

The construction industry continues to change as new technologies reshape jobsites and new generations of leaders rethink the way companies should operate. But one piece of the puzzle remains very much the same: Everyone needs a good lawyer.

According to the most recent edition of the Arcadis Construction Disputes Report, the average value of a dispute in the industry has soared to \$42.8 million — a 42% year-over-year increase between 2021 and 2022. And based on how busy the attorneys have been this year, there is no sign of legal issues becoming less important to builders and contractors.

Every construction leader wants to spend more time and energy doing what they do best — building projects safely,

things that might land them in court. How can you best avoid big disputes bound for mediation, arbitration, or litigation? What emerging rules and regulations should be on your radar as you develop strategies for success?

While legal issues will never disappear, listening to what some of the best construction lawyers in the country — all members of 2024 Top 50 Construction Law Firms — are thinking about

against risk, liability, and worse.

LOOKING BACK



“In some cases, legal theories are allowing contractors to proceed on their claims,” Nelson continues, “while others are indicating that COVID is an uncovered risk that the contractor should bear, absent contract terms to the contrary. Right now, people should be watching as those cases move through the courts and various board of contract appeals.”

For Josh Levy, a Milwaukee-based partner at Husch Blackwell who has worked in commercial construction law for more than 30 years, the disputes among contractors, trade partners, and developers in predicting and committing to prices that arose between 2020 and 2022 aren't going away anytime soon. “The cases are as active as they have ever been,” Levy says.

As an example, Levy points to a general contractor that signed



In the future, Richie expects to see “more people try to push the cardinal-change doctrine in order to recover on their pending change-order claims.” In addition to actually doing

themselves stuck in a position where they’re feeling the effects of death by a thousand cuts — small changes that have added up to what seems like an entirely different scope of work.

“You’re seeing more contractors call their lawyers to ask if they actually have to perform all the work or if there is an avenue to get out of the contract,” Richie says. “They didn’t anticipate doing it, don’t have the crew for it, or may struggle to order materials that weren’t originally contemplated.”

Payment liability for trade partners: While general contractors might be focused on getting payment from owners and developers, they may also need to consider a new piece of the payment stream. Husch Blackwell’s Levy points to a recent statute passed in Illinois that makes general contractors liable for paying the wages of trade partners. “It’s really

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Floyd in 2020, construction was among the many industries that committed to major DEI initiatives, including hiring

programs. Construction Inclusion Week launched in 2021; last



contractor," Moore says.

"The more control exercised by the contractor, the less likely the workers will be found to be subcontractors.

and Illness Prevention in Outdoor and Indoor Work Settings rulemaking process, Moore notes that the agency has gone

standard.

"Compliance is expected to require each employer to have a

monitoring, acclimatization, permitting extensive rest breaks, and providing plenty of drinking water," Moore says. "This program will apply to every part of the U.S., as heat stress is an issue any time the exposure is to unusual temperatures and humidity or those to which the employees are not acclimatized."

In addition to meeting the government's expectations and taking the proper steps to protect workers, companies may no longer be able to point to severe weather as reasons to request project extensions. The advent of weather-related regulations such as the Phoenix City's Council's ordinance for all city contractors and trade partners to have heat plans in place demonstrates how the risk of weather impacts is entering the mainstream.

"Force majeure is for something that's not foreseeable through the exercise of reasonable diligence," Husch Blackwell's Levy says. "The contractors that have a plan and know how to deal with excessive heat the right way will have better production

accommodate an excessive heat event and have to shut down operations.

"And if I was the developer, I might be saying, 'You don't get extra days. You should have built that into your schedule,'" Levy says. "While the developer will bear the risk of a pandemic or a tornado, it's not automatically bearing the risk of heat anymore in Phoenix."

LOOKING AHEAD

Increased potential for reshoring spells good news, while the federal government's increased focus on elevating environmental standards may create additional work for



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