

***It Pays to Know the Title***

by Terrence L. Brookie



While public policy prohibits a subcontractor or material supplier from either acquiring or enforcing a mechanic's lien on Indiana state or local public projects,

Indiana statutes protect claimants by providing an alternative remedy. Specifically, Indiana statutes permit certain claimants to impound contract proceeds by filing a claim with the appropriate public agency and to bring a claim against the prime contractor's surety under the required payment bond.

A recent Indiana Court of Appeals case makes it clear that a claimant on a State public project must know the type of State project on which work is being performed in order to determine when a claim against contract proceeds must be filed. Titles 4 and 5 of the Indiana Code both address State projects. Title 4 governs State projects administered through the Indiana Department of Administration (INDOA); Title 5 governs State projects other than INDOA projects. Title 36 governs local government projects, which include projects performed or contracted for by municipal corporations, such as school corporations, library districts, counties and local building authorities.

In *Electrical Specialties, Inc. v. Siemens Bldg. Tech., Inc.*, 837 N.E.2d 1052 (Ind. Ct. App. 2005), the court interpreted the notice and timing

requirements of claims brought regarding Title 4 and Title 36 projects, concluding that timing differences exist between making a claim on a Title 4 State project, as opposed to making a claim on a local government project under Title 36. It is generally easier to distinguish between a Title 4 and Title 36 project than distinguishing Title 4 and 5 projects. This article explains why, in light of *Electrical Specialties*, it is imperative that a claimant know whether a State project is governed by Title 4 or Title 5, as the applicable provision in Title 5 mirrors the language in Title 36.

In *Electrical Specialties*, Oberle & Associates, Inc. (Oberle) entered into a contract with the State of Indiana as the prime contractor for improvement of Richmond State Hospital, which was a Title 4 project. Oberle entered into a subcontract agreement with Electrical Specialties, Inc. (ESI), to perform electrical work on the project. ESI, in turn, hired Siemens to install fire alarm, intercom, CCTV and music systems for the project. After not being paid in full by ESI, Siemens filed a subcontractor's verified claim with the State.

The *Electrical Specialties* court reviewed the applicable notice provision of Title 4, which provides: "[i]n order to receive payment...any subcontractor or supplier making a claim for payment...must file a verified claim with the division within 60 days from the last labor performed, last material furnished, or last service rendered." Ind. Code § 4-13.6-7-10(a) (emphasis added). The *Electrical Specialties* court contrasted this language with that in Title 36 (local government projects), which provides that claimants "shall file their claims with the board within 60 days after the last labor performed,

last material furnished, or last service rendered by them..." *Id.* at 1057 (emphasis added). The *Electrical Specialties* court acknowledged the express link in Title 36 between the 60 day period to file a claim and the specific claimant's own contribution of labor, material, or service to the project.

The *Electrical Specialties* court observed that the legislature had not inserted any language in Title 4 following "rendered" to link the 60 day filing period to the claimant's personal contribution to the project. The court interpreted the legislature's use of the word "last" to mean the "last labor performed, material furnished, or service rendered [by anyone] on the project." *Id.* Based on this interpretation, the court held that Siemens did not have to file its verified statement of the claim with the State within 60 days after the (earlier) date Siemens last performed work on the project, but rather, had until 60 days after the (later) date when any

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**Mr. Brookie Elected to the American College of Construction Lawyers**

Terrence L. Brookie has been accepted as a new member of the American College of Construction Lawyers (ACCL). Membership in this organization is by invitation only upon nomination and election.

The ACCL is a national organization of lawyers who have demonstrated skill, experience and high standards of professional and ethical conduct in the practice or in the teaching of construction law, and who are dedicated to excellence in the specialized practice of construction law. ♦

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## Employers Face Challenges Presented By Lengthening Tours of Duty

by Amy S. Wilson



More than two years after the start of the war in Iraq and four years after the war in Afghanistan, employers are struggling with challenges arising from the number of employees serving in the military or national guard. Faced with employees' lengthening tours of duty and the urgent need for assistance in the aftermath of hurricanes Katrina and Rita, many employers have requested a refresher on employees' reemployment rights.

The Uniformed Services Employment and Reemployment Rights Act of 1994, as amended (USERRA), 38 U.S.C. chap. 43 §§ 4301-4334, covers individuals who have served or are serving in the uniformed services. USERRA protects eligible employees' rights to reemployment following a tour of duty, as well as their benefits.

To be eligible for protection, an employee must have left his/her civilian job to participate in the uniformed services, giving appropriate prior notice to the employer. The employee's absence may not exceed five years, except under certain circumstances, and the employee must have been honorably released. Then, as long as the employee reports back for work within the time limits required by USERRA, he or she must be reemployed. *See* 38 U.S.C. §§ 4303, 4304, 4312. The time limits vary depending on how long the employee was in service, ranging from eight hours to 90 days.

With the recent hurricanes and related disaster relief efforts, many employees are being pressed into service through the Federal Emergency Management Agency and the National Disaster Medical System. When Congress passed the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, it made sure that USERRA protections would be extended to civilians who lend disaster assistance and support. Individuals appointed to perform this type of service are considered part of the "uniformed serv-

ices" and are entitled to receive USERRA protections.

Employers are not obligated by USERRA to pay employees while they are engaged in active service. Although service members may use accrued vacation as compensation during their leave of absence, they cannot be forced to do so. Employers are required to "promptly reemploy" returning service members to a position that is equivalent to what the person would have had if he or she had not been in the uniformed services. USERRA also imposes a duty on employers to make "reasonable efforts" to provide necessary training for the employee to qualify for reemployment.

Service members are protected from discharge without just cause for up to one year after their reemployment, depending on their length of duty. And they are protected from any form of discrimination based on past, current or future service obligations, or retaliation for having filed a complaint or participated in a proceeding under USERRA.

USERRA protects employees' health care benefits in two ways. First, employers must pay health benefits for thirty days from the time employees leave their civilian jobs to the time they begin active duty. Second, employers must provide up to 24 months of health care continuation coverage to service members and dependents, even when the employer is not otherwise covered by COBRA. Service members returning with a disability incurred or aggravated during active service may be entitled to additional benefits.

Upon reemployment, an eligible employee must be treated for vesting and benefit accrual purposes under his or her USERRA covered pension plan as if he or she had been continuously employed with the employer. *See* 38 U.S.C. § 4318(a)(2)(A). An employer's obligation under a pension plan is dependent on the type of pension plan in place.

In the case of a defined benefit plan, the employee's accrued benefit will be

increased for the period of active service once the employee is reemployed and, if applicable, has made any contributions that may be required by the plan. *See* Proposed Rule, 20 C.F.R. § 1002.261. If the defined contribution plan requires employee contributions, the USERRA-eligible employee must make up any missed employee contributions in order to be treated as continuously employed during active service. *See* 38 U.S.C. § 4318(b)(2).

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*Congress made sure that USERRA protects civilians engaged in disaster relief assistance.*

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For plans that require employers to match employee contributions, the employee is only entitled to employer contributions that correspond to the actual employee contributions made to the plan. *See* Proposed Rule, 20 C.F.R. 1002.262. However, if the plan calls for employer contributions and the employee is not required to contribute, the employer must make the contributions attributable to the employee's period of service after the date of reemployment. *See id.*

The foregoing rules on reemployment, compensation, health benefits, and pension credit must be followed by all employers, unless doing so would cause "undue hardship" or the employer's circumstances have changed such that reemployment is impossible or unreasonable. ♦

### About the Author

Amy S. Wilson is an associate practicing in the Labor & Employment Group. She represents employers in both federal and state courts and proceedings before the Equal Employment Opportunity Commission and Indiana Civil Rights Commission. She also assists employers in preparing and instituting preventative policies. ♦

## The Six Golden Rules for Photographic Evidence

by Steven J. Strawbridge



A general contractor learns there has been an accident at the construction site and numerous workers have been injured. The next 120 minutes can often determine whether it will be exposed to a multi-million dollar adverse jury verdict. This article will address the “six golden rules” for photographic evidence, which can be the most significant evidence at trial.

Photographs help witnesses recall events and can resolve conflicting testimony, particularly when the trial occurs several years later. Jurors pay greater attention when they not only hear testimony, but also see consistent visual evidence.

Photographs can also aid expert testimony. With good photographs, accident reconstruction experts can often review and explain the sequence of events giving rise to a construction accident. Photographs may also establish the comparative fault of other parties.

### 1. Take Photos As Soon As Possible

The general contractor has a brief window of opportunity to secure photographs of the accident scene in its present condition. After addressing personal injuries, photograph the accident scene. Delay allows the accident scene to change, often dramatically. If the injury is severe or property damage extensive, consider retaining a professional photographer to take photographs. In many instances, on-site construction representatives, such as the project superintendent, can take photographs. Also, as debris is removed, take additional photographs reflecting the sequence of accident scene investigation. An expert present during the photographing can provide input in advance.

### 2. Have the Training and Resources Available to Take Immediate Photographs

Include photographic training in your safety program. Make digital cameras and/or video cameras available for on-site

construction representatives, such as project foremen and superintendents, to use in the event of an accident. Generally, you cannot take too many photographs.

### 3. Consider Notification to Third Parties Prior to Moving Evidence

Consider notification to parties who are potentially responsible for the accident, such as subcontractors who were on the scene, or suppliers who provided material and equipment which could have been involved, to allow them an opportunity to inspect and photograph the unchanged accident scene. If a party is in control of an accident scene and changes or alters its condition without giving others a fair and reasonable opportunity to review, inspect and photograph the accident scene, they may face accusations of “spoliation of evidence.” Eliminate evidentiary disputes later by providing notification.

### 4. Photograph with a Plan

Before an accident ever occurs, create an initial plan incorporating these golden rules and planning how and by whom photos will be collected. Photograph the entire accident scene from at least eight angles, using different heights and distances to provide a detailed photographic review of the accident scene from numerous perspec-

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*If a party is in control of an accident scene and changes its condition without giving others a reasonable opportunity to inspect and photograph the accident scene, they may face accusations of “spoliation of evidence.”*

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tives. It is often difficult to predict the cause of the accident in question, so an overall depiction of the accident scene from numerous angles is important. Take plenty of overview photos as well as close-ups focusing upon specific areas involved in the accident. Under some circumstances, photographs of the overall area can be taken from helicopters, planes, or perhaps satellite photographs can be utilized. It is preferable if the camera automatically records the date of the photograph.

### 5. Establish Visual Reference Points

Photographs focusing upon a specific area or piece of equipment can make it difficult to identify the exact location portrayed in that photograph. Be aware of the simple, but important, tactic of establishing visual reference points to resolve this problem. Natural or existing reference points can include trees, utility poles, or some fixed object. If a photograph is taken containing a reference point, identification of the location of the item photographed is easier.

Reference points can also be created at the scene of an accident. Paint a mark where something occurred at a construction site and photograph the mark at various distances or add a cone, tape, or other identifiable item to the frame to help establish the location. Be sure the marker’s position can be later determined with some certainty.

### 6. Establish Dimensional Reference Points

Keep in mind that, even if a photograph establishes reference points as to its location, reference points reflecting the dimensions of the items photographed are also needed. Photograph rulers or measuring tape which establish dimensions at the accident scene, such as a drop-off shoulder area.

If no measuring device is available, use a trick utilized by accident reconstruction experts. When photographs have no measured distances, such as overhead or satellite photos, an accident reconstruction expert will often identify something in the photograph such as a building which is still in existence. The dimensions of the building then can be measured and compared to provide a scale for the rest of the photograph.

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contractor, subcontractor or materialman last provided any materials or performed any labor or services on the project.

The *Electrical Specialties* decision requires examination of claims on Title 5 State projects. Title 5 provides that each “subcontractor or subcontractors, materialmen, laborers, or those furnishing services...shall file with any such board...their claim within 60 days from the last labor performed, last material furnished, or last service ren-

dered by them ....” Ind. Code § 5-16-5-1 (emphasis added). The language in Title 5 is nearly identical to the language in Title 36, in which the Indiana legislature linked the 60 day filing period with that of the claimant’s personal labor, material or service by including the prepositional phrase “by them” at the conclusion. Thus, when filing a claim for services or material under Title 5, notice must be provided within 60 days of the *claimant’s* last work, and not within 60 days of the last work *by anyone*, as is the case on Title 4 projects.

For subcontractors or suppliers, not knowing which Title governs a State project can be a costly mistake. In order to impound contract proceeds, Title 4 requires notice within 60 days of the last labor performed, material furnished, or service rendered *by anyone*. Title 5 requires notice within 60 days of the last labor performed, last material furnished, or last service rendered *by the claimant*. Lastly, Title 36 requires that notice against funds held by the board be given within 60 days of the claimant’s last work. It pays to know your Title! ♦

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Thus, when there is no measuring device available, use an identifiable object with verifiable dimensions. If a notebook, 3x5 card, dollar bill, or even a business card is included in a picture, it can later provide the “verification” to support measurements of items depicted in the photograph. Mark and retain the item in question for evidentiary purposes; it effectively becomes a “unit of measurement” establishing dimensions depicted in the photograph.

**Conclusion**

These golden rules can help protect any general contractor in Indiana after either small or catastrophic construction scene accidents. Failure to properly preserve photographs of an accident scene immediately after the event in question can prove the difference between a verdict in favor of the general contractor or a multi-million dollar verdict against the general contractor. Follow these practices to preserve evidence for the review and evaluation of any claims asserted. Remember, it is important to take photographs immediately and properly. ♦

**Seminars**

Steven J. Strawbridge, Terrence L. Brookie and Dean R. Brackenridge recently made presentations regarding Indiana’s new Design Build Statute to construction trade associations.

Locke Reynolds attorneys are available to make a presentation to your organization regarding construction and real estate issues. If interested, please contact Ranae Stewart, Marketing Manager at 317-237-3817 or [rstewart@locke.com](mailto:rstewart@locke.com).

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