



SUBSTANCE

ILLINOIS MECHANICAL & SPECIALTY CONTRACTORS ASSOCIATION

WINTER 2023



IMSCA PRESIDENT

DECEMBER
2022

Chad Fricke, IMSCA President



As I write this, the end of 2022 is just a few short weeks away. Once again, we successfully navigated another unprecedented year in the construction industry. Throughout the past twelve months, our industry as a whole seems to have thrived in comparison to the years immediately following the COVID-19 pandemic, and I am very thankful for that. However, we are certainly not out of the woods, and we can anticipate continuing to navigate industry challenges in the coming months.

As 2023 quickly approaches, we are already facing some game-changing challenges such as inflation, losses in the stock market, and a potential railroad strike. It's anybody's guess what the next few years have in store for us. In addition, Illinois saw some significant changes following the November 2022 Election. The Illinois General Assembly will have seven (7) brand new

legislators in the Senate and twenty (20) brand new legislators in the House of Representatives when the 103rd General Assembly begins in January. Illinois Democrats gained even more leverage in both chambers. It's possible that as a result, the legislature could trend toward more progressive policies than before.

We can rest assured that IMSCA will be diligent in identifying legislative issues that may impact the Illinois construction industry. Please continue to be on alert throughout the upcoming spring 2023 legislative session for important announcements from IMSCA on ways you can assist our lobbying team in communicating our positions on important legislative matters.

As my term as IMSCA President comes to a close, I would like to express my gratitude to all IMSCA members for your continued support of IMSCA. It has been a pleasure serving as IMSCA's President for the past two years and I am confident our association will continue to thrive under the leadership of IMSCA's incoming President, SJ Peters (Plumbing Contractors Association of Greater Chicago). I would also like to take this opportunity to wish everyone a healthy and prosperous New Year!





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**LEGISLATIVE
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FOR OVER 2,000
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THE ILLINOIS WORKERS RIGHTS AMENDMENT —

The Effect on Illinois Unions

- By Madeline Remish

Background

November 8, 2022 was an historic day for Illinois workers, when the Workers' Rights Amendment (also known as Section 25 of Article I) passed with 58% (2.1 million) of Illinois voters in favor of the Amendment. The Illinois Constitution will now be amended to include the following language:

“Employees shall have the fundamental right to organize and bargain collectively through representatives of their own choosing for the purpose of negotiating wages, hours, and working conditions, and to protect their economic welfare and safety at work. No law shall be passed that interferes with, negates, or diminishes the right of employees to organize and bargain collectively over their wages, hours, and other terms and conditions of employment and work place safety, including any law or ordinance that prohibits the execution

or application of agreements between employers and labor organizations that represent employees requiring membership in an organization as a condition of employment.”

As with any amendment to the Illinois Constitution, the Workers' Rights Amendment will be certified and adopted by the State Board of Election within 20 days of the election. In this case, the Amendment took effect November 28, 2022.

What Does the Amendment Mean?

This Amendment impacts bargaining rights for public and private sector unions by significantly expanding the scope of bargaining as well as who can bargain with employers. Prior to the passing the Amendment, only unions could bargain with employers. Now, the language in the Amendment, “through representatives

of their own choosing for the purpose of negotiating wages, hours, and working conditions,” opens up the playing field for employees and groups of employees to negotiate working conditions. This allows employees to go directly to their employers without even working with their union representatives, which could potentially negatively impact a union's power over its members.

In addition to protecting employees' right to organize and bargain collectively regarding wages, hours and other conditions of employment, the Amendment introduces a new right of employees to bargain “to protect their economic welfare and safety at work.” Of course, the Amendment does not define “economic welfare,” which opens the door for different interpretations, but it certainly implies a bargaining right that extends beyond the traditional rights under the National Labor Relations Act (NLRA).

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In short, the Amendment broadens what issues can be bargained for by employees, and also expands beyond unions who can bargain on behalf of employees.

What Affect Does this Amendment Have on Laws?

The Amendment now completely halts the passing and/or regulation of any Illinois or local law that “interferes with, negates or diminishes the rights of employees to organize and bargain collectively.” In other words, the Amendment forbids any law or ordinance from preventing employees in both the public and private sector from unionizing.

In the private sector, however, this Amendment may have crossed the line under the NLRA. Section 14(b) of the NLRA permits states to bar compulsory union membership as a condition to employment. Since, the Amendment does exactly the opposite -- prohibiting any agreement requiring union membership between unions and employers – principles of federal NLRA preemption may be asserted to argue that the Amendment is preempted or invalid with respect to private sector employers.

Can Employers Expect to See a Change in Union Membership?

The Amendment provides an

opportunity for workers to organize and bargain without jumping through as many hoops as they once did with employers and unions. Now, workers have the ability to bargain without consulting their union and without mass numbers coming to the bargaining table. It is therefore expected that public and private sector union membership will increase in Illinois. However, the Amendment will have to be tested through the court system over several years or more, and only time will tell the full impact the Amendment will have on Illinois employers and employees. ■

“The Amendment provides an opportunity for workers to organize and bargain without jumping through as many hoops as they once did with employers and unions.

Madeline Remish is a labor and employment attorney and litigator who advises all types of companies with any employment issue that may arise. Madeline’s experience in employment matters includes counseling, negotiation and litigation on issues including labor negotiations and bargaining, wage and hour disputes, FMLA, employment agreements, Title VII, ADA, and ADEA claims, and internal investigations as well as assisting with employment handbooks and updating policies. Madeline worked as a union-side attorney before coming to Saul Ewing, where she represented construction trades throughout the Chicagoland area. Madeline’s knowledge of both union and management employers have helped her clients reach successful resolutions in bargaining and negotiations.





ILLINOIS' 103RD GENERAL ASSEMBLY – The Importance of Making Introductions Ahead of IMSCA's 2023 Lobby Day

- By Neil Flynn & Daniel Flynn

Illinois' General Election was held on November 8, 2022, for all Congressional, Statewide Constitutional Officers (i.e., Governor, Lt. Governor, Secretary of State, Comptroller, Treasurer and Attorney General), and for all State Legislative (House and Senate) seats. As a result of the Illinois General Election, the 103rd Illinois General Assembly will consist of:

Illinois Senate

- 40 Democrats and 19 Republicans. This represents a net gain of 1 seat for Republicans. Beginning in 2023, the Illinois Senate will have 7 new (i.e., never before served in the State Senate) members.

Illinois House of Representatives

- 78 Democrats and 40 Republicans. This represents a net gain of 5 seats for the Democrats. Beginning in 2023, the Illinois House of Representatives will have 20 new (i.e., never before served in the House) members.

On January 11, 2023, these newly elected legislators will be sworn into office for the commencement of Illinois' 103rd General Assembly. IMSCA's annual lobby day event in Springfield is tentatively scheduled for April 25, 2023. As part of that lobby day, IMSCA members will go to the State Capitol Building and "drop in" on members to let them know of pending

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Neil Flynn was admitted to practice law in Illinois in 1980 and served in a variety of staff positions with the Illinois House of Representatives, including Counsel to the Illinois House Speaker. Neil's areas of concentration include lobbying before the Illinois General Assembly; State government relations; regulatory advocacy before State agencies, departments, boards and commissions; and administrative rule making.



Daniel Flynn has worked abroad at various FIFA (the governing body of international soccer) events and the Illinois House Democratic Staff. Daniel graduated from Saint Louis University School of Law in May 2010 and was officially sworn in as a member of the Illinois Bar later that year. Daniel's area of expertise is providing lobbying services and advocacy strategies on behalf of the clients of Neil F. Flynn & Associates to the Illinois General Assembly



legislative issues being advanced by, or of concern to, IMSCA.

In order to take full advantage of conversations with General Assembly Members during the upcoming lobby day, IMSCA members would be well served to contact (or perhaps introduce themselves to) the appropriate elected officials ahead of time. Furthermore, it is always a good practice to let your elected officials know about your business/company, and thereafter, to continue to engage with them as appropriate. It is always easier to speak with General Assembly Members about the potential impact (whether it is good or bad) of legislation when they are already aware of your company/business organization, and particularly, for example, if your business is located or employs individuals who live in that legislator's district. By doing so, it may avoid the awkward reply of "well, no one ever talked to me about this before".

Some IMSCA members may already know, and perhaps even previously worked with, their Representative(s) and/or Senator(s). However, given the recent election, some IMSCA members may have new elected officials representing them in the 103rd General Assembly. If any IMSCA member would like any assistance in reaching out to its respective General Assembly Members, we would be happy to assist. Accordingly, please do not hesitate to contact us if we can be of assistance.

In closing, it has been an absolute pleasure working with the entire IMSCA team this year. Further, we are very excited to be working with everyone again in 2023! In the meantime, we wish everyone a very happy and healthy New Year! ■

DON'T THROW AWAY THE EVIDENCE — Spoliation in the Construction World

- By James T. Rohlfsing



When a contractor is asked to perform time sensitive repair work, preserving defective or damaged materials is usually not a consideration. “Time is of the essence” is a persistent phrase in the construction industry. Stopping or delaying necessary work that might result in business closures or project delays is typically avoided at all costs. However, the rush to make immediate repairs – especially if they relate to the defective work of another contractor – may be a disservice to the contractor’s customer, to itself, and to other project participants if performing the repairs will destroy, damage, or alter evidence of another parties’ responsibility for the repairs. There is no easy way to resolve the tension between the need to immediately repair construction defects and the need to preserve evidence of the defects – but the tension should be

acknowledged and given due consideration before repairs are performed. **Spoliation** is a fancy legal word for the destruction, loss, or alteration of evidence necessary for the proof of a claim or defense where the law imposes a duty of preservation. Plainly speaking, if you destroy evidence that makes it harder for your opponent to prove his or her case, a judge may more than level the playing field against you.

Spoliation, or the breach of an obligation to preserve evidence, is an especially vexing problem for the construction industry where delaying repairs to preserve evidence may have costly impacts on a project’s critical path resulting in damages to you, other contractors, or the owner. Though a construction defect may well be

evidence to be preserved, it might also require prompt remediation. Modifying a structure or defective materials or the replacement of materials, such as replacing leaking windows, removing obstructing materials, or bringing in new scaffolding, all can result in the destruction of evidence that could prove or disprove the cause of costly repairs or other damages. If a construction dispute ends up in court or arbitration, the party that has destroyed, or failed to preserve evidence, intentionally or carelessly, risks jeopardizing their right to recover damages and may also take on a greater burden to defend themselves from

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charges by others. Though spoliation can be an issue in any context, it is especially prevalent in a construction project, where rapid change is necessary, and where owners, contractors, subcontractors, and others are usually more focused on finishing the job than on preserving evidence for a potential lawsuit.

When construction litigation is reasonably foreseeable, the party with control of the evidence has a duty to notify all potential parties, and provide a reasonable opportunity to inspect, test and photograph the potential evidence before repair. Often the evidence of construction defects consists of electronic records of work performed that could be maintained in a central database or on the laptops and cell phones of project managers, superintendents, executives, and subcontractors. The loss or destruction of evidence may result in a court imposing sanctions against the “spoliator” (the party that destroyed the evidence) such as an adverse jury instruction, or a finding of liability. The purpose of such sanctions is to level the playing field and to discourage the destruction of evidence in the future. A court or arbitrator will consider a number of factors in reaching a decision whether to impose sanctions and in determining the severity of sanctions, including:

- The fault of the spoliating party.
- The harm to the other party—whether it will be more difficult for that party to prove their innocence or the other parties’ liability.
- Whether a minimal sanction, such as excluding some evidence, will make up for the destroyed evidence and level the playing field.
- Whether there was a clear duty to preserve the evidence.
- The importance of the evidence in proving the non-offending party’s case.

AVOIDING SPOILIATION — A CHECKLIST

If you find yourself in a situation in which litigation is reasonably foreseeable and defective construction materials, whether caused by you or others, are potential evidence what should you do?

- Provide involved parties with a reasonable opportunity to inspect and test the evidence before it is destroyed and, if possible preserve it until testing is possible. Involved parties may include not only the owner, contractors, and material suppliers, but also their insurers and sureties, and particularly in the event of jobsite injuries, the injured employee and possibly his or her union representative.
- Maintain records of invitations provided to adverse parties and inspections offered or performed.
- Take photographs, or videos of physical evidence that must be discarded, and if possible, maintain documentary evidence of repairs performed.
- Include a provision in your construction contract addressing the procedure to be followed if a construction defect arises, requiring prompt and detailed notice of construction defects, followed by an ability to remediate the defective condition without giving rise to a charge of spoliation.
- Instruct third parties under your control, which could include employees, contractors, vendors, suppliers, consultants — anyone who is assisting you or whose activities you have influence over, not to destroy or dispose of documents or things. In a larger organization this entails a “litigation hold notice” to all personnel in the organization who might have evidence related to the dispute to preserve evidence (including electronic evidence) and the suspension of any normal document destruction policies and practices.
- Consult an attorney before throwing away the defective components or performing the repairs.

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If a court finds that the destruction of evidence was intentional, it is more likely to impose sanctions than it would be if the evidence had been destroyed accidentally or inadvertently. A court will also consider the burden imposed on a party to preserve the evidence. If the burden of preserving evidence entails a substantial delay to completion of the project, and the disregarded evidence would be of marginal importance, a court might weigh the equities and decide sanctions are inappropriate. For example, if the cost would be great

to delay a large commercial project for a fairly insignificant defective machine component, a party might be forgiven for moving forward with the repair, especially if inspection would have resulted in practical difficulties. Another example of a situation in which a court or arbitration tribunal might not impose sanctions, would be if the loss of evidence was occasioned by the need to remediate an unsafe condition before all parties could observe the evidence. Thus, court's decisions are not divorced from a practical-minded

weighing of the costs and benefits to all of the involved parties. Further, if there are compelling reasons why the project must be completed and inspection by all parties is impractical, a spoliation sanction is less likely. Finally, if the original evidence has been discarded but there is reliable secondary evidence, such as photographs, pictures and contemporaneous written records supported by competent witness testimony, the absence of the original evidence may be of little consequence. ■



***James T. Rohlffing** is a partner in the national law firm of Saul Ewing Arnstein & Lehr, and a member of the firm's Construction Practice Group and Litigation Practice Group. Mr. Rohlffing represents subcontractors and other participants in the construction industry. He is editor of Illinois Construction Law Manual, a treatise published by Thomson Reuters. Mr. Rohlffing is the current general counsel as well as the past president of the Illinois Mechanical & Specialty Contractor's Association (IMSCA), the largest organization for subcontractors in Illinois. He is an active member of the ABA Construction Forum, the Society of Illinois Construction Attorneys (SOICA), the Chicago Bar Association's Construction Law committee, and the Association of Subcontractors and Affiliates in Chicago. He has drafted and assisted in passing Illinois legislation critical to the construction industry and he has testified on numerous occasions on construction law issues before committees of the Illinois Legislature.*



STATE CAPITOL REPORT

Jessica Newbold Hoselton, IMSCA Executive Director



*Jessica Newbold Hoselton,
IMSCA Executive Director*

If you have any questions regarding this information, please do not hesitate to contact Jessica Newbold Hoselton by calling 217.523.4361 or by email at jnewbold@boldnewstrat.com.

The Illinois General Assembly convened in Springfield November 16-17 and November 29 – December 1 for fall veto session. Lawmakers are scheduled to return to Springfield on January 4, 2023, for “lame duck” session (i.e. final session days of the 102nd General Assembly, January 4-10). The 103rd General Assembly will begin on January 11, 2023.

During the fall veto session, legislators were primarily focused on approving changes to the **Safety, Accountability, Fairness and Equity-Today Act (SAFE-T Act)** and approval of legislation that addresses the remaining \$1.4 billion **Unemployment Trust Fund deficit**.

The SAFE-T Act is a controversial law that was approved in early 2021. The Act made sweeping changes to the criminal justice system and includes a provision

ending cash bail which goes into effect January 1, 2023. Interested parties urged lawmakers to clarify the legislative intent of the underlying law. After many hours of negotiations and debate, **HB 1095** as amended (**Sen. Robert Peters/Rep. Justin Slaughter**) was approved by both chambers along partisan lines. This legislation clarifies five key areas of the statute which include: transition to the new system on January 1st, trespassing, the danger to society standard, detentionable offenses, and clarification of the use of judicial arrest warrants.

An important issue that has been awaiting legislative action is the approval of legislation aimed at addressing the ongoing Unemployment Insurance Trust Fund deficit. Prior to adjourning the fall veto session, Governor Pritzker, legislative leaders, organized labor, and business industry representatives finally

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reached an agreement to pay off the remaining \$1.4 billion unemployment insurance trust fund deficit. The agreement that was reached is a two-part package: **SB 1698 as amended (Sen. Linda Holmes/Rep. Jay Hoffman)** contains the substantive agreement language, while **SB 2801 (Sen. Linda Holmes/House Speaker Welch)** is the appropriations piece of the agreement.

The state borrowed nearly \$4.5 billion from the federal government to provide unemployment insurance payments to unemployed workers during the height of the COVID-19 pandemic. The pandemic created challenges for unemployment insurance systems across the nation. Without legislative action by the Illinois General Assembly – employers would have faced tax increases while employees would have received benefit reductions.

The UI Trust Fund agreement was reached using the long-standing “agreed bill” process. This process is unique to Illinois and has been in place since 1984. The goal of the agreed bill process is to bring employers and organized labor together to solve problems on issues that impact both business and labor, such as workers compensation and unemployment insurance. The system was created to prevent wild swings such as benefit increases and tax increases or benefit cuts and tax decreases, depending on which party was in control. Once an agreement has been reached between business and labor, the four legislative leaders and the Governor also agree to enact the agreement via legislation.

SB 1698 as amended (P.A. 102-1105) was signed into law on December 8, 2022. SB 1698 provides that the state will pay \$1.8 billion in state funds to pay off the remaining \$1.36 billion in loans from the federal government. In addition, the

agreement provides for a \$450 million interest-free cash infusion into the trust fund. As the Illinois Department of Employment Security (IDES) pays off the loan, the money will be deposited into the state’s rainy-day fund. Organized labor and business leaders stated that the approval of SB 1698 will provide stability for Illinois’ unemployment insurance system and will save employers nearly \$900 million in taxes over the next five years.

SB 2801 (Sen. Linda Holmes/House Speaker Welch) is the Unemployment Trust Fund appropriations bill. This piece of the UI Trust Fund agreement was approved by the Senate and the House plans to approve the measure when the chamber returns for the January lame duck session.

IMSCA’s top legislative priority in 2023 will be a continuation of our previous work on retainage reform. As IMSCA members are aware, IMSCA worked hard for many years seeking a reduction in retainage on private, commercial construction projects, which became law in 2019. Some local governments, such as the City of Chicago and Cook County, have voluntarily reduced or eliminated the withholding of retainage on their projects. Other state agencies, like the Illinois Capital Development Board have voluntarily reduced retainage to five percent for the second half of their projects. Most other states restrict the amount of retainage that may be withheld on public projects, but Illinois is not one of them.

Retainage is still withheld at an unreasonably high rate of 10% for most local government construction projects, even though a payment and performance bond are also required to protect local governments from defects and

delinquencies. The combination of the two is excessive and creates unnecessary cash flow burdens. To ease this financial burden, IMSCA will seek an amendment to the Public Construction Bond Act to provide for a 5% cap on the amount of retainage withheld on public construction projects. Our legislative initiative will be sponsored by Assistant Senate Majority Leader Linda Holmes.

IMSCA also plans to introduce legislation amending Section 24 of the Illinois Mechanics Lien Act. Currently, this Section provides that a notice of lien must be served by a subcontractor on the owner by certified mail return receipt requested, with delivery limited to addressee only, or by personal service. This presents practical problems for subcontractors and their attorneys or lien services. These problems include the post office doesn’t always return the green card, service can be refused, and the post office does not restrict delivery to addressee.

Many laws that require serving a notice have been updated to also permit service by overnight delivery companies such as Federal Express, UPS or by any means that provides written, third-party verification of delivery. IMSCA’s goal in updating Section 24 is to ensure lien rights are not lost because someone refused to sign a green card or the post office failed to return it to the sender.

Please be on the lookout in the coming weeks for more information on IMSCA’s 2023 legislative initiatives and ways you can help with our efforts. Your IMSCA lobbying team looks forward to another successful legislative session for our members. ■