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“DO’S AND DON’TS” OF WORKPLACE DISCIPLINE

By Calvin R. Stead, Esq.

Even though the law is behind you when you discipline workers, human factors can change the equation.

Employment-at-will is a bedrock concept in American business, allowing employers, with notable exceptions, to fire anyone, at any time, for any reason or no reason at all. No documentation is legally required. But if you take that concept too literally, you could be looking at trouble, because if the case goes to court, judges and juries make up a human factor that can modify the cold realities of what is and is not in the law books.

One important factor not written into any law that could cause problems in court is fairness. Judges and juries always consider fairness. If your procedures are perceived as fair, you will go into adversarial proceedings with an advantage.

Take the following into consideration to account for the human factors in discipline and termination, both with the employee involved and with the legal system.

Use Progressive Discipline. Handle problem employees through a disciplinary process, instead of simply sacking them, even though you may be entitled to fire the employee without any due process. You might prefer this to ending up married to the employee in lengthy litigation. Maybe if you do the termination in two or three steps, you can get a clean break.

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Calvin R. Stead



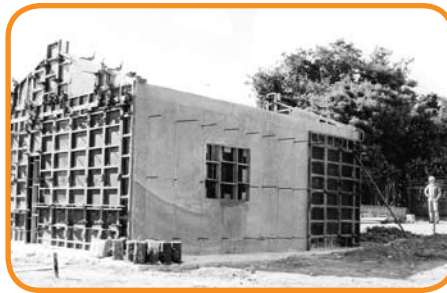
Calvin R. Stead is a partner in the Bakersfield office of Borton Petrini LLP. Cal's areas of legal expertise include construction defects, realtor errors and omissions, commercial and environmental litigation, land use consulting, oil field litigation and toxic tort litigation. Cal has represented builders, developers and sub-contractors on a wide variety of construction issues, including grading, soils, foundation, asphalt, concrete, flat work, tile, framing, floor coverings, roofing, masonry and stucco. Within the area of toxic torts, he has handled a vast array of cases, including toxic molds, vaccine reactions, asbestosis, cancer phobia, chemically induced asthma, pesticide and herbicide contamination, EMF, and AIDS contamination and phobia claims.

CONTRACTOR'S LIENS

By Calvin R. Stead

The California Constitution provides that contractors are entitled to a lien on the property on which they have bestowed labor or furnished material. (Cal. Const. Art. IV, Sec. 3). A mechanic's lien is in the nature of a mortgage on the land. The lien is intended to secure payment for labor performed or materials furnished towards the improvement of the real property of another person.

Pursuant to this constitutional mandate, the state legislature has enacted provisions in the California Civil Code that govern mechanics' liens. Under these provisions, an original contractor is allowed a mechanic's lien on property upon which labor has been done. An original contractor is defined as a contractor having a direct contractual relationship with the owner. Unlike subcontractors and vendors, original contractors do not have to provide preliminary 20-day notice to the owner of his intent to enforce the lien.



The Civil Code requires that the original contractor record his claim of lien after he completes his contract and before the expiration of (a) 90 days after the completion of the work of improvement if no notice of completion or notice of cessation has been recorded, or (b) 60 days after recordation of a notice of completion or notice of cessation. The property owner must file a notice of completion within 10 days of the completion of the work in order to trigger the reduced time frame of recording the lien. A notice of cessation must be filed after there has been a continuous cessation of labor for at least 30 days prior to filing. Failure to file a lien within this time period is fatal to the cause of action to foreclose on a mechanic's lien and the right is lost.

Once the lien is properly recorded, usually within 90 days of the completion of the work, the original contractor may then file a complaint to foreclose on the lien. Generally, the statute of limitations for commencing an action to foreclose a mechanic's lien is 90 days from the date the lien was recorded. However, in certain cases, if an extension of credit is given by the lien claimant, the statute of limitations may be extended. In any case, the time period may never extend beyond one year from the time of the completion of the work. Barring these rules, if a foreclosure action has not been filed within 90 days of recording the lien, the lien is automatically null and void. However, if the period for recording the lien is still open, the right to the lien is not terminated, and a subsequent lien may be recorded and foreclosed.

A lien foreclosure action is an equity action similar to the foreclosure of a mortgage. An alternative action for money

judgment may be brought simultaneously with the foreclosure action. Because the action for foreclosure is in equity, there is no right to a jury trial. A judgment to foreclose on the lien need only determine the amount of the debt, determine the defendant who is personally liable, direct a sale of the property subject to the lien, and apply the proceeds to the debt. [§ 29] Enforcing or Protecting Against Lien.

A landowner who does not authorize work giving rise to a contractor's lien but has knowledge of it can protect himself or herself from the lien by filing a notice of nonresponsibility within 10 days after knowledge of the work. And if, after work is done and a lien is filed, the landowner disputes the correctness or validity of the claim, he or she may record a bond and free the property from the lien. An action on the lien release bond must commence within 6 months of the bond's recording. A person obtaining a lien release bond must give notice of its recording to the lienholder. Failure to give notice tolls the statute of limitations on any action on the bond until the notice is given.

The requirement that an action on an owner's release bond be commenced within 6 months does not apply to pending lien foreclosure actions. If a lien foreclosure action is filed timely before the bond is recorded and the surety is thereafter made a party defendant to the action, the surety may not invoke the limitation period as a defense.



AB 573

By Calvin R. Stead

AB 573 was signed by the Governor, and has become law. AB 573 applies new limitations on the scope of indemnity promises required by local public agencies in contracts for design professional services.

THE PRIOR LAW

Prior to the enactment and passage of AB 573, there were some limitations on indemnity promises in construction contracts between design professionals and local public agencies. A public agency could require a design professional to indemnify the public agency for all claims except those arising out of the public agency's sole negligence or willful misconduct.

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However, the public entity could not require indemnity for its active negligence (i.e., no Type I indemnity). Prior law did not preclude indemnification of the public agency for the public agency’s passive negligence (Type II indemnity). An example of passive negligence might be a planning department’s failure to catch an error during a plan check. These limitations were codified in Civil Code section 2782, which has been a part of the law for many years and was not repealed by AB 573. Civil Code 2782 reads as follows:

(a) Except as provided in Sections 2782.1, 2782.2, 2782.5 and 2782.6, provisions, clauses, covenants, or agreements contained in, collateral to, or affecting any construction contract and which purport to indemnify the promisee against liability for damages for death or bodily injury to persons, injury to property, or any other loss, damage or expense arising from the sole negligence or willful misconduct of the promisee or the promisee’s agents, servants or independent contractors who are directly responsible to such promisee, or for defects in design furnished by such persons, are against public policy and are void and unenforceable; provided, however, that this provision shall not affect the validity of any insurance contract, workers’ compensation or agreement issued by an admitted insurer as defined by the Insurance Code.

(b) Except as provided in Sections 2782.1, 2782.2 and 2782.5, provisions, clauses, covenants, or agreements contained in, collateral to, or affecting any construction contract with a public agency which purport to impose on the contractor, or relieve the public agency from liability for the active negligence of the public agency shall be void and unenforceable.

CHANGES DUE TO AB 573

While AB 573 retained the limitations in Civil Code section 2782, the bill added an additional prohibition which focuses on the conduct of the design professional rather than the public agency. That new limitation exists in addition to the preexisting limitations and provides that for architectural, landscape architectural, engineering and land surveying services, public agencies can no longer require an indemnity promise any broader than a promise that requires the design professional to indemnify for its own negligence, recklessness or willful misconduct (i.e., Type III Indemnity). The law now no longer permits a public agency to require indemnity from design professionals for the entity’s negligence whether active or passive.



“DO’S AND DON’TS” OF WORKPLACE DISCIPLINE

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Use the Same Person Who Hired to Fire. This step prevents charges of bias in firing. The reasoning is simple: If the manager showed no bias in hiring the employee, it is unlikely that the same manager suddenly developed a bias that caused the firing.

Drop Problem Workers at the First Sign of Trouble. Waiting just builds the workers’ “sense of entitlement” about “owning the job.” Ask supervisors for an evaluation of new hires early in the process and take action quickly, if needed. Employee handbooks should note that merely completing probation does not change the employee’s other employment-at-will rights in any way.

When You Document, Cite Specifics. Do not use generalized words like “bad attitude.” Instead, write out the actual acts that merited the description.

Avoid Absolutes. Never say “never” or “always” with employees. If, for instance, you say “Jane always misses deadlines” in documentation or testimony, the employee’s lawyer need only show one instance in which Jane made a deadline for your whole testimony to become suspect.

Have Absolute Reasons for Termination, including violence or theft. Do not write in your policy that such acts may be subject to penalties *up to and including termination*. That seems to suggest that, sometimes, you find these acts acceptable. Do not list all the little things an employee has done wrong. It makes you look petty. Instead, put three or four examples to show a pattern of problem behavior.

Do Not Describe a Problem Worker in Medical Terms.

Saying that “Jim is depressed” or “our EAP helps people with depression” can be seen as an employee being “perceived as disabled.” Just one such utterance can invoke all the job protections of the Americans With Disabilities Act. Train your supervisors to focus on the performance or behavior deficiency and to not speculate on the underlying cause.



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