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DOES OREGON'S ANTI-SLAPP LAW APPLY TO THE RECORDING OF A CONSTRUCTION LIEN? GOOD QUESTION.

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Bill

In 2001, Oregon adopted ORS 31.150, *et. seq.*, the anti-SLAPP statute. SLAPP is short for strategic lawsuit against public participation. Two of the purposes of the anti-SLAPP statute are to protect free speech and the public's participation in governmental processes. ORS 31.150 allows a party to file a special motion to strike, similar to an ORCP 21 motion, to challenge a claim against the party based on the party's speech, *e.g.* a defamation claim. *See* ORS 31.150(1). The motion must be filed within 60 days after the service of the subject claim or, in the court's discretion, at any later time after the party has been served with the claim. *See* ORS 31.152(1). A party making a special motion to strike has the "initial burden of making a *prima facie* showing" that the challenged claim arises out of a statement, document or conduct described in ORS 31.150(2). *See* ORS 31.150(3). If the movant meets this burden, the burden then shifts to the claimant to "present[ ] substantial evidence to support a *prima*

facie case" establishing "there is a probability that the [claimant] will prevail on the claim." ORS 31.150(3). If the claimant fails to meet their burden, the claim will be dismissed. *Id*.; *see also* ORS 31.150(1). A prevailing anti-SLAPP movant is entitled to recover attorney fees. *See* ORS 31.152(3).

Modeled after California's ant-SLAPP statue (*see Handy v. Lane Cnty*., 360 Or 605, 618 (2016)), ORS 31.150(2), protects the following four types of speech:

(a) Any oral statement made, or written statement or other document submitted, in a legislative, executive or judicial proceeding or other proceeding authorized by law;

(b) Any oral statement made, or written statement or other document submitted, in connection with an issue under consideration or review by a legislative, executive or judicial body or other proceeding authorized by law;

(c) Any oral statement made, or written statement or other document presented, in a place open to the public or a public forum in connection with an issue of public interest; or

(d) Any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

Even though the anti-SLAPP statute has been in effect for over 20 years, there is fairly limited case law interpreting it. Many of the Oregon cases on the statute address the application of ORS 31.150, *et. seq*., to social media postings and other published public statements. There is currently no case addressing whether the recording of a construction lien is a protected activity under ORS 31.150(2).

So, is a claim attacking a construction lien, *e.g.* a slander of title claim, subject to a special motion to strike? California courts think so. In *RGC Gaslamp, LLC v. Ehmcke Sheet Metal Co., Inc.*, 56 Cal.App.5th 413 (4th Dist., 2020), the court held that the recording of a construction lien was an act protected by California's anti-SLAPP law, CCP 425.16(e). The *RGC Gaslamp* court held that because recording a mechanic's lien is a prerequisite to filing a foreclosure lawsuit, the recording of a lien is a prelitigation statement that qualified for protection under California's anti-SLAPP statute. *RGC Gaslamp, LLC,* 56 Cal.App.5th at 425-428. Even though Oregon's anti-SLAPP statute is based on California's statute, under Oregon law, because *RGC Gaslamp* was decided after Oregon's law was adopted, *RGC Gaslamp*'s interpretation of California's statute is only persuasive authority regarding an Oregon court's interpretation of Oregon's nearly identical statute.

Recently, the Oregon Court of Appeals held that the issuance of a writ of garnishment was not a protected activity under ORS 31.150(2). *See Baldwin v. Seida*, 297 Or App 67 (2019)(plaintiff brought a claim against defendant for violation of a bankruptcy's automatic stay). The *Baldwin* court noted that the garnishment process (a post-litigation activity) did "not elicit, require, or call for any action by the court, although it issues pursuant to the authority of the court." *Id.* at 75. As a result, the court concluded the issuance of a writ of garnishment was not a protected activity under ORS 30.152(2).

However, unlike a writ of garnishment, the recording of the construction lien is a necessary prerequisite to (a pre-litigation activity) the judicial foreclosure of the construction lien, which necessarily involves the court. *See* ORS 87.060. Indeed, a construction lien must be foreclosed via a civil lawsuit filed in the county where the property is located. *Id*. The necessary involvement of a judicial body to foreclose a lien differentiates a construction lien from a writ of garnishment and supports an argument that the recording a construction lien is a protected statement under ORS 31.150(2)(a) or (b). This argument is further bolstered by the fact that the anti-SLAPP statute is to be "liberally construed in favor of the exercise of the rights of expression * * *." ORS 31.152(4).

Indeed, liberally construing ORS 31.150 (as required), it seems that recording a construction lien is a statutorily required step for a lien claimant in "exercising [its] rights of expression", *i.e.* the constitutional right to obtain remedy by petitioning the courts for redress, and, therefore, should be a protected act under ORS 31.150(2).

In 2023, the Oregon Court of Appeals issued two opinions addressing ORS 31.150(2)(d): *Davoodian v. Rivera*, 327 Or App 197 (2023), and *Mouktabis v. Clackamas County*, *et. al.*, 327 Or App 763 (2023). The *Mouktabis* opinion addressed the issue of whether a statement that a party violated a restraining order was protected under ORS 31.150(2)(d). The *Davoodian* opinion is more on point to our discussion here. The *Davoodian* opinion addressed the issue of whether an attorney sending a pre-litigation demand letter to an alleged OHSU anesthesiologist along with a draft copy of a complaint alleging sexual assault was a protected action under ORS 31.150(2)(d).

The court stated that, to fall under ORS 31.150(2)(d), the statement at issue must be made in the furtherance of the right to petition the government and involve a public issue or issue of public interest. *See Davoodian*, 327 Or App at 205-206. The Court noted that the absence of a judicial proceeding is not necessarily fatal. *Id.* at 208. The Court declined to adopt a categorical rule that ORS 31.150(2)(d) applied to all pre-litigation statements. *Id.* at 207. However, the *Davoodian* court did find, based on the facts of the case, that the pre-litigation letter was a protected activity under ORS 31.150(2)(d) because it was sent in the furtherance of the right to petition the government and that the alleged sexual assault by an anesthesiologist at a state-funded hospital was an issue of public interest. It seems the Court of Appeals would apply the same two prong *Davoodian* test to determine whether the recording of a construction lien is a protected activity under ORS 31.150(2)(d).

Currently, it is an open question in Oregon whether the recording of a construction lien (or other similar document) is a protected act under ORS 31.150(2). The issue is currently pending before the Oregon Court of Appeals in *Craft Renovations, Inc. v. Harris,* A180016. In the meantime, based on the above, a lien claimant should carefully consider whether to file a special motion to strike a slander of title claim (or similar "speech" type claim) challenging the recording and foreclosure of its lien.

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THE AGE OF THE BOTS IS UPON US: ROBOTIC PROCESS AUTOMATION AND AI IN PUBLIC CONTRACTING

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Nick

Many discussions regarding the capabilities and implementation of new technologies, including AI, focus on the fear that it will replace human ingenuity and result in mass unemployment, or worse, a robot revolution. The truth, for the moment at least, is much less sinister. Current technology and typical commercial use of AI is

generally focused on automating simple repeatable tasks and providing efficiencies to a human user.


Andrew

In the world of public contracting, the federal government appears to be leading the charge with regard to both implementation and policy. However, even regional local governments are engaging in the conversation and continue to explore the balance between imposing reasonable limitations and promoting innovation and efficiencies. This article provides a snapshot of some of the current explorations into the emerging fields with a focus on governmental use of automation software and AI for public procurement.

Federal Implementation of Bots in Public Contracting

Given the access to funding and robust internal infrastructure of the federal government, it's no surprise that it took the first substantial steps in integrating automated computer software into its day to day activities, rather than state or local governments. An example is the use of robotic process automation, or RPA. RPA is a type of automation software that uses software robots, or "bots" that mimic basic human/computer interactions. RPA does not involve the use of AI (we'll get to that later) that would allow the software to provide its own independent judgment and decision making. Rather, RPA requires that a human user teach the bot a specific workflow that includes a series of steps and processes, often at set repeated intervals or with pre-defined triggers. An example of RPA that everyone is likely familiar with, especially after the Holidays, is online returns processing. Generally, when a return is initiated, a bot will: generate a message that confirms the return; produce and email a return receipt; issue refunds and adjust payments; and update the seller's inventory. Ultimately, the use of bots is driven by the desire to allow workers to focus on complex interactions rather than wasting time on repetitive, administrative tasks. The same is true in the context of federal procurement.

In 2020, the Feds launched the Truman bot, named for President Truman who established the General Services Administration. The Truman bot pre-populates internal pre-negotiation and price-negotiation memorandums with information from proposer submittals and conducts compliance checks with external databases. Essentially, the Truman bot relieves federal contracting agents of burdensome low-value administrative tasks to allow them to spend their time negotiating and administering contracts. Another federal RPA innovation is the use of the closeout robotic assistant, or CLARA, which provides a full financial review to contracting officers during all phases of open contracts including financial eligibility for contract closeout, and related internal filing. Further, the Feds have developed a bot to assist contracting officers in performing contractor responsibility determinations pursuant to the Federal Acquisition Regulation. One of the primary standards for determining a contractor's responsibility is whether the contractor will actually be able to perform the work. To satisfy this standard, among other things, the contractor must: have adequate financial resources to perform the contract, or the ability to obtain them;

have the ability to comply with the planned schedule; have a satisfactory performance record; have a satisfactory record of integrity and business ethics; and have the necessary organization, experience, accounting and operational controls and technical skills. In order to make the responsibility determination, contracting officers must research the bidders' entity information on several federal databases to identify information relevant to the responsibility factors, and document findings. Bots assist in this process by performing a search of the databases triggered by an email from the contracting officer. The bot identifies and organizes the information from the databases based on the pre-set responsibility criteria and sends the research back to the contracting officer for final review.

The Feds have also experimented with the use of bots by private entities to bid on public contracts. Of 70 bids on a recent federal cloud contract, a bot underbid its competitors seconds before the bid closed, securing the award. In this case, bots were both bidding against each other, and against human bidders who were submitting their offers manually. Bid bots have been used in a similar manner for years on auction sites like eBay to submit bids at the last second, thereby sniping the item in favor of the bots' human counterpart. As with the frustrated shopper on eBay, the Feds noted that they have received feedback from vendors that it can be incredibly demotivating to be underbid at the last minute by a bot. However, the federal tech team intends to allow bots to continue bidding, though it is considering a variety of adjustment to the process that could even the playing field, including extending the bid time if a bid comes in at the last minute, or increasing the minimum increment ($1 in this case) by which vendors can automatically underbid each other.

Although the first thought for many practitioners when hearing about advances in technology is fear for their continued employment, the takeaway here is that the use of bots is generally geared toward streamlining workflows rather than replacing staff or attorneys. Certainly, the assistance of a bot to perform redundant administrative tasks would be a welcome development for attorneys working in either the public or private sectors.

Federal Policy and Implementation of AI

As generally relates to the use of AI, President Biden issued an executive order entitled "Safe, Secure, and Trustworthy Artificial Intelligence," on October 30, 2023, which provides new standards for AI safety and security, and focuses primarily on issues of national security, consumer protection, and civil rights. For example, in accordance with the Defense Production Act, the order requires companies developing AI that poses a serious risk to national security, national economic security, or national public health and safety to notify the federal government when training their AI and share the results of all safety tests. Additionally, in an effort to mitigate AI-enabled fraud and deception, the order directs the Department of Commerce to develop guidance for content authentication and watermarking to clearly label AI-generated content so that the public will know that communications they receive from the government are authentic. Further, the order seeks to ensure fairness throughout the criminal justice system by developing best practices on the use of AI in sentencing parole and probation, pretrial release and detention, surveillance, crime forecasting and predictive policing and forensic analysis.

In the context of federal contracting, AI is already being used to analyze the past performance of contractors during the evaluation of competitive proposals and bids. Additionally, this summer, the State Department issued a request for information seeking industry feedback regarding the use of generative AI and machine learning capabilities to aid in basic contract drafting. Currently, contracting officers typically copy and paste information from previous contracts to save time, often leading to errors, and incorporating outdated provisions and clauses. The State Department's ideal solution would prompt the contracting

officer to draft a goal or problem statement for the acquisition, and the generative AI solution would generate a complete draft contract that would then be reviewed and revised by the contracting officer prior to submission into the federal procurement database. Although this intended use has not been approved yet, it provides a glimpse into what is likely the future of federal contract drafting procedures. However, the focus is cautious engagement with the goal of augmenting human skills rather than replacing them.

State and Local Implementation and Policy on RPA and AI

Perhaps unsurprisingly, none of the current regional state or local agencies' contracts we reviewed specifically account for implementation of RPA. However, we had a bit more luck on the issue of AI. For example, Multnomah County has recently completed its first policy statement on Generative AI Use and Procedures, identified as IT-4. This policy applies to County staff use of AI, but does not limit its use for County contractors or service providers. While the full policy is publicly available on the County website, the main takeaway from a construction-side view is that AI use by County staff is authorized to increase efficiency as long as it is human-reviewed and edited prior to being finalized. The County has no special requirements for documents such as Change Order Requests, billing, testing procedures that utilize AI, and so on, which are simply subject to meeting current contract requirements.

AI has numerous possible uses in contracting, from completing templates and drafting contract clauses, identifying inconsistent language in large contracts, and adding specificity to standard contracts such as AIA. But expecting AI to take into account public contracting laws (such as ORS 279A, 279B, and 279C) or when and how to adjust if federal funding is involved (such as Federal Acquisition Regulations and the Federal Asset Regulation Act), or even to accurately cite such laws is expecting too much at this point. Careful analysis, review and editing is still a necessity for all contract work. Further, Generative AI seems unlikely to become a significant part of public bidding procedures at the local level. The advantages of AI bidding listed above will not be beneficial to the construction delivery methods for most local projects, where CM/GC reigns and GMPs are generally negotiated after the project is awarded. Neither Multnomah County, nor the current versions of local agency construction contracts publicly available, have special requirements for AI use in bidding.

Final Thoughts

Awareness of the emerging use of machine intelligence in the construction industry is increasingly important for the legal community. It is worth noting that there has been recent reporting on a contract negotiation completed entirely by AI, right up until it was signed by attorneys *See* https://www.cnbc.com/2023/11/07/ai-negotiates-legal-contract-without-humans-involved-for-first-time.html. However, at the moment, AI's primary application is utilization on smaller federal projects and use by contractors and their attorneys as starting points subject to rigorous review and editing for contracts and other construction documents.

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CCB LICENSE SURETY BOND AMOUNTS TO INCREASE AS OF JANUARY 1, 2024

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Van

The 2023 Oregon Legislature increased the amount of the surety bond required of licensed contractors in Oregon. Pursuant to House Bill 2922, as of January 1, 2024, the bond amount will increase by $5,000 for each Construction Contractors Board ("CCB") endorsement type. The new bond amounts for the primary CCB endorsements are as follows:

Residential General Contractor
$25,000
Residential Specialty Contractor
$20,000
Residential Limited Contractor
$15,000
Residential Developer
$25,000
Commercial General Contractor Level 1
$25,000
Commercial Specialty Contractor Level 1
$25,000
Commercial General Contractor Level 2
$25,000
Commercial Specialty Contractor Level 2
$25,000
Commercial Developer
$25,000

While this author believes the bond amounts required of licensed contractors in Oregon should be higher, the bond increase is a step in the right direction. The last time the dollar amount of the surety bonds required of licensed contractors in Oregon increased was 2007.

Most contractors licensed with the CCB will not have to take any action to comply with the bond amount increase. The CCB has already reached out to the surety bond companies who sell license surety bonds in Oregon to notify them of the change. Many of the surety bond companies have informed the CCB that they intend on automatically updating the CCB bond amount for their customers and most of them will also separately notify their customers of the increase. Regardless, it is the contractor's responsibility to make sure their bond amount is increased. To facilitate the bond increase, a bond increase rider should be submitted to the CCB before January 1, 2024. A bond increase rider will increase the bond amount of an existing CCB license bond to the new required amount. If a contractor and/or their surety bond company fails to increase the bond by January 1, 2024, the CCB may reach out to the non-complying contractors and give them a deadline to comply with the increased bond requirement.

The following parties have the right to receive payment from a CCB license bond:

1. Property owners who allege breach of contract, negligence or improper work;
2. Property owners who expend funds in discharging a construction lien;
3. Employees alleging non-payment of wages;
4. Suppliers alleging non-payment for materials sold;

5. Subcontractors alleging non-payment for labor or materials provided; and
6. Primary contractors alleging breach of contract, negligence or improper work.

Deadlines to file CCB complaints:
In order to secure the right to receive payment from a CCB license bond, a complainant must file their complaint with the CCB in a timely manner. All complainants must use the complaint form provided by the CCB (which you can find on the CCB website). It is important to note that a party cannot access a contractor's CCB license bond if the contractor was not actively licensed with the CCB for at least part of the time they were working on the subject project. If the complainant fails to file their complaint with the CCB within the following deadlines, they will lose their right to receive payment from the contractor's CCB license bond. The below deadlines apply to complaints against CCB Residential bonds and CCB Commercial bonds.

(1) For work relating to **new structures**, property owners must file their CCB complaint within one year from the date the new structure was first occupied or within two years of substantial completion of the structure, whichever is earlier;
(2) For work relating to **existing structures**, property owners must file their CCB complaint within one year of substantial completion of the work;
(3) Employees must file their CCB complaint within one year from the date the wages were earned;
(4) Suppliers must file their CCB complaints within one year of the date the materials were sold;
(5) Subcontractors must file their CCB complaints within one year from the date their work was completed;
(6) Primary contractors must file their CCB complaints relating to **new structures** within 14 months from the date the structure was first occupied or two years after substantial completion of the structure, whichever is earlier;
(7) Primary contractors must file their CCB complaints relating to **existing structures** within 14 months from the date the subcontractor substantially completed work.

Complaints against a CCB Commercial bond must be filed with the CCB and the contractor's bonding company before a court judgment is issued or a BOLI hearing is held. Complaints against a CCB Residential bond can be filed with the CCB either before or after filing in court. However, the timing of the filing of a complaint at the CCB may affect the complainant's priority against a CCB license bond. As such, it is recommended that complaints against Residential bonds be filed at the CCB before they are filed in court and that complaints against Commercial bonds be filed with the CCB (and the contractor's bonding company) as soon as possible after filing in court. The CCB may charge a $50 processing fee to administer the complaint. The CCB will notify the complainant sometime after the complaint has been filed with the CCB if the complaint is within the CCB's jurisdiction and if the complainant is required to pay the $50 processing fee.

For a thorough analysis of the CCB complaint process and CCB bond claims, see the article titled "A Guide to Construction Contractors Board Bonds and Bond Claims" in the March 2017 edition of the Construction Law Newsletter for the Construction Section of the Oregon State Bar. A plethora of great articles from the Construction Law Section newsletters, dating back to 1986, can be found at said website. It also contains a search feature which is useful when searching for articles relating to specific topics.

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Still more on next page!

THE ADA AT 33

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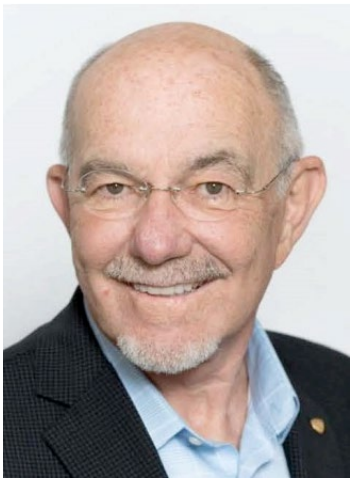

In the past 33 years, there has been what amounts to a revolution in disabled individuals' ability to navigate public spaces and buildings, a far cry from the time in March of 1990, when a group of disability rights activists put aside their wheelchairs, walkers, and crutches, Jim and crawled and drug themselves up the outside steps of the U.S. Capitol Building in Washington, D.C., in what was a vivid demonstration of the obstacles placed in the way of the disabled that prevented them from fully participating in society. *See* Steven A. Holmes, Disabled Protest and Are Arrested, N.Y. TIMES, March 14, 1990.

Following on the heels of that demonstration, the passage of the Americans with Disabilities Act in 1990 led to a major paradigm shift in the design, construction, and renovation of buildings, to provide full access for the disabled. This new access has resulted the disabled not just to get into buildings but has meant changes to the design and placement of essential building elements to ensure that the signs, counters, restrooms, appliances, switches, doors, and alarms are usable by persons with mobility, vision, vitality, and hearing disabilities.

The standards for accessibility have not been static during this time, and recently a major new addition to those standards – one which covers public rights of way – has been published, establishing new standards and obligations for both private developments and public projects that impact the right of way. This article will provide an introduction to the origins and regulatory environment relating to these accessibility standards, identify some of the nuances that can arise from the application of conflicting standards, and briefly describe the new areas that will be regulated by the newly-published standards.

"Powerful in its Simplicity"

Four months after the rights activists struggled up the steps of the Capitol Building, President George H. W. Bush signed into law a new civil rights law: the Americans with Disabilities Act (ADA). *See* 42 U.S.C. § 12101. While Title I of the ADA was concerned with individual rights relating primarily to employment, training, and job conditions, Titles II and II were primarily devoted to the removal of physical barriers, with the purpose of allowing "every man, woman, and child with a disability [to] now pass through once-closed doors into a bright new era." *See* Bush, George H. W. "Remarks on the Signing of the Americans with Disabilities Act." Press release. July 26, 1990.

In the ensuing years, much of that promise has been met. Despite the concerns that the ADA would be "vague or costly, or may lead endlessly to litigation," the President reassured the business community that the law was "powerful in its simplicity," and that such concerns were unfounded because "my administration and the United States Congress have carefully crafted this Act . . . to ensure that it gives flexibility [while] containing costs that may be incurred." *See* Bush, Press release. July 26, 1990.

Enforcement of the law was entrusted primarily to the U.S. Department of Justice, but provided also a separate right for adversely-affected private parties to sue property owners for discriminatory violations of the law. In the years since, at least with respect to Oregon, the President was correct that the ADA would not engender a large amount of litigation. In large part, this is an intended result of the omission of an entitlement to damages for

private actions, which materially reduced many persons' incentive to litigate (although it is worth noting that in some other states—notably California and New York—there have been large numbers of civil ADA complaints, mostly as a result of passage of state laws that provide for the award of damages, or of the activities of prolific litigants known as "testers" who seek out non-compliant facilities as targets).

Standards for Accessibility

The origin of modern accessibility standards dates back to the early twentieth century, with the founding of the National Society for Crippled Children (later known as the Easter Seals Society). *See* Kassidy, Emerson, Associated Content, The History of Easter Seals (2006). There was no shortage of crippled children in the early- and mid-twentieth century, thanks in large part to child labor, unregulated working conditions, industrial pollution, and periodic epidemics of polio. These disabled children were largely locked out of participation in organized society, due in great part to limits on their mobility, and the Easter Seals Society set out to change this environment and to grant them "the right to live a normal life," by providing accessibility into buildings. Kassidy, *supra*. As part of this effort, Easter Seals funded research that established an empirical basis for accessibility design standards, conducted from 1946 to 1960 at the University of Illinois. This research resulted in creation of the first design specifications for accessibility, which were adopted by the American National Standards Institute (ANSI), and published in 1961 as ANSI Standard No. A117.1. Later, Federal agencies joined the effort to continue developing this standard. That ANSI standard, applicable only to buildings, formed the basis for the accessibility standards adopted under the Architectural Barriers Act, Rehabilitation Act, Fair Housing Act, as well as the ADA. *See* The Architectural Barriers Act of 1968, 42 U.S.C. § 4151; Rehabilitation Act of 1973, 29 U.S.C. § 701; The Fair Housing Amendments Act of 1988, 82 Stat. 73.

In the years since A117.1's first publication in 1961, a series of Federal laws adopted these accessibility standards and applied them to, variously, public buildings constructed with Federal funds, multiple-unit housing, and commercial facilities generally, with standards adopted by the Federal agency now known as the United States Access Board. The ADA extended the reach of accessibility law to public accommodations, including places of lodging, recreation, transportation, education, restaurants, stores, service and care providers, museums, recreation and sports facilities, and public buildings, and—unlike its predecessors—Title III of the ADA broadened its reach to include existing facilities, and requires removal of existing barriers when a facility is remodeled or altered. The ADA standards adopted by the Access Board, known as the Americans with Disabilities Act Accessibility Guidelines (ADAAG) have also been adopted by, and incorporated into, the International Building Code, which is the basis for Oregon's building code, the Oregon Structural Specialty Code (OSSC).

Diverging Standards

Generally, constructing buildings in compliance with the OSSC should mean that buildings will be in compliance with ADA standards. However, the ADAAG rules have not always provided a safe harbor: in a well-known 2010 decision in an enforcement case brought by the U.S. Department of Justice against the California Speedway Corporation, the court in *Miller v. California Speedway Corp.*, 536 F3d 1020 (9th Cir. 2008) found that a NASCAR-style automobile racing facility that had been constructed in accordance with ADAAG did not provide the necessary "clear line of sight" for disabled persons in wheelchairs, resulting in violation of the ADA. *See Miller v. California Speedway Corp.*, 536 F3d 1020 (9th Cir 2008).

With respect to multi-unit housing, housing projects including four or more units are subject to accessibility standards adopted under the Fair

Housing Act (FHA). These FHA standards were independently promulgated after passage of amendments to the FHA in 1991, and these FHA standards differ from ADAAG standards in several respects, including the required size and configuration of doors and door hardware, and the configuration of kitchens and bathrooms.

New Right of Way Accessibility Guidelines

Prior to the adoption of the new Public Right of Way Accessibility Guidelines (PROWAG) by the Access Board, there have been no specific standards for accessibility in the public right of way; such requirements have been mostly extrapolated from the ADAAG standards. The PROWAG are available for download from the U.S. Access Board at https://www.access-board.gov/prowag/. The new PROWAG, while mostly derivative of the ADAAG, establish specific standards applicable to sidewalks, crosswalks, and other circulation routes, public transportation systems (including the width of streetcar and light rail track gaps), parking, and signage. New construction and alterations within the public right of way will be required to comply with these guidelines.

This work will be in addition to the work to make highway right of way accessible to people with disabilities that has been undertaken by the Oregon Department of Transportation in recent years, as a result of its obligations under a 2016 settlement agreement of an ADA-based lawsuit against the agency, which has resulted in upgrading of ADA curb ramps and other infrastructure within rights of way under ODOT's jurisdiction. *See* ADA Settlement Agreement Report for 2019, Oregon Department of Transportation, August 19, 2020.

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New Changes to Wage Regulations Under the Davis-Bacon Act and Related Acts are Anticipated to Increase Labor and Administrative Costs for Federally Funded Projects

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Elizabeth

On October 23, 2023, the United States Department of Labor implemented sweeping changes to wage regulations under the Davis-Bacon Act and the so-called Davis-Bacon Related Acts. Perhaps most notably, the changes revise prevailing wage standards for nearly all federally funded projects. The changes have no retroactive application except in certain circumstances (for example, contract change orders, or indefinite-delivery and indefinite-quantity contracts). The full scope of changes under the new rule is beyond the scope of this article, but we write to highlight notable changes to how prevailing wages are determined and enforced under the 2023 changes.


Matthew

Background on Davis-Bacon and Related Acts

Davis-Bacon requires that contractors and subcontractors on most federal construction projects pay prevailing wages established by the Department of Labor. Davis-Bacon seeks to provide local laborers and contractors with a fair opportunity to participate in federally funded projects and to protect local wage standards. The Related Acts include more than seventy active federal statutes that require contractors and subcontractors on federally funded construction projects to pay prevailing wages established by the Department of Labor. Each Related Act is distinct and must be evaluated on a case-by-case basis to determine whether and to what extent Davis-Bacon applies.

Davis-Bacon and the Related Acts regulate an estimated $217 billion in federal and federally funded construction projects each year and set prevailing wages for an estimated 1.2 million construction workers. Recently enacted legislation such as the CHIPS and Science Act, and the Infrastructure Investment and Jobs Act, are expected to substantially increase the number of construction projects subject to prevailing wages in the United States.

2023 Changes to Prevailing Wages and Enforcement

Under the new rule, the definition of "prevailing wage" has been changed to reduce reliance on weighted averages (i.e., total wages divided by number of workers) in each wage classification. The definition reverts to the pre-1982 framework by establishing an intermediate threshold (30%+) for determining prevailing wages in each wage classification. In the absence of a majority wage (50%+), a lower threshold (30%+) of workers paid the same wage in a wage classification will establish the prevailing wage. This lower threshold, which was previously abandoned because of inflationary concerns, is expected to convert more wage classifications in more regions to generally higher union wages.

The new rule also expands the scope of data that can be considered in determining prevailing wages for each wage classification. The new rule eliminates the ban on mixing rural and metropolitan wage data, and otherwise expressly permits the Department of Labor to consider other forms of wage data (*e.g.*, state or local rates). The new rule further permits the Department of Labor to consider variable wage rates as the same rate within collective bargaining agreements if such rates are "functionally equivalent." The latter change is designed to overcome prior restrictions imposed on the Department of Labor's use of variable wages within collective bargaining agreements to determine prevailing wages. As with the adoption of the intermediate threshold (30%+), "functional equivalence" is expected to convert more wage classifications in more locations to generally higher union wages.

In addition to changing how prevailing wages are determined, the new rule also changes how such wages are enforced, by expanding liability for noncompliance. Under the new rule, the definition of "prime contractor" is expanded to include controlling shareholders, controlling members, joint venturers or partners, and any general contractors who have been "delegated the

responsibility for overseeing all or substantially all of the construction anticipated by the prime contract." The new rule expressly holds such "prime contractors" contractually (and therefore, strictly) liable for any violation by subcontractors, and authorizes cross-withholding of funds owing under other federal contracts that involve the same "prime contractors." These changes should motivate prime contractors to select their subcontractors judiciously and closely monitor their performance.

As with "prime contractors," the new rule also adds language that expressly holds subcontractors liable for violations by lower-tier subcontractors. Subcontractors must flow down required contract clauses to lower-tier subcontractors and to pay back wages on behalf of their lower-tier subcontractors. Subcontractors can also be subject to disbarment where appropriate. Unlike "prime contractors," subcontractors are liable only when they have disregarded their obligations (and therefore, they are not strictly liable). These changes may encourage upper-tier subcontractors to take action if they suspect their lower-tier subcontractors have compliance issues.

In sum, all contractors on federal construction projects and federally funded construction contracts should anticipate that their labor and administrative costs will likely increase in the near term. Contractors with questions about changes to Davis-Bacon and the Related Acts should consult an attorney.

This article summarizes aspects of the law and does not constitute legal advice. For legal advice for your situation, you should contact an attorney.

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