



## Court of Appeals Upholds OSHA Silica Rule

In a wide-ranging [decision](#) issued on Dec. 22, the U.S. Court of Appeals for the District of Columbia Circuit decisively rejected the arguments made by ASA and the Construction Industry Safety Coalition on the crystalline silica rule issued by the Occupational Safety and Health Administration in March 2016. The rule, which OSHA started enforcing in the construction industry on Oct. 23, 2017, requires construction employers to limit worker exposure to respirable crystalline silica and to take other steps to protect workers. In a lawsuit filed in April 2016, and in later briefs and oral arguments, industry coalition had petitioned for a review of five issues: (1) whether substantial evidence supports OSHA's finding that limiting workers' silica exposure to the level set by the rule reduces significant risk of material health impairment; (2) whether substantial evidence supports OSHA's finding that the rule is technologically feasible for the foundry, hydraulic fracturing and construction industries; (3) whether substantial evidence supports OSHA's finding that the rule is economically feasible for the foundry, hydraulic fracturing and construction industries; (4) whether OSHA violated the Administrative Procedures Act in promulgating the rule; and (5) whether substantial evidence supports provisions that allows workers who undergo medical examinations to keep the results confidential from their employers and that prohibits employers from using dry cleaning methods unless doing so is infeasible. The court rejected all five of industry's challenges. However, the Court did agree with the North America's Building Trades Unions on their petition concerning the absence of medical removal protections. The Court ruled that "OSHA was arbitrary and capricious in declining to require MRP for some period when a medical professional recommends permanent removal, when a medical professional recommends temporary removal to alleviate COPD symptoms, and when a medical professional recommends temporary removal pending a specialist's determination." The court directed OSHA to reconsider or further explain those aspects of its silica rule. In the meantime, ASA will continue to work with OSHA to seek clarification of and to publish additional enforcement guidance on issues that some in the construction industry have found to be confusing.

## The Tax Bill Is Law—Now What?

Now that Congress has passed and President Trump has signed the "Tax Cuts and Jobs Act," ASA members' questions have ranged from "What's in it?" to "What now?" ASA Chief Advocacy Officer E. Colette Nelson offers seven steps that ASA members should take as a result of the new tax law.

1. Consult with your tax advisor to determine how the law will impact your company. Be patient. The new law is long and complex, and even tax experts don't agree on what some provisions mean. Interpretations may change over time.
2. Review your employee benefit structure. The new law includes provisions dealing with health insurance, family leave, transportation benefits and more.
3. Prepare for a change in your payroll system. The new law significantly alters the structure of the tax-withholding system. The IRS will have to develop and issue new tax tables, and employers will have to implement them in mid-tax year.
4. Help your employees prepare to comply with the new law. Almost certainly, every employee will have to complete a new W-4. They are likely to need help to avoid under- or over-withholding. If necessary, bring in your payroll processor or tax advisor to assist employees.
5. Watch for regulations from the Internal Revenue Service, as the agency issues interpretations and rules of how businesses and employees must comply with the law. Many of these rules will be issued as "interim final" without an opportunity for public comment before they take effect.
6. Recognize that Congress almost certainly will revisit the law during 2018. The 1986 tax law, which passed after more than a year of hearings and drafting, needed more than 100 "technical corrections." The 2017 law was written in only weeks, with more than a few provisions added at the last minute. Republican Congressional leaders already have said they will revisit some provisions. In the Senate, such corrections will need 60 votes (i.e., Democratic votes) to pass the Senate.
7. Brace for further changes to the tax code in future years regardless of which party controls Congress. If Republicans remain in control, they will, at a minimum, consider making permanent many of the now temporary provisions. If the Democrats gain control, they will revisit the law to determine how to shift benefits from higher income taxpayers to lower income taxpayers.

## Foundation of ASA Updates Lien & Bond Claims in the 50 States

Construction subcontractors and suppliers rely on mechanic's lien and payment bonds to assure their payment. To help you learn your lien and bond rights in the states in which your company does business, the Foundation of ASA has updated its *Lien & Bond Claims in the 50 States*, a downloadable manual which outlines the lien and bond laws in each



state and the District Columbia. A mechanic's lien is a claim against property to secure a debt, such as a debt owed to a construction subcontractor for the value of work performed and materials furnished on a construction project. A payment bond, which is required on most public construction, assures the owner that the prime contractor will pay its subcontractors and suppliers. The FASA manual provides a summary of the basic requirements of each state's lien and bond laws, including who is covered; critical deadlines for notices, claims and suits; filing procedures; and more. The summary of laws was prepared by Donald W. Gregory, Esq., and Eric B. Travers, Esq., Kegler, Brown, Hill and Ritter, Columbus, Ohio, ASA's general counsel, with input from attorneys from around the country. [FASA Lien & Bond Claims in the 50 States](#) (Item #3006) is \$55 for ASA members and \$80 for nonmembers.



## Bryan Bernardo to Present 'Trending Now: Lean Construction Top 10 Topics' at SUBExcel 2018

Bryan Bernardo, LEED-AP, Kitchell Contractors, will present an education workshop, "Trending Now: Lean Construction Top 10 Topics" from 3:30 p.m. to 4:45 p.m. on Friday, March 2 during SUBExcel 2018 in Tempe, Ariz. "As experienced workers leave the construction industry and fewer trades enter, we must transform the way we think and deliver projects," Bernardo said. "Lean design and construction enables that shift by focusing on eliminating waste and increasing value with safer job sites, improved profitability and reduced schedules." In the workshop, Bernardo will discuss eight wastes, plus 10 trending Lean construction tools that improve the way we build.



In other SUBExcel 2018 news, the final reception, banquet and awards ceremony on Friday, March 2 at Rustlers Roost will have a Western theme. Be sure to wear your cowboy hats and boots! Also, ASA has produced a new [video](#) and a new [brochure](#) for SUBExcel 2018. SUBExcel 2018 will take place Feb. 28-March 3, 2018, in Tempe, Ariz. [Register online](#) and [make your hotel reservations](#) in the ASA room block at Tempe Mission Palms. The early-bird registration deadline and hotel room block cut-off date is **Jan. 31**. For more information and to view the full [schedule](#), visit [www.SUBExcel.com](http://www.SUBExcel.com).

## Federal Labor Agencies Announce Rulemakings Affecting Subcontractors

Construction subcontractors, specialty contractors and suppliers will need to be alert to changes in federal regulations impacting human resource management during 2018, according to the regulatory plans released on Dec. 14 by the federal agencies regulating worker relations. Among the agencies reporting their plans are those housed in the U.S. Department of Labor, including the Employee Benefits Security Administration, the Employment Training Administration, the Office of Labor-Management Standards, the Wage and Hour Division, and the Office of Workers Compensation Programs. The Equal Employment Opportunity Commission also announced its regulatory program for 2018. Among the final labor regulations scheduled for publication in 2018 are:

- January: ETA: Electronic Filing of Apprenticeship & Training
- January: OLMS: Rescission of Rule Interpreting "Advice" Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act
- February: EBSA: Adoption of Amended and Restated Voluntary Fiduciary Correction (interim)
- April: OWCP: Longshore and Harbor Workers' Compensation Act: Maximum Compensation Rate Determinations

The agencies also announced their intent to publish proposed rules that if/when finalized will impact subcontractors. These include:

- January: ETA: Apprenticeship Programs, Labor Standards for Registration
- January: EEOC: Procedural Regulations Under Title VII, Americans with Disabilities Act, and the Genetic Information Discrimination Act and Procedures, and Age Discrimination in Employment Act
- March: OLMS: Labor Organization Annual Financial Reports: Coverage of Intermediate Bodies
- June: ETA: Drug Testing by States for Purposes of Determining Unemployment Compensation
- August: EEOC: Amendments to Regulations Under the ADA

August: EEOC: Amendments to Regulations Under GINA

October: WHD: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees

ASA will continue to aggressively represent the interests of subcontractors before these agencies and the Congressional committees with oversight responsibilities.

### **Guideline Helps Reduce Threat of Speculative Claims**

You may have heard horror stories like a subcontractor being sued for the financial loss suffered by a prime contractor because it was occupied dealing with a problem allegedly caused by the subcontractor on a current project rather than bidding a future project. Or perhaps you may have heard of a subcontractor being sued for doing something that harmed a prime contractor's bonding capacity. Rather than ending up on the losing side of a speculative lawsuit, a subcontractor can take specific steps to ensure that it has contractual rights limiting expensive claims for damages that are, at best, tangentially related to its performance. The universal recognition of the value of limiting such claims is why subcontractors and prime contractors have agreed that the best practice in the construction industry is that a project's "risks should be limited to those foreseen and agreed upon in contracts, with each party specifically disclaiming any right to assert a claim for consequential damages." Through their collaboration on the "Guideline on Consequential Damages," ASA, the Associated General Contractors of America, and the Associated Specialty Contractors have agreed:

*"All parties in the construction process are best served through clear contractual understandings that achieve certainty and restrict recovery of claimed damages to amounts, if any, specifically agreed upon by the parties. Accordingly, relevant text should be included on mutual consequential damage waiver language in construction agreements."*

Developed and published by ASA, AGC and ASC as part of the [Guidelines for a Successful Construction Project](#), the guideline explains the main considerations behind each party to a contract agreeing to waive their rights to pursue damages that are consequential in nature. The guideline can be a valuable tool in explaining to a client or potential client why a mutual consequential-damages waiver should be inserted, retained or modified in a contract. While the guideline does not provide model waiver language, it does offer pointers to help subcontractors explain the need for a mutual waiver of consequential damages. It notes, for example, that "[c]ontracts and subcontracts that are silent on the subject offer no protection against all sorts of indirect cost claims for alleged damages or performance deficiencies." It also notes that well-established, project-specific costs like the cost of salaried supervision on a project should be clearly charged to each project to ensure consequential-damages waivers do not apply to them. Another important point made in the guideline is the distinction between consequential damages and liquidated damages: "Liquidated damages, unlike consequential damages, allow contractors and subcontractors to make business decisions about whether or not to bid the work and to include contingencies in their pricing. On projects where it is foreseeable that delay beyond a given date will result in known, specific costs, the parties may agree in advance on a reasonable dollar amount of liquidated damages for each day of unexcused delay." Subcontractors can develop a consequential-damages waiver provision using model language such as provided in the ASA-endorsed *ConsensusDocs 750 Standard Form of Agreement Between Constructor and Subcontractor*:

*"5.4.1 Except for any (a) liquidated, consequential or other damages that Owner is entitled to recover against Constructor under the prime agreement, and (b) losses covered by insurance required by the Subcontract Documents, the Parties mutually waive all claims against each other for consequential damages, including but not limited to, damages for loss of business, loss of financing, loss of profits not related to this Project, loss of bonding capacity, loss of reputation, or insolvency. Similarly, Subcontractor shall obtain in contracts with its subcontractors mutual waivers of consequential damages that correspond to Subcontractor's waiver of consequential damages. The provisions of this subsection shall also apply to and survive this Agreement."*

Using such language, a subcontractor would, of course, want to have a thorough understanding of the waiver spelled out in the owner-contractor agreement.

### **Contract Changes and Claims: Maintain Concurrent Cost Records, Part 1**

Earlier articles emphasized the importance of an effective cost accounting system. It also is advantageous to maintain concurrent descriptive summaries of labor and equipment and other cost items as they are consumed, especially on changed or impacted work. These should include the following:

- Maintain labor tickets or other payroll records showing each person employed, the hours worked and the particular tasks performed, especially if those tasks relate to compensable extra work items.

- Maintain equipment usage logs showing each major piece of equipment used on the project, arrival date, departure date, down time, operating time, and the functions performed or the areas worked on.
- If there is no other way to quantify such allocations, qualified personnel should prepare estimates of the allocation of labor, materials or equipment time spent on changed or extra work.
- Maintain any other contemporaneous records that will provide the basis for cost allocation relative to particular changes or changed conditions.

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.

### Attorney Lee Brumitt to Examine 'Indemnity and Hold Harmless' in Jan. 9 ASA Webinar



The most important contract issue facing subcontractors is the extent to which risks inherent in the construction process—property damage, personal injury, liquidated damages, design or construction defects, etc.—are transferred from the upper tiers to subcontractors, said Lee B. Brumitt, Dysart Taylor Cotter McMonigle & Montemore, P.C., Kansas City, Mo. "Risk transfer" to lower tiers is accomplished in many ways. Contract provisions by which a subcontractor agrees to indemnify and hold a general contractor, owner, architect, or other third party harmless are the primary methods by which risks are transferred. In the Jan. 9, 2018, ASA webinar, "Indemnity and Hold Harmless," Brumitt will discuss indemnification and hold harmless provisions, how subcontractors can limit exposure to such provisions, how state laws may impact such provisions, and the key issues involved in assuring that subcontractors have adequate insurance coverage to absorb risks they might agree to assume. 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](#).

### CFMA Invites You to Participate in Jan. 10 '2018 Construction Industry Tax Update' Webinar

The Construction Financial Management Association invites ASA members to participate in its Jan. 10 webinar, "[2018 Construction Industry Tax Update](#)." Presented by Kelli Franco, CPA, construction industry tax leader, Moss Adams, and Jeff Kummer, director of Tax Policy, Deloitte Tax, LLP, this webinar will take place from 3:00 p.m. to 4:15 p.m. Eastern time. Franco and Kummer will discuss new tax policies and what necessary changes construction companies will need to make to reduce their overall tax burden. Participants will take away key strategies to position their businesses for success and take full advantage of the opportunities available. Normally \$65.95 each for non-CFMA members, this webinar is being offered to ASA members at a 40 percent discount, or \$39.57. To register, log-in or create an account at CFMA's [Education Online](#) Web site. For the ASA [discount](#), use the Coupon Code **ASAPROMO** during check-out.

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