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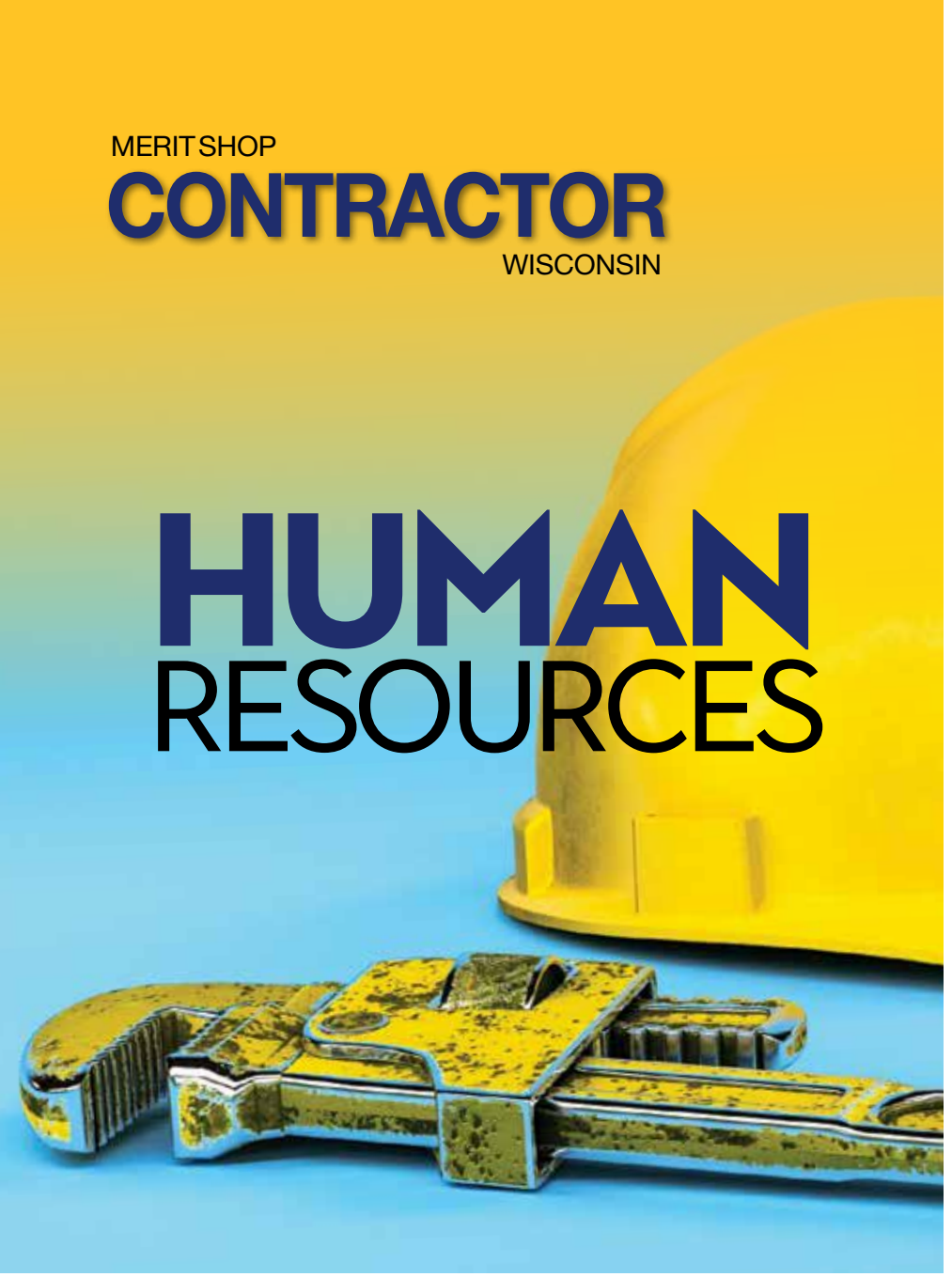

HUMAN RESOURCES

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Merit Shop Contractor Wisconsin is published six times annually by Associated Builders and Contractors of Wisconsin, Inc. (ISSN# 10642978)
5330 Wall St., Madison, WI 53718. Periodicals Postage Paid, Madison, WI and other additional mailing offices. (UPS 340-650). Subscription price is $50 per year.

President and Publisher: John Mielke
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FROM OUR PRESIDENT

The grass is not always greener tool

WHILE THERE ARE MANY GOOD REASONS FOR BELONGING TO AN ASSOCIATION, ONE THAT IS MOST GRATIFYING TO SEE AS A CHAPTER PRESIDENT IS WHEN MEMBERS COME TOGETHER TO DEVELOP SOMETHING THAT WILL SERVE THE GREATER MEMBERSHIP. It's great to see when ABC members selflessly exhibit a desire to assist other companies within the organization. So many of our members have this altruistic trait; willing to share knowledge and expertise with other member volunteers.

The most recent example occurred over the last several months, as members of our chapter's Human Resources Committee were asked by the chapter board of directors to develop a Total Compensation Statement Tool. You've likely seen a total compensation statement, which shares the full picture of an employee's compensation package, including wages, along with the indirect hidden cost of benefits. The chapter sought to develop a benefit statement model to be used as a tool that can be customized by each member who chooses to do so. The new model will allow any employer to plug in a few benefits (numbers) to come up with a statement showing employees a true measure of the value of his or her total compensation.

Many employers assume their employees know the total dollar value of what they're being compensated, but most employees have no idea about the combined direct and indirect compensation provided by their employers. Often times, uninformed employees may "jump ship" for another company they think is more lucrative but isn't. We all know the adage that the grass is not always greener on the other side. Having this tool to use with employees may help them appreciate what they already get, instead of desiring what they think is lacking.

The idea for developing the model emerged organically, as members requested it. It's not the only tool required for the merit shop, as this magazine and the HR & Accounting Conference address. Employee satisfaction, which requires building relationships with your employees and developing a strong culture are just as important and an area in which merit contractors can capitalize. Certainly, our chapter will continue to promote best practice tools for these important areas.

> "MOST EMPLOYEES HAVE NO IDEA ABOUT THE COMBINED DIRECT AND INDIRECT COMPENSATION PROVIDED BY THEIR EMPLOYERS.

There's an article in this issue of the Merit Shop Contractor magazine by two of the total compensation project leaders, Jenna Oliver of Daniels Construction and Angela Wilcox of Stevens Construction Corp. They do a nice job examining the pros and cons so you can decide if this tool is right for your company. There will also be a session on the model at the HR & Accounting Conference next month and we'll be rolling out other instructional materials that explain how to use the tool.

I hope you feel as I do that our member leaders and volunteers hit the mark on this latest membership benefit. Meanwhile, watch your chapter mail to learn how you can acquire the Total Compensation Statement Tool, if you haven't received it already.

THE UNION SURGE

HOW CONTRACTORS CAN GET AHEAD OF THE CURVE

By Dan Barker – JacksonLewis

After decades of decline, the union movement found new life in 2022. In July, the National Labor Relations Board (NLRB) reported that union election petitions in the first three quarters of the federal fiscal year increased by 56% over the prior year. Unfair labor practice charges increased by 14%. Moreover, in 2021, a Gallup poll reported that 65% of Americans approve of labor unions — the highest approval rate since the 1960s.

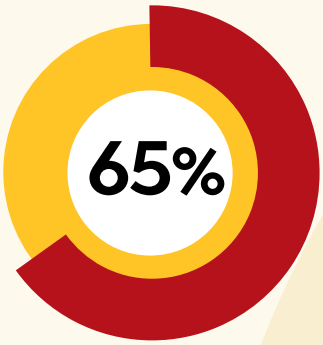
These statistics confirm the anecdotal evidence we have observed over the course of the past two years. Unions have filed election petitions at over 340 Starbucks locations and have already won elections at 211. Starbucks has won the election in only four stores. Unions have also won high-profile elections at Amazon and Apple. And you may remember the 2021 strike at John Deere that lasted over a month and ended with Deere paying massive lump sum bonuses and double-digit percentage wage increases.

The reasons behind this explosion of union activity across the country are no surprise. Isolated and frightened by the pandemic, many Millennials and Generation Zs are searching for belonging, connection, meaning, and relief from economic uncertainty. The new union movement promises all these things. Even better, when you get involved with a union, you can post cool pictures on Instagram with your fist in the air. Surely that's power.

Along with these various forces, the youngest generation has seen politicians and business leaders crumble in response to direct action protests. A decade ago, no one would have dreamed to think that a major city would abandon a police station, allow it to be burned, and then take steps to dismantle its police force. Nor would anyone think that downtown Kenosha would be reduced to a smoldering ruin. The message that many young people have received is that if direct action protests can spark societal change, then the same is likely true at work.

It's all very intoxicating: I can get together with my friends at work, protest, speak truth to power, and be better off because of it. In 2022, what young person wouldn't want to join that movement based on those promises?

Finally, on a regulatory level, Joe Biden promised to be the most pro-union president ever. He is delivering through aggressive policymaking at the National Labor Relations Board. For example, even though Biden's "card check" legislation



OF AMERICANS APPROVE OF LABOR UNIONS

failed in Congress, his administration has not given up. They have just changed course, and NLRB's General Counsel is asking the NLRB (which is dominated by Biden appointees) to issue a decision which essentially has the same effect as card check legislation.

In light of all of this and out of the ashes of the 2020 protest movement, unions have found a winning recipe: Start by providing the connections that workers have been missing for the past several years, sprinkle in some social justice/direct action principles, and top it off with a promise of higher wages and benefits.

To date, much of this new wave of union success has been focused on lower-skilled, lower-paid workers working routine jobs. It has not caught on amongst the traditional construction unions. So far, those unions have generally retained their myopic focus on union benefit funds when organizing and recruiting. But that old model has not worked very well for many years and many unions have declined badly. For example, merit shop contractors have learned how to expose the truth about failing union pension funds. Still more have made sure that their pay, benefits and advancement opportunities outpace the local union contracts.

Because the old model has not been successful, it is only a matter of time before the construction unions begin to model their organizing around what is working at Starbucks. And when they finally change their tactics, merit shop contractors need to have seen that shift coming and be miles ahead. Getting out front of this issue is possible because nimble, motivated businesses can adapt better and more quickly than union tactics.

So, what is the winning formula for merit shop contractors? Merit shop contractors should pay attention to and master the basics of employee retention and satisfaction better than ever. This means realizing that pay and benefits are just the starting point. If a company allows its focus to be myopic on pay and benefits, they make the same mistake that the unions have been making for years.

Instead, the answer lies in creating a thriving community within a workforce. Critically, that community must be based on a real connection between workers and managers. It means paying attention to what workers are interested in and creating connections with individual workers. In reality, it's no different than what has been important for decades. It's just more important now than ever before.

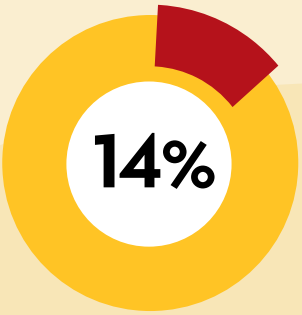
Think about what gives your employees meaning in their work life. Think about what excites them about coming to work and what they like to do outside of work. Then find ways to help them embrace those things in genuine, meaningful ways. And remember—everyone wants to feel appreciated and valued for their work. It's universal. Don't get so wrapped up in the day-to-day that you overlook an opportunity to give genuine and well-earned praise.

Just as importantly, think about what worries and fears and negative emotions your employees may be holding inside about inflation, economic uncertainty and about their jobs in general and then work to address those concerns out in the open as challenges to overcome together. Acknowledge the challenges and embrace them. This takes courage and skilled communication. But by addressing issues and concerns early and head-on, it is less likely that someone will be able to turn your employees' worries into weapons against you.

Every company and every tradesperson is different, but great companies find creative ways to connect with employees. The good news for construction industry employers is that their employees have chosen the trades as a concrete direction in their lives. In other words, it's a little easier to figure out what makes an electrician tick than figuring out how to help a Starbucks barista find meaning from his or her job.

What is critical is that the employer makes a genuine effort to connect with employees. A hollow or forced effort will lead to failure. Genuineness cannot be faked, and employees

UNFAIR LABOR PRACTICE CHARGES INCREASED BY



MERIT SHOP CONTRACTORS SHOULD PAY ATTENTION TO AND **MASTER THE BASICS** OF **EMPLOYEE RETENTION AND SATISFACTION** BETTER THAN EVER.

UNIONS HAVE FILED ELECTION PETITIONS AT OVER **340 STARBUCKS** LOCATIONS AND HAVE ALREADY WON **ELECTIONS AT 211.**

will see through insincerity every time. Instead, commitment to a strong culture that prioritizes employee wants, needs and desires has to become and remain a true priority. The same is true for addressing adversity and change as a team: lip service and platitudes are worse than nothing at all. The bottom line is that you have to truly care about the employees. When you do, they know it because you show it in everything you do.

Finally, each employer that wants to remain union free also has to think about whether it wants to be proactive in educating employees about union issues. Many employers avoid doing this because they think that discussing unions will make employees more interested in the topic and may cause people to seek out more information from unions. The countervailing (and likely more accurate) view is that unions are constantly probing for interest among employees and employees will likely be approached at some point to join or organize. Only when employees know the basics are they better positioned to think for themselves. In other words, many employers find that it's easier to help employees understand union issues before the union knocks than to have to try to change someone's mind after they have already received a sales pitch. Of course, employers that choose to communicate on these topics need to approach proactive communication thoughtfully and ensure that they know the legal rules surrounding these communications.

The union movement has accelerated with some recent big wins. Now is the time for contractors to examine their workplace cultures and prioritize connection with their employees. Doing so could prevent future union gains in this industry that have taken hold in the service industries.

Daniel D. Barker is a principal in the Madison, Wisconsin, office of Jackson Lewis P.C. Daniel represents employers in all labor and employment law matters.

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- **HR BOOT CAMP: OSHA – ACHIEVABLE SAFETY COMPLIANCE IN THE CONSTRUCTION INDUSTRY**
  Online, Sept. 22
- **NETWORKING SOCIAL**
  La Crosse, Sept. 22
- **HR BOOT CAMP: DRUG TESTING AND REASONABLE SUSPICION TRAINING GUIDELINES**
  Online, Sept. 29
- **PROJECTS OF DISTINCTION DEADLINE**
  Sept. 29
- **NETWORKING SOCIAL**
  Wausau, Oct. 6
- **FOREMAN FUNDAMENTALS**
  Madison, Oct. 19
- **NETWORKING SOCIAL**
  Waukesha, Oct. 20
- **THE CONSTRUCTION TEAM**
  Madison, Oct. 20
- **HUMAN RESOURCES & ACCOUNTING CONFERENCE**
  Wis. Dells, Oct. 26-27
- **COMPANY CULTURE AND EMPLOYEE ENGAGEMENT**
  Wis. Dells, Oct. 26
- **PROJECT SUPERVISION SERIES BEGINS**
  Madison, Nov. 3
- **THE CONSTRUCTION FOREMAN**
  Madison, Nov. 9
- **THE CONSTRUCTION LEADER**
  Madison, Nov. 10
- **NETWORKING SOCIAL**
  Green Bay, Nov. 10
- **THE GREAT LEADER**
  Madison, Nov. 16

ABC Wisconsin 50TH ANNIVERSARY 1972-2022

CHEERS TO 50 YEARS

THE INFLATION REDUCTION ACT

A CLOSER LOOK AT ITS PREVAILING WAGE STRUCTURE

By John Rubin – von Briesen and Roper, s.c.

On August 16, 2022, President Biden signed into law the Inflation Reduction Act of 2022 (the "IRA"), just barely passing the U.S. Senate at 51-50. The IRA has been subject to intense controversy and criticism by key affected stakeholders. While legitimate questions remain whether the IRA will actually impact inflation, one thing is certain—the IRA significantly expands Davis-Bacon to the clean and renewable energy sector.

While the general pro-organized labor aspect of the IRA has received attention, the author believes that several concerns regarding the pro-union horizon have gone under the radar. To facilitate development of plan-ahead strategies and maximize risk-reduction parameters, this article overviews the prevailing wage expansion on a big-picture basis and provides specific action points for immediate consideration.

Expansion of Davis-Bacon coverage to the private sector

The nation's primary labor law—the NLRA—is premised on employee-free choice, including the option for right to work. Unionization rates have declined dramatically in recent decades, with the preference for efficiency-value in an unencumbered and dynamic workforce. The declining value of organized labor perhaps manifests in the IRA's implicit message, "If employees keep choosing the wrong option, we will just take away their choice."

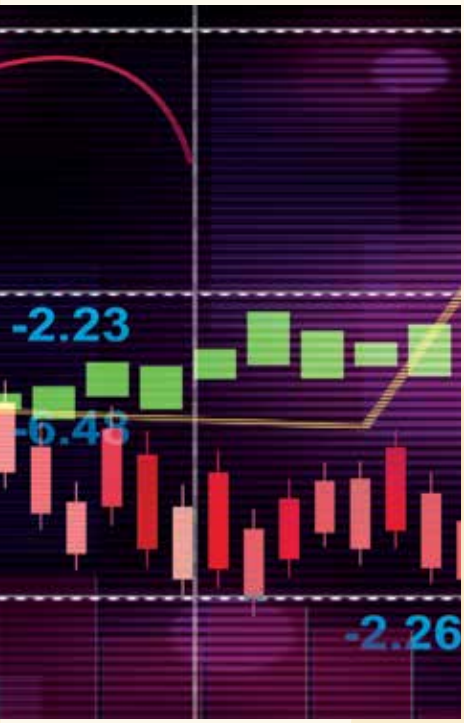
AT PRESENT WE **DO NOT KNOW** HOW THE PREVAILING WAGE REQUIREMENTS OF THE IRA WILL BE ENFORCED.

Reflecting this choice-avoidance turn, the IRA effectively mandates traditional labor union style compensation structures through a sweeping expansion of the Davis-Bacon Act to private companies. As clean and energy efficient projects follow public attention for emerging technologies, private developers of solar, wind, hydrogen, carbon sequestration, and electric vehicle charging stations now face challenges on an inflated cost to maintain preferred workforce structures under the IRA's shadow.

The IRA drastically raises the cost of union-free projects, slashing existing tax credits for clean energy projects from 30% to 6% unless prevailing wages are paid. Coverage is for all mechanics and laborers from top to bottom across the board—all contractors and subcontractors for any construction, alteration, or repair of qualifying projects, with no exception provided for individual priorities. Only then will the full 500% bonus credit apply. And unlike a collective bargaining agreement, Davis Bacon is not subject to negotiation. Market forces need not apply.

The story of a Davis-Bacon audit

Consider the following. You, as Construction Solutions Company XYZ, are hired to work on a federal contracted project. You have long reflected the expressed preference of the workforce to operate autonomous of organized labor strictures. You have costed the prevailing wage into your bid. To the best



of your knowledge and plans, all the prevailing fringe benefits will be paid.

As the project commences, the local union appears, asking that you become a full local signatory on a regional basis. You politely decline, as is your workers' preference.

As work gets underway, huge inflatable animals ("Scabby the Rat") and banners accumulate on the side of the road. The press is contacted and publishes attention-grabbing headlines which you know are not true. Local union patrols stand by the side of the road, videoing on their phones round the clock. Some of your foremen are fined, as they may have an inactive union card in the distant past, never formally withdrawn, as suddenly it is discovered that they have been "disloyal" to the local after all these years. Suddenly mysterious "interest groups" emerge. They trail employees around town, asking to "talk."

One day, government investigators arrive at your worksite. They demand to interview employees "confidentially." You receive notice that you are under investigation by DOL for irregularities with prevailing fringe benefits and classifications. Apparently, "evidence" exists showing that there is work performed off the clock; they say that foremen are working on machines too much, we will need to interview them alone. You are presented with a formidable stack of records. Payment is demanded for figures with several zeros past the comma. The hurried explanation is not understood. You search through stacks of documents, crunch numbers, try to show errors. The investigation proceeds.

You are forced to hire a lawyer. You are told that you can appeal if you would like, but that may exceed the cost of the claimed back wages. There is mention of debarment proceedings in the event of an appeal. And you wonder whether it would have just been better to sign on with the local in the first place. As it is, you have been paying prevailing wage and fringe benefits, so what is all this about?

The above raises the question, "Now that Davis-Bacon has been expanded, do I have any vulnerabilities to an audit?" A vulnerability, of course, can be exploited. And if so, what can I be doing now? (Please see below for suggestions.)

How will the prevailing wage requirements of the IRA play out?

The answer to the audit question above is definitely, "Yes." However, at present we do not know how the prevailing wage requirements of the IRA will be enforced. As is so often the case, "the devil is in the details," and the IRA itself is short on details as to enforcement. Will DOL investigators include IRA compliance in their Davis-Bacon and other prevailing wage investigation and enforcement procedures for Davis-Bacon-related acts? Or will the mechanism of enforcement be IRS audits? Or perhaps both? Could the recently announced (and so well-publicized) increase in IRS funding be in contemplation of IRA prevailing wage investigations? Is this purely a tax issue, or also a labor standards issue? How will enforcement and compliance as to correct wage classification be conducted? Who will be responsible for determining any disputes as to working foremen? What if there is a challenge on whether my company has submitted certified payroll in the correct format? Will that even be required? If I made an underpayment, will that somehow count against me as to the "intentional disregard" penalties? Who will investigate and determine apprentice program claims? What constitutes a "good faith effort" of compliance for the safe harbor provisions? What will the recordkeeping requirements be? How onerous? How closely scrutinized? How complicated? What exactly counts as a qualified project?

For now, we will have to wait to learn more to these critical questions. The IRA directs the Secretary of the Treasury to issue "regulations or other guidance... for requirements for recordkeeping or information reporting" under the IRA's prevailing wage components. However, things will move fast after the guidance and regulations issue—coverage starts as early as 60 days after issuance. Employers will need time to review the regulations in detail and identify questions and issues.

Considerations for employers in light of the above

Contractors will likely benefit from conducting a general analysis of issues and topics in consideration of what lies ahead. With much more to come as to details, the following are suggested as subjects to think about and develop rough action plans on:

❶ Conduct overview and assessment as to potential coverage under IRA prevailing wage provisions;
❷ Survey labor union environment and identify key players in localities of ongoing and future projects;
❸ Update (or develop) company policy on workforce freedom/right-to-work and communicate messages to key supervisors;
❹ Train supervisors on what to say and not to say if organizing begins;
❺ Make sure workforce is OSHA compliant and controlling the narrative as to safety optics to public;
❻ Consider overtures and contacts with apprenticeship stakeholder organizations and networks;
❼ Identify vulnerabilities on flow and process based on experiential review of prior prevailing wage projects;
❽ Develop costing projections to build efficiencies in light of increased costs for bidding. ABC Wisconsin

John Rubin is an experienced labor and employment law attorney with von Briesen and Roper, s.c.

BACKGROUND CHECKS

THEY CAN HELP IN THE HIRING PROCESS

By Doug Witte – Boardman Clark

Many employers conduct background checks as part of their hiring processes. As long as such checks are used on a consistent basis and done properly (for example, complying with the requirements of the Fair Credit Reporting Act – which is beyond the scope of this article), background checks can be an extremely helpful tool in making good hiring decisions. Employers who discover information about arrests or conviction records need to be cautious with what they do with such information. Wisconsin courts recently issued two decisions which provide reminders and clarity with respect to important legal issues in this area.

Conviction records and hiring considerations

The Wisconsin Fair Employment Act (WFEA) generally prohibits employers from discriminating against individuals on the basis of their arrest and conviction records, subject to certain exceptions. One of those exceptions permits employers to refuse to hire or terminate an employee or applicant if the material circumstances of a pending charge or conviction bear a "substantial relationship" to the circumstances of the job at issue. This is known as "the substantial relationship test." Generally, a substantial relationship will exist if the circumstances of the workplace would present an unacceptable level of opportunity for the employee to re-offend in the workplace. It is the employer's burden to prove the existence of a substantial relationship.

The Wisconsin Supreme Court, in a 4-3 decision, recently addressed the substantial relationship test in *Cree, Inc. v. Labor and Industry Review Com'n, 2022* WI 15. In 2015, Derrick Palmer applied for the position of Applications Specialist with Cree, which at the time manufactured and marketed lighting components. His job duties would have included traveling to customers' facilities for consultations, working collaboratively with customers and coworkers, and occasional travel with overnight stays in hotels. His job also required him to work largely independently without direct supervision. Additionally, he would have been working at facilities which were large and had certain secluded areas that were not monitored by security cameras.

Cree made Palmer a contingent job offer subject to a criminal background check. The background check revealed that Palmer had been convicted in 2013 of eight violent crimes against his then-girlfriend, including sexual assault, felony strangulation and suffocation, misdemeanor battery, and criminal damage to property. After consulting with its legal counsel, Cree rescinded the job offer. In response, Palmer filed a complaint with the Wisconsin Equal Rights Division (ERD) and alleged that Cree had unlawfully discriminated against him on the basis of his prior convictions. An Administrative Law Judge (ALJ) held that Cree did not violate the law. The Labor and Industry Review Commission (LIRC) reversed and held that Cree did violate the law by refusing to hire Palmer. The circuit court then reversed LIRC's decision. Finally, the court of appeals reversed the circuit court.

The Wisconsin Supreme Court held that Cree had met its burden of demonstrating the existence of a substantial relationship and addressed how courts, agencies, and employers should analyze whether a substantial relationship exists between a conviction and a job. The court reiterated that the relevant inquiry is whether the circumstances of the Applications Specialist position would have presented opportunities for Palmer to reoffend in the workplace. Applying that inquiry to this case, the court reasoned that the violent nature of his crimes demonstrated his propensity for exerting control and dominance which would have presented opportunities for him to reoffend in the workplace given the position's emphasis on interpersonal relationships.

The court criticized prior LIRC precedent that distinguished crimes of domestic violence from other types of crimes. Previous LIRC decisions had consistently held that domestic violence crimes, due to their nature as crimes related to personal, intimate relationships, were not substantially related to most jobs in workplace settings because such jobs would not present the opportunity for the applicant to reoffend in the workplace. Based on these decisions, in many circumstances it was legally risky to deny employment to applicants with convictions for crimes of domestic violence. The majority opinion in Cree emphasized that cases involving convictions for domestic violence needed to be analyzed in the same manner as any other conviction. The court stated the circumstances of the crimes and the circumstances of the opportunity to re-offend do not need to be identical.

Returning to Palmer's situation, the court said that the circumstances surrounding domestic violence, particularly of the severity of Palmer's actions, could present opportunities for an employee to reoffend in the workplace. The court identified "character traits" it believed were revealed by the elements of crimes of domestic violence as a means of trying to determine whether those traits were likely to resurface in the job. Such character traits included the propensity for exerting control and dominance which could also lead

EMPLOYERS WHO DISCOVER INFORMATION ABOUT **ARRESTS OR CONVICTION RECORDS** NEED TO BE CAUTIOUS WITH WHAT THEY DO WITH SUCH INFORMATION.

ANOTHER TRICKY AREA FOR EMPLOYERS TO NAVIGATE IS WHAT TO DO WITH A **CURRENT EMPLOYEE WHO GETS ARRESTED** OR AN APPLICANT WHO DISCLOSES THEY HAVE PENDING ARREST CHARGES AGAINST THEM.

Palmer to reoffend through professional relationships with customers and coworkers. The court did not narrowly view the circumstances of Palmer's convictions as only relating to personal, domestic relationships. The court also noted the lack of regular supervision, overnight stays in hotels, and lack of security cameras in secluded areas could present further opportunities for Palmer to reoffend.

The court emphasized that in addition to the character traits of the offense, one should also consider issues such as the seriousness of the offense; the number of offenses; how recent the conviction is; and whether there is a pattern of behavior. The court's focus on these issues is a significant departure from prior Wisconsin law.

The court noted the more serious the crime, the less an employer should be expected to bear the risk of recidivism. For example, the risks associated with employing a convicted shoplifter who might steal again is less severe than employing a convicted violent offender who might be violent again. Likewise, the court stressed that the relatively short period of time between the conviction and the application for employment can be a relevant factor in determining the likelihood to reoffend in the workplace. Prior to this decision, the period of time between conviction and application for employment was generally irrelevant to the substantial relationship test. The court's focus on the nearness of the conviction in time suggests that an employer's reliance on an old conviction might raise legal risk under the substantial relationship test.

Taken as a whole, the court concluded that Cree had satisfied its burden of demonstrating the existence of a substantial relationship between Palmer's convictions and the job at issue. However, the court also stressed that its decision was based on the facts and circumstances of Palmer's convictions and the particular job and should not be read as a basis for rejecting all domestic violence offenders. The dissenting justices suggested that the majority opened the door for employers to assert that anyone convicted of crimes of domestic violence are unfit to work in close proximity to other people.

Cree provides some guidance to employers faced with applicants who have prior convictions. While the decision seems to tip the analysis in favor of employers, this is not a carte blanche opportunity for employers to reject applicants with conviction records. The see-saw nature of this case shows just how difficult these cases can be. Employers must conduct a case-by-case analysis of the circumstances of the position in question and to compare them to the material circumstances of the individual's prior offense(s) to determine whether a substantial relationship exists so as to justify an adverse employment action.

Arrest record issues when hiring or with current employees

Another tricky area for employers to navigate is what to do with a current employee who gets arrested or an applicant who discloses they have pending arrest charges against them. As noted above, employers covered by the WFEA are generally prohibited from discriminating against individuals on the basis of their arrest and/or conviction records, subject to certain exceptions. There are key differences in the analysis depending on whether a "conviction" or an "arrest" record is at issue. Generally, employers have more leeway to consider conviction records but are extremely restricted in considering arrest records when making employment decisions. However, one option employers may use is they generally can discharge or refuse to hire an individual based on the individual's arrest record if, through the employer's independent investigation of the conduct underlying the arrest, it concludes that the individual did commit the conduct for which the individual was arrested. This procedure is often referred to as an "Onalaska investigation" because it was established by the Court of Appeals in a 1984 decision in Onalaska v. LIRC, 120 Wis. 2d 363. Employers that rely on this procedure in court are often referred to as raising the "Onalaska defense." The Onalaska defense is not available when employers are concerned about an employee's conviction record.

In *Vega v. LIRC*, the Wisconsin Court of Appeals clarified the scope of the Onalaska defense and held that deferred entries of judgment/deferred prosecution agreements qualify as arrests and not convictions under the WFEA. Thus, the employer in Vega was allowed to terminate an employee who had two deferred prosecution agreements for felony sexual assault after it interviewed the employee and concluded he had engaged

in the conduct (the employee admitted to the conduct). This case marks an important development because it clarifies that deferred prosecution agreements are "arrests" because no final determination of guilt has been made through these agreements.

Vega began working for Preferred Sands of Minnesota, LLC (PSM) in 2010. Shortly after being hired, he was charged in Wisconsin with felony and misdemeanor counts of child sexual assault. He was convicted of the misdemeanor counts, and he pleaded guilty/no contest to the felony sexual assault charges as part of two deferred prosecution agreements. The deferred prosecution agreements stated that the felony charges would be dismissed after a period of years if he met certain requirements which included 90 days of jail time with work release. No judgment of guilt/conviction would be entered for these felony charges unless he violated the terms of the deferred prosecution agreements.

Vega continued working for PSM and informed his employer about the misdemeanor convictions and the deferred prosecution agreements. He told PSM that he would need adjustments to his work schedule to serve his jail time. PSM granted him the necessary scheduling accommodations. In 2015, he was transferred to Preferred Sands of Wisconsin (PSW), which is a sister company of PSM. When he transferred, PSW required him to submit to a criminal background check. The background check revealed his misdemeanor convictions as well as the existence of the two deferred prosecution agreements.

PSW consulted with legal counsel and interviewed Vega. The interview only addressed his deferred prosecution agreements and not his misdemeanor convictions (reminder: the Onalaska defense cannot be used with respect to convictions). During the interview, Vega admitted that the alleged conduct underlying the deferred felony charges occurred, and PSW later terminated his employment. The company's Vice President of Human Resources testified that he was terminated because: "[a]n individual who committed a sexual crime is not acceptable in our society and is concerning and makes people feel unsafe."

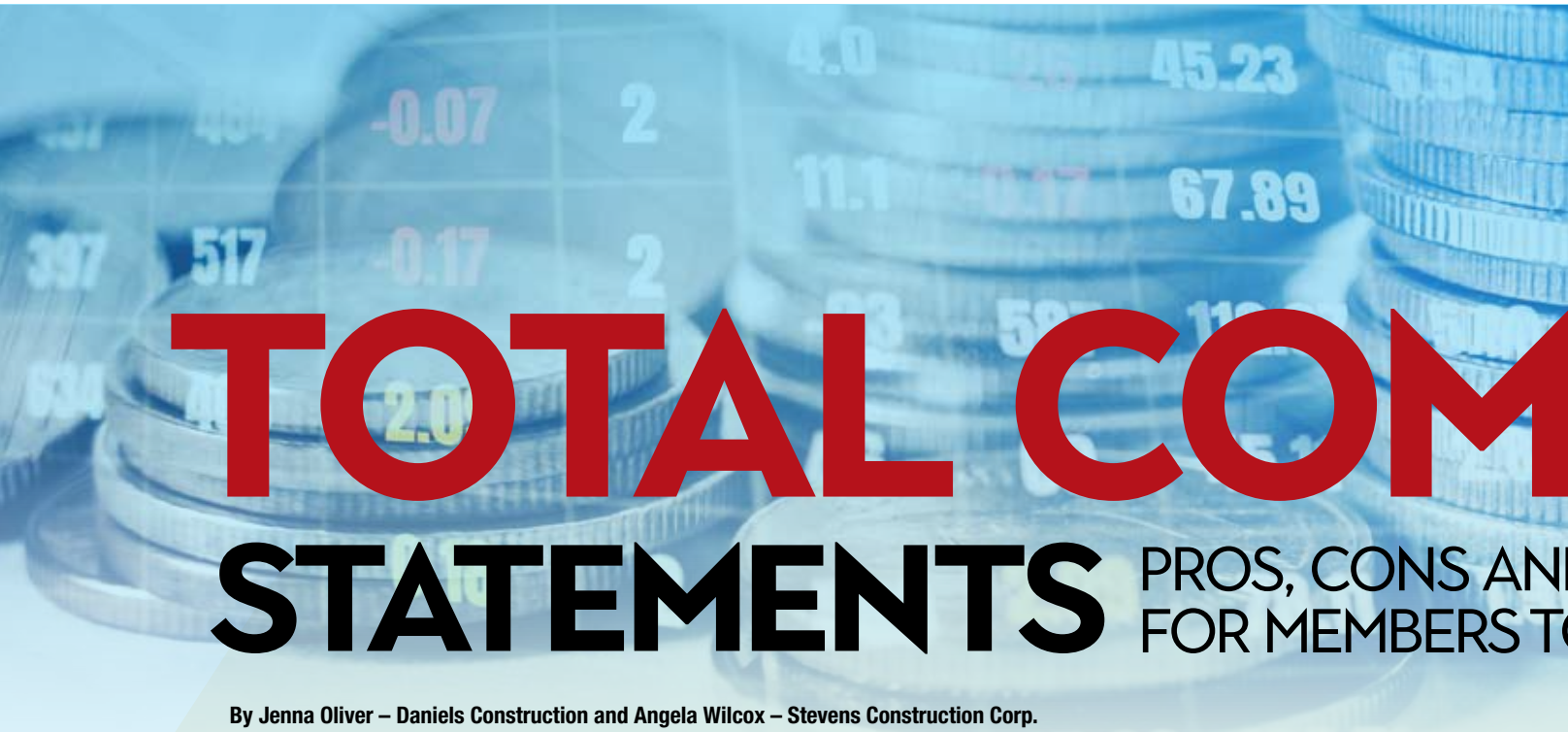
Vega filed a complaint with the Wisconsin ERD alleging arrest/conviction record discrimination. An ALJ found that PSW violated his rights under the WFEA. PSW appealed that decision to LIRC which concluded that PSW had terminated Vega for both lawful and unlawful reasons. LIRC held that the evidence showed that PSW's decision was partially motivated by his status as a sex offender which was unlawful conviction record discrimination. However, LIRC held that PSW was also motivated to terminate him because he admitted to the conduct underlying his deferred prosecution agreements during PSW's Onalaska investigation. According to LIRC, that was lawful because PSW was entitled to investigate those deferred charges under the Onalaska procedure and to terminate him because he admitted to the sexual assaults. Vega appealed LIRC's decision to the circuit court which reversed LIRC's decision and reinstated the administrative law judge's ruling. PSW appealed to the court of appeals which reversed the circuit court's decision and ultimately reinstated LIRC's decision. This ping-ponging during appeal illustrates how challenging the analysis of arrest and conviction record discrimination can be and should be a reminder to employers about seeking legal counsel in these situations.

The Court of Appeals ruled that Vega's deferred prosecution agreements qualified as arrests under the WFEA and not convictions. Therefore, PSW was entitled to investigate Vega's deferred charges under Onalaska and to terminate him based on PSW's conclusion that he had engaged in the conduct at issue. However, the Court of Appeals also held that PSW unlawfully discriminated against Vega based on his misdemeanor convictions as evidenced by the comment from the company's Vice President of Human Resources regarding sexual criminals being unfit for society. Because PSW relied on both proper and improper reasons, Vega was entitled to attorneys' fees and injunctive relief but not reinstatement or backpay.

Vega illustrates that arrest/conviction record claims can be technical and complicated. An employer's obligations depend on the posture of the individual's criminal matter and whether the matter qualifies as an "arrest," a "conviction," or even a third category, a "pending charge," at the time of the employment decision. As Vega demonstrates, the lack of a final determination as to guilt makes the deferred prosecution agreements qualify as arrests rather than convictions. Furthermore, Vega confirms that the Onalaska defense will continue to apply only to an individual's arrest record and not an individual's conviction record.

Take-aways

Employers must be cautious when approaching issues of an employee's or an applicant's criminal history. Getting proper counsel on these issues before commencing an investigation or talking to the candidate or employee may be critical to ensure compliance with Wisconsin's complex arrest and conviction record law.



TOTAL COM

STATEMENTS PROS, CONS AN FOR MEMBERS T

By Jenna Oliver – Daniels Construction and Angela Wilcox – Stevens Construction Corp.

In this uncertain job market, many employers are asking themselves two questions: What can they do to retain their qualified talent and how do they acquire new talent? One way for employers to address both of those questions is by offering a total compensation statement. Total compensation statements show employees or potential employees the true cost of an employee's direct and indirect compensation package. Even though total compensation statements are not a new concept, they are continuously gaining in popularity.

Direct compensation can be defined as "all compensation (base salary and/or incentive pay) that is paid directly to an employee." Indirect compensation can be defined as "compensation that is not paid directly to an employee and is calculated in addition to base salary and incentive pay (example – employer-paid portions of health/dental/vision insurance, retirement benefits, education benefits, relocation expenses, and employee paid time off)."

The total compensation statement is a personalized document that should go into specific details based on employees' individual employment situation. The intent is to ALWAYS give the employee a complete view of the annual value of their pay and benefits.

DIRECT COMPENSATION

"all compensation (base salary and/or incentive pay) that is paid directly to an employee."

INDIRECT COMPENSATION

"compensation that is not paid directly to an employee and is calculated in addition to base salary and incentive pay (example – employer-paid portions of health/dental/vision insurance, retirement benefits, education benefits, relocation expenses, and employee paid time off)."

Pros and Cons

Let's first dive into the pros and cons of completing an annual total compensation statement for your existing employees.

Pros –

- Employees stay up to date on their benefits that are often overlooked until open enrollment time.
- Showcases the employer's total investment in the employee. Many employees often only consider, their direct pay. However, benefit costs represent the second largest payroll expense, so it is important for employees to understand the company's true investment in them. When an employee knows the full value of their compensation package, it can help increase employee appreciation, morale, and loyalty, serving as a useful retention tool.
- Helps employees to see if they are being paid fairly and how their compensation compares to the market. Employers put a lot into making sure employees have a well-rounded compensation package, benefiting them from insurance, growth, and retirement.
- Reduces administration costs as it is a statement that employees can refer to when questions arise about their compensation and benefits, thereby reducing reliance on your HR and payroll teams.

For some of the same reasons total compensations statements can be helpful, there are also disadvantages to using them.

Cons –

- Employees may want to know how their statement stacks up against their colleagues. Although you cannot prohibit this from oc-

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curring, you can use it as an opportunity to eliminate any pay inequities that may exist and encourage open dialogue about compensation.

• Employees might not trust or feel the statement is accurate, especially if they're indifferent to or do not utilize the benefits listed. Employers can negate this by making sure their compensation statements are accurate.

• Employees may feel like it's an employer's way of not giving raises as often or to the amount the employee wants. This can be overcome by implementing standard procedures for performance reviews and pay increases.

For acquiring new talent

Next, let's discuss how total compensation statements can be used as a tool for acquiring new talent. Compensation packages include so much more than just salary detail; it's everything of value, monetary and otherwise, that an employer provides. When an employer makes an offer to a candidate, they want them to consider the entire package; not just the salary. What if the proposed salary is not what the candidate expected? It would be nice if the candidate could also see all the benefits the employer offers and any other perks of working for the organization. A robust benefits package may make a lower salary more acceptable when the candidate is considering what's most important to them in terms of their values, goals, and lifestyles.

A growing number of employers are giving their employees total compensation statements. According to Payscale's 2020 Compensation Best Practices Survey, 38% of U.S. companies provide total compensation statements. This is a slight increase from the 36% in Payscale's 2019 survey.

Should your business follow suit?

With the increased demand employers are feeling in retaining employees and generating new hires, the ABC of Wisconsin HR Committee has been working on putting together a total compensation statement template that members can customize and utilize for their individual companies.

The total compensation statement was created in Microsoft Excel format for easy customization. Employers may select from one of the two forms (hourly or salary), as the forms have slightly different cells on the top information section based on employment status.

Design:

The total compensation statement is user friendly and fully customizable from logo, title, color, cell text, and more.

Layout:

Designed to have a smooth flow from section to section, it was broken up into categories of wage compensation, paid leave compensation, insurance benefits, retirement/investment benefits, and other benefits. Each section and row may be edited or changed to accurately reflect the employee benefits.

Example: not all employers will offer vision insurance and may choose to rename this cell to another benefit provided or delete the row entirely.

The statement has formulas entered to assist in calculating the total compensation and benefits by hourly wage calculation and/or annual compensation.

Disclaimer:

We have added a disclaimer to the bottom of the total compensation statement, so employers are covered legally.

Instructions:

Instructions have been provided within the Excel document to assist employers in creating an accurate and individualized form for each employee. Each employee would have an individualized form customized to their specific benefits and elections during benefit enrollment.

When used and communicated properly total compensation statements can be a valuable tool for companies to make a positive impact on employee retention and show the value of the whole benefits and compensation package offered to employees. In today's competitive marketplace, who couldn't use some extra tools?

ADA

MANAGING EMPLOYEE CONDUCT AND PERFORMANCE AND THE AMERICANS WITH DISABILITIES ACT

By Mark Johnson – Ogletree Deakins

Introduction

Managing employee performance helps a business reach its objectives. Additionally, employees work best when they understand what their employer expects of them and how their employer will judge their performance. This article discusses how the Americans with Disabilities Act (the "ADA") affects employers when they apply conduct and performance standards to employees and the related duty to reasonably accommodate qualified individuals with a disability.

The ADA prohibits employers from discriminating against qualified individuals with mental or physical disabilities with respect to hiring, firing, discipline, promotional opportunities, job training, and other conditions and privileges of employment. Under the ADA, an employer must also make a "reasonable accommodation" of a "qualified" employee with a "covered disability" provided that doing so would not impose an undue hardship on the employer. When dealing with employees who fail to meet the employer's standards for performance, the question often arises of whether and to what extent the employer can enforce its standards or whether the employer's standards must be relaxed to some extent as a reasonable accommodation to the employee's known or suspected disability.

To be a covered employer, an entity must have 15 or more employees for each working day in each of the 20 or more calendar weeks in the current or preceding calendar year when the alleged discrimination occurred.

The ADA makes it unlawful for an employer to discriminate against – including failing to reasonably accommodate – a "qualified individual" with a "covered disability." Whether an individual is disabled under the ADA depends on the particular facts and the individual. Therefore, employers must not make generalized assumptions about whether an individual suffers from an impairment that rises to the level of a disability.

A disability covered by the ADA includes:

(1) A mental or physical impairment that substantially limits one or more major life activities;

(2) A record of having such an impairment; or

(3) Being regarded as having such an impairment.

What does it mean to be "substantially limited in a major life activity?" Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, reading, learning, concentrating, thinking, communicating, and working. A major life activity also includes the operation of a major bodily function. This includes, but is not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

"Substantially limits a major life activity" is similarly broad. Additionally, episodic impairments and impairments in remission can constitute a disability if the impairment would substantially limit a major life activity when active. Moreover, whether an impairment substantially limits a major life activity should be assessed without regard to mitigating measures such as medication, low vision devices (not including ordinary eyeglasses or contact lenses), and prosthetics.

Importantly, employers have no duty to provide reasonable accommodations to persons who are merely "regarded as" having a disability but are not actually substantially limited in a major life activity.

Performance and conduct standards

Under the ADA, employees with disabilities must meet the same performance and conduct standards as other employees. For example, they must meet the same standards that apply to other employees for quantity and quality of work. However, the ADA also requires employers to provide employees with disabilities reasonable accommodations that enable the disabled employee to meet such standards, unless such accommodation would cause the employer undue hardship.

To help you apply performance and conduct standards, you should give clear guidance to all employees regarding the quality and quantity of work expected along with timetables for production.

Evaluating performance

Employers should use the same evaluation criteria and standards for all employees performing the same job regardless of disability. In some instances, however, the employer might need to modify the way performance is evaluated to accommodate a specific disability or accommodation.

Example: An employee does not disclose her ADHD even after she begins having performance problems that she believes are disability-related. Her supervisor counsels her about the performance problems, but they persist. The supervisor warns that if her work does not show improvement within the next month, she will receive a written warning. At this point, the employee discloses her disability and asks for reasonable accommodation.

The supervisor (or human resources) should engage in an interactive process with the employee and discuss the request for a reasonable accommodation and how the proposed accommodation will help improve the employee's performance. The supervisor also may ask questions or request medical documentation to substantiate that the employee actually has a disability. The supervisor does not need to rescind a previous warning or requirement that the employee's performance must improve. However, an evaluation period may be delayed until the employer can evaluate the employee's performance using the reasonable accommodation.

Whenever the employee requests an accommodation, the employer must engage in the interactive process of reasonable accommodation to determine:

- If the employee is covered as a "qualified person with a disability" as those terms are defined by the ADA.
- If the accommodation is "reasonable," in other words, does not create an undue hardship or change the fundamental nature or operation of the business.

The request for reasonable accommodation should be handled promptly, in particular because unnecessary delays in determining or providing an effective accommodation may violate the ADA.

Withdrawing or changing accommodations due to poor performance

Employers should not automatically assume that because performance is unsatisfactory, a reasonable accommodation is not working. There could be numerous reasons for poor performance that have nothing to do with either the accommodation or the employee's disability. However, it makes sense to explore the effectiveness of the accommodation and identify any changes or additions that may be more effective.

Similarly, employers should not take away a reasonable accommodation as a punishment for unsatisfactory performance. This may seem obvious in situations such as giving breaks to an employee with diabetes to administer insulin. But in cases of modified policies and procedures, such as letting an employee work from home or use a modified schedule, the accommodation may be viewed as a "privilege" rather than a reasonable accommodation.

Conduct standards

The ADA generally gives employers discretion to implement conduct rules for all employees. Generally, conduct problems are not related to a disability and the employer may apply the same standards and consequences, regardless of disability. Sometimes, however, the conduct problems are directly related to the worker's disability. In these cases, the ADA only requires that conduct rules be job related and necessary for the operation of the business in order to be enforced.

Example: Phillip is a long-time employee who has a history of good performance. Over the past few months, however, his behavior has changed. He has been observed talking to himself, though he does not speak loudly, make threats, or use inappropriate language. However, some coworkers who are uncomfortable around him complain to the supervisor about Phillip's behavior. His job does not involve customer contact or working in close proximity to coworkers, and his talking to himself does not affect his job performance. When the supervisor tells Phillip to stop talking to himself, Phillip discloses that he has a psychiatric disability. He does not mean to upset anyone, but he cannot control this behavior. Medical documentation supports his explanation. The manager does not believe that Phillip poses a threat to anyone, but he transfers him to a position where he will work in relative isolation and have less opportunity for advancement, because he thinks his behavior is disruptive.

Transferring Phillip to a lesser position, arguably a demotion based solely on this conduct, could violate the ADA. Before deciding what to do, the employer and employee should explore if there is a reasonable accommodation available that could help the employee. If there is no reasonable accommodation available, the employer may follow disciplinary procedures as they would with any other employee. Also, the employer cannot "force" an employee to use a reasonable accommodation. If the employee refuses to try an accommodation, such as taking a break in a quiet room to relieve stress, the employee must face the consequences of their on-the-job behavior without the accommodation.

EMPLOYERS SHOULD USE THE SAME EVALUATION CRITERIA AND STANDARDS FOR **ALL EMPLOYEES PERFORMING THE SAME JOB** REGARDLESS OF DISABILITY.

Alcoholism and illegal use of drugs

Employers may forbid the use of alcohol or the illegal use of drugs in the workplace for all employees. Employees who have alcoholism or drug addiction face the same discipline as any other employees if they break those rules.

An employee whose poor performance or conduct is due to the current illegal use of drugs is not covered under the ADA. Therefore, the employer has no legal obligation to provide a reasonable accommodation and may take whatever disciplinary actions it believes appropriate. However, nothing in the ADA would keep the employer from offering the employee leave of absence or other assistance that may enable the employee to receive treatment.

In contrast, an employee whose poor performance or conduct is due to alcoholism may be entitled to a reasonable accommodation (unless the employee has already been terminated for the conduct).

If the employee only mentions alcoholism but does not request an accommodation, the employer may ask if the employee believes an accommodation would prevent further problems with performance or conduct. If the employee requests an accommodation, the employer should begin an "interactive process" to determine if an accommodation is needed. This discussion may include questions about the connection between the alcoholism and the performance or conduct issue. The employer should seek input from the employee on what accommodations may be needed and also may offer its own suggestions. Possible reasonable accommodations may include a modified work schedule to permit the employee to attend an on-going self-help program.

Conclusion

Employers can generally require that employees meet the same general performance and conduct standards. If an employer becomes aware that an employee with a disability may need an accommodation to meet such a standard, the employer should engage in an interactive dialogue with the employee designed to explore whether there is a reasonable accommodation available that would permit the employee to meet the standard without causing undue hardship. Supervisors should be trained to recognize situations that may trigger the need for such an interactive dialogue and to consult with human resource professionals for guidance. ABC Wisconsin

NEW MEMBERS

For membership information contact Bill Stranberg, Membership Director
Associated Builders and Contractors of Wisconsin – 608-244-5883

JULY 2022

• Badgerland Plumbing, LLC
Jarad Wurst
4930 Wildlife Rd, Ste. 7
Hartford, WI 53027
Phone: 262-623-7009
Description: Contractor Member
Sponsor: Roger Thimm, Wondra Construction, Inc.
Beam Club Members-to-date: 24.5

• BJK of Manitowoc County
DBA Bartow Builders
Lindsey Krause
32 Albert Drive
Manitowoc, WI 54220
Phone: 920-682-7101
Description: Contractor Member
Sponsor: Chad Zeller, CLA
Beam Club Members-to-date: 2

• Chain O'Lakes Plumbing, LLC
Wayne Miller
P.O. Box 273
Waupaca, WI 54981
Phone: 715-942-2525
Description: Contractor Member
Sponsor: Casey Malesevich, Sure-Fire, Inc.
Beam Club Members-to-date: 11

• Wilkins Electric, LLC
Kasie Wilkins
N6539 County Road BB
Plainfield, WI 54966
Phone: 715-335-6216
Description: Contractor Member
Sponsor: Tom Altmann, Altmann Construction Co.
Beam Club Members-to-date: 45

AUGUST 2022

• A-1 Mobile Storage Service
Marc MacTaggart
802 Charles St.
Delhi, IA 52223
Phone: Delhi, IA 52223
Description: Supplier Member
Sponsor: Jim Bunkelman, Royal Construction, Inc.
Beam Club Members-to-date: 14

Commercial Retail Electric, LLC
Robert Holbus
2807 Oakhurst Lane
Franksville, WI 53126
Phone: 262-989-2378
Description: Contractor Member
Sponsor: JR Reesman, Reesman Company
Beam Club Members-to-date: 27

• Fargo Electric LLC
Matt Fargo
2725 County Hwy T
Barneveld, WI 53507
Phone: 608-438-8518
Description: Contractor Member
Sponsor: Kevin Day, CCI
Beam Club Members-to-date: 19.5

ABC Wisconsin
Associated Builders and Contractors

Website:
abcwi.org

ABC National:
abc.org

R&R INSURANCE

CONSTRUCTION & BONDING DIVISION

Brad Stehno, M.S.

Dan Maurer, AU-M

Dan Scheider, CIC, CPIA, CRIS

Thomas Scheider, CPCU, CLU, CRIS

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