



NEWMAYER & DILLION LLP  
ATTORNEYS AT LAW

# LEGAL BRIEFING

## Beware of Pitfalls in the Contractors' License Law

By Joseph A. Ferrentino

As a company's construction activities expand, it is important to remember the requirements of California's Contractor's License Law. While the purpose of the law is to protect the public against unqualified contractors, it may also be used, for example, by subcontractors to void otherwise binding contracts. Worse yet, there are a few cases in which lawyers have filed class action lawsuits claiming unfair business practices. And, in some instances, a company can be prosecuted for misdemeanors or have its license suspended retroactively.

In a nutshell, the law requires any company engaging in construction activities to appoint a responsible agent to be its licensee. The responsible agent must meet certain special requirements, including:

- The agent must pass the license examination.
- The agent must be permanently employed by the company.
- The agent must exercise "direct supervision and control" of the company's construction operations.

"Direct supervision and control" do not require that the licensing agent be physically present at the job site. An agent can meet this requirement if he is "managing construction activities by making technical and administrative decisions." Courts have struggled in attempting to interpret vague phrases such as "direct supervision and control," "technical decisions," "construction operations," and "administrative decisions."

In a larger company, it may be impossible for the responsible agent to visit the construction sites or directly supervise the on-site foreman and superintendents. Therefore, a company should create a corporate structure that keeps the responsible agent involved in the management of the construction activities statewide. This could include having the licensing agent perform audits, lead periodic meetings of regional construction managers, or set company construction

standards or policies. If a company's licensing agent takes an extended leave, changes job responsibilities, or terminates his employment, he must be immediately replaced, with notice to the Contractor's License Board.

Leaving the fate of a company's contractor's license in the hands of a judge or jury is risky in today's litigious world. Monitoring a company's conformance with the licensing law is critical to avoid this risk.

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## Newmeyer & Dillion Expansion Continues:

### John Moohr Joins as Executive Director; Attorneys and Space Added in Both Offices

In a continuing commitment to expanding the depth and breadth of our practice, **Newmeyer & Dillion** has made a significant hire of **John Moohr** as executive director. A veteran administrator who held similar positions with Alschuler, Grossman, Stein & Kahan and Katten, Muchin & Zavis, Moohr will guide the firm's expansion. Moohr also enjoys significant business experience, including as a senior vice president at Lucasfilm Ltd.

Also, since our last edition, the firm has welcomed four new associates and added significantly to our office space, nearly doubling the square footage in Santa Monica and taking an extra half-floor in our Newport Beach building.



## New 'Minimum Wage' Law (SB 179) Impacts Construction Contracts

By Craig A. Callahan and Frederick A. Haist

A new law enacted just before the California recall election imposes new burdens on developers or owners signing construction contracts. Such parties now may become liable to pay "minimum wage," plus penalties and other sums, for project laborers even if the agreed contract price has already been paid.

New Labor Code section 2810 (enacted October 13, 2003, as Senate Bill 179) provides:

"(a) A person or entity may not enter into a contract . . . with a construction . . . contractor, where the person or

entity knows or should know that the contract or agreement does not include funds sufficient to allow the contractor to comply with all applicable local, state, and federal laws or regulations governing the labor or services to be provided. . ."

The developer or owner signing the contract thus "guarantees" that its contractors pay their laborers' wages, taxes, workers' compensation benefits, etc. And a lesser contract price, or a lump sum contract, may not protect the developer or owner from this liability!

*(continued on reverse)*

The new law creates a “rebuttable presumption” that the contract does not violate Labor Code section 2810(a) if the contract contains ten specified provisions written in a “single document.” These required provisions are fairly detailed, and require information that may not be available at the time the contract is made. Unfortunately, even with these added provisions, the “rebuttable presumption” may be overcome under the right (or wrong) set of facts!

Despite some exceptions to the rule (for some owner-occupied residences, work performed under a collective bargaining

agreement, etc.), this new law can create significant exposures for additional costs. Persons entering into construction contracts need to plan to mitigate such exposures, by changing their contract terms to fit into the “safe harbor” under the new law and to shift such exposure back to the contractor employing the labor.

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## California Courts Put Experts to the Test

By V. Alan Bergfeld

As corporate defendants continue to face claims based upon novel expert theories, courts have attempted to develop standards for the admissibility of unique scientific analysis. Although the federal and state courts have not agreed upon a consistent approach to this issue, recent cases indicate that the California courts are inclined to reject theories that are not generally accepted in the scientific community. In federal courts, the standard since 1993 has effectively charged trial court judges with a “gatekeeper” function by requiring a preliminary assessment of expert testimony both as to the validity of the scientific methodology and as to the application of that methodology to the facts at issue. Expert testimony found by the trial court not to be sufficiently reliable to submit to the jury will be excluded. California state courts did not follow that lead, but the tide may be turning.

Two recent California decisions stated that experts must demonstrate a reasonable basis for their opinion, not merely a possible causal link, before their opinion can ever get to the jury. Thus, one court excluded a medical expert’s opinion on causation because it was revealed that the act in question only “could have been” a cause of the plaintiff’s damages. Another court excluded

an expert opinion that a certain chemical caused the plaintiff damage when it determined that the study upon which the opinion was based was too ambiguous to support the expert’s conclusions. These cases are seen as a move in the right direction for defendants who, in the face of ever more speculative theories of causation, may now have a mechanism to make sure that the jury sees only those theories for which there is a reasonable basis.

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## N&D Attorneys on ‘TAP’

The firm continues its participation in the Orange County District Attorney’s office’s re-launched Trial Attorney Partnership (TAP) program, with Partner **Joan Huckabone Mayer** becoming one of the first five lawyers to graduate from the current program. Participating lawyers handle the duties of a deputy district attorney on a pro-bono basis, from case preparation through trial, for an eight-week period. Partner **Laura Ives** and associate **Jay Freedman** are also participating in the program.

## About Newmeyer & Dillion LLP

Newmeyer & Dillion LLP, originally formed in 1984, is comprised of creative, highly motivated business attorneys who possess outstanding credentials, training and experience in their respective fields of practice. The firm represents a wide variety of clients, which include national and local financial institutions, real estate development companies, manufacturers and service organizations, as well as individuals.

### Litigation

- *Business*
  - Unfair Competition/Trade Secret
  - Business & Professions Code §17200
  - Partnership Dissolution
  - Lender Liability
  - General Business Disputes
- *Real Estate*
  - Construction
  - Real Estate Finance
  - Environmental Warranty
  - Title
- *Labor*
  - Wrongful Termination
  - Employment Discrimination
  - Sexual Harassment
- *Insurance*
  - First and Third Party Coverage
  - First and Third Party Bad Faith
- *Products Liability*
- *Appellate Practice*

### Estate & Tax Planning

- Wealth Transfer Planning
- Business Transition Planning
- Wills, Trusts, Probate

### Trusts & Estates Administration & Litigation

### Real Estate Transactions

- Acquisition, Development, Option, Sale and Lease of Real Property (Residential, Retail, Multifamily, Office, Industrial, Agricultural)
- 1031 Like-Kind Exchanges
- Master Planned Community Developments and Community Associations
- Department of Real Estate and Other Regulatory Filings
- Construction Related Matters
- Military Base Reuse

### Business Arrangements

- Formation, Structuring, Maintenance and Evaluation of Business Entities (Corporations, Limited Liability Companies, General Partnerships, Limited Partnerships, Joint Ventures)
- Shareholder, Partnership and Stock Option Plan Agreements
- Purchase and Sale of Businesses
- Business Dissolutions
- Employment and Independent Contractor Matters
- Licensing and Franchising Arrangements

### Corporate Finance, Securities and Mergers & Acquisitions

- Venture Capital Financing
- Mergers, Acquisitions, and Leveraged Buyouts
- Public and Private Securities Offerings
- Federal Securities Law

### Lending & Finance

- Documentation of Real Estate, Personal Property and Unsecured Loans
- Coordination of Loan Transactions for Borrowers

### Land Use/Environmental

- Development Agreements
- Mitigation Agreements
- Subdivision Map Act
- Clean Air Act
- CEQA and NEPA
- Initiatives and Referendums
- Municipal Incorporations and Annexations