

Construction Law Newsletter

From the Construction Section of the Oregon State Bar
Special Legislative Update 2021, Issue No. 68

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Thanks to our authors for this Special Legislative Update!

Attend our annual CLE: “Building Your Construction Project: Critical Concepts and Issues”:

- *Agenda here!*
http://www.osbar.org/cle/sections/construction_law/2021/SCON21.pdf
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Full format Fall Newsletter in November!

2021 LEGISLATIVE UPDATE

Jakob Lutkavage-Dvorscak
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The 2021 Oregon legislative session concluded on June 26 this year. Unprecedented has become a well-worn word in the past 18 months, nevertheless it accurately describes the long, odd-year session just like nearly every aspect of society since the start of the pandemic.



Jakob Lutkavage-Dvorscak

This year, for the first time in history, an Oregon legislator was expelled for his conduct. Also, for the first time ever, the session was held virtually, and the Capitol was closed to the public due to health and safety restrictions for the pandemic.

In what was likely a welcome respite, there was no giant revenue shortfall this biennium. After the long Covid-19 shutdown and restrictions in place to prevent the spread of virus, it was feared that state coffers would be dry resulting in significant budget or attempts to raise taxes. Democrats held supermajorities in both chambers so raising taxes was certainly within the realm of possibility. However, the increase in federal dollars for Covid-19 related stimulus payments and better than expected rebound of the economy created a \$2.8 billion surplus. So, the rarely heard question in Oregon budget debates of “How to spend all the additional revenue?” likely eased some of the tension caused by all the other stressors.

As always, there were numerous bills introduced that would potentially affect the construction

industry. The push and pull of this legislative session seemed less dramatic in its impact (or potential impact) on the industry as it had been in the past. Most notably, there were no walkouts denying quorum over environmental bills that would impact construction vehicle fleets. But, there were still many bills lawyers representing clients in the construction industry should be aware of and look into carefully if it might affect their clients. The below list is not exhaustive, but the author hopes it captures the more significant new laws affecting the industry.

Environmental

HB 2021 – Clean Energy. HB 2021 set clean energy targets for electricity provides of 80% reduction in greenhouse emissions by 2030, 85% by 2035, and 100% by 2040. The bill not only set clean energy targets but also set numerous requirements for power construction projects greater than 10 megawatts, including prevailing wage payment, 15% apprentice utilization, project labor agreements, establishment of outreach plans for recruitment and retention of women, minority individuals, veterans, and people with disabilities.

Taxes

There were a number of bills affecting business taxes this session. As always, be sure to consult with tax professionals (lawyers or accountants) to help you or your clients navigate these issues, but it is worth being at least familiar with some of these tax changes.

SB 139 – Pass Through Entity Tax Treatment. SB 139 modifies tax rates for pass-through entities and ultimately eliminates the preferential treatment of these entities with more than \$5 million of income.

SB 727 – State and Local Tax (SALT) Deduction Cap Workaround. SB 727 creates a workaround for owners of pass-through entities that elect to have Oregon income taxes paid by the entity rather than passed through.

Labor and Employment

A number of bills passed in this session that have instituted new labor standards and requirements on construction projects. As noted above the Clean Energy Bill (HB 2021) put in place a number of labor standards and requirements for 10 megawatt and larger energy construction projects. Similar standards and requirements were instituted on other types of projects. In addition,

SB 5505 – Capital Construction Projects. This bill was for the major capital construction budget but also required new labor standards initially for six higher education capital construction projects. Initially the labor standards were for all the projects but was pared down before final passage. On the higher education projects, each contractor or subcontractor with a contract of \$200,000 must:

1. employ apprentices to perform 15 percent of the work hours for apprenticeable occupations under the contract;
2. have a plan for outreach, recruitment and retention of women, minority individuals, and veterans to perform work under the contract, with the target of having 15 percent of total work hours performed by qualifying individuals; and,
3. provide health insurance and retirement benefits to workers.

HB 3011 – American Rescue Plan Act (ARPA) Projects. For projects funded by \$750,000 or more of ARPA funds and greater than \$10 million in value, all contractors with contracts greater than \$200,000 must enter into project labor agreements that require (1) the payment of at least prevailing wages; (2) 15% of hours be performed by apprentices; and, (3) contractors to develop outreach efforts to women, minorities and veterans with the goal of 15% of work being performed by those individuals. The bill does not apply to areas with a population of less than 50,000 and there are exceptions for costs or limited contractors available.

SB 493 – Prevailing Wage Determination. This bill changes the calculation of prevailing wage to the highest collectively bargained rate for the

region rather than rates based on a survey of contractors. It applies to all public works (local and state) projects.

Miscellaneous

HB 2180 – EV Ready Projects. This bill requires new projects to be built as “Electric Vehicle Ready.” The law applies to commercial buildings under private ownership, multifamily residential with five or more units, and mixed-use buildings with privately owned commercial space and five or more residential dwelling units.

HB 2842 – Affordable Housing Retrofits. This bill established the Healthy Homes program to grant funds for weatherization and building retrofits for low-income households.

SB 8 – Affordable Housing Zoning. This bill restricts local jurisdictions’ authority to deny affordable housing developments on land within an urban grown boundary and not zoned for residential use.

As always, the legislative session is a grab bag of issues. The trend of increased focus on affordable housing development, clean energy, and labor rights issues continued as it has for the past several sessions and will likely in the future.

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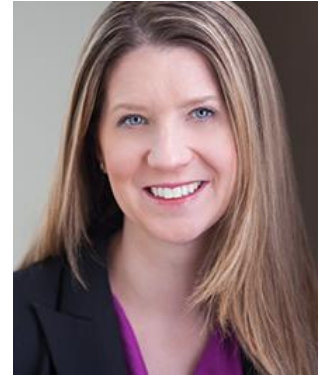


THE EXTENSION OF CERTAIN STATUTES OF LIMITATION UNDER HB 4212 AND SB 813

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In response to the global COVID-19 pandemic, the Oregon Legislature passed, and Governor Brown signed,

several pieces of legislation aimed to provide COVID-19 relief across the state. During the first special session of 2020, they passed House Bill 4212 (“HB 4212”),¹ which was signed into law on



Stacey Martinson

June 30, 2020. Then, effective July 14, 2021, the legislature passed Senate Bill 813 (“SB 813”)² which modifies HB 4212. The focus of this article is on Section 7 of HB 4212 and SB 813, which created an extension of time to commence an action or give notice of a claim under certain statutes during a state of emergency related to COVID-19.

What Is the Current State of Emergency in Oregon Related to COVID-19?

At the time of publication, the COVID-19 state of emergency has been extended by Governor Brown through Executive Orders numerous times over the course of the COVID-19 pandemic. Most recently, Governor Brown issued Executive Order

1

<https://olis.oregonlegislature.gov/liz/2020S1/Downloads/MeasureDocument/HB4212>.

2

<https://olis.oregonlegislature.gov/liz/2021R1/Downloads/MeasureDocument/SB813>

No. 21-15,³ which extends the state of emergency through **December 31, 2021**.

How Do HB 4212 and SB 813 Affect the Statutes of Limitation and What Claims Are Affected?

HB 4212 creates an extension to the statutes of limitation for civil claims that would expire during the COVID-19 state of emergency or within 90 days after the state of emergency ends:

“SECTION 7. (1) If the expiration of the time to commence an action or give notice of a claim falls within the time in which any declaration of a state of emergency issued by the Governor related to COVID-19, and any extension of the declaration, is in effect, or within 90 days after the declaration and any extension is no longer in effect, the expiration of the time to commence the action or give notice of the claim is extended to a date 90 days after the declaration and any extension is no longer in effect.”

This extension applies to some state law claims and other notices, including:

- The time periods for commencing an action (i.e., filing suit) established under ORS Chapter 12;
- Commencing an action for wrongful death under ORS 30.020;
- Commencing an action or giving notice under ORS 30.275 (e.g., action arising from an act or omission of a public body); and
- “Any other time limitation for the commencement of a civil cause of action or the giving of notice of a civil claim established by statute.”

Expressly excluded from the scope of HB 4212 are criminal actions, Oregon Tax Court appeals, and any appeals or judicial review proceedings

³ https://www.oregon.gov/gov/Documents/executive_orders/eo_21-15.pdf.

before the Oregon Court of Appeals or Oregon Supreme Court.

SB 813 modified and clarified HB 4212, and added a new Subsection (4), which provides that "the expirations of the time to commence an action or give notice of a claim occurring" applies to a claim or notice that:

- Expired on or after March 8, 2020, and "the date 90 days after the declaration of a state of emergency issued by the Governor on March 8, 2020, and any extension of the declaration, is no longer in effect;" and
- "During the time in which any other declaration of a state of emergency issued by the Governor related to COVID-19, and any extension of the declaration, is in effect, or within 90 days after the declaration and any extension is no longer in effect."

When Do Claims Expire?

When a claim will expire under HB 4212 and SB 813 will depend on the claim and the original date of expiration. Of importance is that Section 7 of HB 4212 will be *repealed* on December 31, 2021.⁴ SB 813 did not revise the repeal. Therefore, absent additional legislation, *if* HB 4212 and SB 813 apply to a certain claim or notice, the extension will end on **December 31, 2021**.

There is an argument that the intent of HB 4212 and SB 813 should be interpreted to extend until March 31, 2022 (i.e., 90 days after the current state of emergency expires); however, because SB 813 did not modify the repeal of HB 4212, then the best practice would be to not rely on this argument. It is important to note that, as of the date of this publication, the language of HB 4212 and SB 813 has not been interpreted.

⁴ Section 8 of HB 4212 states: “Sections 6 and 7 of this 2020 special session Act are repealed on December 31, 2021.”

What About Construction Claims?

Many of the statutes of limitation for construction claims fall under ORS Chapter 12, which claims are specifically extended by HB 4212 and SB 813. For example:

- Claims for breach of contract: six years. *See* ORS 12.080(1);
- Claims for negligence: two years. *See* ORS 12.110; and
- Claims against architects and engineers: two years. *See* ORS 12.135(3).

It is unclear whether HB 4212 and SB 813 will apply to other claims that do not fall under ORS Chapter 12 including, without limitation, construction lien and foreclosure deadlines that are specified in ORS 87.001 *et seq.* Such deadlines include perfecting a lien within 75 days after work on the construction of the improvement ceases or the structure is completed (ORS 87.035), and filing suit to foreclose the lien within 120 days after the lien is filed (ORS 87.055). These time limitations are not expressly included in HB 4212 and SB 813, but such time limits may be extended by the “catch-all” provision of HB 4212 that states an extension is applicable to “[a]ny other time limitation for the commencement of a civil cause of action or the giving of notice of a civil claim established by statute.” At the time of publication, the “catch-all” language of HB 4212 has not been interpreted by any courts, which leaves an open question as to whether the construction lien and foreclosure deadlines are extended by HB 4212.

Remember December 31, 2021

HB 4212 and SB 813 do provide additional time to bring claims during the state of emergency declared by Governor Brown. However, you will need to evaluate the date of accrual and the applicable statutes of limitation or notice deadlines, and whether HB 4212 and SB 813 apply. Above all, as time draws near, be aware that the date that Section 7 of HB 4212 will be *repealed* is December 31, 2021, and ensure that

any claims and notices are timely filed. Thus, remember to commence any action or serve any notice *before* December 31, 2021.

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