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Inside Counsel's Guide to Preparing for and Managing
**Unexpected Legal Challenges
and Emergencies**

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MURPHY AUSTIN
ADAMS SCHOENFELD LLP

We represent businesses in a variety of industries. Each practice team includes attorneys with in-depth expertise in a particular area of business law:

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- Construction
- Real Estate
- Labor & Employment Law
- Business & Commercial Litigation
- Public Contracts
- Antitrust & Trade Regulation
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Preparing for & Managing Unexpected Legal Events

- Environmental Liability and Related Events
 - Unexpected Discovery of Contamination
 - Inspections by Regulators
- Construction Liability
 - Extra Work in Construction Contracts
 - Construction Delays
- Labor Law-Related Liability
 - Union Organization
 - Understanding the Potential Impact of the *Employee Free Choice Act*



Environmental Liability & Related Events



Environmental Liability & Related Events

Scenario 1: Unexpected Discovery of Contamination

- The year is 2020. Ten years after purchasing real property, your company is served with a complaint alleging that it is responsible, under CERCLA (federal law or "Superfund") for groundwater contamination beneath the adjacent property and your company's property.
- The complaint alleges that your company's property was once a corner shopping center where a dry cleaning business was located. Your company's property is now a commercial office building for your company's headquarters.



Environmental Liability & Related Events

Scenario 1: Unexpected Discovery of Contamination

- Answer:
 - Locate your company's copy of the Phase 1 Environmental Site Assessment ("Phase 1") which was prepared pursuant to the federal "All Appropriate Inquiry Rule" ("AAI Rule") adopted by USEPA and which the company obtained prior to its acquisition of the property.
 - Use the Phase 1 as a defense to prevent the company from expending funds for any cleanup.



Environmental Liability & Related Events

Scenario 1: Unexpected Discovery of Contamination

- Explanation:
 - CERCLA provides for joint, several, and strict liability with few defenses.
 - Two important defenses are:
 - Bona fide Purchaser
 - Innocent Landowner
 - To benefit from either of the two defenses, before acquiring the property, the purchaser must have obtained a Phase 1 that satisfies the AAI Rule or its equivalent, ASTM 1575-2005.



Environmental Liability & Related Events

Scenario 1: Unexpected Discovery of Contamination

- **Suggestions:**
 - Before acquiring legal ownership of the real property, obtain a Phase 1 that satisfies the AAI Rule or ASTM 1575-2005.
 - Review a draft of the Phase 1 and compare it with the AAI Rule and the ASTM 1575-2005 requirements to determine whether the Phase 1 complies.
 - Make certain that prior to closing, the purchaser complies with the “User Requirements” under AAI.
 - Obtain final Phase 1 report before close of escrow.
 - Establish a filing system within the company so that many years later, the company can locate Phase 1 Reports.
 - Recognize that even though the bona fide purchaser or innocent landowner defense applies, the company will need to cooperate by allowing others access to the property to perform any cleanup, among other requirements.



Environmental Liability & Related Events

Scenario 2: Inspections and Environmental Enforcement

- The company's plant manager calls and states that the environmental enforcers are at the main plant requesting access to the plant to inspect the plant's manufacturing operations and the company's compliance records.
- The company's environmental compliance history has been the subject of an internal investigation as part of an effort to improve corporate responsibility.



Environmental Liability & Related Events

Scenario 2: Inspections and Environmental Enforcement

- Answer:
 - Implement the company's plan for handling inspections by regulators (regulatory, permits, civil, criminal).



Environmental Liability & Related Events

Scenario 2: Inspections and Environmental Enforcement

- **Explanation: The Procedures**
 - Anticipate that inspections will occur.
 - Instill with the company's managers and officers the seriousness of any inspection.
 - Develop a compliance program that includes handling of inspections.
 - Interaction with Inspectors
 - Credentials
 - Scope of Inspection
 - Legal Basis for Inspecting
 - Designated Company Personnel/Counsel
 - Decision-making Process by Company Management and Counsel
 - Accompanying/Observing Inspection
 - Handling of Records (e.g., Should the company identify the location of records?)
 - Privileged Materials (Attorney-Client Communications, Attorney Work Product)
 - Management/Counsel Follow Up



Construction Liability



Construction Liability

Scenario 1: Extra Work

The general contractor at your construction site just informed you that extra work, not factored in the original plan, is necessary to complete the project.



Construction Liability

Scenario 1: Extra Work

- Resolving/Evaluating Extra Work Claims
 - First step is to review your prime contract – does it have a clause that addresses changes and extra work.
 - Contact your design professionals to immediately evaluate whether the work truly is “extra.”
 - Your contract should have a clause that requires contractor to provide all detail on extra work, why change is necessary, estimated cost for extra work, and requirement that no extra work shall proceed without written change order.
 - What is typically included in a change order? Time and money.
 - Two types of change orders – bilateral and unilateral. If you cannot agree with contractor on scope and cost of extra work, you may issue unilateral change order for amount you believe is reasonable.
 - “Accord and satisfaction.”
 - Duty to proceed with work.
 - “Reservation of rights.”



Construction Liability

Scenario 2: Delays

A subcontractor at your company construction site just reported to the general contractor that site completion will be delayed by ninety (90) days.



Construction Liability

Scenario 2: Delays

- Resolving/Evaluating Delay Disputes
 - Immediately have construction manager and/or design professionals evaluate delay claim.
 - Look at prime contract – is the event the type of event that allows for granting of a time extension? Is the event a compensable or non-compensable time extension?
 - Delay Claims – contractor generally must demonstrate that conduct on behalf of the owner or its agents caused delay to the project critical path (i.e., project activities with zero float) and thereby delayed the completion of the project.
 - Liquidated damages?
 - Importance of project schedules and “recovery” schedules.
 - Importance of “concurrent delay”
 - If time is of the essence, and owner has caused delay, owner may direct contractor to “accelerate” its efforts.
 - Contractor’s delay claim may include some or all of the following concepts
 - Home Office Overhead (The *Eichleay* Formula)
 - Field Office Overhead
 - Direct Cost Increases
 - Labor Productivity Losses



Union Organization



Union Organization

Have in Place Appropriate Policies & Enforce Them

- No Solicitation Policy and Union Badges
 - No Solicitation Policy
 - If you have adopted a policy prohibiting employee solicitation in the workplace and enforce that policy, you can lawfully prohibit some types of union solicitation at the workplace.
 - Badges
 - If you have adopted a rigid dress policy for a demonstrable business person, you may be able to prevent union badges.



Union Organization

Union Request for Recognition

- Do not agree to a card check and do not accept cards for inspection.
- Tell union organizer that the Company believes the proper way to determine union representation issues is through a secret ballot election.
- Do confirm the union desires the Company to recognize the union as the representative of its employees. (Should picketing occur, this will help to establish that picketing is for “organizational” purposes.)



Union Organization

Union Organizing Drive Commences

- Immediately meet with managers and supervisors and instruct them on the do's and don'ts.
- Conduct individual interviews with the supervisors to discuss issues and strength of the union movement.
- Hire professionals to assist in the response to the union organizing drive.



Union Organization

Union Pickets

- Response will depend on purpose of picketing:
 - Area Standards
 - Organizational directed at other employer(s) (dual gates)
 - Unfair labor practice strike



Union Organization

Employee Free Choice Act

- Should the *Employee Free Choice Act* pass, an employer that has units in its workforce that could be the target of a union organized effort, the employer should consider:
 - Annual employee training on the difficulties of working in a union environment.
 - Annual training of managers and supervisors regarding do's and don'ts as each mistake could cost \$20,000.





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Thank You





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