

CONTRACTORS' ALERT

By Girard R. Visconti, Esq.

WHO FINANCES EXTRA WORK/CHANGE ORDERS

In general, a subcontractor or contractor has a responsibility to financially prosecute the work under its contract.

It is "normal" on construction projects for change-orders to be issued. The change-orders are issued by direction of the owner or contractor for work that is not in dispute. Work that is in dispute could result in implied or constructive change for which a general contractor or subcontractor seeks extra monies because of matters not included in the scope of work, drawings, specifications, etc.

Change-orders sometimes equal between five and fifteen percent on a project.

The question is, should the contractor or subcontractor finance the change-order while the changed work is not paid.



decisions on these issues are addressed in *F.2d.* regarding change-orders.

prove that the change was caused

by the owner and by the owner's direction.

2. That the change resulted in the contractor borrowing extra monies to perform the change.

3. That the monies for the change-order are extra and must be held in a separate account for performance of that work. Any borrowed monies cannot be commingled with the general receipts of the contractor or subcontractor.

4. Borrowed monies must be used exclusively for the performance of the work in relation to the change.

Suggestion: If there is an unexpected change that results in a contractor or subcontractor borrowing money to perform that work, a claim should be made for the cost of borrowing extra monies.

NO DAMAGE FOR DELAY CLAUSES

Many owners are including "no damage for delay clauses" in their contracts with the General Contractor which are passed down to subcontractors. This type of clause prohibits any damages for delay against an owner by a contractor and against a general contractor by a subcontractor.

Courts usually enforce these types of clauses. Some Courts are issuing decisions that an owner or GC may not enforce these clauses if they intentionally interfere with the construction schedule. Some examples of such Court decisions are; where the owner failed to relocate utilities, preliminary work by the owner not performed, failure to grant time extensions on change orders, withholding knowledge that is relevant to the construction project, or incomplete specifications and drawings.

Notwithstanding, contractors and subcontractors should be aware when signing a contract that they have an uphill battle if there is a no damage for delay clause in their contract.

Contributors

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NEWSLETTER



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Accidents Happen

By Richard A. Boren, Esq.

You are forty years old and have been driving for the last twenty-four years without incident. It is a clear, sunny day and you are on your way home traveling South on Route 95 when traffic in front of you slows to a stop. Fortunately, your eyes are on the road and you are able to apply your brakes and stop in time. Unfortunately, the driver of the Ford pick-up truck behind you does not have his eyes completely on the road and strikes you from the rear. The force of the collision causes your car to strike the car in front of you causing a chain reaction of four separate accidents. Your car is an accordion; your body is thrown backwards, forwards and from side to side. The State Police arrive at the scene and transport you by ambulance to the hospital. Fortunately you have health insurance that will cover most of the bills, but you are out of work for three months.

What are your rights and responsibilities? Who can you look to for payment of your total medical bills, your lost wages and your disability?



First and foremost, Rhode Island is referred to as a "fault" state. In a few states, such as Massachusetts, each party looks to his or her own insurance company for compensation unless the injuries and/or the amount of medical bills reach a certain threshold. Under Rhode Island law and the majority of states, the injured person can look to the party at fault for payment of medical bills, loss of earnings and disability whether temporary or permanent. We oftentimes refer to disability as pain and suffering.

Following are some of the various issues that may confront you:

Liability Insurance

Every driver in the State of Rhode Island is presently required to maintain a minimum of \$25,000 in liability coverage. Unfortunately, not everyone complies with the law and even \$25,000 is often insufficient to cover medical bills, loss of earnings and temporary or permanent disability. It is this author's recommendation that a family should not have less than a minimum of \$250,000 in coverage. If you have substantial assets, including equity in a home, you might want to seriously consider an umbrella policy over and above your automobile policy.

How will you learn the amount of coverage the driver carries that struck your car? Under Rhode Island law the other driver's insurance company must notify you in writing as to the amount of coverage. Thus, from the very beginning you will know the extent of coverage that you can seek against the operator of the vehicle that struck your car.

Uninsured/Underinsured Coverage

Under Rhode Island law every insurance company that writes a policy in Rhode Island must offer Uninsured/Underinsured Coverage to its policy holders. The premiums are not particularly high and are well worth the additional cost. For example, if the operator of the other vehicle had a minimum policy of \$25,000 and your medicals alone exceed

\$25,000 you would be able to make a claim against your own insurance company for underinsured benefits. For example, if you had underinsured coverage of \$100,000 and the other driver's insurance company offered its policy limits of \$25,000 you could look to your own insurance company for the balance up to your limit of \$100,000.

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Mom's Egg Biscuits

Ingredients:

- 5 Cups Flour
- 2 Cups Sugar
- 1 Cup Olive Oil
- 5 Eggs
- 2 Tsp. Flavored Extract
(You can use Vanilla, Anise or Lemon)
- 5 Tsp. Baking Power

Instructions:

- Mix all ingredients, then cut dough into strips.
- Shape strips of dough into biscuits and place on baking sheet.
- Bake at 400 for 12 - 15 minutes.
- If desired, glaze with a plain glaze or same flavor glaze as biscuits.
- Makes approximately 40 biscuits.

Perfect with a cup of tea on a lazy Autumn afternoon!



FAIR PAY ACT
by Dante J. Giammarco

Two (2) years ago Congress passed into law an amendment to the Fair Labor Standards Act called "Fair Pay". The changes were intended to clarify the rules as to which employees were entitled to overtime pay and who was exempt from such requirements.

It is apparent that there remains a fair amount of confusion and uncertainty regarding who is exempt from overtime pay; that is, pay for working more than forty (40) hours in one week or working on a holiday.

The easiest way to view these rules is by the opposite; that is, assume everyone is covered by the rules except those groups of employees who are exempt.

There are four (4) basic groups who are exempt, plus certain computer-related employees. The exemptions apply to executives, professionals, administrators and outside sales employees.

In all instances, even if a person would otherwise be characterized as being in an exempt group, the employee is not exempt if the salary involved is less than \$455 per week, except outside sales personnel. The salary requirement also does not apply to teachers, lawyers or doctors. Exempt computer personnel must be paid at a rate not less than \$27.63 per hour.

A) Executive.

An executive is defined as a individual whose primary duty is to manage the business, a department or subdivision of the business. Further, the

person must direct the work of two or more full-time employees and have the authority to hire, fire, promote (or recommend for promotion) or otherwise change the status of another employee. These activities must be the employee's primary duty. Naturally, business owners are automatically in this category if the individual owns at least twenty (20%) of the business.



The fact that an employee is highly compensated (making \$100,000 or more) does not automatically exempt the employee as a executive unless the employee is engaged in at least one of the duties of an exempt executive.

B) Professionals.

A professional must be an educated individual whose primary duty is the performance of work requiring

advanced knowledge of a predominately intellectual nature and which includes the exercise of discretion and judgment. The knowledge must be in a field of science or learning which required a prolonged course of specialized intellectual instruction. If the individual otherwise is qualified as a professional, but who is primarily engaged in physical labor, then the employee is not exempt.

Creative professionals are also recognized. A creative professional is an employee whose work primarily involves imagination, invention, originality of an artistic or creative nature.

C) Administrators.

An administrator employee is defined as having duties of performing office or non-manual work directly related to the management or general business operations of the employer or with the employer's customers and who can exercise discretion and independent judgment with respect to matters of significance. The business operations of the employer has been interpreted to refer to matters of finance, insurance, quality control, marketing, research, benefits, public relations and similar activities.

It should be noted that simply granting a title to an employee will not place the individual in an exempt category. The employee and his/her responsibilities must fit the definitions.

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Accidents - Continued from page 1

Health Insurance

If you have health insurance coverage through a company such as Blue Cross/Blue Shield or UnitedHealth when the hospital, emergency room or a doctor submits the bill for payment to the health insurer, you will receive a form from the health insurer that must be filled out. One of the questions asked on the form is whether the treatment was the result of an accident where a third party could be held liable. If you answer "yes" to that question, the health insurer will notify both you and the third party that the health insurer is entitled to be reimbursed in full for the payments made. Unbeknownst to most people, if you have retained an attorney to represent you in your claim against the third party, the attorney can negotiate with the health insurance company for only a percentage to be paid back to the health insurer rather than 100%.

Medical Payments Provision

Most motor vehicle policies also include a medical payments provision that allows the insured, when involved in a motor vehicle accident, to have medical payments paid through their own insurance company. Typically, the amount of coverage ranges from \$2,500 to \$10,000. This coverage can be a supplement to your health coverage. Even if the other party to the accident is at fault, you should immediately notify your own insurance company of the accident. In all likelihood, your own insurance company will offer you medical payments under your policy. However, be aware that just like your health insurer your motor vehicle insurance carrier will also seek reimbursement from the party at fault if there is a settlement.



Placing a Value on Your Injuries

In any motor vehicle accident, the injured party has the burden of establishing that the other party was negligent, the injured party suffered damages, and that there is a relationship between the accident and the injuries suffered.

In a rear end collision, there is little or no question that the driver who struck your car was negligent. But, how do you place a value on your injuries, your lost wages and your disability?

Although valuing an injury is not an exact science, there are certain components that are taken into account. Briefly, this includes the following:

- The total amount of the medical bills, regardless of payment by a health insurer;
- The dollar amount of loss of earning capacity;

Please note that the loss of earning capacity is different from loss of wages. *Even if your employer has paid your salary while you have been physically unable to work*, the measure of loss is your average weekly wage times the number of weeks that you were unable to perform your job.

- The nature, extent and length of disability, taking into account any permanent injury, scarring, and inability to carry out any daily functions.

Conclusion

Although accidents happen and you cannot control the actions of other drivers, DON'T BE A VICTIM. Understand your rights, your responsibilities, where you can go for benefits, and the components of a personal injury case.

Fair Pay - Continued from page 2

D) Outside Sales Personnel.

An outside sales employee is an employee whose primary duty is making sales, obtaining orders or contracts for goods or services of the employer for which the employer is to be paid by the customer. This type of employee generally is away from the employer's offices or places of business.

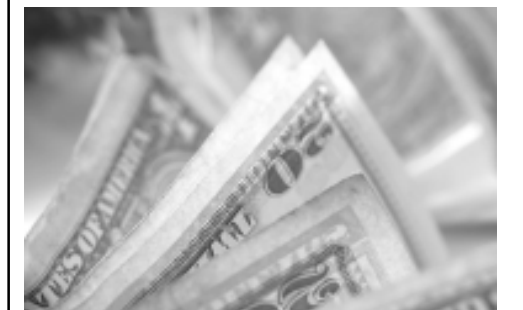
It should be noted that if a "salesperson" is only conducting sales for one (1) employer, especially if he/she is restricted to do so as a condition of contained pay, that individual is probably an employee, not an independent contractor. The minimum salary requirement does not apply to an outside sales person.

E) Certain Computer Employees.

If an employee is engaged as a computer systems analyst, computer programmer, software engineer or similarly skilled work in the computer field and has either a salary of not less than \$455 per week or is paid at the rate of not less than \$27.63 per hour, the employee may be exempted from the overtime requirements.

Conclusion:

The categorization of employees as exempt or non-exempt is still a complex area of law. Employers should regularly review the primary work functions of each employee to be as precise as possible in avoiding a mis-characterization and the penalties and back pay owed which could result from an error. When in doubt, an employer should always contact legal counsel for guidance in this area.



Through winter-time
we call on spring, ...

-William Butler Yeats