Legal Implications of Wearables in the Construction Industry

Jessica Courtway

Technological advances over the past two decades have drastically altered nearly every aspect of day-to-day life. Unsurprisingly, sophisticated technologies like wearables have made their way into the construction industry. This type of new technology promises to shape the construction industry’s efficiency and safety standards as they are currently known.

In an industry as competitive as construction, keeping up to date on the latest technological offerings can be critically important. Equally important, however, is understanding the risks and liabilities associated with each new development. The purpose of this article is to provide an overview of the risks and challenges associated and presented by the rising use of wearables in the construction industry.

Wearables Defined
While there is no universally agreed-upon definition of wearable technology, the key elements of wearables are that they: (1) are carried or worn on—or even embedded in—the person of the user; and (2) track and store data about the user. The ways in which wearables measure and monitor the user and their environment are potentially infinite, but the most common sensors employed in wearables include GPS, accelerometers and gyroscopes, electrodes, thermometers, and proximity sensors. The data from these sensors can in turn be used to measure things such as location, movement, heart rate, and weather. Many wearables allow the user to interface with them directly, commonly through a touchscreen, speech, or haptic feedback. Some wearables, however, are purely tracking devices, and the data they gather can only be viewed and analyzed using other devices.

Over 60 million Americans over the age of 18—nearly a quarter of the adult population—are expected to use wearables regularly in 2020. As the number of people using wearables grows, so too does the sophistication of the wearables themselves. Wearables are taking hold in the workplace as well, with nearly 70 percent of employers with more than 50 employees offering wellness programs, many of which include wearables as a component.

As wearables are put to increasingly sophisticated uses, commercial applications—ones in which wearables are employed as specialized tools in the company’s core business—are on the rise. The construction industry is ripe for commercial application of wearables. Many of the issues that eat up the time and attention of managers in the construction industry—such as safety, personnel management, and compliance—are areas where wearables can shine. Commonly utilized wearables include the wearable vest with tracking capabilities, fatigue-monitoring hard hats, boots connected to the cloud, and smartwatches designed to measure efficiency and improve safety. These technologies can detect and warn of safety hazards in dangerous environments, track the whereabouts of personnel at hectic construction sites, and provide reliable, high-quality data that can prove regulatory compliance (and identify areas for improvement).
Legal Implications
There is also a potential legal upside to wearables. For example, in an employment-discrimination lawsuit, data gathered for the purpose of tracking and improving productivity could be used to prove that an employee’s firing was indeed justified and not a mere pretext. Similarly, a defendant in a workplace-injury lawsuit could use data from a wearable to tell a different story about an accident than the one contained in the plaintiff’s complaint.

While legal advantages provided by wearables are easy to imagine, so are the potential pitfalls. For example, what if a worker is injured after relying on a device that failed to detect a hazard? Or what if an employee misuses the new technology and increases his own risk of injury? There are many legal issues raised by wearable technology that companies in the construction industry may need to be mindful of.

Liability for Safety Hazard Detection
The intended effect is that wearables will prevent safety incidents. However, even if the number of accidents decreases overall, what if a wearable—especially one that a worker has come to rely on—fails to detect a safety hazard in a particular instance and an employee is hurt? Will the manufacturer of the wearable device be liable for a failure to detect? Will the employer be liable?

For these questions, courts typically look to traditional negligence and products liability law to inform on this issue. For example, does a company impose a duty upon itself to keep safety-critical wearables in good working order when it supplies workers with such devices, even if the law would not impose such a duty independently? What if the contractor provided the wearable as part of a mandatory uniform that workers were required to purchase?

Another interesting question in this regard concerns the effect of an employee who receives a warning but fails to act on it. The Society for Human Resource Management (“SHRM”) has emphasized the importance of uniform policies in order to reduce the potential for liability that may arise from employees who ignore safety warnings.

Privacy & Data Concerns
In addition to issues related to safety hazard detection, wearables present legal issues related to data and privacy. Data from wearables could provide actionable insights that can be used to improve productivity, increase efficiency and make changes to the way companies do business to increase their bottom lines. However, there may be consequences for failing to keep such a large volume of data secure. As such, the type and amount of data collected by wearables means companies that control said data may expose themselves to liability.

Wearables, especially in the employment context, also create consent issues. Employees, particularly union workers, might not readily accept the company’s mandatory implementation of wearable technology. However, an employer whose collective bargaining agreement states an intention to continually upgrade and increase its use of technology may be permitted to require union employees to utilize new technologies. In addition, notifying employees in advance of the implementation of new technologies may vitiate any subsequent violation of privacy claims. For example, one court has held that because employees belonged to a “closely regulated industry” and had knowledge that a new technology system was collecting data on their on-the-job activities, they had a reason to expect intrusions into their privacy at work.

Wage & Hour Concerns
A basic use construction companies could have for wearable technology is tracking whether or not employees are working. This information would be useful in a wage and hour dispute: there would be objective data to either verify or dispute the claims of the company and/or the employee.

However, it is possible that the mere fact that an employee is wearing a wearable could make them “on the clock” for the purposes of wage and hour laws like the Fair Labor Standards Act (“FLSA”). This is especially true given the consent issues mentioned above, which might render any waiver useless. The U.S. Department of Labor has described the standard for when employees are “on the clock” under the FLSA as follows: “In general, ‘hours worked’ includes all time an employee must be on duty, or on the employer’s premises or at any other prescribed place of work, from the beginning of the first principal activity of the workday to the end of the last principal work activity of the workday. Also included is any additional time the employee is allowed (i.e., suffered or permitted) to work.” Counting wearing a wearable as “work” under this standard is a stretch. However, in states with more employee-friendly wage and hour laws, such as California, mandatory wearable policies may pose a problem.

Conclusion
With the rise of technologies like wearables come unique challenges, potential liabilities, and compliance implications. Keeping current with the new and emerging technologies is critically important to construction companies to ensure they are on the forefront of innovations of safety and efficiency.

Endnotes may be viewed on UC Online at www.ambar.org/FCLUC.
An Ancient Problem, A New Awareness: Slavery in Construction Materials Supply Chains

Leslie P. King and Luis C. de Baca

In March of 2019, a federal jury in Brooklyn returned guilty verdicts against construction company owner, Dan Zhong, related to his use of slave labor on construction projects in the United States, including a high-rise project in midtown Manhattan and a mansion on Long Island. Zhong brought many of his crew from China, forced them to work seven days a week, locked them in cramped conditions, threatened them with financial ruin and deportation, and even had them violently punished if they tried to leave. In characterizing the case, the United States Attorney pointed out the imperative for confronting this type of exploitation: Zhong’s “crimes not only violate our laws, they contradict the values of this country.” These values are both long-standing and modern: while the Thirteenth Amendment’s 1865 prohibition of slavery continues to protect workers from forced labor, the Trafficking Victims Protection Act of 2000 made it clear that they are also protected from psychological coercion, including threats of deportation if they lack immigration status.

Human trafficking and forced labor on construction projects is immoral and criminal. We are sure that no one reading this article, nor any of our clients, would ever want to contribute to such a practice. But just because we don’t see forced labor on our jobsites does not mean that our projects are “slave free.” Far from it. Construction projects are complex, and their materials supply chains even more so. Even a project that ensures that the workers on site are free to come and go and are not being threatened, extorted, or exploited may be at risk of modern-day slavery – because while the jobsite might be local, the materials supply chain has become global.

Just imagine all the components that comprise a roof, and work backwards, down to the literal nuts and bolts, and even the raw materials. Chances are, that somewhere along one of these supply chains, someone — maybe even a child — was forced to work to create the materials that our industry regularly relies upon. While Mr. Zhong’s slavery scheme was brutal and shocking to realize, the construction supply chain is infected with equally horrific conditions. Cleaning up our supply chains will not come easily, but it is necessary. It is not only the right thing to do, it is required by federal law.

Since the 1930s, under the Smoot Hawley Tariff Act (the “Tariff Act”), the United States has officially banned the import of materials “mined, produced or manufactured wholly or in part” by forced labor. But a major loophole under the Tariff Act allowed importation in the event that goods were “not mined, produced, or manufactured in such quantities in the United States as to meet the consumptive demands of the United States.” This “consumptive demand” exception essentially prevented any meaningful enforcement of the law over the subsequent 85 years, as U.S. manufacturers and builders argued that important inputs such as rubber, rare earth minerals, and palm oil could not be produced in America.

But in 2016, recognizing that all supply chains are now global, and that forced labor could no longer be tolerated as an off-shore problem, Congress managed to close the loophole with the passage of the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA). Under Section 910 of TFTEA, Congress completely eliminated the consumptive demand exception. Now, it is unequivocally illegal to import anything into the United States created by forced labor. In addition, under TFTEA, the Commissioner of Customs is required to submit annual reports to Congress documenting all the instances that this section of the law was enforced and identifying the materials that were denied entry.

The movement to deny entry of slave-produced materials has already begun. Just this past fall, Customs and Border Patrol (CBP) issued “withhold release” orders for gold from the Democratic Republic of the Congo, rubber gloves from Malaysia, diamonds from Zimbabwe, clothes from China and bone black (a key ingredient in filtration) from Brazil. While TFTEA was an Obama Administration legacy, it passed with bipartisan support and is one policy that is continuing under the Trump Administration. In the words of Acting CBP Commissioner Mark Morgan, “CBP’s issuing of these five withhold release orders shows that if we suspect a product is made using forced labor, we’ll take that product off U.S. shelves.” The terrible swift sword of anti-slavery enforcement has hit the medical supply industry, garments, and air and water filtration – it is only a matter of time before this commitment to deny entry to materials produced by forced labor in a globalized supply chain impacts the construction industry.

We already know that certain building materials are more likely to have been tainted by forced labor and deserve more scrutiny. The Bureau of International Labor Affairs publishes a list of materials likely produced by child labor, forced labor or both. The 2018 list identifies numerous materials that can easily make their way onto our projects if we are not careful. For example, bricks from over twelve countries are created by child labor. Bamboo from Myanmar is also on the list as sourced by child and forced labor, yet several floor manufacturers openly identify the country as their source. Glass made
The Department of Labor list is a sobering view into forced and child labor, but it is necessarily a broad snapshot of entire commodities industries. While they identify liability risks (and may even begin to establish a duty of care) for common inputs, these lists do not necessarily help owners, design professionals or contractors penetrate or even begin to understand their often opaque supply chains on their own. Instead, construction industry professionals need to come together, look outside our usual orbits, and collectively seek change.

The authors are both members of a working group that was convened for that purpose by the Grace Farms Foundation. The goal of the Architecture and Construction Working Group is ambitious: “[T]o eradicate modern slavery from the built environment by convening ecosystem leaders and creating actionable outcomes with systemic impact.” The Working Group includes design professionals, builders, a professional specifier, and even a supply chain specialist with a focus on labor abuses. The Working Group began convening in 2019 and has made significant strides to raise awareness of the problem.

But awareness is not enough. As CBP continues to increase scrutiny on construction materials, as the FBI and ICE continue to investigate modern slavery cases, addressing forced labor in your supply chain and job sites may not just be a moral choice, but a necessity. Imagine if your client’s substantial completion deadline was compromised because a supplier fell behind as a crucial material was the subject of a “withhold release” order at the border. What would you advise your client to do? Tell them to apologize to the owner and explain that their project was about to be built with child labor? Tell them to hope for the best while they scramble for an alternative? Challenge the decision? What if you represent an owner whose opening is thwarted? Again, running a fair and ethical jobsite is no longer enough; the minute that an input is specified that has international components, you have inherited any exploitation that may have produced it.

Regardless of delivery method and contractual scheme, every member of the team — design professionals, construction managers, contractors, owner’s representatives and design-builders — promise to abide by the law in the performance of their duties. Any of these players could get caught up in a tussle that attempts to sort out the responsibility for late delivery caused by illegally sourced materials. In this first round of TFTEA enforcement, the construction industry dodged a bullet. But like everything else, it is better to see the problem coming and attempt to deal with it in your contracts ahead of time.

Before it becomes readily apparent how to minimize the risk of specifying materials that depend on forced and child labor, and while the industry attempts to understand the problem, it may be wise to insert a disclaimer for a missed substantial completion deadline that was the result of an inadvertent violation of TFTEA. Coupling the disclaimer with some kind of duty to cooperate with consultants may invite the parties to seek outside help. This new category of “force majeure” will definitely spark discussions and even pushback, but it will force the industry to at least acknowledge the problem. Hopefully, professional consultants already versed in sustainability and worker-led social responsibility will eventually emerge as another member of the project team. In the meantime, however, we should assume that more withhold release orders are well on their way and take contractual precautions. We encourage everyone to assess their own risk and invite you all to seek guidance from us in the Architecture and Construction Working Group as we navigate this new risk together.
FCL Chair, Kristine Kubes “practices from the human side”

Catherine Bragg

This article is the first in a series featuring members of the Forum on Construction Law (FCL). When the concept of this series was forming, certain obvious questions came to mind to ask any successful construction attorney, such as: What values form the foundation of your practice? And what lessons did you learn along the way that you would share with attorneys who are new to the construction industry? The attorneys featured in this series have devoted a significant amount of time to the FCL and have made a strong commitment to helping other construction attorneys.

The attorney featured in this article is the current Chair of the FCL, Kristine Kubes. Kristine has built a successful law firm, Kubes Law Office, PLLC, in Minneapolis, Minnesota. As a counselor, litigator and mediator representing architects, engineers, contractors and sureties, she is a highly respected construction attorney amongst her colleagues and clients. She has presented and written extensively over the years on various construction topics and is the co-editor of the popular FCL publication, “Infrastructure from the Ground Up.”

Kristine has been practicing in the construction industry for more than 20 years, and when asked what keeps her interested, she replied that it is the unique quality of the cases and clients that challenge her, as well as the focus on relationships between people and their environments. “I love being part of that dialogue, helping people hear one another and move through their challenges to successful completion of a project or resolution of disputes.” She added that the technical and/or forensic elements of construction projects pique her innate curiosity and remind her of spending time in her father’s workshop growing up. Her father was a carpenter and her parents had their own contracting company.

In describing her style, Kristine believes that she is “diplo-matic and compassionate” with a strong belief in relying upon the objective facts of any case. Although, she acknowledges, “it’s not always black and white.” Kristine is committed to giving her clients a fair and honest assessment of their situation and to being candid about the weaknesses of their situation. She says, “I learned years ago that responding to a situation with ‘yes, and...’ may open up more options to resolution than ‘no, but...’.” It is a combination of honest communication and thorough preparation that form the foundation of her workstyle.

When asked about practice tips she might offer to attorneys new to the construction industry, Kristine offered three pieces of advice: (1) “Listen carefully to your clients... The better you understand what they do and how, how they run their business, etc., the better you will be able to see the risks they face and help them manage those risks proactively as they move ahead.” (2) “Be true to your values. One size does not fit all when it comes to handling oneself under pressure, in adversity, in court.” (3) “Be patient with yourself while you develop your own way of being as a professional and do not let anyone pressure you to give up your values or ethics.”

Kristine acknowledges that the FCL has been an important part of her involvement in the construction industry for over 20 years. She credits the education she has received from FCL programming for making her a better attorney and giving her the opportunity to build relationships with attorneys from all over the country and the world. These relationships have translated into resources for her and her clients, for which she is very grateful. She notes, “Forum members are some of the smartest and kindest, most generous lawyers a person could meet.” The FCL has also given her a chance to give back to the profession and the industry that has been her passion for so long. She has highly valued the opportunity to be “a mentor to many emerging construction lawyers over the years. The opportunity to invest in people is the best gift I can receive.”

If you run into Kristine at a national meeting or special event, be sure to ask her about her practice and the FCL programs she is developing. I guarantee that you will not run out of things to talk about, but as a fallback, you can always ask her about those Minnesota winters.

Catherine Bragg, TRC Companies, Inc., Charlotte, NC, Division 11 (In-House Counsel)

In Memorium

We honor with gratitude the contributions and memories of Forum members who have recently passed.

Richard Obadiah (1949-2019), Legal Consultants LLC, Boston, MA.
Richard was an active member of Divisions 8 and 12 and contributed to numerous Forum initiatives.

Timothy R. Thornton (1955-2019), Greensfelder, St. Louis, MO.
Tim was a former Chair of Division 4. He never said “no” to a Forum opportunity.
ON IN-HOUSE COUNSEL’S DESK

The active involvement of in-house counsel within the Forum is a fantastic benefit of being a member of the Forum. Our in-house counsel members from Division 11 consistently deliver first-rate articles for Under Construction. In this edition, we have two articles On-In House Counsel’s Desk:

But It’s Design-Build: Analyzing and Overcoming This Conclusory Defense
By Sean Dowsing, Orion Construction Company, Orange County, CA, Division 11 (In-House Counsel) and Division 13 (Government Construction).

A helpful overview on the risk allocation between owners and design-builders when there are changed or commercially impracticable conditions.

Are A/E Firms Ready to Sign & Seal 3D Deliverables?
By Shawn Rodda, HDR Engineering, Denver, CO. Know the risks of transferring final work product in the form of a 3D model, as well as contractual and other risk mitigation measures your clients can take to protect themselves.

Read these articles on Under Construction online at www.ambar.org/FCLUC.

CONSTRUCTION LAW 101

Looking to build the next generation of the best construction lawyers, Under Construction publishes articles on fundamental construction law topics for our law student and new attorney members. In this edition, we publish three such articles.

Read the full articles on Under Construction online at www.ambar.org/FCLUC.

Help Me Help You: Four Insider Tips to Make Your Expert More Efficient
By Tony Doganiero and Jonathan Haag, FTI Consulting

Help me help you: No cost tips for increasing your testifying expert’s efficiency from a construction lawyer-turned-consultant.

Overlook Consolidation and Joinder Under the AAA Construction Rules at Your Peril!
By Rae D. Mueller, Baker Botts LLP, Washington, DC, Young Lawyers Division

Why consolidation and joinder should be addressed in your arbitration agreement to avoid expense and delay.

The “Professional Services” Exclusion in a Design Professional’s Commercial General Liability Policy: Considerations for Contract Negotiations and Coverage Disputes
By Sam Laurin, Bose McKinney & Evans LLP, Indianapolis, IN, Division 7 (Insurance, Surety and Liens)

A Checklist of Issues Caused by the Professional Services Exclusions in a Design Professional’s Commercial General Liability Policy.

WORKPLACE CHATTER

Brought to you by Division 6 (Labor & Employment), Workplace Chatter is a running column that addresses employment and labor law issues. We publish two articles in this edition:

General Contractors: Know Your Subcontractors (and Sub-subcontractors) or Pay the Price
By Jessica A. Hill, Dave O’Mara Contractor, Inc., North Vernon, IN

Shocking surprise for general contractors! You may be liable for unpaid wages of your subcontractors and lower tiers.

Year-End NLRB Rulings Boost Employers Into 2020
By Adam C. Doerr, Jackson Lewis P.C., St. Louis, MO

This article highlights the NLRB’s most impactful year-end decisions boosting construction employers into an inevitably eventful 2020.

Read the full articles at www.ambar.org/FCLUC.
Taking the First Steps to Forum Involvement

Arlan D. Lewis

The question I get most often from relatively new Forum members is: “How do I get more involved?” As a long-term Forum member, it’s easy to forget how it felt to be new to this amazing organization. Over years of Forum involvement, many of us have developed deep, meaningful professional and personal relationships. To the new attendee at a Forum meeting, this group of several hundred people, all of whom seem to know each other, can be daunting. We have taken a number of steps to make new members feel welcome and get off to a good start. At our national meetings, we have a designated gathering of new attendees, and those who have not attended in some time, where we provide an overview of the Forum and access to Forum leadership. We are also working on several initiatives to clarify the opportunities available for Forum involvement. Whether you’re contemplating Forum membership, are new to the Forum, or have simply reached a point in your career where you’re ready to get more involved, I’m going to provide a simple three-step guide for you to get the ball rolling.

Step 1: Join the ABA
I know this sounds obvious, but a number of attendees at Forum national meetings are not ABA members. This is not necessarily a bad thing, because it is evidence that construction lawyers are aware of the Forum and see value in the education, networking and other activities provided. As an ABA entity, membership in the ABA is a prerequisite to Forum membership. In the past, the cost of joining the ABA may have been a deterrent for those who were primarily interested in the Forum. However, effective May 2019, the ABA simplified its membership dues structure to five price points. I’d encourage you to check out www.americanbar.org — you may find that your ABA membership is more affordable than it was in the past.

Step 2: Join the Forum
As an ABA member, joining the Forum is easy and very affordable (currently $60 per year). Joining the Forum opens the door to discounts on Forum publications, CLE offerings, and access to a number of free construction law resources. The return on your investment will be much greater than $60.

Step 3: Join a Division (or several) and Get Plugged In!
Now that we’ve covered the basics, the most important action for you to take is to join one of the Forum’s fourteen (14) divisions. The Forum’s divisions were created to focus on a particular substantive topic or the interests of various participants within the construction industry. Here’s a list of the Forum divisions: Division 1 (Litigation & Dispute Resolution); Division 2 (Contract Documents); Division 3 (Design); Division 4 (Project Delivery and Construction Technology); Division 5 (General Contractors); Division 6 (Labor & Employment); Division 7 (Insurance, Surety & Liens); Division 8 (International Construction); Division 9 (Subcontractors & Suppliers); Division 10 (Transportation, Energy & Environment); Division 11 (In-House Counsel); Division 12 (Owners & Project Finance); Division 13 (Government Construction); and YLD (Young Lawyers Division). To learn more about what each division is doing, visit the Division Corner page on Under Construction Online at www.ambar.org/FCLUC.

If you are a construction lawyer, I’m certain that one or more of the divisions are relevant to your practice. There is no limit to the number of divisions you are allowed to join. The divisions are truly “the lifeblood of the Forum.” Opportunities for writing, speaking, program coordination, special committee membership, and any other Forum initiatives, are first published through the divisions. If you want to be involved in the Forum, the most effective step you can take is to join a division so that you are in the communication loop. No more excuses! Join a division and get involved to extract maximum value from your Forum membership!

[Image]

Arlan D. Lewis, Blueprint Construction Counsel, LLP, Birmingham, AL

Have an Article for Under Construction? Contact the Editors. Join UC’s ABA Connect Page!

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