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ASA Advocacy Committees Discuss Trends and Plan for Future

The four ASA committees responsible for oversight of the Association's government and industry advocacy programs discussed trends and planned for the future during their meetings on Oct. 20-21 in Santa Ana Pueblo, N.M. The Task Force on Government Advocacy focused its discussion on state adoption of mechanic's lien registries and how such registries should be structured to best service subcontractors and suppliers. The task force also discussed how it can help ASA chapters, individual subcontractors and other subcontractor advocates identify what issues to tackle in their state legislatures and how to recognize the successes of ASA's advocacy leaders. The Task Force on Contract Documents discussed alternative ways to provide information to subcontractors on how they can negotiate more equitable subcontracts, including updating and compiling ASA's subcontract negotiating tips. The Task Force on the Subcontractors Legal Defense Fund discussed cases in which ASA recently filed "friend of the court" briefs and reviewed a plan to raise the funds to assure that ASA can continue to represent subcontractor interests in precedent-setting court cases. The Attorneys' Council discussed a wide range of issues, including appeals from arbitration proceedings, mechanic's liens on government property used for private purposes, and antitrust concerns in the construction industry and within associations like ASA. All four committees are scheduled to meet in conjunction with [SUBExcel 2018](#), which will take place Feb. 28-March 3, 2018, in Tempe, Ariz.

Register Online Now for SUBExcel 2018 and Make Your Hotel Room Reservations



[Online registration](#) for SUBExcel 2018 is now available! ASA's national annual convention, the premier education and networking event for construction subcontractors and suppliers, will take place Feb. 28-March 3, 2018, at Tempe Mission Palms in Tempe, Ariz. You can also [make your hotel reservations online](#) at Tempe Mission Palms, or call (800) 547-8705. ASA has negotiated the special room rate of \$204 single/double. The early-bird registration deadline and hotel room block cut-off date is **Jan. 31, 2018**. To register and for more information, visit ASA's [SUBExcel 2018 Web site](#) or enter via the SUBExcel 2018 Web portal, www.SUBExcel.com.

States Address Workforce Shortages

"The U.S. must work to find innovative ways to expand its workforce and improve productivity," said Federal Reserve Bank of Dallas CEO Robert Kaplan in a [Bloomberg op-ed](#) earlier this year. Kaplan added, "[T]he majority of this decline [in the rate of labor force participation] is due to aging-population demographics, and that this trend will intensify in the years ahead. In addition, middle-class jobs are increasingly requiring higher skill levels." Indeed, according to a 2016 [Georgetown University study](#), of the 7.2 million jobs lost during the Great Recession, 5.6 million—or 77 percent—were jobs that required a high school degree or less. In this environment, state legislatures increasingly are studying and passing legislation intended to help workers obtain the skills they need to participate in the middle-wage market, including the construction industry. According to the [National Conference of State Legislatures](#), in 2016 37 states enacted 97 workforce development laws. NCSC reported that these workforce development laws "spanned the gamut but focused largely on the following strategies:

- Offering and incentivizing **apprenticeships and other work-based learning**.
- **Sharing workforce information and data** to identify workforce needs and make sure training and education programs are aligned to meet those needs.
- **Tailoring job services** to specific folks such as youth, people with disabilities, veterans and their families, and people with criminal backgrounds.
- **Aligning K-12 education with job needs** via career pathways, tailored plans for students and offering dual credit at postsecondary institutions.
- **Meeting federal requirements** by organizing workforce plans and/or boards and adhering to reporting requirements."

Some states are offering to share with employers the cost of training employees. For example: Alabama and South Carolina have a tax credit for employers that hire an apprentice; Colorado provides financial incentives to schools that engage students in earning certificates or participate in apprenticeships for high demand industries; Maryland

established a program to offset the costs of hiring apprentices in the construction industry; and Rhode Island reimburses employers up to \$5,000 annually for apprentice training costs. See the NCSL report for information on your state's laws. "These laws certainly can spur workforce development," said ASA Chief Advocacy Officer E. Colette Nelson. "Ultimately, however, construction employers must invest their own resources in workforce development, including hiring apprentices; providing employees with specialized training; and working with local high schools, technical schools and community organizations to develop training programs to fill their needs."

OSHA Issues Enforcement Guidance for Now Effective Silica Rule

On Oct. 19, the Occupational Safety and Health Administration issued a [memorandum](#) to OSHA's regional administrators intended to help them enforce the agency's rule on crystalline silica in the construction industry. OSHA has been enforcing the Respirable Crystalline Silica in Construction standard since Sept. 23. However, for the first 30 days, OSHA offered compliance assistance in lieu of enforcement for those employers who were making good faith efforts to comply with the silica standard. Effective Oct. 23, OSHA began fully enforcing the standard with respect to construction. The new memorandum highlights some of the requirements of the OSHA rule, but does not provide guidance on all the standard's provisions. The attachments provide inspection and citation guidance; as well as flow charts to assist with evaluating employers' control methods. The memo also says that OSHA is in the process of developing a final compliance directive.

The Foundational Logic of Zero Injury

The [National Academy of Construction](#) has urged construction leaders to embrace the operational concept of "achieving Zero Injury" as a corporate safety performance norm. NAC offers the following safety precepts on which the Zero Injury safety concept is based:

1. Know that the fact injuries occur does not mean that injuries must occur; all injuries are preventable.
2. View the objective of Zero Injury outcome as a commitment, not a target or goal. There is a difference.
3. Understand there are many reasons injuries occur, but only one cause, which is always linked to some form of at-risk behavior.
4. Ensure all employees make a commitment to avoid all at-risk behaviors.
5. Accept that committing to Zero Injury is not saying there will never be another injury, but that another injury is never wanted.
6. Know employees will fully support a company's Zero Injury efforts since no employee nor their families want an injury to occur to anyone.
7. Acknowledge that safety has always been about working more hours without injury. It is clear that Zero Injury is statistically possible.
8. Recognize that an informed construction leader's job is simply to apply the Zero Injury research of the Construction Industry Institute to redefine a company's longest string of hours worked at Zero Injury.
9. If Zero Injury is not your heart's desire for a safety outcome, then what is?

According to NAC, these statements give insight into how to begin the process that yields in Zero Injury outcomes. The Zero Injury precepts assist individuals in forming their foundational safety beliefs. The NAC is a professional society of 200 construction leaders honored for their distinguished contributions to the industry. The NAC's white papers on safety are available at <http://www.naocon.org/research/>.

FASA Resource Answers Questions About Pay-If-Paid

"Pay-if-paid" contract clauses can cause big problems for unpaid construction subcontractors and suppliers. Such clauses specify that a subcontractor or material supplier will not be paid for the work it performed or the supplies or services it provided "if" the general contractor doesn't receive payment from the project owner. Pay-if-paid is not enforceable in all circumstances, however, and the Foundation of ASA's [Contingent Payment Clauses in the 50 States](#) helps subcontractors and suppliers understand their risk. "This resource is of tremendous business value to subcontractors and suppliers, who need to know the risk of pay-if-paid," said ASA Chief Advocacy Officer E. Colette Nelson. "Pay-if-paid is enforceable in some but not all states, and the states in which pay-if-paid is enforceable differ as to when a contract clause creates a true 'condition precedent to payment' threatening the right of unpaid subcontractors to be paid for satisfactory work." *Contingent Payment Clauses in the 50 States* explains for each state (plus the District of Columbia and the U.S. Virgin Islands):

- Whether a "pay-if-paid" clause will be enforced in that state if it is unambiguously drafted.
- Whether the state distinguishes between "pay-if-paid" and "pay-when-paid" provisions.
- Whether "pay-when-paid" clauses allow a contractor in the state to only delay payment to its subcontractors for a reasonable time.
- Key statutes and cases that describe the state's position on contingent payment clauses.

The ASA-member law firm and ASA general counsel, Kegler, Brown, Hill and Ritter, Columbus, Ohio, prepared the manual, which contains contributions from construction attorneys from across the country. The manual is available to ASA members as a downloadable PDF document under "[Contracts and Project Management](#)" in the Member Resources section of the ASA Web site.

Documentation: The Importance of Photos and Videos

The old saying that "a picture is worth a thousand words" is applicable to construction. A subcontractor should take quality progress photos at regular intervals, even daily, to illustrate the working conditions, damage to work, problems and progress as the job evolves. Delay factors should be photographed and identified. Videos also are useful. Use the cameras in smartphones and tablets to photograph problems and delays before they are covered or become difficult to recognize. Make sure to also document the date the photograph was taken, who took it, and what the photograph is intended to depict. Photographs and videos are very powerful pieces of evidence of what took place during construction. They can be very persuasive in settling a claim.

Using Drones in Construction? Attorneys Explain What You Need to Know in New FASA Video



In a new FASA video-on-demand, attorneys Brian Esler, P.C., and Seth Row, Miller Nash Graham & Dunn, LLP, explain what subcontractors need to know about using drones legally on the construction job, including the new FAA regulations on drone use, and what steps to take to minimize risks from drone use, including insurance traps for the unwary. "[Using Drones: What Subcontractors Need to Know](#)" (Item #8115) is \$65 for ASA members and \$95 for nonmembers. For more on drones, read "[Drones—Coming Now to a Construction Site Near You](#)" by Esler and Row in the May 2017 edition of *The Contractor's Compass*.

Contract Changes and Claims: Performance Phase, Part 2

A project schedule should be a dynamic device that changes to reflect the realities of the project. During performance, the subcontractor must carefully monitor all schedule revisions or updates, and all changes, conditions or occurrences which directly, indirectly, or even potentially affect its performance. Such alterations potentially impact the subcontractor's work and entitlement to more money and extensions of time. However, entitlement depends upon timely response which first requires prompt recognition of schedule impacts. To regularly monitor and evaluate schedule updates, the subcontractor should set up a schedule system which can:

- Identify the impact, or even the potential for impact, of all project changes, changed conditions or other schedule disruptions.
- Assess the impact on the sequence and duration of the subcontractor's own planned activities.
- Determine whether and to what extent the overall duration of the subcontractor's work on the project will be extended.
- Measure the secondary impact on the cost of performance, considering longer durations, changed sequences, compressed activities, and other inefficiencies resulting from the schedule disruption.
- Respond appropriately and as required contractually with proper notifications of delay and requests for time extensions or other adjustments.

ASA's [Contract Changes and Claims](#) is a series of articles providing tips for the management of changes and changed conditions and how to realize full adjustment to the contract price or contract time.

More and More Trades Recognizing Importance of 'Lean' by Participating in 2017 LCI Congress

More than 1,500 people—210 of which were construction trade partners—participated in the Lean Construction Institute's 19th LCI Congress Oct. 16-20 in Anaheim, Calif. The theme, "Capture and Leverage the Lean Advantage," recognized that the individuals and organizations that attended the Congress would share, and learn, how by leveraging Lean culture and processes, they could provide better service to their clients, become leaders in innovation, enhance profitability, and create a more integrated and engaging workplace. "Lean best practices embody the six Lean tenets of respect for people, optimize the whole, generate value, eliminate waste, focus on flow, and continuous improvement," said 2017 LCI Congress Chair Greg Zinberg, vice president, Clark Construction Group, Los Angeles, Calif. Trade partners and all stakeholders involved in Lean benefit from the collaborative environment ILPD produces. The LCI Congress included design and construction participants who understand the unique challenges that reveal themselves as a project takes shape. "I am always interested in



how other general contractors are using Lean tools on their projects because I have seen, as a trade partner, marked improvements for all team members when projects are managed using Lean tools,” said Perry L. Thompson, Lean executive director, Parsons Electric. The 20th LCI Congress will take place Oct. 15-19, 2019, in Orlando, Fla.

Attorney to Examine Employment Law Mistakes in Nov. 14 ASA Webinar



Philip J. Siegel, Hendrick, Phillips, Salzman & Siegel, will address the top employment law mistakes made by subcontractors in the Nov. 14 ASA webinar, “Employment Law Mistakes Most Commonly Made by Subcontractors.” Siegel will share steps subcontractors can take to minimize potential liability for employment law matters. He will also explain how best to ensure a former employee is prohibited from bringing claims against the company and how to avoid other common traps in the employment law arena. Additional discussion will include proper classification of independent contractors, permitted deductions from employee paychecks, severance pay, documenting disciplinary actions, the importance of written job descriptions, the importance of a discrimination and harassment policy, and common wage and hour mistakes such as those made regarding travel pay. This webinar will take place from noon to 1:30 p.m. Eastern time. Registration is \$99 for ASA members and \$179 for nonmembers. [Register online.](#)

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ASA Gold Sponsor Redirect Health Solves Healthcare Problems for Contractors

Contracting is a tough business with challenges like high workers’ comp rates, slim profit margins and workforce retention. On top of these day-to-day challenges, healthcare costs are severely threatening bottom lines. With the help of ASA Gold Sponsor Redirect Health, contractors nationwide are discovering a new way of doing healthcare. At just \$105 a month per person, the company’s EverydayCARE™ plan is helping hardworking business owners drastically cut costs, take better care of their workers, reduce worker comp claims and even improve eMod scores. Redirect Health takes contractors’ existing health insurance budgets and helps them get more out of it. That means no increases in healthcare costs—and better care. What’s more, the company can cover the cost of the plan, or the employee can, which wouldn’t cost the company a dime. To learn more, visit us at www.redirecthealth.com/asa or contact (888) 560-7421, nextsteps@redirecthealth.com.

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