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REPORT

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NAPAC'S TOP STORIES

EPA Enforcement Against Contractors Increasing

Since taking effect on April 22, 2010, the EPA has taken little enforcement action against contractors for violating the new lead-safe work practices under the Renovation, Repair and Painting Rule. This appears to be changing. *(Full story on page 2)*

White House Moves to Target 1099 Workers Without Congressional Approval

While the proposed Employee Misclassification Prevention Act may not become law anytime soon, the Obama Administration is not relenting on its effort to crack down on worker misclassification. Soon to be released Department of Labor rules may drastically change current law. *(Full story on page 3)*

Sales Tax for Contractors That Also Manufacture Products

One would think that if you manufacture products in a state that exempts the purchase of the manufacturing machinery from sales tax, you would qualify for the exemption. Not so fast. Contractors have been singled out and forced to pay delinquent sales tax on their purchases. *(Full story on page 4)*

Can You Solicit Leads Before You Are Licensed?

It is easy to imagine the following: You are a fully functioning home improvement contractor that is properly licensed in all of your markets. You decide to enter a new market, so you prepare an application for licensing. A home show is scheduled, and for whatever reason, you still do not have your license. Do you set up a booth at the home show or do you wait for the license? *(Full story on page 5)*



In Other News

Senate Votes to Repeal New 1099 Reporting Requirement *(Full story on page 2)*

Hand Out the Lead Paint Pamphlet! *(Full story on page 3)*

LLCs Can Soon Be Used by California Contractors *(Full story on page 4)*

Local Licenses *(Full story on page 5)*

CONTRACTOR CORNER

Washington Sets Its Own Lead Paint Rule...

Washington State has become the 11th state to be authorized by the EPA to run its own Renovation, Repair and Painting Rule program. Washington-based companies and individual renovators who have already received certification through the EPA will be notified by Washington and be grandfathered in. Once their EPA certification expires, future renewals will be through the state. All non-Washingtonians must be certified by the state immediately. Fortunately, the certification fee for both companies and individuals is only \$25.

Want to submit a question for the next Contractor Corner? Email your question to ccquestion@napac.net



ON NAPAC'S RADAR



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

...and Georgia Lead Paint Rule Is on the Horizon

Per the Georgia Environmental Protection Division (EPD), Georgia has been authorized by the EPA to run its own Renovation, Repair and Painting Rule program. The EPA has not officially acknowledged this fact, but Georgia is in the midst of approving training providers to conduct classes in Georgia. Once training providers are in place, EPD will begin requiring firm and individual certification.



The National Association of Professionally Accredited Contractors is pleased to offer you this issue of the NAPAC Report.

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In Other News

SENATE VOTES TO REPEAL NEW 1099 REPORTING REQUIREMENT

As NAPAC previously predicted, the U.S. Senate has now voted to repeal the Form 1099 tax reporting requirements under the Patient Protection and Affordable Care Act. When passed, the Act included a provision that required businesses to file a Form 1099 with the Internal Revenue Service for every vendor from which they purchased more than \$600 worth of goods or services in a year. Previously, purchases of goods (but not services) and purchases from corporations were excluded from the Form 1099 reporting requirements. Barring legislative action, the expanded Form 1099 requirements were to become effective January 1, 2012.

With the Senate voting 87-12 in favor of repeal, the bill has now passed both chambers of Congress and will now go to President Obama, who has stated that he will sign the bill.

EPA Enforcement Against Contractors Increasing

EPA enforcement of the recently enacted Renovation, Repair and Painting Rule (“RRP Rule”) is finally becoming more common after a period of very little enforcement. NAPAC has reviewed a number of EPA enforcement-related actions against its members. The most common approach is for the EPA to send a simple letter advising that it is concerned about the contractor’s compliance with the RRP Rule and is requesting documentation and information concerning the contractor’s compliance. Of course, if the request for documentation and information is ignored, a formal government subpoena follows.

Aside from the obvious ruinous fines that the EPA can impose on a contractor for non-compliance with the RRP Rule (\$37,500 per violation), an EPA request (via letter) or demand (via subpoena) is a tremendous burden on the contractor. In the EPA correspondence that NAPAC has reviewed, the EPA asks for a list of all jobs performed by the contractor, a list of each individual acting as a Certified Renovator on behalf of the contractor, the steps taken by the contractor to ensure that lead-safe work practices are being utilized in pre-1978 housing, etc. Any NAPAC member that has ever had to comply with a government subpoena can not only appreciate how much time it takes to compile the requested documentation and information, but also how costly it is to have legal counsel review all of the documentation and information first to make sure you are not blindly turning over documentation and information that makes it obvious that you violated the law.

“...an EPA request or demand is a tremendous burden on the contractor.”

How can NAPAC members avoid being targeted? First and foremost, you must comply with the RRP Rule. This is predicated on fully understanding the RRP Rule, whether the EPA rule or your state rule. NAPAC’s lead-based paint memos, which are available on www.NAPAC.net for FREE to NAPAC members, are the best place to learn what you must be doing to comply.

Leaving aside compliance, many contractors who have encountered run-ins with the EPA in the past can trace their problem to either a child testing for elevated blood levels or a disgruntled ex-employee or installer who has reported (ironically) his unlawful actions while he worked for the contractor. As NAPAC has noted before, ex-employees or installers know nearly everything about your business, and a disgruntled one is all too happy to “air your dirty laundry” to anyone who will listen. If it happens to be about your non-compliance with the RRP Rule, it can turn into a nightmare.



White House Moves to Target 1099 Workers Without Congressional Approval

With the 2010 midterm elections so drastically changing the makeup of Congress, the prospects for enactment of the Employee Misclassification Prevention Act quickly became doubtful. While both Republicans and Democrats would relish closing the supposed “tax gap” by cracking down on misclassified workers, it is highly unlikely that Republicans would back a bill as draconian as the Employee Misclassification Prevention Act given the effect it would have on the business community.

The problem though is that while Congress may not be interested in pursuing the Employee Misclassification Prevention Act, the Obama Administration continues to seek ways to pursue this issue through other channels that are free from Congressional oversight. To accomplish this, in April 2011, the U.S. Department of Labor (DOL) is expected to issue new rules amending the Fair Labor Standards Act to implement portions of the Employee Misclassification Prevention Act without actually enacting it. While we must await the new rules, two previous bantered-about rules, if issued, could have a particularly painful effect:

- require that hiring firms, before declaring that a worker is not an “employee”, not only perform a written analysis of the worker’s status applying the “economic realities” test, but also disclose the analysis to the affected worker, and keep a record of the analysis in the hiring firm’s files should a DOL investigator request this information
- require hiring firms to generate and maintain the records necessary for the DOL or an attorney to successfully challenge the classification of a worker as independent contractor

“...the Obama Administration is committed to cracking down on what it perceives as misclassified workers.”

Commentary: The handwriting is on the wall—the Obama Administration is committed to cracking down on what it perceives as misclassified workers. With or without enactment of the Employee Misclassification Prevention Act, President Obama’s

budgets show his priorities. The DOL’s 2011 budget included an additional \$25 million to target misclassification of independent contractors and allowed for the DOL to hire 100 new enforcement personnel to investigate alleged misclassifications. Not relenting, the DOL’s 2012 proposed budget continues to ask for increased funding to target misclassification.

When the DOL issues its new rules, NAPAC will review same and publish a guide that not only explains the new rules, but also what NAPAC members should do to ensure they are in compliance.

In Other News

HAND OUT THE LEAD PAINT PAMPHLET!

Per an EPA press release, the EPA recently entered into a Consent Agreement and Final Order with Permanent Siding and Windows, LLC, of Milford, Connecticut, over claims that Permanent Siding violated the requirements of the Lead-Based Paint Pre-Renovation Education Rule by failing to provide EPA’s lead hazard information pamphlet, now titled “The Lead-Safe Certified Guide To Renovate Right” to 17 property owners prior to conducting renovations at their respective properties. Under the consent agreement, Permanent Siding agreed to pay a penalty of \$30,702.

NAPAC urges its members to consider 4 issues: (1) the EPA issues a press release for all the world to see when it enters into a consent decree, (2) competitors can obtain a copy of the consent decree from EPA.gov and use it to trash the contractor’s reputation in the home, (3) for Permanent Siding, the math came out to \$1,806 per violation, and (4) Permanent Siding paid \$1,806 per violation for simply failing to provide a pamphlet. Imagine if it had failed to be a Certified Firm, failed to use Certified Renovators, or failed to use lead-safe work practices on the renovations – all required under the new Renovation, Repair and Painting Rule.



In Other News

LLCS CAN SOON BE USED BY CALIFORNIA CONTRACTORS

With the passage of Senate Bill 392, California will finally allow limited liability companies to obtain contractor licenses from the California State Licensing Board. Under the law, CSLB is required to begin processing applications no later than January 1, 2012.

To obtain a license, an LLC will, among other requirements, be required to file and maintain a surety bond in the amount of \$100,000 for damages arising out of specified claims of employees and maintain and furnish proof of specified insurance coverage in an amount between \$1 million and \$5 million, depending on the number of personnel of record.

Per www.cslb.ca.gov, CSLB staff is currently developing new application procedures, creating applications, etc., but anticipates that it will be ready to begin accepting applications from LLC applicants in late 2011. Until the program is in place, CSLB will not accept applications from LLCs and no LLC licenses will be issued.

Sales Tax for Contractors That Also Manufacture Products

Most manufacturers are aware that many states allow a manufacturer to purchase manufacturing equipment for use in that state without paying sales or use tax on the purchase price of the equipment. The rationale for excluding these purchases from sales or use tax is that it encourages the location, development, and growth of manufacturing jobs in the state.

However, a contractor that manufactures its own products may not qualify for the manufacturing equipment exclusion due to (1) a quirk in most states' manufacturing equipment exclusion and (2) most states' very restrictive interpretations of these laws.

"...a contractor that manufactures its own products may not qualify for the manufacturing equipment exclusion..."

Specifically, most states provide that sales or use tax is not owed for manufacturing equipment that assembles, manufactures, processes, or refines tangible personal property for sale or resale. It is the use of the terms "sales" and/or "resale" and, NAPAC argues, more importantly, most states' very restrictive interpretations of these terms that cause the problem for contractors that also manufacture their products.

In short, while a company like Sony sells its manufactured products, a contractor, in the view of most states, does not. Instead, the contractor uses (or consumes) the product in the performance of the construction contract that it enters into with a customer. The simplest analogy is to consider the building of a deck. The contractor who agrees to build a deck for a customer purchases wood, nails, screws, fasteners, etc., but that contractor does not really sell those items to the customer. Instead, the contractor uses these items to build the deck. When the contractor has completed the work, these items are part of the deck, and will never be removed from the deck.

Of course, if the contractor offers to sell its product without installation, it may qualify for the manufacturing equipment exclusion, but so few contractors do this. Also, if the manufacturer of the product does not directly provide for installation—instead, the product is sold to a dealer who provides installation—the manufacturer will likely qualify for the exclusion.

Regardless, in nearly every case, the state legislators who wrote the state's manufacturing equipment exclusion probably never intended to preclude a contractor who manufactures its own products from taking advantage of an exclusion that it otherwise qualifies for, but most state revenue departments seize on the terms "sale" and/or "resale" to deny the exclusion. This happens most often during an audit where the state attempts to impose sales or use tax on the contractor's previous purchase of manufacturing equipment. Obviously, if the contractor has a large manufacturing operation, it may have purchased a significant quantity of manufacturing equipment over the years, and all of it will then be subject to tax along with penalties and interest.

Commentary: NAPAC recommends that any member that manufactures product and takes advantage of a state's manufacturing equipment exclusion from sales or use tax consult with their legal and/or tax advisors to ensure they qualify for the exclusion.



Can You Solicit Leads Before You Are Licensed?

It is easy to imagine the following: You are a fully functioning home improvement contractor that is properly licensed in all of your markets. You decide to enter a new market, so you prepare an application for licensing. A home show is scheduled, and for whatever reason, you still do not have your license. Do you set up a booth at the home show or do you wait for the license?

If NAPAC polled 100 members, we imagine that the vast majority would assume the risk and set up a booth at the home show. Certainly statistics are on the risk-taker's side: There are a number of shows throughout the year, a lot of exhibitors at each one, and the state or local agencies that enforce licensing are understaffed and underfunded.

However, contractors do get caught. Admittedly, it tends to be in places that very aggressively enforce their laws—think places like Nassau and Suffolk counties New York—but it can happen anywhere. An agent in plain clothes attends the show to basically walk around and find violations of law, most often unlicensed contracting activity. When he or she does, she records it and a few weeks later the contractor receives a nasty letter and a fine. It is an all too easy way for these jurisdictions to raise revenue without irritating citizens.

But if that was the only issue, then the risk might be worth the reward. The problem is that that is not the only risk. The agency will likely issue a stop order against the contractor prohibiting the contractor from performing business until it is properly licensed. This can lead to the contractor having to delay installation of any job sold, or worse, advise the customer that the job was sold while unlicensed—thus invalid.

A more practical concern is that the agencies that enforce laws against contractors tend to be small departments with dedicated staff who often have an adversarial attitude toward the industry. They have nothing better to do and they have very long memories. So when a once-unlicensed contractor needs a favor, the agency may say no. When a customer calls the agency to complain about the contractor, the agency is already inclined to believe that the contractor is “fly by night”. Any NAPAC member who has ever been subjected to an arrogant state or local agent can attest to how much power they can wield over a matter.

“Your reputation as a contractor—in eyes of both consumers and officials—is your most important asset.”

Your reputation as a contractor—in eyes of both consumers and officials—is your most important asset. Contractors will continue to be faced with the above dilemma, and most of them will determine that the reward outweighs the risk. To each his own. But, the next time you are faced with this dilemma or a similar one,

remember that contractors do get caught and the damage done, while subtle, can have a lasting impact.

In Other News

LOCAL LICEN\$E\$

A story in the Luzerne County Pennsylvania's Citizens Voice serves as a sad reminder of how professional licensing is often about money-making and nothing else.

Mike Haduck just wants to take a test. However, the stonemason must pass a contractor's exam to work in Wilkes-Barre, and he said he's spent three futile days trying to figure out how.

Haduck first called City Hall to ask about the exam. With no reply, he went to the code enforcement office. A woman told him he could take a scheduled exam in about a month. If Haduck wanted to take it immediately, the woman told him, he had to call a toll-free number for details. The number led Haduck to an automated answering system at an office in Minnesota. So Haduck tracked down the company he needed to contact, Pearson Professional Services, in the phone book. He found an office in Moosic, Pennsylvania. He drove there, but nobody was there.

A frustrated Haduck then returned to City Hall to complain. “They're running me around in circles,” he said.

(original article can be found at <http://citizensvoice.com/news/contractors-confused-by-w-b-licensing-process-1.1113701#ixzz1G1oyIfTR>)