

ROGERS JOSEPH O'DONNELL

## Construction Newsletter

### *Significant Changes to California Construction Laws for 2012*

As surely as the ball dropping in Times Square, the New Year means a series of new laws will drop on the construction industry. The following is a list of the most significant new construction laws. Unless otherwise specified, these new laws took effect *January 1, 2012*. These are laws that all contractors, architects, engineers, suppliers and others involved in construction in California should understand and incorporate into their practices and procedures. Our Employment Law Practice Group has also prepared a summary of new employment laws, including prevailing wage requirements and other rules that may affect the construction industry, that is accessible on our website.<sup>1</sup> Please contact Rogers Joseph O'Donnell if you any further questions about the scope of these laws and the impact on your business.

<b>Senate Bill 392</b>	
<b>Subject</b>	Contractor Licensing
<b>Description</b>	Under the prior law, only corporations, partnerships and individuals could hold a contractor's license in California. The new law authorizes a Limited Liability Company ("LLC") to obtain a contractor's license in a similar manner to a corporation, and to render all professional services that are authorized by such a license.
<b>Impact</b>	Contractors now have a potentially more convenient way to obtain limited liability protection for their professional ventures.
<b>Assembly Bill 1091</b>	
<b>Subject</b>	Contractor Licensing
<b>Description</b>	In addition to replacing a disassociating Responsible Managing Officer ("RMO") or Employee ("RME") within 90 days to maintain the qualified license or classification, contractors are now required to also notify the licensing board within 90 days of an RMO's or RME's disassociation.
<b>Impact</b>	Contractors should ensure that they include a notice of the disassociation of the prior RMO/RME when they notify the board of the replacement

<sup>1</sup> See [http://www.rjo.com/PDF/New\\_Labor\\_Employment\\_Laws\\_for\\_2012.pdf](http://www.rjo.com/PDF/New_Labor_Employment_Laws_for_2012.pdf)

	RMO/RME.
<b>Assembly Bill 397</b>	
<b>Subject</b>	Contractor Licensing / Worker's Compensation
<b>Description</b>	Imposes requirement that any contractor who licensed with an exemption from the requirement to carry worker's compensation insurance must now either recertify the basis for the exemption or submit a current certificate of worker's compensation insurance upon renewal of the license.
<b>Impact</b>	Any contractor operating under the worker's compensation exemption should update its license renewal file to include this newly required worker's compensation information, or risk a rejection of its license renewal. Or, worse yet, risk operating under an invalid renewed license with a resultant loss of the right to obtain payment for work performed.
<b>Senate Bill 293</b>	
<b>Subject</b>	Retention / Progress Payments
<b>Description</b>	Restricts the amount of retention for public projects to 5% of the total contract price. For both public and private projects, decreases from 10 to 7 the number of days in which a contractor must pay a subcontractor after receipt of a progress payment, unless otherwise agreed in writing.
<b>Impact</b>	This law is important for any contractor that works with California public entities, including cities, counties, boards and districts. Previously, these entities would usually hold at least 5% in retention, and often up to 10%. With a 5% cap, contractors will have more funding available during the course of the project, which may make it easier to run other projects at the same time. However, a state public entity may still withhold more retention if the governing board for the agency, after a properly noticed hearing, determines that the project is "substantially complex," and includes this determination in the bid documents.
<b>Senate Bill 424</b>	
<b>Subject</b>	Mechanic's and Design Professional Liens ( <i>July 1, 2012</i> )
<b>Description</b>	Like other entities that contribute value to a work of improvement, design professionals have the right to lien the improved real property. Unlike mechanic's liens, a design professional's lien is recorded before construction of the improvement has commenced. With this new law, the lien will automatically convert to a mechanic's lien when construction has started,

	rather than recording a new lien.
<b>Impact</b>	It will now be easier, and likely cheaper, for engineers, architects and other design professionals to enforce their lien rights.
<b>Senate Bill 456</b>	
<b>Subject</b>	Mechanic's Liens
<b>Description</b>	The proof of service affidavit that is required for every lien must now show the name of the owner or reputed owner upon whom the lien was served, and not just the name of the particular entity that is being served.
<b>Impact</b>	All construction professionals should immediately update their lien forms to include this information in order to avoid recording an unenforceable lien.
<b>Senate Bill 474</b>	
<b>Subject</b>	Indemnity Agreements ( <i>January 1, 2013</i> )
<b>Description</b>	Currently, parties to a construction contract may not agree to indemnify a party for its "sole negligence or willful misconduct." For all contracts entered into at the start of next year, this prohibition is expanded to prevent indemnity for the "active negligence" of a party. This bill also operates as a clarification (and arguable restriction) of the <i>Crawford</i> decision as applicable to most commercial projects, in that it eliminates the duty to defend from indemnity agreements for claims that "arise out of, pertain to, or relate to the active negligence or willful misconduct" of the indemnitee or another party. It also imposes strict requirements for the tender of defense before the duty to defend is invoked, and provides for the "reasonable" allocation of defense fees among the responsible parties.
<b>Impact</b>	There is some ambiguity regarding the full impact of this provision on the duty to defend, and it will likely take at least one appellate court decision to clarify its effect. The definition of "active negligence," as opposed to "passive negligence," is particularly vague and complex, and may cause problems in the application of this new rule. Regardless, this rule should decrease a subcontractor's exposure and cost of litigation, as well as its insurance premiums. Conversely, it could increase a prime contractor's insurance premiums, which may ultimately be passed through to the owner in the cost of construction.

If you are involved in the construction industry in California and have questions on how these new laws will affect you, or any other legal issues that need attention, please

contact the Rogers Joseph O'Donnell attorney with whom you regularly work or any member of our Construction Law Practice Group.

Mark J. Linderman (mlinderman@rjo.com)  
Joseph C. McGowan (jmcgowan@rjo.com)  
Patricia A. Meagher (pmeagher@rjo.com)  
Roland Nikles (rnikles@rjo.com)  
Neil H. O'Donnell (nodonnell@rjo.com)  
Robert M. Osier (rosier@rjo.com)  
Aaron P. Silberman (asilberman@rjo.com)  
Alan J. Wilhelmy (awilhelmy@rjo.com)  
Tyson Arbuthnot (tarbuthnot@rjo.com)  
Christine S. Liyanto (cliyanto@rjo.com)

Rogers Joseph O'Donnell, P.C.  
Robert Dollar Building, 10th Floor  
311 California Street  
San Francisco, CA 94104  
Phone: 415.956.2828  
Fax: 415.956.6457

*The content of this article is intended to provide a general guide to the subject matter, and is not a substitute for legal advice in specific circumstances.*