

WRIGHT v. ISSAK: THE COST OF NOT HAVING WORKERS' COMPENSATION? YOUR LICENSE AND MORE...

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In March 2007, the Sixth District California Appellate Court issued a decision in *Wright v. Issak* (2007) 149 Cal.App.4th 1116, finding a contractor's license is automatically deemed suspended as of the date a contractor is required to obtain workers' compensation, but fails to do so. The ramifications of this decision are far reaching. A contractor who fails to obtain or to maintain workers' compensation insurance when required to do so is guilty of a misdemeanor and is subject to discipline by the Contractor's State License Board ("CSLB"). Additionally, there may be large financial implications that result from a suspended license. A contractor deemed unlicensed because of lacking workers' compensation coverage has no standing to sue an owner for non-payment and all moneys paid may be disgorged. As such, contractors with employees, now more than ever, need to be vigilant to keep and maintain workers' compensation insurance.

Wright v. Issak In *Wright*, the contractor sued the homeowner for the balance remaining on a construction contract. The homeowner alleged that the contractor was not a licensed contractor and filed a cross complaint under Business & Professions Code section 7031, seeking reimbursement for the amounts paid to the contractor. During the trial, the facts revealed that the contractor had severely under-reported the amount of its payroll to the State Compensation Insurance Fund and the Court held that under Business & Professions Code section 7125.2, the act of under-reporting was the equivalent to failing to obtain adequate workers' compensation coverage. The Court interpreted Business & Professions Code section 7125.2(a)(2) as providing an automatic suspension of a contractor's license for failure to obtain workers' compensation when required, regardless of whether the contractor was actually notified by the CSLB that it should have coverage. As a result, the Court held that the contractor did not have an active license while performing the job. Not only could the contractor not sue the homeowner for the amounts owing on the contract, but he had to disgorge and pay back the homeowner all the monies paid for the work.

Notice of potential litigation, management should implement a "litigation hold" policy to prevent the alteration or destruction of potentially relevant evidence, and should communicate the obligations to preserve and disclose ESI to all employees in possession of potentially discoverable data.

And third, by codifying the disclosure requirements for ESI, the new rules open the door for potentially harsh sanctions against those litigants who fail to comply. In 2005, Morgan Stanley was fined \$1.5 billion by a judge who ruled that it had failed to preserve electronic evidence. See, *Coleman (Parent) Holdings v. Morgan Stanley & Co.*, 2006 EXTRA LEXIS 94 (Fla. Cir. Ct. Mar. 23, 2005). Now that the Supreme Court has formalized the disclosure requirements, expect the federal judges to vigorously enforce them.

The above discussion reveals the consequences of under-reporting a payroll. However, the same consequences will apply to those contractors deemed to have employees, yet who do not have workers' compensation insurance. The practice of hiring day laborers is probably the most common practice that can expose a contractor to license suspension under section 7125.2 if a contractor is not carrying workers' compensation insurance.

The Problem Posed by Day Laborers. Many contractors may not realize that the day laborers are deemed to be employees, which requires a contractor to carry active workers' compensation insurance. California Labor Code section 2750.5 provides that there is a rebuttable presumption that a laborer is an employee rather than an independent contractor.

While circumstances may vary, day laborers are generally deemed an employee in all but the rarest cases. Additionally, it should be noted that any person performing any function or activity for which a license is required must hold a valid contractor's license as a condition of having independent contractor status, otherwise that person is deemed to be the contractor's employee. As such, if a contractor is hiring day laborers, or any non-licensed individuals to carry out work, the contractor should carry workers' compensation insurance to cover those laborers.

Employees and No Workers' Compensation – The Consequences. As discussed above in *Wright v. Issak*, the consequence of having employees without maintaining workers' compensation coverage is that a contractor's license is automatically deemed suspended under Business and Professions Code section 7125.2 as of the time the workers' compensation was required to be obtained. Furthermore, section 7125.4 exposes a contractor's license to discipline and section 7126 states that any contractor who violates the requirement for obtaining workers' compensation is guilty of a misdemeanor.

Additionally, because a contractor is automatically deemed unlicensed under Business and Professions Code section 7125.2, he may also come under Business and Professions Code section 7031, should a dispute with an owner arise. Under section 7031(a) no contractor not duly licensed at all times during a project may bring an action for collection of compensation of any act or contract for which a license is required. Furthermore, under section 7031(b) an owner can disgorge a contractor of all monies paid.

As can be seen from the above discussion, failure to properly maintain workers' compensation insurance can have severe financial consequences. . . ■