ROBINSON & COLE LLP
ATTORNEYS AT LAW

Attorney Advertising


Update Education Law

June 2013

Dear Readers,

Robinson & Cole's Education Practice is pleased to offer you the June 2013 edition of its Education Law Update. In this issue, we tackle two developments in immigration law that will undoubtedly affect educational institutions of all kinds. We also confront the growing concern over who takes responsibility when a school's construction and renovation projects create ADA and accessibility issues. Finally, for those in Connecticut, we address the amnesty program instituted by CT DEEP for K-12 schools, both public and private. It looks to be an eventful few months for educational institutions. We look forward to seeing many of you at this year's NACUA Annual Conference in Philadelphia.

Gregory R. Faulkner
Megan R. Naughton
Co-editors

CONTENTS

AUTOMATED I-94 CARDS FOR VISITORS AND STUDENTS

An interim final rule published in the Federal Register automates Form I-94 Arrival/Departure Records. The automation means that affected visitors and students no longer need to fill out a paper Form I-94 when arriving in the United States by air or sea, nor do they receive a paper I-94 card upon arrival. Form I-94 provides international visitors evidence that they have been lawfully admitted to the United States, which is necessary to verify alien registration, immigration status, and employment authorization. It has been used by the Social Security Administration and state Departments of Motor Vehicles to verify lawful admission. In lieu of the paper I-94 card, visitors will receive an annotated admission stamp in their passport.

Travelers wanting a hard copy or other evidence of admission are directed to http://www.CBP.gov/I94 to print a copy of an I-94 based on the electronically submitted data. According to Customs and Border Protection (CBP), the hard copy is available immediately and includes an I-94 number to provide to benefits providers, if necessary, or as evidence of lawful admission. The website includes data on the history of admissions going back two

years. Customs and Border Protection is conducting outreach to employers, local offices of the Social Security Administration, and state Departments of Motor Vehicles regarding the acceptability of the annotated admission stamp, the printout form http://www.CBP.gov/I94, and a travel document (visa/passport) as proof of lawful admission.

The change became effective on April 26 and has been phased in at airports and seaports of entry beginning April 30. Travelers should continue to surrender their current I-94 cards when appropriate.

CONNECTICUT AIR PERMITTING: AMNESTY FOR K-12 SCHOOLS

Public and private K-12 schools in Connecticut are eligible for an amnesty program launched earlier this year by the Connecticut Department of Energy & Environmental Protection (CTDEEP). The amnesty program addresses state and federal regulatory requirements regarding air emission permits. A school can be subject to permit requirements due to operations and equipment, such as boilers, emergency generators, spray paint booths, and solvent-based parts cleaning.

Air permitting regulations are often complex and counterintuitive and can apply more broadly than expected to relatively small or infrequently used equipment or processes. Lack of a required air permit can expose a facility, whether public or private, to significant penalties and other enforcement action.

CTDEEP announced the amnesty program in February 2013 in a letter to public and private K-12 superintendents and heads of school. The letter includes a survey seeking information regarding school operations and equipment with potential air emissions. Upon receipt of a completed survey, CTDEEP staff then assess whether any permit requirements may apply. If so, the school must complete and submit any necessary permit applications. Any penalties that might be sought for prior lack of an air permit are waived.

Participating schools must also agree to participate in the state's "Green LEAF" schools program. Among other things, this program provides guidance and recognition to schools for reducing their environmental impacts and costs through energy efficiency assessments and other measures.

CTDEEP also intends to provide guidance to amnesty program participants regarding new federal regulations for boilers and stationary reciprocating internal-combustion engines. These regulations apply regardless of whether the boiler or engine is subject to permitting; however, the amnesty program and penalty waiver apparently do not extend to other, nonpermit-related regulatory requirements regarding air emissions, such as CTDEEP regulations specific to nitrogen oxides (NOx) emissions from boilers, engines, or other combustion sources.

With the potential for significant penalties and costs if required air permits are lacking, schools with air emission sources should consider carefully whether the amnesty program may be beneficial.

USCIS ISSUES REVISED I-9 FORM

The new Form I-9, dated "(Rev. 03/08/13) N," is available at http://www.uscis.gov/files/form/i-9.pdf. Key revisions include the following:

On Friday, March 8, 2013, the U.S. Citizenship and Immigration Services (USCIS) issued its long-awaited revised Form I-9, the Employment Eligibility Verification form. Employers have been required to complete a Form I-9 for every employee hired after November 6, 1986, and should use the new form for new hires.

Data fields were added, including the employee's foreign passport number and country of issuance (if applicable) and telephone and e-mail addresses (optional for the employee). The form's instructions were improved, including more specific directions for the employee

regarding Section 1 and better directions for the employer regarding the review and verification/reverification (even guidance on the copying of document(s) presented and on expired documents).

The layout of the form was revised, expanding from one to two pages (not including the form instructions and the Lists of Acceptable Documents). Employers must have converted to using the new form by May 7, 2013.

IS COMPLIANCE WITH FEDERAL DISABILITY LAW A NONDELEGABLE DUTY?

Contracts for architectural services often include indemnification provisions that permit owners to recover damages in the event of an architect's negligence; however, over the last ten years, there has been a growing trend for U.S. District Courts to nullify indemnification clauses where the damages were incurred as a result of violations of the Americans with Disabilities Act (ADA) and/or the Fair Housing Amendments Act (FHAA). While no specific language in those statutes prohibits indemnification, District Courts deciding this issue have ruled that the ADA and FHAA do not permit an owner to seek indemnification from an architect against claims of noncompliance under either common law or contractual indemnification theories. This trend should concern educational institutions that rely on professional expertise in designing projects that must comply with the ADA and FHAA.

Congress enacted the FHAA and ADA in 1988 and 1990 respectively, and neither act expressly prohibits indemnification clauses. In the last decade, however, several District Courts have interpreted these acts to prohibit common law indemnification and, more recently, contractual indemnification. In 2003, *United States v. Quality Built Constr., Inc.*, was the first District Court case to reject an owner's claim for indemnification for failure to design and construct buildings according to FHAA or ADA requirements. In the *Quality Built* court, the North Carolina Eastern District Court recognized that whether claims of common law indemnification could be pursued for FHAA violations was an issue of first impression and relied on the U.S. Supreme Court's interpretation of Title VII in a federal employment discrimination case, *Northwest Airlines v. Transport Workers Union of America*. Using the *Northwest* reasoning, the *Quality Built* court determined that the FHAA does not provide an owner a right of action against an architect for indemnification because Congress did not expressly provide such a remedy in the language of the act nor make any implication that such a remedy should be available to an owner. Therefore, the court determined that, because the owner was clearly not part of the class the act is intended to protect, no right to contribution or indemnity exists.

In 2008 and 2009, several other District Courts took up the issue of indemnification in FHAA and ADA lawsuits. None of these courts have challenged the reasoning of *Quality Built* or addressed differences between employment discrimination and design and construction cases; however, some District Courts have expanded on *Quality Built*'s reasoning to prohibit contractual indemnity claims. One such case is *Equal Rights Center v. Archstone Smith Trust*. Although a number of recent District Court decisions follow Quality Built's reasoning, *Archstone* best evidences the trend toward prohibiting express contractual indemnification under both the FHAA and the ADA.

In *Archstone*, the Maryland District Court essentially disallowed any right of action by the owner against the architect for the architect's failure to design structures in compliance with the ADA and the FHAA. The owner in *Archstone* sought damages from the architect for violations of the ADA and the FHAA that occurred as a result of the architect's negligence and asserted its indemnification claim both on an implied indemnification theory and on the basis of an express contractual obligation. According to contracts between the architect and the owner, the architect was responsible for designing the structures in compliance with all federal laws, including the FHAA and ADA. The architect also agreed to indemnify the owner for any costs incurred as a result of its failure to properly design the buildings.

Archstone held that the owner's implied tort law and express contract law indemnification claims failed and that the architect did not have to indemnify the owner. The Court held that

federal law preempts express contractual indemnification claims under state law because such claims conflict with the FHAA and ADA. The Court reasoned that the owner's state law claims for breach of contract and professional negligence were wholly derivative of the owner's primary liability and were, therefore, what federal law regards as de facto claims for indemnification. Accordingly, the *Archstone* court determined that such state law claims are similarly barred because any recovery by the owner would frustrate the achievement of Congress's purposes in the FHAA and the ADA.

While the *Archstone* decision weighs heavily on educational institutions seeking to manage the risk of negligent design, this issue is far from being fully settled by the courts. No Circuit Court has yet weighed in, and only a few District Courts have taken up the issue. Neither Connecticut nor Massachusetts courts have addressed this issue, but two New York District Courts have followed the trend and ruled against an owner's right to seek indemnification from an architect for ADA or FHAA violations; however, these New York decisions deal only with common law indemnification and do not directly address the issue of contractual or express indemnification. Interestingly, both cases hint at a possible receptiveness to allowing contractual indemnification.

Based on this developing law, educational institutions should carefully review their design agreements to limit exposure for these potentially costly ADA claims and to best protect their interests vis-à-vis design professionals. Contractually, mechanisms remain that educational institutions may utilize, even if the right to indemnification is not available. Regardless of whether the right to indemnity exists, design agreements should require an architect to comply with accessibility legislation in the performance of its services and should include provisions expressly requiring an architect to design in compliance with ADA, FHAA, and other accessibility legislation on all levels - federal, state, or local. In addition, agreements with an architect should set forth that the educational institution is relying upon the architect's expertise in complying with and interpreting ADA, FHAA, and other federal, state, and local accessibility legislation. In this manner, even if an architect is not required to indemnify or defend an educational owner for third-party claims, there may still be recourse under theories of breach of contract and negligence relating to the owner's direct loses. These design professional obligations should also include a requirement to redesign to comply with interpretations under the ADA, FHAA, or other federal or state accessibility legislation without additional compensation. Furthermore, despite these recent developments in the law, and because the matter is not decided at an appellate level, there is no harm in continuing to include a requirement that an architect indemnify and hold harmless an educational institution from violations of any laws, including, without limitation, the ADA or FHAA. Even if an indemnification requirement is later found to be invalid, assuming a contract contains the appropriate severability provisions, the addition of such a clause will not likely invalidate the remainder of the indemnity obligations. Furthermore, the threat of such action alone may be enough to cause the architect to resolve matters short of litigation or arbitration.

At this time, an educational institution's ability to seek indemnification from an architect for ADA or FHAA violations is uncertain. Future developments in this area of the law may provide more guidance on this issue. In the meantime, educational institutions should make every effort to ensure that their architect's initial designs are ADA- and FHAA-compliant and that their design agreements provide every protection possible to limit exposure to such claims.

FIRM NEWS AND NOTES

> Construction partners Gregory R. Faulkner and Martin A. Onorato will attend the 53rd Annual Conference of the National Association of College and University Attorneys (NACUA) in Philadelphia from June 19 to June 22, 2013. NACUA educates attorneys and administrators about legal issues on campuses and provides continuing legal education to higher education counsel. Robinson & Cole was honored to have represented the Ethel Walker School in connection with the construction and financing of its new girls dormitory, scheduled for completion by the end of 2013. The new dorm, a component of the school's Centennial Campaign, will house approximately 40 boarding students and contain four faculty apartments. The financing was provided through the issuance of CHEFA tax-exempt bonds, which were

purchased by First Niagara Bank.

> Construction and Education Law Group lawyer Joseph A. Barra of the firm's Boston office received one of the 2013 Distinguished Service Awards at the 19th Annual Project Achievement Awards Luncheon, presented by the Construction Management Association of America (CMAA), New England Chapter. Held in Boston, Massachusetts, on April 23, 2013, this event recognizes exceptional achievement in the New England construction management community. Mr. Barra was honored for his years of service, his support of the Standards of Practice course, and his valuable insight on the workings of the CMAA's New England Chapter.

> Robinson & Cole was a sponsor of the 2013 Annual Meeting of the American Bar Association's Forum on the Construction Industry in Dana Point, California, from April 25 to April 27, 2013. Pictured from left to right are construction lawyers Gregory R. Faulkner and Dennis C. Cavanaugh.

> Several lawyers from Robinson & Cole's Education Law Group were elected by the Connecticut Bar Foundation as Fellows to the James W. Cooper Fellows Program. Among those recognized were Dennis C. Cavanaugh, Gregory R. Faulkner, and Brian R. Smith. The program honors leaders in the legal profession and the judiciary in Connecticut. Membership in the Fellows is by invitation only. The program promotes a better understanding of the legal profession and the judicial system, and explores ways to improve the profession and the administration of justice in Connecticut. The Fellows Program has approximately 850 to 900 members.

> *Connecticut Green Guide* magazine featured environmental attorney Pamela K. Elkow in its inaugural issue. The story, "Smarter policies for making better planet," discussed Ms. Elkow's experience as an attorney in Connecticut helping businesses follow environmental laws and be proactive on sustainability. It also notes that Ms. Elkow founded the Connecticut Society for Women Environmental Professionals in 1999 and worked on Governor Dannel Malloy's transition team on environmental and brownfield issues.

> Eric D. Daniels, products liability and subrogation lawyer and a member of the Education Law Group, was elected to the board of directors of the United Way of Central and Northeastern Connecticut at its annual meeting on April 3, 2013. The United Way joins together a diverse group of stakeholders who work to create positive changes for the common good of a community. In this community, the priorities that nurture the common good include helping students of all ages succeed academically, assisting neighborhoods to become financially stable and independent, promoting healthy people and communities, and providing a safety net of health and human services for everyone.

For more information on our Education Law Practice, please contact Gregory R. Faulkner in our Hartford office at (860) 275-8288 or Megan R. Naughton in our Hartford office at (860) 275-8263.
