The skilled labour shortage is a legal problem, not only a recruitment issue

Owen Newman and **Chris Chasin** of **Duane Morris LLP** warn that the skilled labour shortage isn't only a recruitment problem, it has potential legal implications as well. And the crisis is not going away, so make sure your legal team is up to speed.

KEY POINTS

- The construction industry's skilled labour crisis is not in dispute, it crosses international borders and industry sectors.
- It is a legal issue, one that in-house legal teams should be proactively addressing with the project teams they support.
- A labour pool that does not have enough qualified tradespeople to staff your project at the level you priced is not a contractor execution failure.
- The legal significance of that distinction is substantial: it is the difference between a productivity claim that invites a lack of supervision defence and a market-condition claim that engages force majeure, impracticability, or exceptional events relief.
- Documentation of labour shortage issues can help with negotiations with clients when productivity has been hit.

Skilled labour shortages rarely announce themselves as such. They masquerade as other problems – ones your team is already reporting, categorising, and responding to, many times without recognising the underlying issue. Legal's job is to see the pattern, name it, and make sure the project record reflects what is actually happening.

The construction industry's skilled labour crisis is not in dispute. It crosses international borders and industry sectors – from energy and power generation to data centres, nuclear, and renewables. Ninety-two percent of U.S. construction firms for example cannot fill open positions. Nearly half a million net new workers will be needed annually just to keep pace with retirements. Sixty percent of energy firms worldwide report critical hiring bottlenecks. Industry leaders, companies, and project teams are actively engaged in efforts to manage it. It is also a legal issue – one that in-house legal teams should be proactively addressing with the project teams they support.

The shortage that doesn't look like one

Experienced construction lawyers develop pattern recognition over time. They know when a series of design changes starts to look like cardinal change. They know when adverse weather begins to satisfy the test for force majeure. They know when schedule compression starts to look like constructive acceleration. Skilled labour shortage requires the same instinct, which is largely a new skill because the shortage has not, until recently, been consistently severe enough to generate the volume of disputes that builds it. Most of us learned to spot these patterns the hard way: by missing them the first time.

Here are some of the patterns that may indicate an issue with skilled labour: Earned progress falling behind the curve on specific trades while overall headcount and man-hours remain steady – a signal that you have bodies on site but not the right skills doing the work. Excessive overtime used as a response to under-delivery, masking rather than solving the underlying problem. High turnover among subcontractor crews, particularly in trades under regional pressure. Quality and safety incidents disproportionate to the scope – more rework and more near-misses than usual. And perhaps the clearest signal of all: delay without a discrete, documentable cause event. Progress is simply slower than it should be, and there isn't a clear and obvious reason why.

No single one of these conditions is conclusive. But when several appear together, on a project in a regional market where labour is objectively constrained, they tell a different story than any of the individual symptoms would suggest. They tell the story of a market condition, a regional labour pool that does not have enough qualified tradespeople to staff your project at the level you priced, not a contractor execution failure. The legal significance of that distinction is substantial: it is the difference between a productivity claim that invites a lack of supervision defence and a market-condition claim that engages force majeure, impracticability, or exceptional events relief.

Ask "why?" until the picture is complete

Legal's role on a construction project is to support the team, and on labour availability that means being genuinely curious: asking questions, listening carefully to how the project team characterises the challenges they are seeing, and following the thread until the root cause comes into focus – not as an auditor, not as a second-guesser, but as a partner.

When a project manager reports that earned progress is falling behind on electrical work, start with the basics: Who is on the crew, and how does that compare to what was planned? What has changed since the last reporting period – in headcount, experience mix, or subcontractor staffing? Where is the underperformance concentrated – across the board, or in specific areas or tasks? When did the trend begin and does it correlate with any observable workforce shift? Why does the project team believe it is happening – and if the answer is vague or defaults to 'productivity', that is itself a signal worth pursuing. Follow the thread: Are other trades showing similar patterns? Is overtime running above plan? Are journeyman-to-apprentice ratios where they were at bid? Is the subcontractor losing people to competing projects in the region?

None of these are "legal" questions in the traditional sense. They are the questions a well-informed partner asks to help the team think through whether what they are seeing is a project execution issue, a market condition, or some combination of both. The project team owns the operational analysis. The best legal teams I've seen ask 'why?' enough times – genuinely, not as an interrogation – to ensure that the analysis is complete, that the root cause is identified, and that whatever the team decides to do about it is supported by the right documentation from the start. A project manager who hears "walk me through what's driving turnover on the mechanical crew" is having a collaborative conversation. That conversation, pursued honestly, is often what surfaces the labour market reality that no one had named.

Read the contract again – with different eyes

Most legal teams reviewing a construction agreement for labour risk go directly to the force majeure clause. It's the obvious provision – but a skilled labour shortage doesn't implicate one clause. It implicates a constellation of provisions that nobody grouped together because they weren't thinking about labour markets when they reviewed the contract.

Contract provisions such as sufficiency and quality of workforce covenants, quality and safety specifications, price escalation mechanisms, and shared contingency structures are frequently drafted to address issues that appear, on their face, unrelated to available skilled labour. But when a constrained workforce is at issue in a subsequent dispute, each of these clauses raises questions that can determine whether the contractor bears the loss alone or shares it with the owner.

A skilled labour market constraint can implicate provisions across the entire agreement, and making those connections visible to the project team is where legal adds the most value – so that when notice is given, claims are quantified, and entitlement is argued, the full contractual picture is on the table, not just the force majeure clause.

For future contracts, the concept is analogous to a geotechnical baseline report: Establish the labour market assumptions at the time of contracting – prevailing trade availability, regional wage rates, workforce pipeline data – so that both parties share a common baseline against which deviations can be measured. The specifics will be project- and market-dependent, but the principle is straightforward: if you want to claim that market conditions changed, you need to have documented what they were at the start.

Document the market, not just the project

Legal and contractual bases for seeking relief from impacts caused by skilled labour shortages already exist. The primary bases are contractual: For instance, FIDIC 2017, Clause 18 (exceptional events) and AIA A201-2017 Section 8.3.1 (extensions of time for causes beyond the contractor's control) may provide some measure of relief. Legal doctrines like impracticability or impossibility may also exist. But regardless of the basis, there are likely two primary considerations: (1) foreseeability and (2) causation – both of which are difficult to credibly reconstruct three years later during deposition preparation.

Foreseeability starts at formation. What assumptions did the estimating team use in developing the bid – which trades, rates, subcontractors? Were they based on reasonable sources – regional employment data, subcontractor representations, documented wage data? Did the contractor review and consider publicly available records regarding competing projects?

Causation largely depends on documentation compiled during execution and needs to capture data from the local labour market, not just the project. Market evidence can be statistical, but it also needs to include narrative: the competing mega project drawing from the same regional trade pool, the hiring incentives and wage escalation on other local jobs, and the inversion of journeyman-to-apprentice ratios on critical-path work. These are the types of narrative that can make a difference down the road.

Notice is where recognition of the underlying issue matters most. And I've seen it happen more often than it should. A notice that misidentifies the cause – reporting productivity losses on structural steel when the actual driver is a regional shortage of qualified ironworkers – creates two problems. First, it may fail to satisfy contractual notice requirements for the actual claim. Different causes often trigger different notice provisions with different timing and content obligations. Second, it forfeits the opportunity to present the owner with a contractually legitimate, market-based explanation – one that invites collaborative problem-solving rather than positional defence.

The contractor who arrives at a dispute with a baseline that documents what was reasonably foreseeable at contract formation, an execution record that tracks how market conditions evolved and how the project was affected, and a set of notices that name the condition and establish causation in real time is in a materially different position than one reconstructing all of that retrospectively. That difference is not about diligence – it is about whether the record tells the story of a market condition or the story of a project that underperformed.

The skilled labour crisis is not going away, and it is a virtual certainty that some, if not all, of your project teams are to some degree already managing its effects. Legal's instinct is often to wait and let the project team run the project while preserving options for down the road.

But the greatest value legal can add on this issue is not at the back end. It is mid-project, helping the team identify a root cause they may not have named, documenting it with the rigour and context that makes it credible, and presenting it to the owner as what it actually is: a shared problem with a factual basis, not a contractor's after the fact excuse. Owners know the difference. A well-developed, contemporaneous presentation grounded in real causation and supported with facts invites a conversation. A reconstructed narrative at the end of the job invites a fight. Help your team get to the conversation. **CL**