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ATTORNEYS AT LAW

BUSINESS AND EMPLOYMENT NEWSLETTER

FOURTH QUARTER, 2008

LEAKING ROOFS AND BROKEN GLASS: WHAT DOES A MAINTENANCE PROVISION REALLY MEAN?

PART 3 OF 5 IN THE ONGOING SERIES "COMMON LEASE TERMS"

By Sallye Quinn

As with most lease provisions, the specific circumstances involved will dictate what is appropriate for your lease. The maintenance provision is a good example of a lease clause that must be specifically drafted for your situation. The term of the lease and the sophistication of parties involved will play the biggest role in determining what the maintenance provision provides. In almost all leasing situations, however, the landlord maintains responsibility for the repair and maintenance of the structural elements of the premise. Because "structural elements" is a broad term with a lot of room for interpretation, the better way to define the landlord's responsibility for "structural elements" is to state something like the following:

"Landlord shall pay for and make all other repairs, replacements and/or capital improvements to the structural elements of the premises such as foundation, roof system, windows, and exterior walls, and shall keep the same in good order, condition and repair."

In a short term lease or in a multi-tenant lease, it may be appropriate for the landlord to have responsibility for more than the structural elements. In a short term lease, the allocation of maintenance responsibilities in this manner makes sense because the tenant will not be in the premises long enough to reap the benefits of any large repair expenditures. In a multi-tenant lease this makes sense because one structural element or system may serve many tenants. The landlord will want to control how that system is maintained in order to insure that one tenant does not cause damage to a shared system that can cause difficulty for other tenants. For example, one heating, venting and air-conditioning (HVAC) sys-

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**** IMPORTANT NOTICE ****

In an effort to decrease our consumption of natural resources and "go green," this newsletter will no longer be available in printed format. To receive this newsletter via email, please call us at (360)733-0212 or email Debbie Nelson at dnelson@barronsmithlaw.com. We hope this publication continues to be of help to our friends, clients and colleagues.

LEAKING ROOFS AND BROKEN GLASS—CONTINUED

tem may serve all of the tenants in a multi-tenant building. In that situation, the landlord will want to control the repair, maintenance and replacement of the HVAC system.

Regardless of whether a landlord or tenant has responsibility for the repair, maintenance or replacement of a specific element of the premises, "responsibility" usually only defines who is tasked with completing the maintenance, repair and replacement and does NOT define who pays for the cost. In many leases, especially leases involving multi-tenant premises, it is very common for the cost of the repair, maintenance and replacement to be passed along to the tenant as an operating expense or a common area maintenance expense. This issue will be more fully addressed in next quarter's series installment, "Net: What does it really mean?"

Once the landlord's responsibility is defined, the tenant typically has responsibility for whatever maintenance is left. A common description of the tenant's responsibility is as follows:

"Tenant shall, at Tenant's sole cost and expense, keep in good condition and repair all portions of the premises not being maintained by Landlord, including, without limitation, the maintenance, repair and replacement of any storefront, all interior walls or partitions and interior portions of exterior walls, doors, exterior and

interior glass and window casements, roof covering (but not floor structure) and all utility systems within the premises including heating, ventilation and air conditioning systems."

As noted above, the specific circumstances of the lease always play a role in determining who has responsibility for each aspect of the lease. For some tenants, it may make sense for the landlord to be responsible for repairing and replacing plate glass. In large shopping center leases, a common point of negotiation is often over the parking area; typically the landlord has responsibility for maintaining the parking lot in a multi-tenant facility. However, the frequency of striping and paving can be a point of contention, especially when the cost of the work is passed along to the tenant.

Other common elements of maintenance provisions address responsibility in the event that the need for the maintenance is caused by the other party's negligence or willful misconduct, and the remedy if one party does not perform as required under the lease terms. Typically, if damage occurs as a result of the non-responsible party's conduct, the responsible party is then absolved from its obligation to repair the damage. For example, one provision may be "Landlord's obliga-

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** EMPLOYER ALERT **

ADA AMENDMENTS IN EFFECT JANUARY 1, 2009

By Amy Robinson

On September 25, 2008 President Bush signed the ADA Amendments Act of 2009 (the "ADAAA") into law. The ADAAA is Congress's response to the decisions made by the Supreme Court and a number of lower courts which imposed a restrictive reading of the protections of the Americans with Disabilities Act (ADA). It was notable for garnering overwhelming support in the House, with over 250 co-sponsors from both sides of the aisle.

Recall that the ADA was enacted in 1990 with the intent to prohibit discrimination on the basis of a person's disability. Prior to the ADAAA, the ADA defined disability as "(A) a physical or mental impairment that substantially limits one or more major life activities; (B) a record of such an impairment; or (C) being regarded as having such an impairment."

In particular, Congress believed that the courts had impermissibly narrowed the group of people whom it had intended to protect under the ADA. For example, the Supreme Court held in a trio of highly criticized cases that when determining the severity of an employee's condition – and thus whether the employee is disabled and protected by the law – a court must consider whether the employee takes medicine or uses devices (such as eyeglasses or a hearing aid) that improve the employee's condition. *Sutton v. United Air Lines,* 527 U.S. 471, 119 S. Ct. 2139 (1999); *Murphy v. United Parcel Service,* 527 U.S. 516,119 S. Ct. 2133 (1999); *Albertsons Inc. v. Kirkingburg,* 527 U.S. 555, 119 S. Ct. 2162 (1999). The result of these decisions has been that many individuals with serious and legitimate medical conditions who have been able to control or mitigate their conditions with medications (for example, diabetes or epilepsy) have been held <u>not</u> disabled, and denied the protections that should have been afforded them by the ADA.

<u>ACTION ITEM</u>

Review your policies and procedures to ensure they comply with the new Americans with Disabilities law, which takes effect January 1.

The ADAAA seeks to correct those and other interpretations and provide additional clarity for applying the ADA. In particular, the new law states:

- When considering whether an individual is a "qualified individual with a disability" under the law, the new law directs that mitigating measures other than "ordinary eyeglasses or contact lenses" shall not be considered in such considerations.

- Episodic impairments must be viewed from the perspective of when they are "active" to determine whether such impairment constitutes a "disability" for purposes of the ADA. This means that now an impairment that is intermittent or in remission may still qualify as a disability that requires accommodation if it substantially limits a major life activity when active.

- An individual who claims that he or she was discriminated against due to a perceived disability need only show that the employer regarded him or her as having an impairment, but need not show that the "regarded" impairment limited a major life activity itself.

- However, individuals who are "regarded as" having a disability but do not actually have a disability, are not entitled to reasonable accommodation.

- The new act also affirmatively states that the definition of "disability" must be interpreted liberally.

The ADAAA takes effect on January 1, 2009, and as a result we anticipate that far more individuals will seek the protections of, and indeed be covered by, the ADA. We recommend you take this time to review and consider your current disability and/or accommodations policies and procedures and make sure they comply with these changes. As always, for compliance assistance or guidance with potential claims, please contact your employment counsel.

Please visit the Equal Employment Opportunity Commission's website for more information at www.eeoc.gov.

MECHANIC'S LIENS: THE TOP 3 THINGS YOU NEED TO KNOW

By Sallye Quinn

One of the most powerful tools anyone providing labor, materials or professional services has in ensuring they get paid is the ability to place a mechanic's lien on the real property that benefited from the work or materials. A lien is an encumbrance on real property, like a mortgage or a deed of trust; however, a mechanic's lien is not voluntary, as with the deed of trust or mortgage, and is a creation of statute, not contract. The purpose of a mechanic's lien is to secure priority of payment for the price of labor, materials or equipment provided to the real property. Generally, in Washington, any person "furnishing labor, professional services, materials, or equipment for the improvement of real property shall have a lien upon the improvement for the contract price of labor, professional services, materials, or equipment furnished at the insistence of the owner, or the agent or construction agent of the owner." RCW 60.04.021.

If you are a labor or materials provider who risks not being paid, it is imperative that you understand what steps you must take to preserve your right to a mechanic's lien. A mechanic's lien may be the only leverage you have to get paid. If you are a property owner, you need to understand how to protect yourself from frivolous liens filed on your property. You may also need to protect yourself from liens filed by subcontractors who haven't been paid by a prime contractor, even though that prime contractor should have paid the sub with money you paid to the prime. This article addresses the top three things that a potential lien claimant or a property owner needs to know to successfully navigate the world of mechanic's liens.

CLAIMANT'S TOP 3

#1: Get Registered.

If you are required to be registered as a contractor pursuant to RCW 18.27, but haven't registered, you will likely lose your lien rights. Pursuant to RCW 18.27.080, an unregistered contractor cannot bring suit for collection of compensation if she is not registered. Although RCW 18.27.080 does not actually prevent filing a lien, it will prevent foreclosure of that lien, which means that if the lien is not paid during the 8 month validity period, you cannot preserve your lien rights by filing suit to foreclose the lien.

#2: Timing is everything.

The mechanic's lien must be filed within ninety days after you have ceased to furnish labor, professional services, materials, or equipment, or the last day on which employee benefit contributions were due. RCW 60.04.091. The ninety day time period can be extended by performing additional labor or providing additional materials, even if the amount of work or materials is small. The key is whether the additional work was performed or the materials supplied solely for the purpose of extending the ninety-day period. If the property owner can prove it was, a court is not likely to allow your lien claim. Note that performing warranty work will **not** extend the time period.

After your lien is filed, you must file suit to foreclose your lien within 8 months of the filing of your lien. RCW 60.04.141. Failure to file a suit will cause the lien to expire. In addition, after filing the lawsuit, you must serve it within ninety days. RCW 60.04.14

#3: Provide Pre-Lien Notice

Notice to Customer. In order to file a lien, registered contractors (and those who should be registered but are not) must provide the Notice to Customer in the form set out in RCW 18.27.114. Some exceptions apply, such as residential projects for a bid or contract price less than $1,000, commercial projects that are less than $1,000 or more than $60,000, and for contractors contracting with other contractors. However, in general the Notice to Customer is a key pre-lien notice. As of July 2007, the Notice to Customer must be signed by the customer, and the contractor must keep a copy of the Notice for 3 years.

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The contributors to this publication wanted to address the continuing economic disturbances affecting our community, but we did not feel that we were qualified to render such analysis. For that, we turned to Dr. Robert Patton, Ph.D., financial and economic consultant. We are grateful to Dr. Patton for providing his thoughts regarding the recent economic crisis. The following article represents Dr. Patton's ideas and thoughts, and does not necessarily represent the opinions of the Business Department or Barron Smith Daugert as a whole.

AMERICA'S ECONOMIC MELTDOWN… HOW CAN WE FIX THIS MESS?

By Robert T. Patton, Ph.D.

WHAT HAPPENED?

After a relatively mild recession in 2000-2001, the American economy seemed to appear healthy, despite the September 11, 2001 terrorist's attacks and two subsequent wars. Gross National Product was expanding at a steady rate, corporate profits were growing, we had low unemployment and the stock market had regained all of the losses from the 2000-2001 bear market. How could such a happy picture come apart so quickly and so completely that it now seems that it will require more than a trillion dollars to bail out major portions of the financial system and our largest manufacturing companies? Any event of this magnitude will always have many contributing factors that could be singled out to share the blame. However, let's focus on one sequence of interconnected events that have led the United States to this point in our economic history.

The sequence begins during President Carter's years when Congress passed the Community Reinvestment Act of 1977. This new federal law was intended to meet the needs of borrowers in all economic segments of a community, including low and moderate-income neighborhoods, by reducing discriminatory lending practices in these areas of a community. Enforcement was achieved by reviewing bank CRA compliance and taking this into account before approving applications for new bank branches, or for mergers or acquisitions. In other words, banks either complied or they would not be allowed to grow.

The CRA of 1977 was modified at various times in the following years. A major reworking occurred when Congress passed the Community Reinvestment Act of 1995. In this revision, lenders were told that proof of income, source of down payment and credit history would no longer be required to qualify for a home loan. As an added incentive, Freddie Mac and Fannie Mae agreed to buy the resulting high-risk loans from lenders to insure that they would not get stuck with bad loans. Over the next few years Freddie and Fannie continued to ease credit requirements even further to help increase home ownership rates among minorities and low-income families whose credit was not good enough to qualify for conventional mortgages. Banks, real estate agents and developers happily participated in this new subprime borrowing frenzy for obvious reasons. The immediate result was a rapid rise in the rates of home ownership, particularly among those families that would not otherwise qualify for the necessary credit to allow them to purchase the size and quality of dwelling that the subprime system now permitted. During subsequent years many members of Congress spoke out publicly about the apparent success of the CRA and resisted any efforts to tighten lending standards even amidst dire warnings coming from the few voices that saw the coming consequences.

WHAT ARE THE CONSEQUENCES?

Initially, everyone seemed to benefit from the borrowing frenzy. Many people were finding it possible to own homes, even large homes that they never thought they would be able to own. Adjustable rate mortgages made the payments seem manageable, at least until they might be able to refinance or even sell the house in a year or two at a generous profit. Real estate agents were able to move homes coming on the market within a matter of days at full asking prices, or even more, and the commission checks just kept coming at an ever in-

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AMERICA'S ECONOMIC MELTDOWN—CONTINUED

creasing rate. Developers and homebuilders could not produce new residential units as fast as the demand was increasing. Material suppliers and construction workers were benefiting from an environment where price was no concern, just get the work done. Banks and title companies could not process loans and closings fast enough to keep up with the pace of new transactions, but the fees were rolling in at record rates. Even government benefited by expanding tax revenues and began finding many new ways to spend the rush of new taxpayer dollars being channeled into government treasuries.

One of the major results of all of this activity is that home prices began to increase dramatically as demand exceeded supply month after month. This created a whole new source of rapid wealth creation for American families and they took advantage of this quickly. Home equity loans or home refinancing became easy sources of new cash flows for households. Credit cards also became very easy for anyone to obtain. Most Americans held multiple cards and used them freely. The seemingly endless source of easy credit sparked one of the most spectacular buying binges this world has ever witnessed. During this time, Americans were able to acquire almost any and every item they desired and economies around the world expanded rapidly. Purchases of new vehicles, boats, large flat screen TVs, new appliances, expensive vacations all went on credit accounts. Economists refer to this event as a bubble. The real estate bubble, the consumer spending bubble, the China bubble, the emerging markets bubble are all at least partially emanating out of the artificially created easy credit environment that can be linked directly back to the Community Reinvestment Act of 1977 and its modified successors in the twenty some odd years following.

WHY THE COLLAPSE?

Too much of any good thing usually brings on some kind of difficulty. In this case, Americans simply took on way too much debt and they took on the wrong kind of debt. Then they simply ran out of the cash flow capacity to service their debt. Credit card balances became too large to allow families to continue to make regular payments in a timely manner and so banks increased the interest rates dramatically to reflect the higher risk on these accounts. This made the payments even more difficult for households. Adjustable rate mortgages began scheduled upward adjustments to the interest rate and pushed monthly payments beyond the income capabilities of homeowners. As households began to struggle under the impossible burden of debt, they began to borrow less and buy less and the commercial world that had geared up to respond to the consumer demand began to slow down. Inventories began to pile up in all consumer sectors, including houses, vehicles and manufactured goods in many other categories. Then came the layoffs and unemployment began to increase. This lowered average household income and made debt service even more difficult. Housing prices began to decline in many

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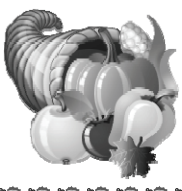
In the spirit of the season, and on behalf of our clients and those with whom we work, Barron Smith Daugert has made a holiday donation to the Bellingham Food Bank.



MECHANIC'S LIENS—CONTINUED

Notice to Owner. In addition, unless you are a laborer or contracting directly with an owner, or in cases where the project is NOT for the repair or remodel of an existing owner-occupied single family residence (and you are contracting directly with the prime contractor), you need to provide the Notice to Owner in the form set out in RCW 60.04.031 to the owner and in some cases the prime contractor. Accordingly, second tier subs and materials suppliers should, as a matter of course, provide the Notice to Owner in all situations to be sure that lien rights are preserved.

Notice of Providing Professional Services. Professional service providers must also provide notice in the form set out in RCW 60.04.031 as soon as professional services are begun, and especially when there is no sign on the property that professional services have begun (such as setting stakes or other physical indications of professional services). Note that the professional services notice is provided by recording the notice with the county auditor, unlike the Notice to Customer or Notice to Owner, which are provided either by personal service or by certified mail.

PROPERTY OWNER'S TOP 3

#1: Is the Lien Frivolous?

RCW 60.04.081 provides property owners with an expedited procedure (i.e. a hearing within 6 to 15 days after service of the motion and order) for determining whether a lien is frivolous. Note that "frivolous" means that there is no debatable issue as to the validity of the lien and there is no possibility of the lien surviving. In other words, a frivolous lien action is not the place to determine whether the lien was filed within 90 days of the last day of work when there are factual disputes on that issue or when there is a dispute as to the amount of money owed. In contrast, an issue that is clearly one for a frivolous lien action is the failure to provide pre-lien notices where they are required to be given.

#2: Can You Bond Around the Lien?

RCW 60.04.161 allows property owners to record a bond from a qualified surety in place of the lien, thus releasing the lien and allowing transfer (or refinancing) to occur free of the lien. The cost of the bond, and the security required by the surety, can be an obstacle in bonding around the lien. Pursuant to statute, if the lien is $10,000 or less, the bond must be in amount equal to the greater of $5,000 or 2 times the amount of the lien. If the lien is for more than $10,000, the bond must be for 1 ½ times the lien amount.

#3: Get Lien Waivers.

An ounce of prevention can save a ton of frustration. When making payment, especially to prime contractors who are in charge of insuring that subcontractors and materialmen get paid, getting lien waivers is key. The lien waiver should be signed by the prime contractor and all subcontractors or materialmen stating that upon payment for work done through a certain period, they have no lien claims for that period. In addition, the lien waiver requirement will often work to bring to light at an early stage whether the prime contractor is in fact making payments to subs and materialmen.

If you have any questions about these issues, please feel free to give me a call or send me an email.

FORMS

If you would like to receive a form of any of the notices discussed in this article, please feel free to email me at squinn@barronsmithlaw.com. In addition, most forms can be found at the Washington Department of Labor website at http://www.lni.wa.gov/

AMERICA'S ECONOMIC MELTDOWN—CONTINUED

cases to levels below the mortgage balance. Now many credit card balances and home mortgages became labeled as bad assets on the balance sheets of financial institutions depriving them of the required capital needed to extend more credit, even to credit worthy business organizations. Then the house of cards began to collapse. Developers had overbuilt new homes and had excess inventory. Bank foreclosures increased available home inventory even more and buyers were few and hard to find. Manufacturers watched inventories increase, especially in the automotive sector. However, buyers were simply tapped out.

HERE COMES THE BAILOUT.

There is no easy way to describe the bailout engineered hastily by government officials and politicians. It is changing day by day and it seems that every direction proposed is beset with a variety of impossible difficulties. There are some things that we can state fairly clearly. This event looks like it will be papered over with more than a trillion dollars of taxpayer dollars, although how those dollars will be collected from taxpayers is still somewhat a mystery. Another thing that seems clear is that the real problem here is a huge mountain of consumer debt, a significant amount of which appears to be uncollectible at the moment. One of the initial tenets of the bailout plan was for government to buy up the bad debts held as assets by financial institutions. However, if the bailout money is spent this way, the bad assets are still bad assets after being purchased by the government. It is somewhat difficult to see how this solves the basic problem of too much consumer debt. It certainly does not help consumers pay off their debts, especially if they will be required to pay higher taxes in order to provide the funds to buy the bad assets from financial institutions. This approach will improve the balance sheets of financial institutions, presumably granting them new capacity to extend credit again. However, if the consumer is already overburdened with a debt load they can't repay, what financial institution

will be eager to lend any of their new found credit capacity to these consumers who can't pay the debts they already owe. This approach does not seem likely to cure the economic woes besieging this nation.

Taxpayers in general are rarely excited about giving the government a trillion new dollars out of their incomes to spend on new government programs, even for some promised economic recovery bailout. However, if it is a given that this trillion dollars is going to be spent by government, then should it not be spent in ways that address the basic problem? The money needs to be spent in a manner that will put American workers to work earning enough money to pay off their debts and turn bad assets held by financial institutions back into good assets. It also seems that America has some obvious future needs for more electrical power, new bridges, new and improved highways and other similar public assets. If these two sets of needs are matched up, then it seems obvious that the most effective expenditure of a trillion dollars of taxpayer funds would be to build forty new nuclear power plants, five thousand new bridges and ten thousand new highways, or some such mix of new public assets. The result would be millions of new family wage jobs allowing households to pay back debts that are now considered bad assets on the books of our financial institutions. However, in order for

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THINK GREEN!

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AMERICA'S ECONOMIC MELTDOWN—CONTINUED

this approach to work, the permitting process for such public works projects would need to be shortened from years down to days and the planning and contracting process would need to be shortened from months down to weeks. Just think about the long-term benefits if government learned how to move such projects through their offices quickly. Future public and private projects could actually be built while cost estimates were still valid.

THE FUTURE.

The economic woes we face today are not going to be quickly or easily resolved. However, if government is going to play an effective role in bringing about an ultimate solution, it must first have a clear understanding that households carrying heavy debt load and facing possible lay-offs will not be motivated to either spend or borrow until their future looks much brighter. Buying bad assets or refunding financial institutions in other ways does not address the real problem. Some loosening of the credit crunch will be helpful to viable businesses that presently find their banks unable to lend because of the bank's financial condition, even though such a business might normally be considered a prime borrower. However, the bigger problem is that consumers will have to find new and better income streams that will allow them to repay their debt. This will not happen quickly and consumers will not quickly return to their free spending patterns that fueled the worldwide economic bubble of the past few years. This means that financial institutions will need to become much more patient in their efforts to collect nonperforming debts. This also means that consumers will need to take responsibility for the debt loads they have assumed and work out repayment plans with financial institutions that will take years to complete. If this approach is followed, households will live a much more frugal lifestyle than they have become accustomed to over the past few years. Consumer oriented businesses will experience slower growth rates and reduced profits. However, if the trillion dollar bailout money is largely spent on development of public assets rather than buying up bad assets from financial institutions, the country can ultimately work it's way out of our problems leaving everyone in a much healthier financial condition. The bonus will be that the American taxpayer will have thousands of new public assets that will serve the country's needs for years to come.

** EMPLOYER ALERT **

NEW FMLA RULES EFFECTIVE JANUARY 16, 2009!

By Amy Robinson

The U.S. Department of Labor has finally issued the anticipated revisions to the federal Family Medical Leave Act (FMLA) regulations. These new rules take effect on January 16, 2009, so employers have a short time to comply. Most importantly, for those of you that are required to post FMLA policies in the workplace, you must have the most up-to-date version displayed by the time your doors open on January 16, 2009.

Although there are a number of changes contained in the new regulations, the two primary goals were to (1) provide clearer guidance to both employers and employees about their rights and obligations under the FMLA, and (2) implement new FMLA leave for military family members. Here are a few highlights:

- As we noted in our Spring issue, the FMLA now provides eligible employees with up to 26 weeks of leave to employees to care for a covered service member spouse, child, parent, or next-of-kin (i.e. closest blood relative) who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury incurred in the line of duty. If you haven't already modified your leave policies and forms accordingly, be sure to include this "Military Caregiver Leave" when you re-

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NEW FMLA RULES—CONTINUED

vise them to incorporate these additional changes.

• Eligible employees may use up to 12 weeks of FMLA leave if the employee's spouse, child, or parent is a member of one of the U.S. Armed Forces (including the Reserves and National Guard) on active duty or who receives notice of an impending call to active duty and a "qualifying exigency" exists. The regulations provide a nonexclusive list of 8 "qualifying exigencies" that may mandate use of leave for such activities as: attending military events and deployment-related ceremonies or activities, providing childcare or attending school activities, attending to financial or legal arrangements, counseling for the covered service member or his or her child (provided the need for counseling arises from the call to active duty), or spending time with a covered military member who is on short-term, temporary rest and recuperation leave during the period of deployment.

• Employees may now be required to follow the employer's call-in procedures or risk losing FMLA protection, as long as the call-in procedures do not require employees to do more than call in immediately before the start of a shift.

• The required employee notice must now specifically reference the qualifying reason for the need for leave, not just "information sufficient to give an employer notice of a need for leave."

• An updated model medical certification form is provided. The new form requires additional information such as (1) the health care provider's specialization; (2) the medical facts regarding the employee's medical condition and diagnosis; and (3) a certification that intermittent leave is medically necessary, if it applies.

• The term "serious health condition" has been clarified.

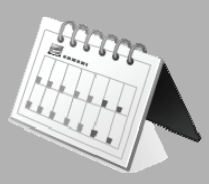
1. Under the new rules, a condition would be a "serious health condition" only if the first medical treatment occurs within 7 days from the initial date of incapacity.
2. In addition, one of the existing definitions of "serious health condition" defines it as involving more than three consecutive calendar days of incapacity plus "two visits to a health care provider." The new rules clarify that that the two visits must be within 30 days of the period of incapacity.
3. For a chronic condition, the new rules define "periodic visits" as at least two visits to a health care provider per year. This would prevent employees with chronic conditions from providing medical certifications based on a doctor visit from more than a year ago.

These are just a few of the changes that go into effect in just a few short weeks. For a full discussion of the new rules, and information about where to obtain updated posters, please go to the Department of Labor's website at:

http://www.dol.gov/esa/whd/fmla/finalrule.htm.

Please be sure to update your policies and forms, and familiarize those who administer your FMLA leave policies with the changes right away. As always, if you have any questions or would like compliance assistance, feel free to give us a call.

Remember to post the up-to-date FMLA policies before January 16th!



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LEAKING ROOFS AND BROKEN GLASS—CONTINUED

tions under this Lease shall not include making any repair or improvement necessitated by the negligence or willful misconduct of Tenant, its agents, employees or servants." In addition, if a party does not perform as required, the other party has the right to complete the maintenance and charge the other party the cost. For example, a maintenance provision might state that:

"If Landlord fails to perform any work required hereunder within thirty (30) days after Tenant's notice (except when the work requires more than thirty (30) days for performance and Landlord commences the repair within thirty (30) days and diligently pursues the repair to completion), Tenant may, at its option, undertake such repairs and deduct the cost thereof from the installments of Base Rent and Additional Rent next falling due. Notwithstanding the foregoing, in the event of an emergency, Tenant may give Landlord such shorter notice as is practicable under the circumstances, and if Landlord fails to perform such work immediately, Tenant may undertake such work and deduct the cost thereof from the installments of Base Rent and all other charges next falling due."

Lastly, remember that maintenance provisions must address not only "repair and maintenance," but "replacement." Not defining replacement creates an opening for the other party to beg out on a significant capital expenditure. For example, if a repair provision states only that the tenant has to "maintain and repair all utility systems within the premises including heating, ventilation and air conditioning systems," and the landlord is not given the "replacement" responsibility, who must bear the cost when the HVAC fails and simply must be replaced? Most likely, the tenant will have the responsibility since the landlord was not assigned any HVAC responsibility, but the tenant certainly has an opening to argue otherwise. Including the replacement responsibility provision highlights the importance of an inspection on the part of the tenant. If the tenant is fully aware that it has the responsibility to replace something, it will want to be certain it knows how likely the need for replacement will be during the term of its lease.

If you have any questions regarding this article, please feel free to contact me. Remember to look for next quarter's installment, "Net: What does it really mean?"

CONGRATULATIONS to Amy Robinson, who was elected president of Washington Women Lawyers for 2009. Amy formally accepted the position at the group's annual awards dinner in October.

Amy Robinson with Donna Brazile, the keynote speaker, and Janet Chung, last year's WWL president.

Amy Robinson addresses the crowd.

KIRSTEN BARRON RECEIVES LOCAL HERO AWARD

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The Washington State Bar Association (WSBA) announces that it is presenting Bellingham attorney **Kirsten Barron** with its Local Hero Award. The Local Hero Award is presented to lawyers who have made noteworthy contributions to their communities. The WSBA Board of Governors will meet in Bellingham at the Hotel Bellwether on December 5–6. President **Mark Johnson** will present the award at a luncheon on December 5, with members of the WSBA Board of Governors and Whatcom County Bar Association in attendance.

Barron received her bachelor's degree from James Madison University and her law degree from the University of Richmond T.C. Williams School of Law. She worked as a civil deputy prosecuting attorney for Grays Harbor County. She joined Barron, Smith, and Daugert PLLC, formerly known as Brett and Daugert PLLC, in 1998 and became a partner in 2004. She currently practices business and employment law.

Barron is extensively involved in her community. She has served as a board member of Allied Arts of Whatcom County, and volunteered with the YMCA. For the past ten years, she has served on the board of LAW Advocates, and as chair for the last three years. Barron volunteers for the Law Advocates Street Law program, and will be a volunteer attorney in the new Courthouse Based Eviction Clinic for low-income tenants. She serves as a board member of the Whatcom Film Association, and as vice president on the board of the Slum Doctor Programme, which works to improve the lives of those impacted by AIDS in Africa. Barron also volunteers at the schools of her three children and at St. Paul's Episcopal Church.

"While there are a number of attorneys who would rightfully qualify for the Local Hero Award, this year Kristen Barron stands above the rest for the leadership she bestows to her law firm, and in her committed service to our local community," wrote **Steve Chance**, president of the Whatcom County Bar Association.

Happy holidays and best wishes for the new year from all of us at Barron Smith Daugert!

A PERSONAL NOTE FROM THE DEPARTMENT:

By Kirsten Barron

Happy Holidays to all of you.

I hope that you enjoy this newsletter. We are grateful to Bob Patton for his interesting article on the state of the economy and how we got here. Bob's article addresses the complexities of this situation without being overwhelming – quite a feat!! I know that I seem to have an insatiable appetite to understand more about our current economic situation. Much like the election of Barack Obama, it feels, regardless of your political position, that we are really living in historically meaningful times.

I continue to advise my clients to keep a steady hand on the rudder. Colleagues who I consider knowledgeable and thoughtful on the economic situation continue to tell me that there is much uncertainty. So hold steady!!

I think it is important to remember that even in these times, there is still much to celebrate this season - the opportunity for work, our families and friends and this amazing community in which we live.

Speaking of community, I want to tell you a little about some "recent happenings" in our community here at Barron Smith Daugert. We do not usually do this, but there is so much to share!

Amy Robinson has been elected to serve as the President of the Washington Women Lawyers. We are so very proud of her as she leads this wonderful state-wide organization. The focus of this group has historically been on the King County region and Amy is bringing new awareness of other parts of our state and the role we have to play.

Dennis William is serving as the chair of the St. Luke's Foundation.

Heather Sheldon, a legal assistant, has headed off to Africa to do relief work with Western Washington University.

Sallye Quinn begins her term as the Chair of the Literacy Council.

We are a busy group!! Our involvement in the community says a lot about who we are and what we care about. We are grateful to be a part of it and thankful for all of our clients and the work we do with you!!

Kirsten Barron

CONTRIBUTORS AND EDITORS TO THIS PUBLICATION

Sallye Quinn is a senior associate in the firm's business department and focuses her practice on business and real estate transactions and creditor's rights.

Amy Robinson brings employment and human resource experience to the firm and is invaluable to our department and the Litigation team in solving a myriad of complex legal issues. Her practice is focused on employment and civil litigation.

Debbie Nelson is a paralegal in the firm's business department and has extensive experience in corporate legal services.

Jamie Falter has recently joined the firm as a legal assistant in the business department.