

Stop Work Orders and the Construction Industry

About me: I'm Kris Dunn and I am the owner of The Dunn Law Firm. It is Florida's only firm dedicated to fighting Stop Work Orders. It is based out of Tallahassee and has been in existence since October 2012. Prior to opening The Dunn Law Firm, I graduated with a degree in accounting from the University of California in 1995, was an Airborne Ranger with the 3rd Ranger Battalion from 1995-2000, and then graduated law school from Florida State in 2003. I started out as a criminal prosecutor in Tallahassee and did criminal law for four years and returned to the State as a prosecutor for the Department of Financial Services in their Stop Work Order section, and became the chief litigator there. After DFS, I went to the Attorney General's Office as a tax prosecutor and was later hired by Shutts & Bowen as one of their white-collar criminal defense attorneys. I ran for Circuit Judge in 2012 for the Second Judicial Circuit and came in third place, so I decided to open my law firm after that ordeal.

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1. Sources of law for the Stop Work Order (SWO):
 - a. Chapter 440.107.
 - b. Agency Rules 69L-6.
 - c. Civil enforcement authority: Department of Financial Services, Division of Worker's Compensation (DWC), Bureau of Compliance.
 - d. Criminal enforcement authority: DFS, Insurance Fraud Division, and any other law enforcement authority. See Sec. 440.105.
 - i. The penalties begin at a 3rd Degree Felony and go all the way to a 1st Degree Felony, if you have committed over \$100,000 in fraud.
 - ii. It used to be rare for these type of prosecutions but apparently they are picking these cases up more.
2. The genesis of an SWO:
 - a. Bureau of Compliance sends out an investigator.
 - i. Over 2000 SWOs issued each year.
 - b. For construction companies/ jobsites you are "easy money"
 - i. Construction rules v. Non-construction rules
 1. Everyone in the construction field must be covered by WC

- a. Coverage through:
 - i. Exemption
 - ii. WC policy (stand-alone)
 - iii. Payroll company/ Employee leasing service
 - b. Sole proprietors must be covered despite the insanity of it.
 - i. If a sole proprietor injures himself on the job would he sue himself?
 - ii. The ease of spotting a jobsite (part 1):
 - 1. Investigator is in the state-issued Chevy Impala just driving around
 - 2. 7 districts in FL and roughly 40 investigators, total.
 - 3. Inv. can see a job site and the activity.
 - 4. Inv. Will utilize a wireless tablet and ascertain the companies' coverage.
 - 5. They can ascertain companies from the permit board, decals on work trucks, T-shirts, and finally approaching random workers.
 - iii. Ongoing investigation (part 2):
 - 1. Inv. will try and confirm that each company/ entity is in compliance.
 - 2. Inv. will sometimes believe what they want to believe and place a SWO on the company for no apparent reason. This is an illegal SWO and the ramifications are immense. Including arrest if Div. of Fraud is tagging along!
 - 3. Remember procedure is paramount.
 - a. I've been able to overturn a SWO against a company that was not compliant, due to the procedural issues and mishaps done by the rookie investigator.
- 3. Getting a SWO
 - a. SWO is attached with an Order of Penalty of \$1000.00
 - i. This is not your final penalty
 - b. SWO is attached with a Notice of Rights (NOR).
 - i. Back side of SWO, basically outlines what you need to do to protest the SWO

1. Allows 21 days to lodge protest or you lose your right.
 - ii. SWO is attached with an Election of Proceeding.
 - iii. Relatively new, since 2010, DFS basically realized that no-one was reading the NOR and consequently made it easier for laymen to protest their SWOs.
 - iv. SWO also comes along with a Request for Production of Business Records for Assess Penalty (called a Business Records Request a.k.a. "BRR").
 - a. It demands 3 years worth of records, eg: payroll, WC ins. Info, bank records, taxes, exemptions, etc.
 - b. Not required to provide it
 - i. If not provided the Inv. can impute a penalty.
 1. Number of workers they saw, plus any corp officers are imputed wage of roughly \$60k/ year.
 - c. Sometimes it can be a strategy to withhold info, but not very often.
4. Getting a penalty (Amended Order of Penalty Assessment "AOPA").
 - a. They try and get them done as soon as possible but waits of up to two weeks are common. More if the records are voluminous.
 - b. The Inv. used to calculate the penalty, but not since 2009. They have a specialist called a penalty calculator (PC).
 - i. Problem is that the PC knows nothing about the business and they really don't communicate with the inv. except through reading the inv. reports.
 - ii. Penalties seem to be produced at a slower rate.
 - c. Penalties come with a 21-day NOTICE of RIGHTS.
 - i. Second bite at the apple. Technically you protest only the penalty, not the stop, but I have never seen the Dept. argue that.
 - d. Penalties may be amended throughout the process of discovery.
5. Practical Considerations
 - a. How do I get the SWO lifted?
 - i. Pay 10% of the penalty, arrange a payment plan up to 60 months for the remaining 90% (no interest).

- ii. Prove that your business is in compliance (eg: a policy, exemptions, or covered through a payroll company).
 - iii. You then get a **CONDITIONAL** release of the SWO.
 - iv. You are put on a “probationary” status, meaning the department can check on your business for compliance. They passed this agency 2010, but I have never seen them actually do this.
- b. If you fail to pay for several consecutive months, the SWO will be re-imposed.
 - i. To lift it again, you have to pay off the **ENTIRE BALANCE**.
- c. The Dept. does not “settle” cases. They are completely ludicrous about this.
 - i. I can remember only twice the Dept. settling a case:
 - 1. There was a pizza franchise which had a \$970k fine that was brought to \$3k. Reason: it was an election year 2010 and the owner told Alex Sink, via a polite letter, he would smear her name in the Orlando Sentinel for closing his 5 shops and having 120+ jobs destroyed.
 - 2. There was a time an attorney depo’d the Chief of the Bureau of Compliance and she failed miserably in her depo and she knocked the penalty from \$2.5 million to \$435k. She was fearful of being put on the stand at DOAH. This person is not the current Bureau Chief.
 - ii. The DWC cites the language of “shall assess” a penalty (based on payroll) as an absolutely inviolate command. The DWC then tells legal that legal will not settle a case. The problem is that the lawyers at legal would love to settle a case and bring some definite money into the DWC Trust Fund. The DWC seems to have this all or nothing approach.
 - iii. So when the lawyers lose a case the DWC always blames the lawyers and they never blame themselves for such a crappy case.
 - 1. I personally believe this system should be retooled and hopefully with a few fee cases that I plan on winning, maybe they will reconsider.
- 6. The Division of Administrative Hearings “DOAH” process.
 - a. Your filing the Request for Hearing initiates the process.

- b. You have the opportunity to have a hearing anywhere in the state.
 - i. Video hearing through “skype-like” technology if you choose to have the hearing outside of Tallahassee.
 - c. Strategically best to have it in TLH, I’m just old-school like that.
 - i. I tell clients that I see the ALJs in my local bar meetings and have developed a good rapport and reputation (it’s true!).
 - d. DOAH, is basically a court very similar to any other, Evidentiary rules are slightly relaxed (hearsay is permitted), but I pretty much treat every case like a circuit court case. I recommend you treat it like Circuit Court.
 - e. The trial date is expedited generally held within 40-70 days from the day of the initial order.
 - f. The trial is pretty expedited: simple opening, witnesses brought forth, and that’s it. You save your closing for the Proposed Recommended Order (PRO) where you encapsulate your Statement of Facts, Conclusions of Law, and Argument.
 - g. The PRO is supposed to be filed by the 10th day after you receive the transcript.
 - i. Can request additional time, but this gets the ALJ off the hook for abiding by his timeline for producing his Recommended Order (RO).
 - h. Judge required to produce RO within 30 days.
 - i. if litigants file PROs later than 10, then the judge has no time limit, but most are pretty good about it.
 - ii. Litigants may file “Exceptions” to the RO and direct them to the AGENCY.
 - i. RO is filed with AGENCY (DFS) and they have to produce a Final Order (FO)
 - j. The FO need not agree with the judge’s finding of facts or conclusions of law, but the standard is pretty high to overturn the judge’s FO.
 - k. FO is filed with DOAH
7. What happens if you get a SWO revoked?
- a. You can seek fees by going after the agency under 120.595.
 - i. Up to \$50k in legal fees.
 - ii. Includes costs, as well.
 - b. This is a separate DOAH hearing.
 - c. The Department pays out fees maybe once a year.
 - i. Only because so few lawyers know how to defeat a SWO

ii. Not many lawyers know about 120.595

8. What should you do when your client gets one?

- a. Have them call me.
- b. Ensure that they protect themselves by Challenging the SWO and Penalty (remember you get TWO bites) once at SWO and once when the AOPA is issued.
- c. DON'T give them records right off the bat.
 - i. I'd like to know if there is more exposure as opposed to less.
- d. HAVE THEM CALL ME.

9. Questions from callers.

- a. Please ID your name, firm, and town.
- b. Fire away with your question(s).