advance notice to the other parties in a lawsuit – to seize trade secret materials, such as electronic files, confidential documents, computer drives, or new product samples. 18 U.S.C. § 1836(b)(2)(a)(i) provides in relevant part that:

  > Based on an affidavit or verified complaint satisfying the requirements of this paragraph, the court may, upon *ex parte* application but only in extraordinary circumstances, issue an order providing for the seizure of property necessary to prevent the propagation or dissemination of the trade secret that is the subject of the action.

- The DTSA provides individuals with immunity from civil and criminal prosecution if they disclose a trade secret in confidence to a federal, state, or local government official, or an attorney: "solely for the purpose of reporting or investigating a suspected violation of law," or the disclosure "is made in a complaint or other document filed in a lawsuit or other proceeding, if such filing is made under seal."

- The DTSA requires that in "any contract or agreement with an employee that governs the use of a trade secret or other confidential information" an employer must give notice of the immunity provision described above. Employee is defined broadly to include employees, contractors, and consultants. Notice can be either given specifically in an agreement, or by "cross-reference to a policy document provided to the employee that sets forth the employer's reporting policy for a suspected violation of law." If no disclosure is given, the employer cannot recover attorneys' fees or exemplary (double) damages in a lawsuit against the employee who did not receive notice.

- The DTSA protects against plaintiffs being forced to disclose their trade secrets to the general public in litigation by allowing plaintiffs to file information about their trade secrets "under seal," which prevents public access of the information. Further, the statute provides that filing trade secret information under seal "shall not constitute a waiver of trade secret protection unless the trade secret owner expressly consents to such waiver."

- The DTSA does not allow injunctions based on the inevitable disclosure doctrine – which is consistent with California law that generally prohibits non-compete agreements – and as such cannot be used, for example, to stop a former employee from simply accepting a new job because the former employer is afraid trade secrets the former employee has in her head might be used in her new job.

In addition to the UTSA and the DTSA, employers should also keep in mind laws such as: the Computer Fraud and Abuse Act, which governs unauthorized access to computers; the Economic Espionage Act of 1996; and state and federal RICO laws.

What To Look For In Your Annual Check Up

Given the changes in trade secret laws, as well as the rapidly expanding manner in which trade secrets can be stolen, companies would be well advised to have a plan in place to deal with such issues before they arise, and to update the plan on an annual basis. Examples of things to consider include the following:

- Is the UTSA or DTSA a better option? Considerations include: whether state or federal courts in your jurisdiction offer quicker trial dates; whether you want to ask for an immediate *ex parte* order to have something seized; specific state law remedies that might exist; the extent to which the trade secret has already been disclosed; and whether you made appropriate disclosures to employees regarding the DTSA.

- Have your employment and other vendor contracts been updated to include DTSA disclosures?

- Have you spoken to your insurance broker about adding to or updating your cyber insurance in the last year?

- Have you involved your IT department in developing plans to detect intrusion into your computer network, and how to respond if one is detected? Do you have an electronic forensic expert ready to conduct an investigation if one is needed?

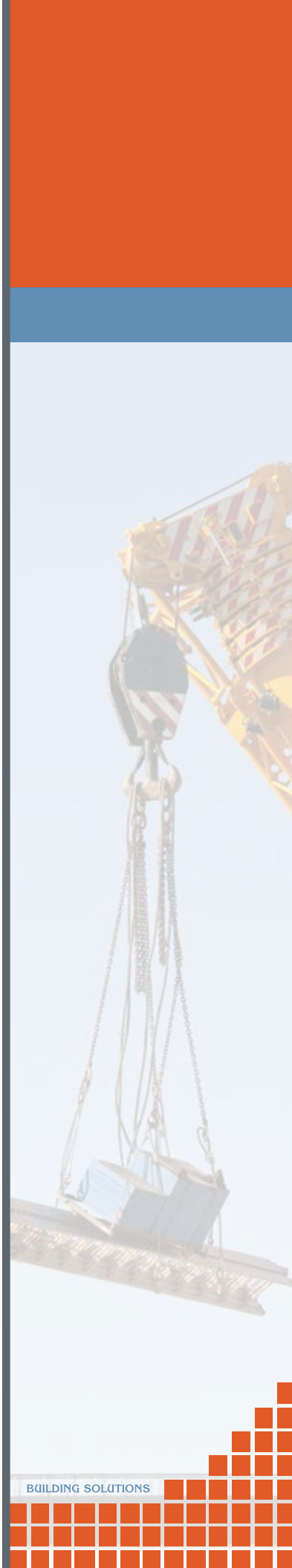
- Do you have policies in place to: (1) terminate employee logins when they leave; (2) make sure no copies of sensitive documents leave with departing employees; and (3) prevent current employees from downloading sensitive materials onto personal electronic devices?

- Do you have clear policies for employees when using computers and trade secret information in physical form, and do you provide employees with education to make sure they remember to follow such procedures?

If your answer to any of the above questions is "no," you should seriously consider consulting the appropriate professionals to develop a plan or update your policies and procedures. The costs of protecting yourself in advance are nearly always far lower and less painful than a lawsuit.

Conclusion

Trade secrets can be one of the most important assets a company owns. With advance planning, they can be important weapons in being as successful as possible.



How To Negotiate A Good Deal For Large And Complex Mining Projects - Lessons Learnt In Civil Law Africa: The Benefit Of A 'Consensus Negotiation,' Process And Outcome

by Marc Frilet

Introduction

Negotiation of large and complex mining and infrastructure projects in developing countries is a special and often a new deal both for the country and the mining company. In most cases, neither of them is well prepared initially and the respective economical and legal culture is often at odds.

Investing upfront millions and sometimes billions of dollars with a return on investment after decades is very different from any other type of transaction: for instance in Africa cumulative international and local experience based on a significant number of deals remains extremely limited.

Some take-away from the aggregated experience gathered by the French Institute of International Legal Experts (IFEJI) from lawyers and other service providers advising both mining companies and States in negotiation of large mining and infrastructure projects in civil law Africa over the last 30 years:

- A good deal is good for both parties today, tomorrow and the day after tomorrow;
- A smart clause aggressively negotiated has chances to become a pathologic clause and altogether a 'pyrrhic victory;'
- In case of serious dispute on natural resources, States eventually win;
- An innovative concept not familiar for many stakeholders but tested with success for world-class composite projects emerges: the concept of 'consensus negotiation,' which bridges to a large extent the gap with the traditional asymmetry of information.

Process

Several steps to consider by a Mining Company before negotiating such a Mining Convention include: [1) Pre-negotiation homework; 2) Engage with a government on the perception of the main issues identified and how to address them realistically in a sustainable manner; 3) Listen to the government objectives; 4) Develop a consensus between the government and mining company on their respective objectives and on the main issues to address; 5) Exchange on the organization on a multidisciplinary negotiation team for both sides and agree an efficient process conductive to success; 6) Clarify the decision making process for each side - on the government side, a coordinated inter-ministerial approach is important; 7) If necessary break out into sectorial exchanges on some key issues based on clear mission and appropriate coordination; 8) For the most complex issues, prepare position Memorandum before drafting contractual clauses; 9) Start by drafting simple sets of conceptual clauses dealing with all the key issues with more or less the same level of details, in plain wording, duly interrelated in an holistic manner; and 10) Draft and negotiate the Mining convention in plain language so it is easy to understand . . . .]

In our experience, if the above process is implemented professionally and in good faith, a consensus on key issues will have taken place, based on a similar level of information. Drafting and final negotiation becomes a rather simple and straightforward exercise. Empirical evidence indicates that this process which takes time and resources often reduces the time and resources needed up to the execution of a Mining Convention compared with a traditional transactional approach and facilitates smooth development of the project.

Conclusion

For large and complex projects, a structured and progressive approach for preparing, negotiating and implementing a holistic Mining Convention, including series of innovative provisions which have been tested in landmark projects in civil law Africa, should be seriously considered in order to effectively conclude a good deal.

One of the benefits of this approach is to reduce substantially the initial asymmetry of information and to develop a level of transparency which may satisfy at the same time the legitimate interests of the State and of the Mining Company which should have in fact a common interest for resilient venture (otherwise it cannot be a 'good deal').

This modern approach which departs substantially from the negotiation of traditional international transactions leads in fact to a new form of 'collaborative agreement' well captured in the concept of 'social license to operate' that ICMM advocates for large and complex mining projects having a strong transformational potential toward the SDGs.

Marc Frilet is the Managing Partner at Frilet Société d'avocats (www.frilet.com). To read the full article, please visit the GcilA Knowledge Centre at www.gcila.org/knowledge-center.

FIRM NEWS

Honors

U.S. News and World Report - Best Law Firms

Watt, Tieder, Hoffar & Fitzgerald, L.L.P. is once again ranked as a Tier 1 Law Firm by **U.S. News and World Report**. **Watt Tieder** is ranked as a Tier 1 firm nationally in Construction Law and Litigation – Construction. **Watt Tieder** is also recognized in Washington, D.C. for Arbitration, Mediation, Construction Law and Construction – Litigation. In Orange County, **Watt Tieder** is recognized for Construction Law and Litigation – Construction.

Best Lawyers "Best Law Firms" rankings are based on a rigorous evaluation process that includes the collection of client and lawyer evaluations, peer review from leading attorneys in their field, and review of additional information provided by law firms as part of the formal submission process.

Upcoming And Recent Events

American Road & Transportation Builders Association ("ARTBA") Project Management Academy, December 6-7, 2016; Charlotte, NC; **Christopher J. Brasco** spoke on Construction Documentation.

American Road & Transportation Builders Association ("ARTBA") Project Management Academy; December 13-15, 2016; Chicago, IL; **Christopher J. Brasco** spoke on Construction Documentation.

ABA Fidelity & Surety Law Committee's 2017 Midwinter Meeting, January 19, 2017; New Orleans, LA; **Christopher J. Brasco** and **Kathleen O. Barnes** spoke on "Practicing at the Court of Federal Claims & the Boards of Contract Appeals - Strategies for Prompt and Effective Resolution of Government Claims Utilizing the Court of Federal Claims and Boards of Contract Appeals."

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International Construction Law Association's Dubai Conference, January 26, 2017; Dubai, UAE; **John B. Tieder, Jr.** spoke on "Managing Legal Risk to Minimize Disputes."

National Utility Contractors Association's Project Management Fundamentals Leadership Seminar, February 9, 2017; State College, PA; **Kevin J. McKeon** and **Jonathan R. Wright** spoke on "Best Legal Practices to Keep Jobs Profitable."

iLaw2017, ILS Global Forum on International Law (Sponsored by the International Sections of the Florida and New York Bar Associations), February 17, 2017; Miami, FL; **Mariela Malfeld** chaired a panel on "International Construction Arbitration – Trends and Best Practices," and **Shelly L. Ewald** presented.

University of Stuttgart, March 9-11, 2017; Stuttgart, Germany; **John B. Tieder, Jr.** will teach a session on North American construction law as part of the University's International Construction Practice and Law Master's degree program.

American College of Construction Lawyers' Annual Meeting, March 16-17, 2017; Amelia Island, FL; **Shelly L. Ewald** to speak on "*Post Escobar: Living in a Material World.*"

Appointments

Shelly L. Ewald has been invited to become a member of the *ICC Working Group Update Construction Report.*

Webinar

The Lorman Group, April 19, 2017; via Live Webinar. **Mark Rosencrantz** will speak on "How to Detect Fraud."

Publications

Rebecca Glos published an article in the ABA Fidelity & Surety Law Committee Newsletter entitled "Defending the Surety Using FAR 28.106-5 and the Consent of Surety Requirement for Federal Contract Modifications Over $50,000 or 25% of Contract Value" (Fall 2016).

Robyn N. Burrows published an article in the ABA Fidelity & Surety Law Committee Newsletter entitled "The Supreme Court Upholds Implied Certification Under the False Claims Act but Imposes 'Rigorous Materiality' Standard" (Fall 2016).

Watt Tieder Announces New Practice in McLean, Virginia

Watt Tieder welcomes new partner, **Jennifer L. Kneeland**. Jennifer is the Chair of the Creditors' Rights, Bankruptcy and Insolvency Practice. She focuses her practice on business constructuring, workouts, and bankruptcy and creditor's rights. She has handled complex chapter 11 cases and out-of-court workouts involving a variety of industries, including real estate, education, telecommunications, hospitality and not-for-profit companies. In addition, Jennifer frequently represents creditors who must protect their rights in connection with construction and other types of real estate related loans and other types of obligations that are either in default or at risk of default.

Jennifer currently serves as the President Elect of the Bankruptcy Bar Association for the District of Maryland. The Maryland Bankruptcy Bar Association is the premier bar association for attorneys who practice bankruptcy law in the State of Maryland. Prior to serving as President Elect, over a period of eleven years, Jennifer was elected to various offices such as Secretary; Treasurer; Greenbelt, Maryland Chapter Chair; and At-large member of the Maryland Bankruptcy Bar Association's Board of Directors.

Jennifer attended Villanova University School of Law and is admitted to practice law in Washington, D.C., Virginia and Maryland, as well as in various United States District and Bankruptcy Courts.

Marguerite Lee DeVoll is an associate in **Watt Tieder's** McLean, Virginia office. Marguerite's practice focuses on business restructurings, bankruptcy, and creditors' rights, as well as complex commercial disputes in state and federal courts across the United States.

Prior to joining the firm, Marguerite represented commercial landlords and national retail tenants in commercial real property litigation in the Washington, D.C. metropolitan area. In addition, she has significant experience defending fraudulent transfer and preference actions. She has experience representing creditors in corporate Chapter 11 cases and individual Chapter 7 and 13 cases as well as debtors in corporate Chapter 11 cases.

Marguerite currently serves on the Council for the Maryland State Bar Association's Veterans' Affairs and Military Law Section. She is also the treasurer for Capital City Toastmasters International Club, and the Newsletter Co-editor for the Greater Maryland Chapter of International Women's Insolvency and Restructuring Confederation.

Marguerite attended the Emory School of Law and is admitted to practice law in Georgia and Maryland. She also is admitted to practice in various United States District and Bankruptcy Courts.

Watt Tieder Welcomes New Partners in California and Washington

Jane G. Kearl joins the Irvine, California office. She focuses her multi-state law practice on real estate issues. She represents developers, owners, and landlords in negotiating high value transactions, primarily in the construction law area, including multi-family and mixed-use developments. Jane also litigates cases involving lien and bond claim workouts, lease issues, and contract matters. In addition to her private practice, Jane serves as a hearing officer for public entities.

Jane holds an "AV Preeminent" rating for professional abilities and ethical standards with Martindale-Hubbell Peer Review Ratings. She is featured in "Women Leaders in the Law" by The American Lawyer, and was named as a Southern California "Super Lawyer."

Jane's legal leadership roles include serving as an arbitrator for the Orange County Bar Association since 2006, and as a member of the Board of Directors of the Orange County Women Lawyers Association from 2008-2012. Further, she volunteers with the Orange County Constitutional Rights Foundation, Mock Trial Program, and has been honored as its Volunteer of the Year.

Jane graduated from The Ohio State University College of Law, with honors, where she was an extern for the United States District Court, Southern District of Ohio. She is admitted to the practice of law in California, Colorado and Washington, as well as before select United States District Courts.

Thomas K. Windus joins the Seattle, Washington office. Tom's practice focuses primarily in the area of surety and construction law. Tom has represented surety and construction clients for over thirty years in a variety of disputes involving litigation in both state and federal courts. Tom has extensive experience in state and federal courts as well as in arbitration and mediation. Tom's undergraduate accounting degree gives him the ability to help clients in the analysis of claims involving breach of contract, payment disputes, delay and disruption, labor productivity, contract interpretation and differing site conditions. Tom's practice has also involved representing commercial and surety clients in bankruptcy proceedings.

Tom earned his law degree from Gonzaga University School of Law and is admitted to practice law in Washington. Tom is also admitted in the United States District and Bankruptcy Courts in Washington.

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The Watt, Tieder, Hoffar & Fitzgerald newsletter is published quarterly and is designed to provide information on general legal issues that are of interest to our friends and clients. For specific questions and concerns, the advice of legal counsel should be obtained. Any opinions expressed herein are solely those of the individual author.

Special Thanks to Editors, **Robert G. Barbour, Keith C. Phillips, William Groscup** and **Heather Stangle**.

BUILDING SOLUTIONS