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REPORT

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NAPAC'S TOP STORIES

More NLRB Nonsense

A recent controversial decision by the National Labor Relations Board may hinder or eliminate class action waivers in employment contracts. *(Full story on page 2)*

Facebook® and Sweepstakes

The use of Facebook® as part of a sweepstakes or contest is becoming much more common. And while Facebook® is a big place and a whole lot goes unmonitored, NAPAC members should at least be aware that Facebook's® Promotion Guidelines, along with other applicable Facebook® policies, govern any contest offering using Facebook®. *(Full story on page 3)*

If You Don't Document It, Did It Really Happen?

If you take action against an employee, but do not document it, the lack of documentation can come back to haunt you. Understand why. *(Full story on page 4)*

Waiving Implied Warranties

Many remodelers waive implied warranties. What must you say? What does it mean? Should you do it? *(Full story on page 5)*



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It May Matter to You *(Full story on page 6)*

CONTRACTOR CORNER

Hold That Tax Return!

Starting with tax year 2011, the IRS will require that certain payments for goods and services paid for by credit card or third-party merchants must be reported to the IRS via new IRS form, 1099-K. This means that if you have a credit card merchant account, Paypal account, or similar account and either gross payments to you exceed \$20,000 for the year or you had more than 200 transactions with a merchant, you will receive a form 1099-K from that merchant.



ON NAPAC'S RADAR



We're tracking this story to keep you updated on news that may affect our industry.

Consumer Financial Protection Bureau Has a Leader

With the recess appointment of Richard Cordray as director of the Consumer Financial Protection Bureau, the new agency has legal standing to supervise financial institutions as required by the Dodd-Frank financial regulation act. NAPAC will be monitoring how the CFPB impacts retail installment contracts and home improvement financing.



The National Association of Professionally Accredited Contractors is pleased to offer you this issue of the NAPAC Report. NAPAC Reports are automatically emailed to NAPAC members as a benefit of their membership (annual membership fee of \$499). NAPAC also offers a subscription to the NAPAC REPORT for an annual fee of \$149. To purchase a membership or subscription, visit <http://napac.net/join-napac>

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In Other News

RRP ENFORCEMENT TO RISE IN 2012

The Environmental Protection Agency (EPA) has “begun stepping up its inspections and enforcement” of its Renovation, Repair and Painting (RRP) Rule for lead paint, according to the associate director of the EPA’s Waste and Chemical Enforcement Division, Don Lott.

The EPA primarily relies on tips from consumers, competitors, or workers to find those who violate the law. According to Lott, on average, the EPA receives 400 tips a month. Since inception of the RRP Rule in April 2010, the EPA has performed about 1,000 compliance inspections of job sites.

NAPAC members must recognize that now that some time has passed since enactment of the RRP Rule – any EPA grace period is over. Further, as consumers, competitors, and workers have come to learn the nuances of the RRP Rule, they are better suited to report violations to the EPA. In 2012, a lot of remodelers are going to learn how unpleasant it is to go through an EPA RRP Rule audit. Do not make yourself one of them. Make sure you are either following the EPA’s RRP Rule or (if applicable) your state’s RRP Rule.

More NLRB Nonsense

A recent controversial decision by the National Labor Relations Board (“NLRB”) puts into question the use of class action waivers in employment contracts.

In a 2-0 vote, the NLRB ruled that requiring a waiver of class action participation violated the rights of employees to engage in concerted, protected activity. The NLRB noted that “When, as here, employers require employees to execute a waiver as a condition of employment, there is an implicit threat that if they refuse to do so, they will be fired or not hired.”

However, the ruling left open (1) whether an employer can require employees, as a condition of employment, to waive their right to pursue class or collective action in court so long as the employees retain the right to pursue class claims in arbitration and (2) whether an employer can enter into a class action waiver agreement to resolve either a particular dispute or all potential employment disputes through non-class arbitration.

While this decision is concerning for employers, it is also concerning how the decision was made. Normally, comprised of a 5-member board, the NLRB decided this case by a 2-0 decision because two board seats are currently vacant and the other current board member recused himself from the case. Not only did a recent Supreme Court decision hold that the NLRB needs a quorum of three members to rule on a case, but the NLRB has consistently adopted the practice of not deciding a case without the votes of at least three members of the Board.

This is almost certainly not the last word on this issue, as the ruling has gone over like a lead balloon to many in the business and legal community. Moreover, when combined with the NLRB’s new labor poster requirement, it is becoming clearer by the day that the NLRB has committed to interjecting itself into the non-union workplace.

NAPAC members that have class arbitration waiver agreements may want to consider the risks involved with their current situation.

“...the ruling has gone over like a lead balloon.”



Facebook® and Sweepstakes

The use of Facebook® as part of a sweepstakes or contest is becoming much more common. And while Facebook® is a big place and a whole lot goes unmonitored, NAPAC members should at least be aware that Facebook's® Promotion Guidelines, along with other applicable Facebook® policies, govern any contest offering using Facebook®.

NAPAC members can read Facebook's® Promotion Guidelines online at http://www.facebook.com/promotions_guidelines.php, but below are some guidelines that are most commonly abused.

Promotions on Facebook® must include the following:

- a. A complete release of Facebook® by each entrant or participant.
- b. Acknowledgment that the promotion is in not sponsored, endorsed, or administered by, or associated with, Facebook®.
- c. Disclosure that the participant is providing information to the promotion sponsor and not to Facebook®.

You cannot use Facebook® features as a promotion's entry mechanism. For example, the act of liking a Page or checking in to a Place cannot automatically enter a participant.

You cannot condition entry upon the user taking any action using any Facebook® features other than liking a Page, checking in to a Place, or connecting to your app. For example, you must not condition entry upon the user liking a Wall post, or commenting or uploading a photo on a Wall.

You cannot use Facebook® features or functionality, such as the Like button, as a voting mechanism for a promotion.

"What are the consequences of violating Facebook's® policies?"

What are the consequences of violating Facebook's® policies? The most likely result is Facebook® deleting your contest page. Now you have to find a new way to conduct your contest after hundreds if not thousands have already

entered. You'd better find a solution; otherwise, you will have a lot of unhappy entrants...who will certainly not appreciate any telemarketing calls you place to them later on.

In Other News

CAN YOU REQUIRE ACH?

Many remodelers who originate retail installment contracts and finance companies that extend credit prefer that customers make their periodic payments via pre-authorized electronic fund transfers. The benefits are obvious. However, it is critical to understand that the Electronic Fund Transfer Act, a federal law, mandates that no person may condition an extension of credit to a consumer on the consumer's repayment by pre-authorized electronic fund transfers. This means that while you can *offer* pre-authorized electronic fund transfers (such as ACH), you cannot *require* a consumer to participate.

To *encourage* a customer to agree to pre-authorized electronic fund transfers, you can offer the customer a slight discount for using it. However, while you can offer a discount for using pre-authorized electronic fund transfers,

you cannot charge the customer more on the job if he refuses.



In Other News

A REAL EMERGENCY REPAIR?

With federal and state right to cancel laws allowing remodelers to avoid offering the customer the 3-business-day right to cancel if the work performed is the result of an emergency, fitting a job within the emergency exception is enticing. However, overreliance on, or forcing non-emergency jobs into the emergency exception, is risky.

Federal and many state laws require that the customer provide the remodeler with a separate, dated, and signed personal statement *in the customer's own handwriting* describing the situation requiring immediate work and expressly acknowledging and waiving the right to cancel the sale within 3 business days.

NAPAC sees far too many customer contracts with boilerplate language stating that the work being performed is due to an emergency, so no right to cancel is being offered. This boilerplate language, even if independently signed by the customer, is usually not sufficient. If relying on the emergency exception, NAPAC members should use NAPAC's Emergency Waiver form available on NAPAC.net.

If You Don't Document It, Did It Really Happen?

Imagine the following: An employee sexually harasses a co-worker. You talk to the employee who acted inappropriately. Months later, for performance reasons, you terminate the employee. The now-terminated employee files a claim against you alleging that you ran a business office that permitted sexual harassment and that the now-terminated employee suffered from this!

This stuff happens all the time. If not sexual harassment, its racism, or the next thing. A disgruntled employee will have no shame in seeking retribution against you. And, of course, the state labor board will knock on your door after having taken the disgruntled employee's accusations as fact.

Now, if the disgruntled employee's accusations are baseless, you should be able to resolve the issue. However, the smarter play is to document issues as they occur. Then, when the state labor board knocks on your door, or worse, the disgruntled ex-employee's lawyer, you have solid ammunition to fight back. Assuming the above scenario played out, how helpful would the following letter be:

On May 13, 2010, Jane Smith reported to me that Tom Jones made the following comment to Ms. Smith: "Hey, good lookin'". I spoke with Mr. Jones about the comment, advised him of its inappropriateness, and advised him that such actions are grounds for immediate termination. Mr. Jones responded that he understood.

_____ /s/ _____	_____ /s/ _____	_____ /s/ _____
Betty Clark, Human Resources Manager	Jane Smith	Tom Jones

With one letter, you have likely inoculated yourself from the disgruntled ex-employee! Imagine if the disgruntled ex-employee had multiple letters like this on his file.

Whether it be inappropriate comments, performance issues, pay, termination, etc., creating a contemporaneous written record of the event can be a life saver if a dispute comes along later. Without a written record, you have to slog through a "he said, she said" war.

"Without a written record, you have to slog through a 'he said, she said' war."

Of course, while a written record of an event can be incredibly helpful, a poorly written or damaging written record can backfire. For this reason, only key employees should be permitted to write letters to the file and these key employees should be trained to simply recite facts – not opinion or speculation.



Waiving Implied Warranties

Implied warranties are unspoken, unwritten promises, created solely by state law. Implied warranties are based on the principle of “fair value for money spent.” There are technically two types of these implied warranties: the implied warranty of merchantability and the implied warranty of fitness for a particular purpose.

The implied warranty of merchantability is a merchant’s basic promise that the product sold will do what it is supposed to do and that there is nothing significantly wrong with the product. In other words, it is an implied promise that the product is fit to be sold.

The implied warranty of fitness for a particular purpose is a promise that the law says a seller makes when the customer relies on the merchant’s advice that a product can be used for some specific purpose. For example, suppose you are an appliance retailer and a customer asks for a clothes washer that can handle 15 pounds of laundry at a time. If you recommend a particular model, and the customer buys that model on the basis of your recommendation, the law says that you have made a warranty of fitness for a particular purpose. If the model you recommended proves unable to handle 15-pound loads, even though it may effectively wash 10-pound loads, you have breached the warranty of fitness for a particular purpose.

The implied warranty of merchantability will accompany the sale of nearly every product sold by a remodeler, but the implied warranty of fitness for a particular purpose will only accompany a product if the remodeler, or one of the remodeler’s representatives, offers the customer advice and the customer relies on that advice that a product can be used for some specific purpose.

For what NAPAC believes is a variety of reasons, a number of remodelers attempt to waive all implied warranties with their customers. However, this is a tricky area both

“Disclaiming implied warranties can signal that your product is defective”

legally and from the competitive point of view. Disclaiming implied warranties can signal that your product is defective or not as good as others. Further, in order to disclaim implied warranties, the disclaimer must be conspicuous and use terms such as “sold as is” or “installed with all faults”.

Even if a particular waiver is legally valid, the cost/benefit analysis comes up short. Savvy customers will understand what you are saying and look elsewhere. For customers who do sign the contract, this issue will almost exclusively arise in a lawsuit after work has gone bad, and courts will seek out ways to invalidate waivers of implied warranties.

In Other News

NLRB POSTER POSTPONED AGAIN!

The National Labor Relations Board (“NLRB”) has once again postponed the date by which most employers, whether union or not, are required to conspicuously post a notice informing employees of their rights under the National Labor Relations Act. The new date is April 30, 2012, but even that date must now be considered tentative.

As the NAPAC Report has advised previously, the National Labor Relations Board’s decision to impose this requirement on non-union employers led to an immediate uproar. (See *New Labor Poster Required*, September 2011). The poster tells employees about their right to unionize, gives examples of unlawful employer and union conduct, and tells employees how to contact the NLRB with questions and complaints.

A number of lawsuits have been filed alleging that the NLRB overstepped its statutory authority and ignored congressional intent in imposing the poster requirement. The actual effective date for the poster will ultimately be subject to the progress of the pending lawsuits. Republican members in Congress have introduced a number of bills to rescind the NLRB’s requirement, but with Democrat control of the Senate, these bills will go nowhere.



It May Matter to You

States and the federal government are constantly passing new laws and rules and changing others. NAPAC comes across these items in its daily operations, but because we prefer to reserve the limited space in the main NAPAC Report for stories relevant to all members, we discuss these items in this special section, “It May Matter to You”.



An Illinois-based telemarketing company will pay \$500,000 to settle Federal Trade Commission charges that it interfered with consumers’ requests to be placed on company-specific do not call lists and transmitted deceptive Caller ID names. “When it comes to the Do Not Call provisions, compliance is not rocket science,” said David C. Vladeck, Director of the FTC’s Bureau of Consumer Protection. “It includes honoring a consumer’s request to be placed on a specific do not call list, and not messing with anyone’s caller ID. Legitimate companies comply with the law every day.”



Illinois: A recent Illinois Supreme Court decision will make enforcing non-compete clauses easier. In essence, the court announced that protecting confidential information and/or protecting near-permanent customer relationships are not the only legitimate business interests that an employer can be seeking to protect when enforcing a non-compete. This is a sizable change in previous law.



California: The California Contractor State License Board is now accepting applications for licensure from limited liability companies (LLCs). LLC applications can be obtained from CSLB’s website at <http://www.cslb.ca.gov/GeneralInformation/About/LLC.asp>. Before now, because an LLC could not become licensed, remodelers in California either had to go unlicensed or use a non-preferred corporate structure simply to get a CSLB license.