



Legal news & views

Issue: V

October 2012

Meet Our Directors



Michael P. Sams



Christopher A. Kenney



David R. Kerrigan

In This Issue

[Massachusetts Declares Payment Bond Claims Unwaivable](#)

[Transforming Personnel Files From Lawsuit Liability to Your Greatest Asset](#)

[Lunch and Learn](#)

Quick Links

[Newsletter Archive](#)

www.KandSLegal.com

Dear Patty,

Thank you for reading news & views from Kenney & Sams, P.C. We value your time and promise to keep the content brief, educational and direct. If you would like to discontinue receiving this type of communication, please unsubscribe below.



Kenney & Sams, P.C. Announces Mediation and Arbitration Services

Chris Kenney is an AV rated trial lawyer with over twenty two years of experience litigating a wide variety of tort and contract claims before state and federal courts, administrative agencies, at mediation and in arbitration. For the past six years, Chris has also served as a mediator and arbitrator in a diverse array of cases. He is fully trained and certified in ADR, and welcomes the opportunity to help resolve disputes including: breach of contract, personal injury, employment law, insurance coverage, consumer protection and professional liability.

For more information on our ADR practice, please visit: www.kandslegal.com/adr



Christopher Kenney Named To Best Lawyers in America For 2013

Chris Kenney was recently selected by his peers for inclusion in the 2013 edition of of The Best Lawyers in America. This marks the fifth straight year that Mr. Kenney has been listed in this



Massachusetts Declares Payment Bond Claims Unwaivable

By: Joseph P. Callendrelli

The freedom to contract is a driving force of the economy and a central tenet of the American legal system. This freedom, however, is not unlimited. If a contractual provision violates well established public policy, courts in Massachusetts will declare that provision unenforceable - even if both parties mutually agreed to it. Massachusetts' highest court recently did just that in declaring that a subcontractor cannot contractually waive its right to assert a payment bond claim against the general contractor's surety on a public construction project.

In *Costa v. Brait Builders Corp.*, 463 Mass. 65 (2012), a subcontractor entered into a \$900,000.00 subcontract with the general contractor to perform site work at an elementary school project in Bridgewater. Because the job was public, the general contractor secured payment and performance bonds as required by G.L. c. 149, § 29. However, the parties' subcontract provided that the subcontractor waived its right to assert a claim on the general contractor's payment bond if the subcontractor failed to provide its own bonds in a form acceptable to the general contractor. The subcontractor agreed to these terms.

After the subcontractor was terminated, it filed suit against the general contractor asserting a claim for breach of contract and against the general contractor's surety under the payment bond. Because the subcontractor had been unable to secure its own bonds, the trial court issued a judgment against the subcontractor on its bond claim, enforcing the parties' contractual agreement.

Massachusetts' highest court reversed the decision and held that a subcontractor's purported waiver of a right to assert a payment bond claim is unenforceable. The Court recognized the critical purpose that payment bonds serve on public projects and compared a subcontractor's statutory right to assert a bond claim to a contractor's right to file a mechanic's lien on private property. Although the payment bond statute does not mention waiver, whereas the mechanic's lien statute expressly prohibits it, the Court reasoned that to allow different results based on the nature of the property (especially where one cannot assert a lien on public property) would be anomalous. It ruled that the right to assert a payment bond claim is so entrenched in Massachusetts public works projects that to allow a contractor to waive this right would violate the state's public policy.

This decision is critically important for non-filed subcontractors performing work on public projects throughout Massachusetts. Especially in today's economy, where work can be hard to come by, non-filed

prestigious publication.

Best lawyers in America has been described by American Lawyer as "the most respected referral list of attorneys in practice."



Adam Ponte Joins Kenney & Sams

Kenney & Sams, P.C. is pleased to announce that Adam Chin Ponte has joined the firm.

Mr. Ponte is a graduate of Holy Cross College and Boston University School of Law.

 School of Law

Silver Shingle Alumni Award

Chris Kenney received the Silver Shingle Award presented by Boston University School of Law to honor his outstanding service and leadership within the community

subcontractors, forced to accept different terms, have little negotiating leverage. Subcontractors can breathe easy knowing that the security of a payment bond will always be available on public projects and that a contractor cannot force any of its subcontractors to relinquish its right to assert a claim against the bond.



Ready, Aim, File! Transforming Personnel Files From Lawsuit Liability To Your Greatest Asset

By: Christopher A. Kenney, Esq.
Ryan P. Menard, Esq.

As a business owner, it can be easy to neglect your employees' personnel files when there is so much else to do at work. However, when one of your employees becomes something else-specifically, a plaintiff or grievant-there are few resources as important to your case as the files you have kept.

As the old adage goes, failing to plan is planning to fail. This is particularly true for employers facing discrimination claims or labor arbitrations based on discharge or discipline, cases which often hinge on whether the employer planned ahead by keeping records justifying its decision. The best evidence an employer could ask for is a complete, consistent, and candid personnel file containing documentation tailored to the employer's business.

Good recordkeeping is not just for performance improvement and risk management, it is also a matter of law. By statute, Massachusetts employers are required to keep certain records, and must follow certain rules for keeping them. Noncompliant employers could face penalties or, perhaps worse, evidentiary sanctions in litigation later on.

So, before winter hits, be sure to make room in your company's filing cabinets for your employee's personnel files, and consult an attorney on how best to utilize them-not only to comply with law and enhance your operations, but to best protect your business from employee lawsuits, too.

Personnel Files: A Little-Known Legal Requirement

All employers *should* keep comprehensive personnel files. But, by law, many employers *must*.

By statute, Massachusetts law requires employers with 20 or more employees to keep a file on each employee which contains all information which could affect the employee's "qualifications for employment, promotion, transfer, additional compensation or disciplinary action." G.L. c. 149, § 52C.

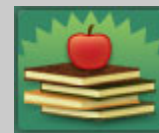
and to the School of Law.



Mike Sams presented to the **Boston Bar Association's Construction Law Committee** on September 25th concerning the Massachusetts Public Bid Law.



Mike Sams and David Kerrigan spoke at **the Gould Construction Institute** on October 4th concerning employment and contract risk management for contractors.



At a minimum, an employer must include the basics: the employee's name, address, date of birth, job title and description; rate of pay and any other compensation or benefits; starting dates of employment; and the employee's job application and all related materials (e.g. resumes, cover letters, and references). *Id.*

Importantly, the employer must also include all written warnings of substandard performance; lists of probationary periods; waivers signed by the employee; copies of dated termination notices; and any other documents relating to discipline. *Id.* Before adding any negative information to the file—a discipline notice or unfavorable evaluation, for example—the employer must first give the employee 10 days' notice that the information will be added to the personnel file. The employee then has five days to request a review of the personnel file, and may then work with the employer to remove the negative information or may submit a written explanation from the employee's point of view. *Id.*

Finally, employers must keep their personnel files for three years after the employee leaves the business or until the resolution of any relevant lawsuit, investigation, or claim. *Id.* Employers who violate any portion of the statute could face enforcement by the attorney general and violations of up to \$2,500.

The Best Defense: How A Personnel File Can Make Or Break The Employer's Case

Consider a common occurrence in most businesses: After passively tolerating an underperforming employee for years, you finally decide to part ways. A week later, just as you are appreciating the wisdom of your decision to terminate, you get a letter from the employee's attorney, claiming the termination was discriminatory and demanding a pricy settlement.

The value of that demand letter depends in large part on the records you have kept. Unfortunately, most employers discover this too late, and reluctantly must produce a litigious ex-employee a personnel file containing sugarcoated performance reviews, inconsistent or nonexistent documentation of performance problems, and negative information which was not shared with the employee in accordance with the personnel-file statute.

The employee now has bargaining chips to negotiate a bigger settlement from you: rather than illustrating the inefficient employee you have come to know, the personnel file describes an employee with favorable reviews and few problems, if any. This scenario results from supervisors who understandably prefer to appease underperforming subordinates rather than risk hostility by documenting performance flaws. Likewise, if there is documentation of problems but no notice was ever given, the employee might even argue—perhaps plausibly—that you should not be allowed to use this evidence to justify the termination.

Luckily, it is not too late to head off the next claim before it arises. Employers should take the opportunity to review their personnel files and recordkeeping practices, not only to comply with the personnel-file statute, but to build a strong defense for when a disgruntled employee will not take "you're fired" for an answer. At a minimum, your business should:

- Train your record-keepers in personnel-file law;
- Ensure that your supervisors and managers are consistently and accurately documenting your employees' performance issues in writing, with notice to the employee-and make sure all employees are treated equally in this regard;
- Review your employment documentation and adopt comprehensive, easy-to-use forms such as Performance Appraisal Forms, and Discipline Forms; and
- Remind your supervisors and managers to be candid in written employee reviews.

Taking just these small steps can drastically improve the prospect for your termination decisions to be upheld. Contact your attorneys to learn more about strategically managing your personnel files, to schedule an in-office training, or to obtain easy-to-use written forms for you and your management team to use in your personnel files.



Kenney and & Sams, P.C. hosted its second "Lunch & Learn" client workshop in September. It focused on Common Employment Issues Facing Massachusetts Employers.

Topics discussed included wage and hour laws, the wage payment statute, enforcement trends, and traps for the unwary. We also reviewed Massachusetts' Independent Contractor law, the Federal test, their implications, and presented risk management tips to avoid misclassification of an employee.

For more information on Kenney & Sams' next Lunch & Learn Legal Check-up, please inquire at events@KandSlegal.com, and be on the lookout for our e-mail invitations.

Sincerely,

Kenney & Sams, P.C.

