TOP EMERGING LEGAL ISSUES TO WATCH OUT FOR IN 2024 IN ARCHITECTURE, ENGINEERING, AND CONSTRUCTION

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Insurance | Risk Management | Consulting

Construction

Over the past several years, the construction industry has rightly focused on how to address delays and cost impacts arising out of the COVID-19 pandemic and resulting supply chain disruptions, price fluctuations, and labor shortages. Looking ahead to 2024, the industry now needs to include legal issues when considering its insurance and risk management programs. The following is a brief synopsis of issues the industry should watch.

1. GREENWASHING AND GREEN DURABILITY

Our rush to a green future presents novel legal issues for the architecture, engineering, and construction (AEC) community.

The first issue to watch for this year is greenwashing, which is the process of making a project seem more environmentally sound than it is. Greenwashing liability is most likely to arise if a design or structure does not meet promised performance criteria, such as a net-zero project that consumes more energy than it produces. But it can also arise from errors and omissions in procurement and construction. For example, by using wood not certified by the Forest Stewardship Council (FSC) when LEED points depend on FSC certified materials.

Also, because green technology is relatively new, we can expect numerous product failures leading to possible claims. For example, it appears that many wind turbines are being brought online with less than fully vetted engineering, which may result in possible breakdown.

Another concern relates to the location of solar project sites, which are often in remote areas exposed to severe winds that can cause panels to flex. This flexing causes microcracking, which reduces the useful life of the panel. Solar farms are also often located in areas exposed to destruction from hail or wildfire. This can lead to claims against the engineers who approved the project siting in feasibility studies or who failed to engineer the trackers for weather conditions at the site.

2. AFFIRMATIVE ACTION AND DIVERSITY, EQUITY, AND INCLUSION

In a 2023 college admissions court case, the United States Supreme Court held that using race as a factor in choosing to admit students violated the Civil Rights Act of 1964 and the Equal Protection Clause of the US Constitution. While this ruling was limited to student admissions, there is potential for it to be expanded to other affirmative action programs, including set asides for minority and women-owned businesses or corporate DEI programs.

DEI programs have become a common part of the construction industry, and many contractors promote their dedication to diverse hiring practices in their marketing materials. Many private owners require contractors to demonstrate a commitment to these goals, and public contracts often require that a percentage of the work go to firms owned by minorities, women, or persons perceived as coming from disadvantaged backgrounds.

This change in the world of college admissions could soon have reverberations in the business world, and be a source of future litigation for hiring and employment practices. Indeed, 13 state attorneys general recently sent a letter to Fortune 100 companies warning of potential legal consequences for racial preferences in hiring. While you might think affirmative action only impacts higher education regarding not utilizing race-based admission, there are starting to be trends where companies can have legal action taken against them for race-based hiring. So just because you're not a college doesn't mean you can't be impacted by this legislation.

This in turn gives rise to numerous insurance implications. Policyholders should take note of pathways to coverage under certain types of insurance, but they must also remain wary of exclusions and other potential roadblocks. Policyholders in the space should be vigilant about potentially unfavorable changes to their coverage. For example, in anticipation of widespread and costly litigation, insurers may introduce discrimination-related or event-driven exclusions — or limitations such as sublimits — for claims arising from disputed admissions policies.

It's important to note that the Supreme Court's affirmative action ruling technically only addresses affirmative action in the context of Title VI in the admissions process. That said, you can see a potential jump into Title VII (which addresses employment discrimination) on the horizon. Title VII was specifically mentioned in Justice Gorsuch's concurrence and, as Rodney just mentioned, recently 13 state attorneys general issued a letter to the CEOs of the Fortune 100 threatening serious legal consequences over race-based employment and diversity policies.

The EEOC chair did release an official statement that the affirmative action decision does not prohibit employers from implementing DEI programs or fostering diverse and inclusive workforces.

If anything, this emphasizes the need to review your own policies and DEI programs and consult with outside counsel. As to insurance coverage, we've already seen newly introduced admissions

exclusions for higher education policies. As to non-higher education insureds, we haven't seen any new exclusions attempted, but it is something we are monitoring.

3. ADMINISTRATIVE LAW

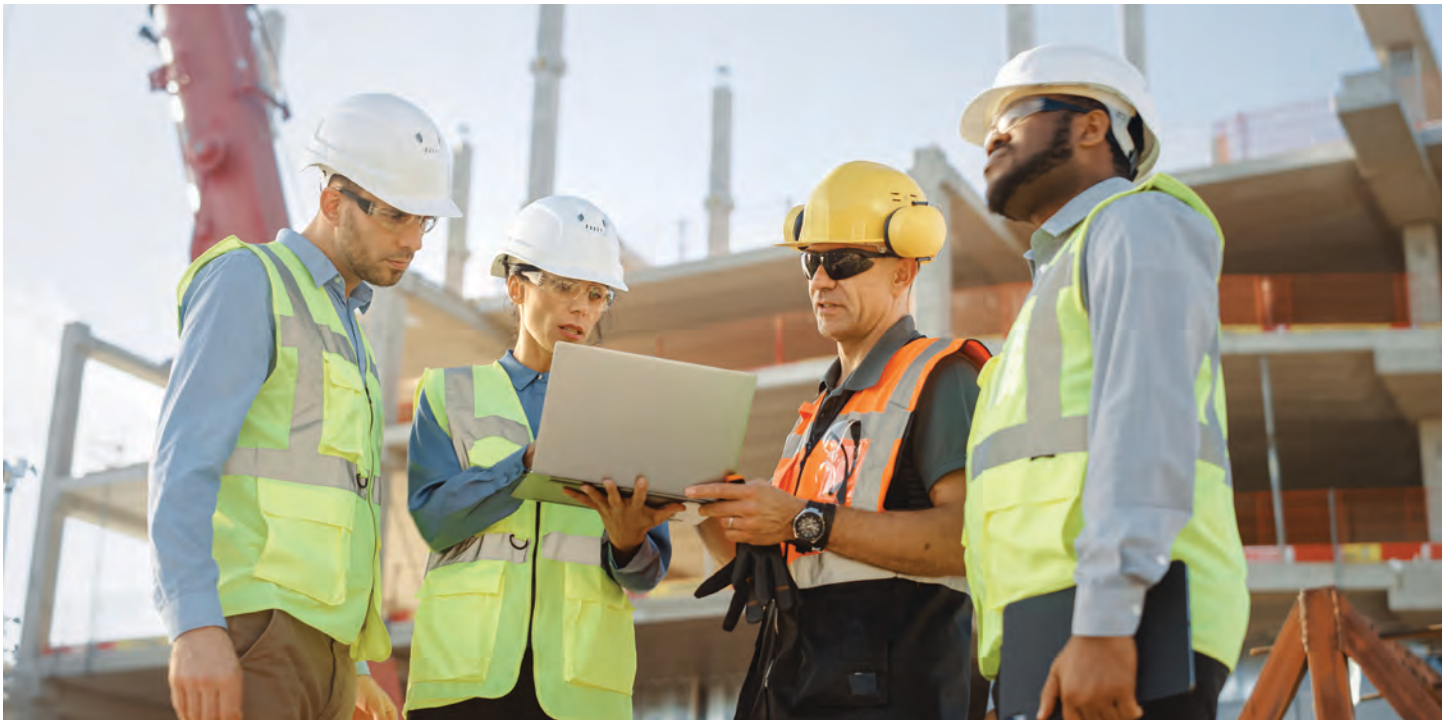
Much of the construction world is ruled by administrative agencies, from environmental permitting to OSHA. These agencies write the governing regulations, Issue citations, and then enforce those citations through their own administrative procedures. The power of agencies to write regulations and control enforcement of those regulations may be changing soon, and we can expect two major impacts to the construction industry.

- First, administrative rulemaking will likely be less expansive. These rules have significant impacts on construction. For example, the EPA has recently issued new rules restricting the kinds of refrigerant that may be used in HVAC equipment. Phasedown on Hydrofluorocarbons (Federal Regulation 73098, October 24, 2023) includes restrictions on the use of certain hydrofluorocarbons under the American Innovation and Manufacturing Act of 2020. The new rules impact HVAC design and construction for both new construction and renovation work.
- Administrative judges are sometimes perceived as not being truly independent when ruling on claims brought by the agencies that employ them — especially when those judges previously worked as advocates on behalf of those agencies. Federal judges are perceived as more independent, and contractors facing administrative fines — such as those levied by OSHA — will be more inclined to challenge those fines if they believe they will get a more impartial judge on appeal. Also, rules of court are more demanding than those in administrative procedures, so it will become more difficult for the agencies to bring enforcement actions.

4. ARTIFICIAL INTELLIGENCE AND THE STANDARD OF CARE

Although no one knows entirely how the AEC world will use artificial intelligence (AI), we can be certain it will be used widely. Current generative AI "learns" patterns from existing data sets and then employs those patterns to generate new content. The product can be remarkable, but it can also "learn" the wrong things. For example, one AI program was shown pictures of dogs and wolves so that it could distinguish between the two animals. Because many of the wolf pictures had snow in the background, it determined that the difference was not in the animal, but in whether the picture had a white background.

For the foreseeable future, we will still need human controls to make sure AI is focusing on the relevant variables and giving us accurate results. Indeed, Executive Order 13960 from the Biden Administration requires those using AI to develop standards and tests to ensure that AI results are trustworthy.[1]



When costly design errors occur, questions will arise over whether the standard of care required use of more AI or less AI, and whether the controls met the standard of a reasonable professional based on that stage of AI development.[2] To address these issues, designers will need to establish protocols for training AI and verifying that the results of AI-generated content meet the desired parameters. This may include performing audits where specific results are tested using more traditional methods.

5. INVESTING IN AMERICA COMPLIANCE

The federal government has boosted construction spending through several new laws, including the Inflation Reduction Act (IRA) and CHIPS Act. This funding comes with many new restrictions. For example, to obtain clean energy tax incentives, private projects must comply with prevailing wage and apprenticeship requirements applicable to federally funded projects.[3] These programs had never before been applied to a tax incentive. Additionally, bonus tax credits are available if the domestic content in the project reaches certain levels.[4] Much effort will be required to understand what is required and to comply with those requirements. Owners will need to make the requirements clear in their contracts, and contractors working on thin margins will need to learn the rules and document compliance for the owners' tax advisors.

CONCLUSION

2024 promises to be an interesting year for legal changes. Trade associations and in-house counsel will need to pay special attention to the Supreme Court, as recent cases could bring fundamental changes to the administrative laws that govern design and construction. They will also need to watch carefully to see if the college admissions decision has a wider impact on DEI and minority contracting rules. Minority- and women-owned contractors who rely on their status for marketing purposes should assume that such preferences will go away in the next several years and plan accordingly.

Risk managers should review their employment practices coverage and DEI policies with an assumption that they may be subject to reverse-discrimination suits based on the ruling of the 2023 college admissions court case. They should also review professional and general liability policies with an eye toward greenwashing claims.

Contractors and subcontractors going into projects funded under the IRA and CHIPS Act will need to pay special attention to compliance issues.

Finally, while we fully endorse technological advancement to achieve better results and efficiency, we caution that new technologies bring new risks. This applies to cutting-edge green technology and the use of AI. We encourage everyone to think about those risks, consult with counsel on how to address those risks through their contractual arrangements, and keep their insurance professionals fully informed to obtain the best possible insurance coverage in the event of suboptimal results.

SOURCES

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[2]Stephen, Anand. "Powerful AI Still Needs Quality Checks," *Engineering News-Record*, 27 Dec. 2023.

[3]"U.S. Department of the Treasury, IRS Release Guidance on Inflation Reduction Act Provision to Ensure Good-Paying Clean Energy Jobs, Expand Clean Energy Workforce," *U.S. Department of the Treasury,*" 29 Aug. 2023.

[4]"Domestic Content Bonus Credit Guidance under Sections 45, 45Y, 48, and 48E," *irs.gov*, accessed 18 Apr. 2024. PDF file.

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