

Presentation:

Managing Risk: From Internal Employment Issues to Common Contracting Pitfalls

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- Represent general contractors, EPC contractors, DB contractors, engineers, owners/developers, subcontractors
- Projects include Embassies, water treatment plants, utility-scale solar plants, condo towers, interstate expansions

Introduction

- What is risk?
 - Risk is the possibility or likelihood of loss – degree of uncertainty
- It is the essence of business – must take risks to generate returns
- Key is determining “acceptable” risk
 - Bargaining power
 - Time constraint
 - Ability to mitigate/minimize risk
 - Ability to understand and price risk

Introduction

- What is “risk” in the context of construction contracts?
 - Address “critical” items that could have **significant cost/time impact** in the real world of performing the work
 - This is the challenge in reviewing and negotiating contracts
 - No risk = No margin
 - Cannot sell a “no risk” agreement to the counterparty
 - Delays negotiation – eats up your float
 - Must prioritize risks

Introduction

- Form Agreement = “Wish List”
- Unless you have significant bargaining power, it is unlikely that you will get everything you want from your form
- So, in addition to identifying and understanding key aspects of your form agreement, you must also be prepared for “compromise” positions on each of those issues
 - How to mitigate/minimize risk?
 - How to price risk?
 - How to pass risk along to others?

Agenda

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Discrimination Laws

- Title VII of the Civil Rights Act
- The Americans with Disabilities Act

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Leave Laws – the Family and Medical Leave Act

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Scope of Work

- Performance vs. Design Specifications
- Incorporation of Documents
 - Upstream Contracts
 - Permits & Limitations
 - Specific Exhibit for Incorporated Obligations
- Define Milestones
 - All items should be in your control
- Standards of Performance
 - Applicable Codes
 - Prudent Industry Practices vs. “Best” Industry Practices
- Ambiguities
 - How Resolve?
 - Contract vs. Exhibits

Payment Clauses

- Payment Methods
 - Lump Sum / Cost Plus / Time and Material Rates
 - Cost Plus with Guaranteed Maximum Price
 - Percentage Complete vs. Milestone Payments
- What constitutes a valid invoice?
 - Establish a Checklist
 - Lien Waivers and Claim Waivers
- Payment Period
 - Net 30 Days
 - Pay-When-Paid vs. Pay-if-Paid
- Non-Payment
 - Payment of Undisputed Amounts
 - Breach and Default
 - Suspension vs. Termination
 - Payment of Costs Pending Resolution
 - Withholding Rights
- Retainage

Force Majeure Recovery

- Force Majeure: three avenues of recovery:
 - Time Extension/Relief from Performance (“Excusability”)
 - Cost Recovery (“Compensability”)
 - Cost of damage/repair from FM
 - Cost of mitigation measures arising out of FM
 - Cost of acceleration to overcome impact of FM
 - Insurance (always at least consider)
- How do you establish “adverse” weather conditions?
 - Do they need to be “abnormally severe” or simply “adverse”?
 - Outside of 5/10/20/50/100-year average?
 - Examples:
 - Rain in Florida
 - Snow in Montana
 - Heat in California

Project Change Provisions

- Grounds for Recovery:
 - Additional/Extra Changed Work
 - Excusable Event (including Owner-Caused Delay and Change in Law)
 - Force Majeure
 - Acceleration Costs (including Constructive Acceleration)
- Extent of Recovery
 - Compensable vs. Excusable
 - Cost Plus
 - Definition of “cost” – does it include home office overhead / general conditions / labor rates / etc.)
 - Lump Sum
 - Time and Materials Rates (if available)
- Disputes with Change Orders
 - What if dispute regarding existence of a change or extent of recovery?
 - Continuation of work clause & default
 - Monthly payment of actual “costs” pending dispute (who finances disputed work?)

Notice Requirements

- NOTICE IS **NOT** MERELY A “GOTCHA”
- Notice provides the recipient with OPTIONS
 - Don’t authorize extra work
 - Propose an alternative plan that benefits the recipient
 - Use alternative resources
 - Etc.
- Notice allows the recipient to make cost / benefit analysis for itself as the higher tier party

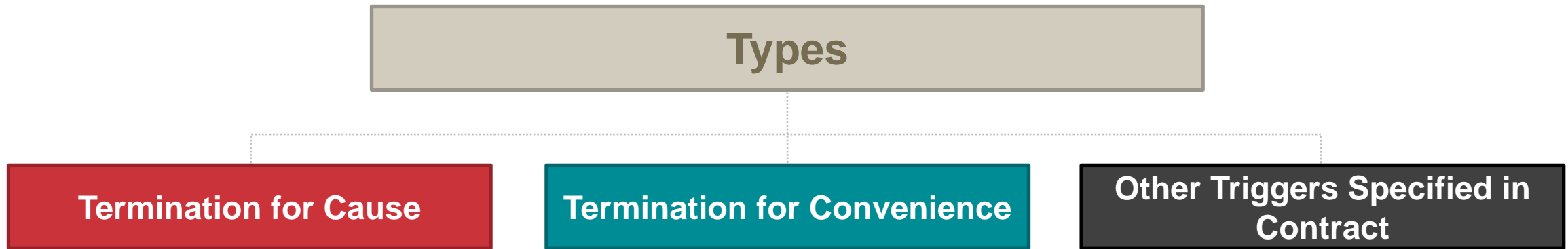
Notice Requirements

- Issues to Consider for “Notice”
 - Notice Period
 - Business days vs. calendar days vs. hours
 - Trigger for Notice Period
 - Knowledge trigger
 - Occurrence trigger
 - When deemed “delivered”?
 - Personal delivery
 - Mail / courier
 - Fax / email
- Failure to provide adequate / timely Notice:
 - Potential waiver of claim – consider a clause that waiver only applies until actual Notice is provided
 - Reduced bargaining power in final project negotiations (reduced value of claim because of potential waiver argument)

Notice Requirements

- What Should Notice say?
 - Keep it Simple
 - This is an opportunity to create a great piece of evidence
 - Something arbitrator or judge would understand
 - Be Careful with Narrow Wording
 - Don't limit the reasons
 - Avoid Quantifying Damages
 - Don't forget impact
 - Broadly Reserve Rights

Termination



Termination

- Practical Considerations
 - Ability and Plan to Complete the work
 - Are LDs sufficient to cover any damages?
 - Do I have a Replacement Contractor/Subcontractor Available?
 - Increased costs to re-procure / premium
 - Can I satisfy my duty to Mitigate Damages?
 - When will I be able to finish the Project?
 - Delays in re-procuring
 - What do I need from the defaulting party to complete?
 - Licensing/Permitting/Lien/Bidding issues?
 - Finances Available to Complete
 - Do I have enough withheld to cover the Cost of Completion?
 - Can I deal with the liens that are going to be filed?
 - Am I in a financial position to pay for the fight?

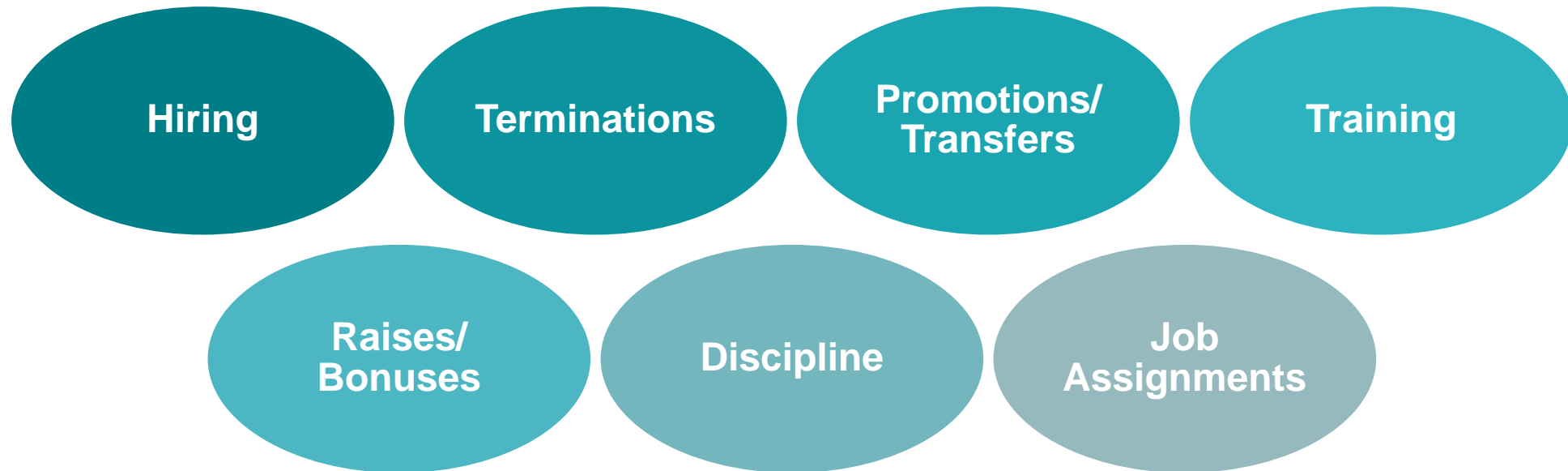
Title VII Of The Civil Rights Act

Discrimination

Title VII Prohibits Discrimination “Because of”

- Sex
 - Includes sexual orientation
 - Includes pregnancy
- Race
- National Origin
- Religion
- Color

Anti-Discrimination Provisions Apply to ALL Employment Decisions



Key Inquiries

- Were other employees, outside of the protected class, treated differently?
- Was there a “legitimate, nondiscriminatory reason” for the action taken?
- Did we consider any applicant’s or employee’s protected status in any employment decision?
- Who made the decision?
- Are there any actions that are going to make your reasoning look “pretextual”?

Harassment

Harassment Is Discrimination If It Is Based On:

- Race or color
- National origin or ancestry
- *Sex (including pregnancy and sexual orientation)
- Age (40 or over)
- Disability or medical condition
- Genetic Information
- Religion
- Veteran status
- Marital status

What Is Sexual Harassment?



“**Unwelcome** sexual advances, requests for sexual favors, or other verbal, visual or physical conduct of a sexual nature...”

Two Types of Sexual Harassment

- Quid Pro Quo (Tangible Employment Action)
 - Submission to the conduct is a condition of employment OR the basis of an employment decision
- Hostile Work Environment (No Tangible Employment Action)
 - The harassment interferes with an employee's work performance or creates an intimidating, hostile, or offensive work environment
 - Severe or pervasive such that it alters the terms and conditions of employment



Retaliation

- Adverse action against an employee because of any protected activity (complaining internally or externally)
- Underlying complaint may not be substantiated– still basis for retaliation claims
- Retaliation is in the eye of the beholder
 - Employees who complain are sensitive

The Americans with Disabilities Act

ADA Basics

- No discrimination against employees OR applicants based on disability
- No retaliation for exercising rights
- *Failure to make a reasonable accommodation
- **15** employee threshold

Defining a Disability

- A physical/mental impairment that substantially limits one or more major life activities (MLAs)
- A record of such impairment
- Being regarded as having such an impairment



Conditions That Are Not Covered

- Current illegal drug use
- Sexual behavior disorders (cross-dressing, pedophilia, voyeurism)
- Compulsive gambling
- Kleptomania or pyromania
- Homosexuality or bisexuality

Employee Requests a Reasonable Accommodation

- Employee has to ask, but doesn't have to mention ADA
- No magic words:
 - “I need help doing the job because of my back problem”
 - “I have diabetes and need to take breaks to eat”

Next Step: Interactive Process

- Talk to employee about what they want
- Don't assume what the employee can or can't do— let them tell you
- Don't assume the employee's disability is the same as someone else's
- Get a doctor's note

Is the Requested Accommodation Reasonable?

- Not reasonable if:
 - Eliminates an essential function (but may have to eliminate non-essential functions)
 - Poses direct threat of imminent harm
 - Poses an undue hardship (i.e., impossible, costs more than the job is worth)
- Are there other options?

Is Transfer an Option?

- If you can't accommodate an employee in his job, you must consider any vacant positions he can do with or without a reasonable accommodation

Is Leave an Option?

- Last resort– only if can't accommodate in current job and there are no vacant positions



The Family And Medical Leave Act

FMLA Basics

- 12 weeks of leave for eligible employees (26 weeks in some cases)
- Continued benefits, like health insurance
- Only for certain reasons
- Job protection
- No retaliation

Eligible Employees

- Eligible Employee must:
 - Have worked 12 months
 - Have worked 1250 hours in last 12 months
 - Work at worksite with 50 employees within a 75-mile radius

STEP 1: Has the Employee asked for Leave?

- Employee doesn't have to mention FMLA
- Notice to you that (1) needs time off for (2) a covered reason is sufficient

STEP 2: Is the Employee Eligible?

- IF NOT – reason for the leave doesn't matter
- Have to check every time – things change

STEP 3: Is the Reason for Leave Covered by the FMLA?

- New Child, Serious Health Condition, and Qualifying Exigency (military) all get 12 weeks



- Injured Service Member (military) gets 26 weeks



Who Is A Family Member?

- Spouses (may include common law)
- Parents (not in-laws or grandparents unless *in loco parentis*)
- Children (minor or incapacitated adults)



Relationship to Paid Leave

- No legal requirement to pay FMLA leave
- Can require employees to use available paid leave
- Depends on your policy

Employer Notice Requirements

- General notice (posted, handbook)
- Eligibility notice
 - Once you know the employee needs leave, only 5 days to say she is eligible (or not)
- Rights and Responsibilities Notice
 - Provide with Eligibility Notice and request the medical certification
- Designation Notice
 - Leave counts (or doesn't) as FMLA, call-in and return to work requirements

Employee Notice Requirements

- 30 days for foreseeable leave (childbirth, scheduled, elective surgery), and
- If not foreseeable – as soon as practicable, usually as soon as the employee knows
- Insufficient notice– you may be able to delay (but probably not deny) leave
- Rescheduling medical treatment to suit the employer’s schedule, if possible



Protections for Employees

- Return to their job (or equivalent position)
- No loss of employment benefits he had prior to leave
- Any benefit or position she would have gotten if she had not taken leave (raises, vacation accrual increases)
- Maintain coverage under group health plans (like they were at work)

Documentation

Why Do We Put Things In Writing?

- To communicate clearly
 - It gives the employee a chance to fix the problem
 - It helps you treat everyone consistently, avoid errors
- So the employee can look at it later
- So we can refer back to it
- Juries like it

When Should You Write It Up?

- When it continues despite the earlier discussion
- “We’ve talked about this before—you are still coming back from break late. You must change this behavior”
 - Maybe file memo
 - If next step is termination or suspension— serious documentation (counseling form)

Documentation: Basic Rules

- Be accurate and timely
- Be thorough
- Date and sign
- If disciplinary, have employee sign and give him or her a copy

Terminations

- Before discharging an employee, double check prior documentation for consistency
 - Staff/safety meetings
 - Disciplinary notices
- Termination should be the next logical step
 - Did we give the employee enough warning?

Questions?



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