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## **Real Estate, Business, Construction and Environmental Law Alert**

### **NEW CASES AND REGULATORY DEVELOPMENTS**

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This memo provides an update to clients and colleagues on recent legal developments in the real estate, business, construction and environmental law areas.

1. **General Contractor Liable if Its Subcontractor Lacks Workers' Compensation Insurance:** The Appeals Court recently held that a general contractor is liable to a subcontractor's employee if the subcontractor failed to carry the required workers' compensation insurance. Thus, even if a general contractor pays workers' compensation benefits to an uninsured subcontractor's employee, the general contractor is not released from its independent wrongful death or common law liability to the subcontractor's employee. As Judge Berry wrote, "The lesson to be drawn is that general contractors must be scrupulous in demanding proof of workers' compensation insurance from any subcontractor they engage."
2. **Tenant Not Required to Indemnify Landlord Despite Clear Lease Terms:** The Supreme Judicial Court recently voided a commercial lease provision that required a tenant to indemnify a landlord for the landlord's own negligence. The Court held that the statute (G.L. c.186, §15) prevented a landlord from shifting responsibility for its own negligence to its tenant, even if the tenant signed a lease agreeing to such indemnification. In that same case, the SJC upheld a lease provision requiring the tenant to acquire insurance for the benefit of the landlord.
3. **A Lawsuit Challenging a Final Environmental Impact Report Must Be Filed Within 30 Days After the First Permit is Issued:** The Supreme Judicial Court recently dismissed a town's lawsuit challenging a developer's final environmental impact report (FEIR) because the suit was filed more than 30 days after the first State permit was issued for the project. The town had argued that its lawsuit was timely compared to a traffic permit that had been issued. However, the SJC held that a sewer permit had previously been issued, and the town did not file suit within 30 days of that permit. The SJC held that the sewer permit started the statute of limitations even if the town did not have any objections to that particular permit.
4. **Increased Federal and State Scrutiny of Worker Misclassification (Independent Contractor vs. Employee):** As I discussed in a memo in February 2009, the possible misclassification of employees as independent contractors is a significant concern for Massachusetts businesses due to potential liability under wage and independent contractor laws, and ramped up enforcement by the Attorney General (e.g., see the recent settlement involving restaurant meal delivery companies misclassifying their drivers as independent contractors, and the August 2009 SJC case favoring an employee who had been misclassified, even though the worker received more money

as an independent contractor than he would have as a correctly classified employee.) In addition to the State liability concerns, the federal Labor and Treasury Departments are stepping up enforcement, including the IRS's random audit of 6,000 businesses to see if they are properly classifying employees and complying with laws on paying employment taxes and protecting workers (e.g., Social Security, Medicare, health benefits, overtime, unemployment, anti-discrimination, etc.).

- 5. Businesses Handling Personal Information of Massachusetts Residents Must Have a Written Data Security Program:** As of March 1, 2010, all businesses (including businesses that are not located in Massachusetts, and the self-employed) handling the personal information (e.g., a name in combination with a Social Security or other ID number or account, credit or debit card number) of Massachusetts residents (employees or customers) must implement a written information security program ("WISP") to safeguard physical and electronic records, according to Massachusetts business regulations (201 CMR 17.00). The rule adopts a risk-based approach so that each WISP should take into account the size of the business and its need for security. Among other concerns, businesses should consider updating their employment contracts to require employees to comply with the WISP and their contracts with third-party service providers to ensure that the providers are implementing appropriate security measures for personal information.

Please contact me if you or a colleague has a question on these real estate, business, construction or environmental issues.

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