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ARCHITECTS & ENGINEERS NEWSLETTER

OPERATING AN A/E FIRM UNDER OHIO'S STAY-AT-HOME ORDER

A/E firms throughout Ohio have been left reeling since the ***Stay-at-Home Order*** issued by Dr. Amy Acton of the Ohio Department of Health became effective on March 23, 2020. Typically small businesses, trying to protect the health and welfare of their employees while also interpreting and understanding the implications of the Order can be onerous for A/E firms. The purpose of this article is to offer guidance in interpreting the Order as well as understanding some recent changes to employment law that may impact A/E firms in the immediate future.

Under the Order, all non-essential business and operations must cease activities except for minimum basic operations. Essential businesses are encouraged to remain open, however. Section 9 of the Order states that individuals may leave their residence to provide any services or perform any work necessary to provide or maintain "Essential Infrastructure." "Essential Infrastructure" includes "construction (including, but not limited to, construction required in response to this public health emergency, hospital construction, construction of long-term care facilities, public works construction, school construction, essential business construction, and housing construction)." Subsection u. of Section 12 of the Order states that business providing professional services are "Essential Infrastructure" and exempt from the "cease activities" requirement. While Subsection u. does not specifically identify A/E firms in its list, it is clear from reviewing the Order that the list is not exhaustive. Accordingly, any reasonable interpretation of the Order would find that A/E firms are exempt from the "cease activities" requirement and may continue to operate as essential to infrastructure, subject to the previous social distancing at work requirements ordered by Dr. Acton and Governor DeWine.

Of course, being allowed to operate and being able to operate in this new environment are two entirely different issues. Several A/E firms are trying to operate with as much staff as possible working remotely and just a skeleton crew working from the office as necessary. Some employees lack the technical skill or ability to be able to work remotely. A/E firms are left with difficult decisions as to finances and staffing. In that light, it is important to understand how legislation set to take effect in the near future may impact such decisions.

The ***Families First Coronavirus Response Act*** is a law passed by the United States Senate and signed by President Trump on March 18, 2020. This law responds to the impact of the ongoing coronavirus pandemic on employees. The Act provides paid FMLA leave, 14-days paid sick leave for full time American workers affected by the pandemic, and funding for other programs. Two key components of this law - the temporary expansion of FMLA and the immediate provision of paid sick leave to certain employees - are discussed below.

EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT

The Act applies to employers with fewer than 500 employees and exempts certain health care providers and emergency responders. Small businesses with fewer than 50 employees are exempt when the imposition of the Act's requirements would jeopardize viability of the business as an ongoing concern.

Here are the key changes that covered employers should implement effective April 2, 2020 through December 31, 2020:

- The Act amends the FMLA to cover full or part time employees who have worked for an employer for 30 days. Note: this temporarily substitutes for the previous 1 year and 1,250 hour eligibility requirement.
- Employees may use the expanded FMLA for a qualifying need related to a public health emergency if they are unable to work or telework due to a need for leave to care for a son or daughter under the age of 18 if the school or place of care has been closed or the child care provider of such son or daughter is unavailable due to a public health emergency. Employees may still use the traditional FMLA for any other qualifying events.

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- The first 10 days are unpaid. An employee may elect to substitute paid time off for these days. Subsequent days are paid at 2/3 the regular rate of pay capped at $200 per day, $10,000 in aggregate total over 12 weeks of FMLA leave. There are alternate calculations for less than full time employees where an employer pays 2/3 the average weekly hours over 6 months, or the average weekly hours of a reasonable period of time.

Employees are required to provide as much notice as possible. Employers are required to restore the employee to the same or similar position. Employers with less than 25 employees are exempted if the position no longer exists due to economics or operational changes due to the pandemic. The employer has to make reasonable efforts to find an equivalent position within the company if possible for 1 year.

EMERGENCY PAID SICK LEAVE

Another section of the Families First Coronavirus Response Act grants certain employees an allotment of paid sick leave. This sick leave does not roll over past December 31, 2020. This applies to employers with fewer than 500 employees. Healthcare providers and emergency responders are exempted. Small businesses with fewer than 50 employees are exempt when the imposition would jeopardize the viability of the business as an ongoing concern.

Full time eligible employees are provided 80 hours of emergency sick leave to be used if they are unable to work or telework because:

1. They are ordered to be quarantined or isolated due to COVID-19 by Federal, State or local officials.
2. They are advised to quarantine or self-isolate by a medical professional due to exposure.
3. They are experiencing symptoms of COVID-19 and seeking treatment.
4. Caring for someone either diagnosed with COVID-19 or exposed to it (see 1 or 2).
5. Caring for a son or daughter if a school or day care provider closes due to the COVID-19 pandemic.
6. They are experiencing substantially similar conditions.

Less than full time employees are provided with a number of hours equal to the number of hours that such employee works on average over a 2-week period. In no event will such paid sick time exceed:

- $511 per day and $5,110 in the aggregate for a use described in paragraphs 1, 2, or 3; and
- $200 per day and $2,000 in the aggregate for a use described in paragraphs 4, 5 and 6 above.

Other key provisions of the emergency grant of sick leave include:

- An employer may not require the employee search for or find a replacement employee to cover the hours during which the employee is using paid sick time.
- The paid sick time under this section is available for immediate use by the employee regardless of how long the employee has been employed by an employer. In other words, this temporary and emergency grant of sick leave begins the first day of employment, unlike the new 30 day wait period for the emergency amended FMLA.
- An employer may not require an employee to use other paid leave provided by the employer to the employee before the employee uses the paid sick time.
- An employer may not discharge, discipline or in any manner discriminate against any employee who takes leave under this Act or filed any complaint related to this Act.

The Act further provides covered employers with tax credits for the payment of the paid sick leave and expanded FMLA.

The attorneys at Weston Hurd LLP remain dedicated to providing its clients the advice and professional services needed during these uncertain times. The Stay-at-Home Order issued by Dr. Acton and the Ohio Department of Health and ensuing legislation both locally and at the federal level will continue to impact A/E firms as the country tries to slow the spread of the coronavirus and navigate a rapidly changing economy. They will impact your firm, practice, and employees in a myriad of ways. Weston Hurd's Employment Section is working to stay on top of the legislation to ensure its clients derive the benefits businesses of all sizes need. ■

HAVE AN UNSIGNED PROPOSAL – NOW WHAT?

It is not unusual for designers working with owners or as consultants to other designers to submit a proposal for services. The proposal often includes "terms and conditions" and signature lines for both parties. Also, it is not unusual when two parties work together on a continuing basis they are working from proposals. But what happens when, either because of oversight or neglect, the proposal is not sigCourts are going to look at the manner in which the parties behaved to determine if the unsigned proposal is enforceable. Courts focus on the following to determine if the party attempting to enforce the contract should succeed:

- that the party carried out significant works based upon reliance that there was a contract;
- that both parties conducted themselves as though there was a binding contract;
- that any alteration to the scope of the contract were minor in nature;
- there was no particular reason that formal execution was essential.

For a contract to be binding on parties, there has to be an offer and an acceptance. Obviously, with a contract that is signed by both parties, the signatures are confirmation of the offer and acceptance. Silence can never be the basis for the establishing acceptance. However, silence in conjunction with conduct can be construed as acceptance. In *Jatsek Constr., Co., Inc. v. Burton Scot Constrs., LLC*, 2012 Ohio App LEXIS 3489, the subcontractor in a public improvement project claimed that it had performed work pursuant to the subcontract agreement with the general contractor, but had not been paid for the work. The general contractor admitted that the subcontractor had performed the work, but argued that the subcontract agreement required arbitration. The subcontract agreement had been signed by the subcontractor, but not by the general contractor. The trial court held that no contract existed and the general contractor appealed. On appeal, the subcontractor argued that the contract was formed, since the general contractor did not sign the agreement and therefore arbitration was not required. The subcontractor also argued that even if the contract had been formed, it was against public policy to enforce the arbitration provision. The Court of Appeals held that where parties do not sign a proposed contract, but one party still performs the work, an implied contract forms under the terms of that proposal. The court stated that both parties are considered to have agreed to a contract. Because both parties agreed that the work had been performed, the court held that the contract existed between the subcontractor and the general contractor. Because the general contractor was seeking to enforce the arbitration provision, the court agreed and enforced the arbitration provision.

In addition to the concept of an applied contract, courts also look at equitable theories such as estoppel and quantum meruit. Estoppel is a doctrine to prevent a party from denying its obligation after another party acted on reliance of the belief that there was in existence a binding contract. Quantum meruit is a Latin term meaning "as much as it deserved." Quantum meruit is an equitable theory when certain works have been carried out to one party's benefit it creates to pay a reasonable amount for labor or materials furnished even in the absence of a legally enforceable agreement.

In conclusion, good practice is to make certain all contracts are executed by both parties. However, given the hustle and bustle of daily practice, this not always happens. A contract that is not signed by both parties is still enforceable, assuming that the parties acted as if the contract was in existence. ■

WHAT IS MEANT BY WAIVER OF "CONSEQUENTIAL DAMAGES"?

Most of the industry form documents have a waiver of consequential damages provision. For instance, the AIA B101-2017 provides the following:

> §8.1.3 The Architect and Owner waive consequential damages for claims, disputes, or other matters in question arising out of or relating to this Agreement. The mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination of this Agreement, except as specifically provided in Section 9.7

The B101 further states in §10.1 that terms in this Agreement have the same meaning as those in the A201-2017 General Conditions. The A201 provides the following guidance as to what is included within the term "consequential damages":

> **§15.1.7 Waiver of Claims for Consequential Damages**
>
> The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes
>
> **.1** damages incurred by the Owner for rental expense, for losses of use, income, profit, finance, business and reputation, and for loss of management or employee productivity, or of the service of such persons;

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The clear intent is to use this definition as a basis for how Owner's consequential damages are to be determined. But the language is not all inclusive. Case law also is to be considered as to how courts have defined consequential damages. Some examples include the following:

Architectural Identification, Inc. v. American Bus. Equip., 10th Dist. Franklin No. 85-AP-1048, 1986 Ohio App. LEXIS 8380

Plaintiff AII brought a claim for recession of contract for delivery of computer equipment whose software did not conform to AII's needs as was represented. AII recovered consequential damages in the form of finance charges and interest for the loan that the court found AII reasonably incurred for the equipment and foreseeable damages. AII also recovered employee wages for "lost employee productivity" when equipment did not conform to AII's needs. Calculation of employee productivity was 2.5 times the hourly wage rate and was the same computation used by AII when determining the cost of a job. Upon appeal the interest amount of consequential damages was adjusted based on the evidence supplied by AII.

World Metals, Inc. v. AGA Gas, Inc., 142 Ohio App.3d 283, 755 N.E.2d 434 (9th Dist. 2001)

AGA Gas appealed a judgment from Summit County for $969,172 in consequential damages awarded to World Metals where World Metals was unsatisfied with the purchase of a gas flow control system purchased from AGA pursuant to a 6-part payment schedule. The trial court found World Metals could recover lost profits for "the decrease in volume traceable to the wrong" as well as any additional overhead it incurred due to the breach, but not general overhead. *Id.* at 11. These overhead costs were any "reasonably incurred in efforts to rehabilitate the damage to its business caused by the breach because those costs were directly attributable to the breach." *Id.*

They included as consequential damages "costs of diverting its own time and resources from other projects to correct the deficiencies created by the defendant's breach" including production slow-downs and delays. *Id.* The appellate court reversed the trial court based on the lack of evidence showing the slow-downs and delays were attributable to the breach, but agreed with the trial court's interpretation of the scope of consequential damages.

Consequential damages are indirect damages that do "[n]ot flow directly and immediately from the act of the party, but only from the consequences or results of such act." *See* Black's Law Dictionary 416 (8th ed. 2004). See, also. DP *Serv. Inc. v. Am Int'l.*, 508 F. Supp.162, 167 (N.D. Ill. 1981). Consequential damages may include lost profits, provided they are not remote or speculative. *Id.* at 103.

Conclusion: Waiver of consequential damage provision is one of those "must haves" in an agreement with the owner. It is not unusual for consequential damages to be much larger than direct damages. Thus, for good risk management practices insist upon a waiver of consequential damage clause; but, understand it applies to the designer's damages as well! ■

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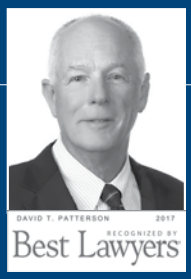

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