GDB
Legal Update
PROVIDING CURRENT INFORMATION ABOUT LEGAL DEVELOPMENTS FOR OUR CLIENTS AND FRIENDS SUMMER 2016

Crowdfunding: Can I Use it to Raise Money?

By: Jay L. Hack, Esq.

"Crowdfunding" is the flavor of the month when it comes to raising money. You read about it on the Internet, you see stories on television, and your broker tells you it's a source of funds to buy real estate or open a restaurant. Unfortunately, Crowdfunding may be the most misunderstood term in finance because four different transactions all take the same moniker. We'd like to take the mystery out of the term.

In Crowdfunding, a group (the crowd) is solicited, usually on the Internet, to contribute or invest money in exchange for something. Which rules apply to a Crowdfunding offer depends on what the "investor" gets in exchange for the money. If the investor gets a warm and fuzzy feeling (Gofundme: Help pay for my kidney transplant) then the law has minimal impact. If the investor gets a product for the money (Kickstarter: Fund my children's book so you can get a copy) then it may look like an investment, but it isn't. This type of Crowdfunding is more like the charitable contribution and is just a high risk way to buy a product. The up side is getting the product and the down side is getting nothing. Not a lot of legal implications.

The first modern Crowdfunding was this type — US fans solicited contributions through the Internet so that their favorite rock band from London could come to the United States. The fans got tickets to enjoy

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Coop and Condo Boards: Do Not Ignore Second-Hand Smoke Complaints

By: Peter R. Massa, Esq.

Cooperative and Condominium board members frequently receive complaints about smoke traveling from one apartment to another. Many residents now wish to live in smoke-free buildings and worry about the effects that second-hand smoke will have on themselves and their families.

Board members can be stuck in the middle between residents who believe they have the right to do what they want to do (i.e. smoke) in their own apartments and other residents who believe they should have the right to live without second-hand smoke.

The courts are now weighing in. Recently, a New York State Supreme Court judge in Manhattan held that a resident who had smoke emanating into her unit since 2007 was entitled to a maintenance abatement of over $120,000. This case should be a wake-up call to all cooperative and condominium boards and managing agents that smoking complaints cannot be ignored.

We have frequently been asked by our cooperative and condominium clients what they can or should do about smoking. When a resident complains to a board or managing agent about smoke, often

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In this issue

Gallet Dreyer & Berkey, LLP
ATTORNEYS AT LAW

What an Employer Needs to Know About the Criminal History of Prospective Employees

By: Roger L. Stavis, Esq. and Adam M. Felsenstein, Esq.

Employers often face questions regarding whether, or how to, inquire about the criminal history of prospective employees. It is natural to want to know whether someone joining your company has ever been arrested or convicted of a crime. However, in light of new anti-discrimination laws, an employer must exercise caution when inquiring into an applicant's criminal history.

Given the restrictive nature of the New York City statute, it is best not to ask about any criminal history until after an offer of employment is made.

New York State has enacted a law, which prohibits discrimination against people who come in contact with the criminal justice system. In New York, pursuant to Human Rights Law §296(16), an employer cannot ask whether an applicant has ever been arrested or charged with a crime. An employer can only inquire about a criminal case that terminated with a conviction. Further, §752 of New York Correction Law prohibits employers from denying employment to people who have been convicted of crimes, unless there is a direct relationship between the crime and the employment sought, or the employment would create an unreasonable risk to public safety.

New York City's recently enacted version of this law, the Fair Chance Act, NY Admin Code §8-107, goes even farther. The Fair Chance Act prohibits employers, labor organizations, and employment agencies from inquiring into the criminal history of job applicants, before extending conditional offers of employment. If an employer wishes to withdraw its offer, it must give the applicant a copy of its inquiry into and analysis of the applicant's conviction history, along with at least three business days to respond.

From the employee's perspective, not every encounter with law enforcement or the criminal justice system results in a conviction. Many criminal defendants are acquitted or have charges dismissed for other reasons. Given the restrictive nature of the New York City statute, it is best not to ask about any criminal history until after an offer of employment is made.

Indeed, the New York Criminal Procedure law has built-in protections for defendants who are arrested but, for myriad reasons, the arrest does not result in a conviction. Acquittal at trial, dismissal of the charges, or for minor offenses an adjournment in contemplation of dismissal ("ACD") can all result in termination of the charges in favor of the defendant without a conviction. Criminal Procedure Law §160.50 dictates that when a criminal case terminates in favor of the defendant, the file is sealed, and all documents related to the

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About the author: *Roger L. Stavis is a senior partner at Gallet Dreyer & Berkey, LLP. His practice focuses on white collar criminal defense. Mr. Stavis can be reached at rls@gdblaw.com.*

About the author: *Adam M. Felsenstein is an associate at Gallet Dreyer & Berkey, LLP. His practice focuses on civil and criminal litigation matters, including trial work in the state and federal courts. Mr. Felsenstein can be reached at amf@gdblaw.com.*

Firm Speaking Engagements

MARC J. LUXEMBURG

In February, partner Marc J. Luxemburg was the speaker at a seminar sponsored by the Association of Riverdale Cooperatives entitled A Review of Current Significant Legal Issues of 2015. The seminar is a survey of the court decisions in the past year that affect cooperatives and condominiums, with an emphasis on how boards need to update their procedures to kept abreast of the new developments.

In February, Mr. Luxemburg was a moderator of an Issues Breakfast for professional members of the Council of New York Cooperatives and Condominiums and the Federation of New York Housing Cooperatives and Condominiums entitled "Major Issues Facing NYC Cooperatives & Condominiums Today." Mr. Luxemburg spoke about the current state of the law concerning trespass and the right of a Board to enter a unit owner's apartment to inspect or make repairs.

In March, Mr. Luxemburg co-presented a seminar with Gregory Carlson, president of the National Association of Housing Cooperatives, entitled Introduction to Co-op Board Responsibilities. The seminar is designed to provide board members, particularly those who are recently elected to their boards, with an overview of their legal and operational responsibilities and how to deal with common situations.

In April, Mr. Luxemburg presented a seminar for members of cooperative boards on The New Form of Proprietary Lease which has been promulgated by the Council of New York Cooperatives & Condominiums. The seminar explores the deficiencies in existing forms of proprietary leases and how the new form clarifies the authority of a board to manage the cooperative.

JAY L. HACK

In March, partner Jay L. Hack, participated on a panel titled "Decrypting Virtual Currency Regulation" that focused on the regulation of Bitcoins and related technology issues at Dev BootCamp NYC, a technology think tank and training center.

DAVID T. AZRIN

In May, partner David T. Azrin conducted a webinar, organized by the International Franchise Professionals Group, on the following topic: "What the NLRB's Joint Employer Position Means for the Franchise Industry."

TOBIAS F. ZIEGLER

In May, counsel Tobias F. Ziegler participated in and presented at the Eurojuris International and International Business Group (IBG) meetings in Marseilles, France.

ADAM J. BERKEY

In June, associate Adam J. Berkey was a panelist at the following industry roundtable: "Legal Considerations for Buying Real Estate: What You Need to Know for Residential and Commercial Properties." This roundtable was presented by the Colgate Real Estate Council and Colgate Lawyers Association.

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Counting on Someone Else's Insurance Policy for Protection? First Check the Fine Print

By: Eugene H. Goldberg, Esq.

A business or property owner starting a project often stipulates that the contractor/service provider name the owner as an "additional insured" on the contractor's insurance policy, and that the contractor require all its subcontractors to name the owner as an "additional insured" on each subcontractor's insurance policy.

Before the project starts, an owner should closely examine each contractor/subcontractor insurance policy to make sure that it actually provides the coverage the owner is counting on.

The owner takes comfort that if it is sued for something a contractor/subcontractor did, then the contractor/subcontractor's insurance policy will provide insurance coverage, rather than the owner's own policy.

When a contractor/subcontractor's liability policy provides an owner with additional insured coverage ("AIC"), it is generally understood that the owner has the same protection as the contractor/subcontractor. Standard language affords coverage for injury arising out of the contractor/subcontractor's acts or omissions as well as of those acting on the contractor/subcontractor's behalf. If a suit is brought within these criteria, the owner can turn to the contractor/subcontractor's insurer for defense and payment of a loss/judgment.

However, before the project starts, an owner should closely examine each contractor/subcontractor insurance policy to make sure that it actually provides the coverage the owner is counting on.

Unfortunately, insurers are increasingly using nonstandard policy language to limit and deny AIC in contractor/subcontractor's policies.

For example, a subcontractor's liability policy with AIC may exclude coverage for bodily injury to the subcontractor's own employees. From the subcontractor's point of view, the subcontractor is not concerned believing that worker's compensation will shield the subcontractor. But from the owner's point of view, this exclusion can cause a problem. When the owner is sued by the injured subcontractor's employee, the subcontractor's liability policy affords the owner with the same coverage the subcontractor has—none. AIC is illusory.

Insurers are also diluting AIC in other ways. Some insurers are reducing AIC with nonstandard policy language resulting in the owner not receiving the same protection as the contractor/subcontractor. For example, a subcontractor liability policy may provide no AIC unless the subcontractor caused the injuries and/or was negligent. When an injured subcontractor's employee sues the owner alleging

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Our Practice Areas Include:

- Banking and Financial Institutions
- Bankruptcy
- Construction Law
- Co-op and Condo Law
- Corporate Finance and Securities
- Corporate Law
- Employment Law
- Franchising, Distribution and Licensing
- Intellectual Property
- International Business Law
- Litigation
- Mergers and Acquisitions
- Real Estate Law
- Tax Law
- Trademarks and Copyright
- Trusts and Estates
- White Collar Criminal Defense

Crowdfunding (continued from page 1)

When you use Crowdfunding properly, it can be an important tool in providing necessary capital to allow you to fund or grow your business.

the concerts but they did not have an interest in the profits of the concert tour.

If the fans had gotten an interest in the profits of the tour, then the Crowdfunding would have involved the sale of a security. An interest in the profits of an entity from the activities of others is the law school definition of a "security," and if someone offers a security in exchange for money, federal securities laws are in play. The offer of a security means we must turn the page to the chapter on using Crowdfunding to raise money for a business activity from investors who expect to earn a profit from the activities of others.

The most common form of a security is common stock, but preferred stock, bonds, debentures and many other arrangements are also securities. If a company (known as the "issuer") wants to offer its securities to the public, then it must either register the offering with the Securities and Exchange Commission or take advantage of an exemption. Registration with the SEC takes a lot of time and costs a lot of money, so avoiding registration by taking advantage of two Crowdfunding exemptions may provide cost-effective alternatives.

We will call the first exemption "Small Crowdfunding." We call it "small" because issuers can sell only $1 million of securities per year under the "small" Crowdfunding rules. Independent Internet portals offer the securities to the general public. The maximum that one person may invest in all Small Crowdfunding is limited to between $2,000 and $100,000 per year, based upon a percentage of the lower of the investor's annual income or net worth.

The rules require the issuer to provide offering information and financial statements on the Internet portal. Financial statements need not be audited for an issuer's first Small Crowdfunding. There will be costs to prepare the disclosures and for the Internet portal to conduct the offering. For issuers, the $1 million annual limit may be too small and the costs of making the offering may be relatively high as a percentage of the amount raised. However, if an issuer needs less than $1 million to get off the ground and has no other acceptable source of funds, Small Crowdfunding may be the best route because the issuer can offer whatever creative type of security it thinks people will buy. There is a lot of flexibility to structure a Small Crowdfunding to the issuer's specific needs.

We will call the second exemption "Big Crowdfunding," which allows issuers to solicit "accredited investors" to invest in their securities, with no dollar limit. Defining an "accredited investor" is complicated, but if we simplify it and say that the term includes people whose incomes or net worth exceed minimums that the SEC has established, we will cover most accredited investors.

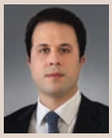
An issuer can engage in a "general solicitation" of accredited investors in a Big Crowdfunding. A general solicitation is not quite a public offering, but it is close. There are fewer rules, but the issuer must collect meaningful evidence that the investor qualifies as accredited. There are Internet sites that specialize in Big Crowdfunding and they tend to have relationships with accredited investors who are looking to make significant investments in major projects. Those sites also obtain verification that the investors qualify as accredited.

When you use Crowdfunding properly, it can be an important tool in providing necessary capital to allow you to fund or grow your business. If you would like to discuss using Crowdfunding to raise capital for your business, contact Jay L. Hack at jlh@gdblaw.com.

About the author: *Jay L. Hack is a partner at Gallet Dreyer & Berkey, LLP and head of the firm's banking department. Mr. Hack is the immediate past Chair of the Business Law Section of the New York State Bar Association. Mr. Hack's practice focuses on providing a full range of legal services to banks and other financial institutions. Mr. Hack can be reached at jlh@gdblaw.com.*

Firm News and Honors

LEONARD M. WINTERS



In April, Leonard M. Winters joined Gallet Dreyer & Berkey, LLP as an associate in the litigation and bankruptcy departments. Mr. Winters represents clients in civil litigation and in criminal and regulatory proceedings. His complex commercial litigation experience includes handling matters in state and federal courts stemming from contractual disputes, bankruptcy proceedings, and data security breaches.

Prior to joining the firm, Mr. Winters was a litigation associate at Ropes & Gray LLP. There, he represented corporations, financial services firms, pharmaceutical and medical device companies, and individuals in civil litigation, regulatory and white collar proceedings, and internal investigations. Mr. Winters also previously served as a law clerk to the Honorable Frank J. Bailey of the United States Bankruptcy Court for the District of Massachusetts. He graduated from Fordham University Law School, magna cum laude, where he served as a member of the *Fordham Law Review*.

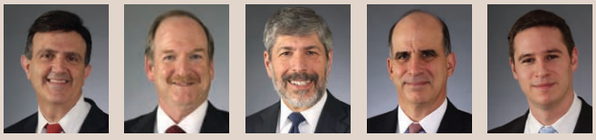
ROGER L. STAVIS

In March, partner Roger L. Stavis successfully defended Nova Group, Inc. in the case of, Universitas Education, LLC v. Nova Group. As a result of the victory, the U.S. District Court for the Southern District of New York reduced Nova's sanctions from $30 million to $25,000.

DAVID S. DOUGLAS

In February, partner David S. Douglas was honored by the Town Board of the Town of Cortlandt, the second largest town in Westchester County, New York, with a special Certificate of Appreciation for his years of service on the Town's Zoning Board of Appeals, the last six of those as Chair. Mr. Douglas continues to serve as Chair of the ZBA, and is also the Chair of the Town's Open Space Committee and Conservation Advisory Council and a member of the Master Plan Committee.

DAVID T. AZRIN, DAVID L. BERKEY, RANDY J. HELLER, ROGER L. STAVIS, ADAM M. FELSENSTEIN



In April, partners David T. Azrin, David L. Berkey, Randy J. Heller and Roger L. Stavis were selected to the 2017 New York Metro Super Lawyers list appearing in *The New York Times*. Mr. Berkey and Mr. Stavis are 10-year honorees of the Super Lawyers list. In addition, associate Adam M. Felsenstein was selected to the 2017 Rising Stars list.

DAVID T. AZRIN

In February, partner David T. Azrin was again named a Legal Eagle, a designation given to top franchise attorneys in the country, as judged by the editorial board of the *Franchise Times*.

Criminal History (continued from page 2)

case are kept from public view. The following section, Criminal Procedure Law §160.60, provides that any such action, "shall be considered a nullity, and the accused will be returned…to the status he occupied before the arrest and prosecution," and any arrest or prosecution that terminates in favor of the accused shall not operate as a disqualification of that person to engage in any lawful activity, employment or profession.

Because of these statutes, a prospective employee may take the position that he or she does not have to disclose ever having been charged with a crime, because the incident has been deemed a "nullity." A simple Internet search of a prospective applicant may reveal that they were arrested or charged with a crime. However, if that arrest terminates in the applicant's favor, he or she has no obligation to disclose it to a prospective employer, and that employer has no legal right to ask.

If you are an employer who seeks more information about how and when to inquire about an applicant's criminal history, it is extremely important to consult legal counsel while preparing an employment application and before interviewing prospective employees.

Second-Hand Smoke (continued from page 1)

there are no easy answers. Before reaching another apartment, smoke may travel through vents, floors, ceilings, and even outside of the building. We recommend that the board hire an industrial hygienist to determine where the smoke is traveling through to get to the affected unit and propose remediation solutions for the problem. The board should attempt to work with unit owners to implement any proposed solutions and begin the legal process if the offending resident does not cooperate and the problem persists. Most buildings have house rules that state that odors may not emanate from one unit into another unit, and many proprietary leases and by-laws contain similar language.

Many boards are also contemplating making their buildings smoke free. While we believe boards generally have the right to prohibit smoking by instituting a House Rule, most boards initially start with a survey of shareholders/unit owners to determine if there is sufficient support in the building for such a ban. Many boards also propose amendments to the proprietary lease or by-laws to enact a smoking ban so that if the ban is later challenged, the board's position is stronger since the ban has been approved by the shareholders/unit owners.

Therefore, based on where the case law is heading, boards that ignore and do not act on smoking complaints do so at their own peril.

The board should attempt to work with unit owners to implement any proposed solutions and begin the legal process if the offending resident does not cooperate and the problem persists.

About the author: *Peter R. Massa is a partner at Gallet Dreyer & Berkey, LLP. He acts as general counsel to many coop and condo boards, advising them on a wide range of sophisticated issues. Mr. Massa is a member of the Committee on Condominiums and Cooperatives of the New York State Bar Association. He has presented and taught at many seminars such as the annual Housing Conference of the Council of New York Cooperatives and Condominiums and has been quoted regarding real estate law in publications such as* The New York Times. *Mr. Massa can be reached at prm@gdblaw.com.*

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Wage Law Update

New Higher Minimum Wage and Paid Family Medical Leave for all New York Employees, and New Higher Federal Salary Requirement for all Exempt Employees

By: David T. Azrin, Esq.

New York State has recently adopted two new measures that will make significant changes in the workplace in the coming years. These measures include a steady increase in the minimum wage starting in 2017, and the establishment of a new government mandated insurance benefit program starting in 2018, which will be paid for by additional payroll deductions.

In addition, the U.S. Department of Labor recently enacted a new regulation, effective December 1, 2016, which increases the minimum salary requirement for any salaried employee to qualify as an exempt employee not entitled to overtime.

MINIMUM WAGE — NEW YORK

The minimum wage increases are based upon a schedule that depends on the geographic location of the employer and (for companies located in New York City) the size of the employer, as follows:

New York City

For next year (2017), the minimum wage will increase to $11 at large companies (with 11 or more employees) in New York City, and $10.50 at small companies (10 or fewer employees). Subsequently, the minimum wage in New York City at companies with 11 or more employees will increase to $13 in 2018 and then to $15 in 2019 and thereafter. For companies in New York City with fewer than 11 employees, the minimum wage will increase more gradually to $12 in 2018, $13.50 in 2019, and $15 in 2020.

Westchester, Nassau and Suffolk County

The minimum wage for companies in Westchester, Nassau and Suffolk counties, regardless of size, will increase to $10 in 2017, $11 in 2018, $12 in 2019, $13 in 2020, $14 in 2021, and $15 in 2022.

Remainder of New York State

The minimum wage for companies in the remainder of New York State, regardless of size, will increase to $9.70 in 2017, $10.40 in 2018, $11.10 in 2019, $11.80 in 2020, $12.50 in 2021, and will increase each year after 2021 based on the rate of inflation, personal income growth, and wage growth.

Tipped Food Service Workers

The new law increases the minimum hourly wage for tipped food service workers from the current $4.60 to $7.50 in 2017 or an amount equal to two thirds of the then-current minimum wage, whichever is higher.

PAID FAMILY MEDICAL LEAVE — NEW YORK

New York's new "paid family benefits law," which takes effect in 2018, requires all employers to permit employees, who have worked for the employer for at least six months, to take a period of family medical leave to care for a sick family member or to bond with a new child. The employee can take up to 8 weeks per calendar year in 2018, increasing to 10 weeks in 2019 and to 12 weeks in 2021. When the employee returns to work at the end of the allotted period, the employer has to restore the employee to his or her previous position or a similar position.

Notably, the law does not provide leave for an employee's *own* health condition. Employees who need to take leave for their own health condition may be entitled to leave or benefits under other less generous existing programs, discussed below.

Under the new law, an employee taking family medical leave will not receive the full amount of their regular wages during such leave, rather only a percentage, subject to caps. Specifically, while an employee is on family medical leave, the employee will be paid a weekly family medical leave benefit payment equal to 50% of the employee's regular weekly wage, capped at 50% of the state's average weekly wage (meaning a cap of $648 based on the state's current average weekly wage of $1,296.48). The benefit payment increases in 2019 to 55 percent, in 2020 to 60 percent, and in 2021 and thereafter to 67%. The payment caps are based on this specified percentage of the state's then-current average weekly wage, so the caps will increase each year as the state's average weekly wage increases.

The employer does not pay for the paid leave. Rather, the new law establishes a new government insurance program, starting in 2018, to be funded by payroll deductions. The amount to be deducted from employee payroll to pay for the program has not yet been established, and will be set by the superintendent of financial services on June 1, 2017.

Employers are prohibited from taking retaliatory action against employees for taking the leave. Employers are required to post a notice concerning the benefits and to give employees written notice of the benefits within five business days after the employee takes such leave.

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The employer does not pay for the paid leave. Rather, the new law establishes a new government insurance program, starting in 2018, to be funded by payroll deductions.

The new law is a dramatic change from the current law for smaller companies (fewer than 50 employees) which are currently not required to provide any paid or unpaid family medical leave.

Under current law, New York employees who need to take family or medical leave are only entitled to the following:

1) Under the federal Family and Medical Leave Act, companies with 50 or more employees are required to allow employees (who have been working for the employer for at least one year, and have worked for the employer at least 1250 hours in that year) to take up to 12 weeks of unpaid medical leave, for their own or their family member's serious health condition, and to restore the employee to the same position or a similar position at the end of such leave.

2) Under the state's short-term disability insurance program paid by employers from payroll deductions, employees (who have worked for an employer for more than four weeks) who are unable to work due to a disability and who are not receiving any pay during their leave, are entitled, after a seven day waiting period, to a weekly payment equal to 50% of the employee's weekly wage capped at $170 per week, during the period of disability, up to 26 weeks. Like the new state family medical leave program, the insurance is paid from deductions from employee payroll, in the amount of one half of one percent of the employee's wages up to sixty cents per week. Unlike the new law, employers are not legally required to hold open an employee's job during the period of disability, and disability benefits end four weeks after the employer terminates employment, even if the termination occurs during the disability. Pregnancy is considered a disability, but a woman claiming disability due to pregnancy for a period of more than four weeks before the anticipated birth date or after the actual birth date, must submit more detailed medical information substantiating the disability.

3) Under current law, if an employee is terminated or laid off due to absence from the job, the employee may be entitled to unemployment insurance benefits when the disability benefits end. Unemployment insurance benefits are paid for up to 26 weeks, and the amount is based on a percentage of the employee's prior high quarterly earnings, currently capped at $425 per week.

4) Under New York City's paid sick leave law, employees in New York City at companies with 15 or more employees are entitled to one hour of paid sick leave per 30 hours worked, up to five days per year.

The new law requires that all employers (regardless of size) must offer family medical leave.

The new law represents a dramatic change from the current law because it provides a benefit payment for individuals who are not disabled themselves but who simply want to take leave to care for a sick family member or to bond with a new child. In addition, the new benefit payment starts on the first day of such leave, in contrast to disability benefits, which start after a seven day waiting period.

NEW HIGHER FEDERAL SALARY REQUIREMENT TO QUALIFY AS AN EXEMPT EMPLOYEE

New federal regulations, effective December 1, 2016, increase the minimum salary requirement for a person to qualify as an "exempt" employee (meaning a salaried administrative, executive, and professional employee who is not entitled to overtime), from the current $23,660 to $47,476.

This new rule means that any salaried employee earning less than $47,476 must receive overtime for hours worked over 40 hours per week, even if the employee has a managerial or professional type position.

The new rule does not have as significant effect in New York as other states, because New York state law already imposed a higher minimum salary requirement, namely $35,100 since December 31, 2015, than the old federal requirement, which was $23,660, for exempt administrative and executive employees. As a result, the new federal regulations will only impact New York exempt salaried employees who were making between $35,100 and $47,476. Under the new regulations, effective December 1, 2016, these employees will be entitled to overtime for hours worked over 40 hours per week.

About the author: *David T. Azrin, a partner at Gallet Dreyer & Berkey, LLP, represents a range of business clients and individuals on employment, trademark, and franchise law matters. Mr. Azrin is the organizer of the International Franchise Association's franchise business network program in the New York City area, and has been named by* Super Lawyers *magazine as one of the top attorneys in franchise and distribution law in the New York metropolitan area, and by the editorial board of* Franchise Times *magazine as one of the top franchise attorneys ("Legal Eagle") in the United States. Mr. Azrin can be reached at dta@gdblaw.com.*

How Not to Let Your Mechanic's Lien Lapse

By: Randy J. Heller, Esq.

Mechanic's liens are often very effective enforcement tools. They allow anyone doing work on a property to file a notice in the county records that the person is owed money for their work, which creates a lien on the property. But mechanic's liens come with their own set of esoteric rules and lots of traps for the unwary. One such trap tests the lienor's ability to make a diary entry for a date three years down the road.

A lien can serve as a long term security device, basically allowing the person who did the work to start a "foreclosure action" in court and use the lien to enforce any judgment they may obtain in that action. Being on top of the calendar is critical to actually realizing any benefit.

Filing a mechanic's lien can have both short term and long term benefits, by creating a problem for the property owner or general contractor, which forces them to pay the money owed. In the short term, the filing of a lien might stop a pending payment by the property owner to the general contractor, or interfere with a loan funding to the owner. It might constitute a breach under the owner's lease or a contract. In each of these cases, it might create an immediate thorn in the side of the party being liened and provoke a settlement of the outstanding debt just to make the lien go away.

But even where there is no short term impact, a lien can serve as a long term security device, basically allowing the person who did the work to start a "foreclosure action" in court and use the lien to enforce any judgment they may obtain in that action. On a private project, the person who did the work may eventually be allowed to force a sale of the building that was liened. On a public project, they may be allowed to collect against any money the owner owes the general contractor.

Nevertheless, being on top of the calendar is critical to actually realizing any benefit. The New York Lien Law provides that when you start a foreclosure action, accompanied by the filing of a Notice of Pendency — a notice filed with the County Clerk or the public owner giving constructive notification to the world of the pendency of your foreclosure action — your lien automatically gets a 3-year extension. But alas, there's the rub — keeping track of the expiration date 3 years into the future. As a side effect, the filing of a Notice of Pendency can automatically give every other lienor at the project the same 3-year lien extension, which can be a good thing, or simply complicate the record keeping.

In a recent case involving the construction of a property in Nassau County, the pile driving subcontractor, claiming it was unpaid, filed a lien and then started a foreclosure action by commencing the lawsuit and filing a Notice of Pendency. It was a complicated action involving at least 7 trade contractors who had filed liens. Perhaps due to its complexity, the lawsuit went on for over 3 years.

As it turned out, the calendaring system of the defendant/owner proved better than that of the plaintiff/subcontractors. As the third year elapsed, the defendant/owner moved for an order terminating some of the liens since the Notice of Pendency had not been renewed before the expiration of its 3-year term. The court agreed, holding that: "While a Notice of Pendency may be extended for additional three-year periods upon a showing of good cause, the exten-

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it (not the subcontractor) was solely at fault and/or solely caused the injuries, the owner has no coverage under the subcontractor's policy.

In another variant, the subcontractor's policy may provide AIC only to the extent that the subcontractor is proven at fault. Unless the subcontractor is entirely at fault, the subcontractor's insurer pays only a portion of the owner's defense and loss. The owner's own policy may end up paying a portion of the AIC defense and loss.

There are other holes to be found. Language in an endorsement to a contractor/subcontractor's policy may provide that any AIC loss/settlement payment is "excess" to the owner's policy. The owner's policy pays first. Under this language not only will the owner bear the loss, the owner's policy may be paid out entirely to an injured contractor/subcontractor employee, leaving nothing left for the owner to pay towards other claims.

Furthermore, there are gaps specific to subcontractors. Some AIC language requires that before an accident occurs there needs to be a written executed contract between the additional insured and the subcontractor. The insurer is playing two games: the contractor may have orally hired the subcontractor and there is no contract between an owner and subcontractor.

We have warned in previous newsletter articles not to depend on certificates of insurance and to contractually require that a contractor/subcontractor's liability policy contain specific endorsements (such as Insurance Service Organization form CG 20101185 or the equivalent). But the contract/subcontract does not override the insurance policy. Even if the policy contains a specified endorsement, other policy language may nullify or weaken the policy's AIC.

Many insurers licensed in New York do not play these games. Others, such as surplus line insurers, issue policies with proprietary forms and/or endorsements subtracting from AIC. To avoid gaps and omissions, an owner must obtain the contractor/subcontractor's complete liability policy before the contractor/subcontractor ever steps foot on the project, and then furnish it to an insurance professional for scrutiny.

An owner should not learn of AIC holes after suit starts. Early review will reduce significant exposures later.

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MECHANIC'S LIEN (CONTINUED FROM PAGE 10)

sion must be requested prior to the expiration of the prior notice…and a lapsed Notice of Pendency may not be revived."

In other words, if you snooze, you lose. By letting the Notice of Pendency expire after 3 years without renewing it for an additional 3-year term, the pile driver's mechanic's lien expired and could no longer be revived. Worse yet, the liens of four other subcontractors, which were riding on the coattails of the pile driver's [now expired] Notice of Pendency, had expired as well.

Therefore, the court granted the motion to strike the foreclosure causes of action on behalf of five of the lienors, and their mechanic's liens and the Notice of Pendency were stricken from the land records. Since the mechanic's liens were their only means of enforcing the amounts they were seeking against the owner, they were left with nothing — except for perhaps a malpractice action against their attorneys who lacked an effective system for making a diary entry 3 years down the road.

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