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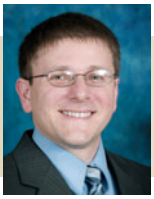
COMMUNITY UPDATE

INSIGHTS, ANALYSIS & IDEAS FOR COMMUNITY LEADERS SINCE 1980

The Long & Short of Seawall Repair



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A Condominium Association along the Intracoastal waterway determines that it is time to repair its 20-year old seawall. The Association hires an engineer to prepare the scope of work for the project and additional requirements for the bid. The Association puts the work out for bid, and receives three bids: two that are about the same and one that is significantly cheaper than the other two. The contractor with the lowest bid asserts in the bid that they do not need the longshoreman's insurance specified in the engineer's bid because it is a small company and their corporate officers will perform most of the work themselves and are exempt under the state workers' compensation laws. He also asserts that any other employees on the job are covered under their state-required workers' compensation policy. The board wants to go with the lower bid to save money, and they all agree that the contractor "seems like a good guy", but that pesky engineer keeps telling the board to consult with its association attorney before agreeing to waive the insurance requirement for the low bidder. The contractor states that if he will be required to obtain the "unnecessary" insurance just to do the project, he would not be able to afford to do it and will have to withdraw his bid. What should the condominium association do? In this situation, is requiring longshoreman's insurance for a seawall repair project just "overkill" and an unnecessary burden on the contractor? This article will address the implications to an association of its contractor failing to comply with longshoreman's insurance requirements when necessary.

Do your contractors need Longshoresman's insurance?

The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.* ("LHWCA") is a federal law that provides for the payment of compensation, medical care, and vocational rehabilitation services to workers disabled from injuries on the job and that occur on the navigable waters of the United States, or in adjoining areas, including piers, docks, terminals, wharves, and those areas used in loading and unloading vessels. The LHWCA also provides the payment of survivor benefits to dependents if a work injury causes, or contributes to, the worker's death. It is similar to, but distinct from, state workers' compensation laws in that it is intended

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HOA REGISTRATION REQUIREMENTS

Is your HOA on the Division's list?

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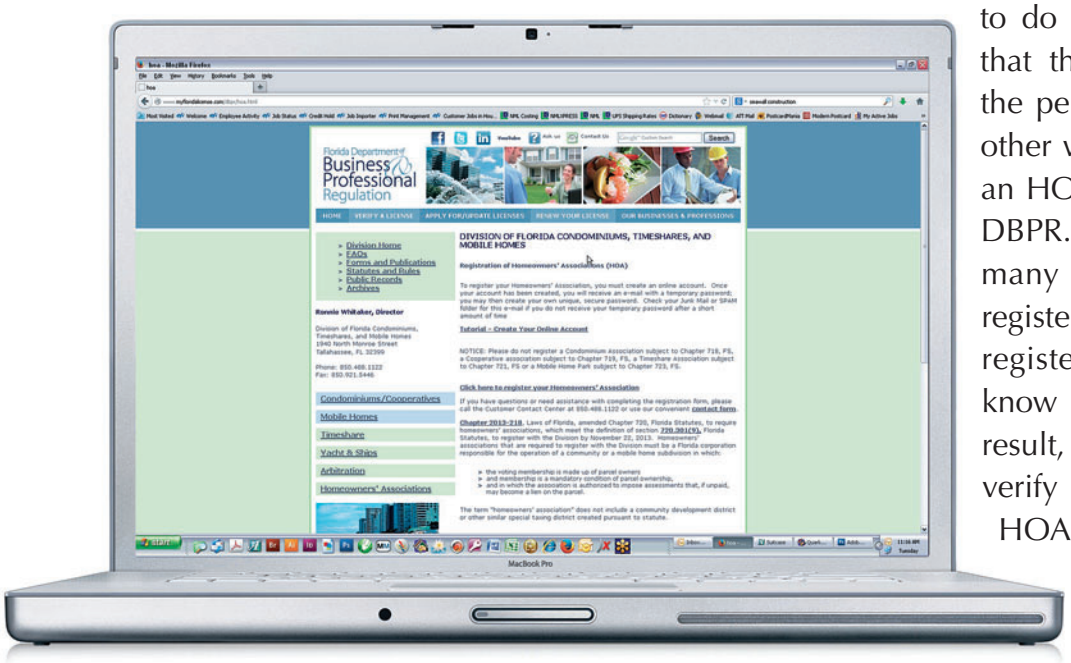
The Florida Legislature adopted a new law, effective on July 1, 2013, which requires all homeowners' associations (HOAs) that are governed by Chapter 720, Florida Statutes, to register with the Department of Business and Professional Regulation (DBPR) by **November 22, 2013**. The DBPR created an on-line registration process at: http://www.myfloridalicense.com/dbpr/hoa.html.

The latest report from DBPR indicates that 12,914 HOAs have registered, representing approximately 2.6 million parcels. The County with the largest number of HOAs is Palm Beach, with 1,545 HOAs (309,037 parcels), followed by Broward, with 1054 HOAs (219,370 parcels).

Note that although the initial deadline was November 22, 2013, the law also provides that the reporting requirement shall be a continuing obligation on each association until the required information is reported to DBPR. Therefore, even if an HOA did not register by November 22, 2013, it is still required to do so under the law. Also note that the statute is silent regarding the penalty for non-compliance. In other words, there is no penalty for an HOA that does not register with DBPR. Because there is no penalty, many HOAs may not have registered, or they may not have registered because they do not know about the new law. As a result, there really is no way to verify whether the total number of HOAs in the report accurately represents the total number of HOAs in the State of Florida.



It remains to be seen what, if any, the Legislature will do with this information. There are some homeowners calling for full regulation of HOAs by DBPR, just like condominiums are currently regulated. If the State was to impose a $4 per parcel fee on HOAs (which is the current fee for condominiums in the State of Florida), it would result in additional State revenues of approximately $10.3 million.

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to provide for a set of statutory benefits which must be paid to eligible workers, with the advantage to the employer that the coverage provided is to be the "sole remedy" for the worker or his or her family if properly insured. As noted above, LHWCA covers workers on "navigable waters of the United States" and "adjoining areas" and these terms have been given very broad interpretation by the courts. According to 33 C.F.R. §329.4, "navigable waters of the United States" are generally defined as "those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce." In our example, the association is on the Intracoastal waterway, which is considered one of the "navigable waters" of the United States. Therefore, the repair activities and work being performed is most likely covered under the LHWCA.

What, then, is the consequence of not having the LHWCA coverage? In short, quite a bit. An employer who fails to secure the payment of compensation under the LHWCA through an insurance carrier, with limited exceptions, may face criminal prosecution and be subject to imprisonment and/or fines of up to $10,000. In addition, if the employer is a corporation, the president, secretary and treasurer can be prosecuted individually and may be personally and severally liable for compensation and other benefits. Furthermore, if the employer is not insured, an injured employee also may elect to either claim compensation under the LHWCA or sue for damages for the injuries incurred under general tort law. In such a lawsuit, the employer may not rely on the customary tort defenses that the employee is prevented from recovery by the worker's own contribution to the cause of the injury or even the employee's own negligence or wrong-doing.

You may be thinking, "That's the contractor's problem, not ours, right?" "We cannot be held liable for an independent contractor's actions," you also may argue. However, under the LHWCA, it may not be that simple. Under the LHWCA, there are no "independent contractors" described or express exceptions provided regarding them, and, therefore, the worker of an uninsured contractor may be able to go directly against the association as the perceived principal or general contractor of the project for the injuries incurred. In addition, unlike under state workers' compensation laws, corporate officers cannot be excluded from LHWCA coverage if they perform duties falling under the LHWCA. Therefore, in this example, the association could not only be potentially at risk of claims from an employee of the uninsured contractor, but potentially for claims of the officer of the contractor himself!

In light of the potential and extreme ramifications of the association hiring a contractor that does not have the proper coverage under the LHWCA if legally required to do so, the Association, at best, may be being penny-wise and pound foolish to hire the uninsured contractor. As a mentor once said to me, no one will be patting the board members on the back for saving a few hundred dollars up front, only to pay out tens of thousands of dollars when something goes wrong.

LHWCA insurance coverage requirements can present complex legal questions that depends on the nature and location of the work to be performed, and a thorough review of this topic is beyond the scope of this article. There may also be other insurance requirements and applicable state and federal statutory obligations that may overlap the LHWCA requirements in these situations. Therefore, if your association is adjacent to a federal navigable waterway, or if you are unsure whether it is considered navigable waters, we suggest that you consult with your community association attorney, engineer and insurance agent to ensure that the association obtains any pertinent coverage it needs, as well as identifies what coverage its contractors should obtain for the intended project, before any bids are accepted or contracts are signed.

The Value of Guest Restrictions

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in Community Associations

Often, a controversial and hotly debated issue in community associations concerns the existence and scope of guest restrictions. While there is rarely disagreement that owners should be permitted to have a reasonable number of guests when the owner is present, disagreement frequently arises on the issue of guests in the absence of the owner. Therefore, guest restrictions in any community must strike a balance between the interests of owners who wish to preserve a very sedate, residential environment, and those owners who view their property as a vacation destination for themselves, their extended family, and friends. The correct balance can be different for each community, and can even change over time.

But another very important function of comprehensive restrictions on guest occupancy in the absence of the owner should not be overlooked. Specifically, such restrictions close a loophole that exists when some owners attempt to circumvent leasing restrictions by misrepresenting that persons who are actually tenants are instead, "guests." Even most owners who wish to allow their extended family and friends to regularly occupy the property make a distinction between the desirability of that use, and frequent, short term rentals to strangers. For this reason, many communities have rental restrictions limiting both the frequency and duration of rentals. But in the absence of 24 hour surveillance of every unit or perfect intelligence information about occupants, both of which are practically impossible in any situation, let alone in a not-for profit community administered by volunteer directors, such rental restrictions are easily avoided by a tenant disguised as a guest. The solution is to allow a limited number of guest occupancies in the absence of owners, but not to allow so many that the leasing restrictions can be easily defeated. The difficulty is in finding the right balance to satisfy most owners.

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