SEPTEMBER/OCTOBER 2016

MERIT **SHOP**

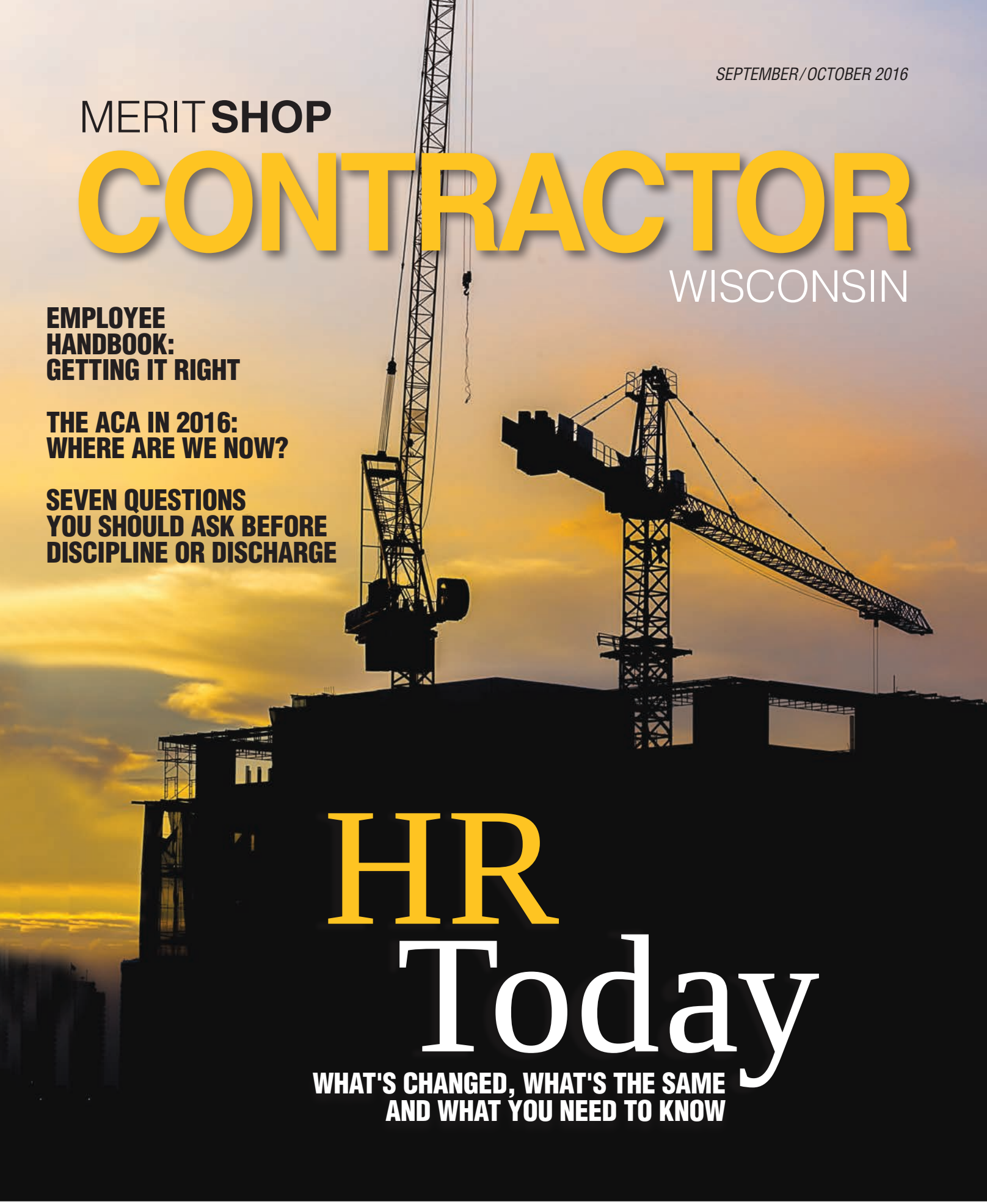
CONTRACTOR

WISCONSIN

EMPLOYEE HANDBOOK: GETTING IT RIGHT

THE ACA IN 2016: WHERE ARE WE NOW?

SEVEN QUESTIONS YOU SHOULD ASK BEFORE DISCIPLINE OR DISCHARGE



HR Today

WHAT'S CHANGED, WHAT'S THE SAME AND WHAT YOU NEED TO KNOW

YOUR FULL-SERVICE LIFTING SPECIALISTS.

LOCALLY OWNED AND OPERATED SINCE 1973

» EQUIPMENT RENTALS & SALES

» PARTS AND SERVICE

» TRANSPORTATION

At Ideal Crane Rental, Inc. we can provide all the equipment for your job. Our extensive selection of cranes, forklifts, aerial lifts and trucking services means we have the equipment you need when you need it.

IDEAL CRANE RENTAL, INC.

www.idealcranerental.com

Madison	608-241-4092
Milwaukee	414-463-5438
Oshkosh	920-235-2411
Green Bay	920-235-2411
Lacrosse	608-784-4862

Rental, sales and service - we do it all.

Call today for your heavy lifting needs.

TABLE OF CONTENTS

MERIT SHOP CONTRACTOR WISCONSIN

HR Today

WHAT'S CHANGED, WHAT'S THE SAME AND WHAT YOU NEED TO KNOW

Associated Builders and Contractors, Inc.
Wisconsin Chapter

Website:www.abcwi.org
ABC National: www.abc.org

President and Publisher: John Mielke
Managing Editor: Nick Novak
Art Director: Jayne Laste Design Solutions LLC

Postmaster, send address changes to:
ABC of Wisconsin, 5330 Wall Street, Madison, WI 53718

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

www.facebook.com/abcwi
www.linkedin.com/company/abc-of-wisconsin
twitter.com/ABCofWisconsin

For membership information, contact Deanna Regel at ABC of Wisconsin **608-244-5883** or fax **608-244-2401**

FROM OUR PRESIDENT

Where Do You Turn?

ONE OF MY FAVORITE THINGS ABOUT Associated Builders and Contractors of Wisconsin is the fact that we have such a diverse group of merit shop contractors in our membership. We have large companies and small. We have general contractors and subcontractors. And together, we work to deliver the best projects at the most cost-effective prices. Together, we literally are building Wisconsin.

Having such a diverse group means that each of you tackle challenges in different ways. When it comes to Human Resources, some of you have a whole staff dedicated just to payroll and benefits. Others I talk with, the president is in charge of operations, sales, HR, marketing, training and recruitment.

So, I guess my question is: Where do you turn when you have a question?

Big or small, I hope that all of you know ABC of Wisconsin should be a resource for your firm. We are here to help train your employees, grow your business and answer any questions along the way. When it comes to Human Resources, I hope this issue of *Merit Shop Contractor* will provide some insight into some of the issues we have heard from you on.

Not everything can be covered in this short magazine, however. So, I hope you will consider joining us at our annual HR Conference in Wisconsin Dells on October 19th and 20th. More information on the conference can be found on our website: www.abcwi.org/hrconf.

As always, thank you for your continued membership.

— John Mielke

"BIG OR SMALL, I HOPE THAT ALL OF YOU KNOW ABC OF WISCONSIN SHOULD BE A RESOURCE FOR YOUR FIRM."

EMPLOY HANDBOO GETTING IT RIGHT.

By Dan Barker — Jackson Lewis PC

At some point, every emerging company needs to decide whether to adopt an employee handbook. Having a handbook provides a ready resource to common employee questions and helps establish a corporate culture. A good handbook also provides guidance to supervisors and helps promote clear, consistent decision-making. And a good handbook can prevent or form the basis of a defense to a variety of legal claims, such as harassment, discrimination, or certain wage claims. Moreover, certain laws, such as the federal Family and Medical Leave Act (FMLA) require employers to inform employees of their policies on these issues and a handbook is the natural place to notify employees of these legally required policies.

While there are innumerable reasons to publish an employee handbook, there are more than a few bear traps that lurk in the shadows for employers who do not pay sufficient attention to developing a handbook and following its policies after publication. An employer that is not willing to follow its own handbook or an employer that creates innumerable "exceptions" to the written rules is better off not having one. In these cases, handbook policies can be used against the employer to bolster claims of unlawful discrimination, since the failure to follow a published policy can be viewed as evidence of nefarious intent.

Similarly, an employer that tries to write its own handbook without professional legal or HR guidance is entering a risky arena. Well-intentioned policies that make good intuitive sense are often found to be

SIX IMPORTANT POLICY AREAS THAT **EVERY HANDBOOK** SHOULD **ADDRESS**

[1] Equal Employment Opportunity/ Harassment Policies.

[2] Leave of Absence & Disability Accommodation Policies.

[3] Paid Time Off/ Vacation Policies.

[4] Wage & Hour Policies.

[5] Conduct Rules.

[6] Contract Disclaimers and Acknowledgment

YEE OK

unlawful based on any number of obscure laws that are anything but intuitive. Moreover, buying an "off the shelf" handbook or one copied off the internet is no guarantee that the policies will pass legal muster or will fit your business. Instead, it is always best to get customized advice. Further, because employment laws are constantly changing, having a good employee handbook means making a commitment to update it on a regular basis.

Once an employer decides that a handbook is necessary, the next logical question is what kinds of policies should be included. A full recitation of all the items that should be included in a handbook is far beyond the scope of this article. However, below are six important policy areas that every handbook should address:

1. EQUAL EMPLOYMENT OPPORTUNITY / HARASSMENT POLICIES

Every handbook should contain a clear prohibition against unlawful discrimination and harassment. And it should contain a clear path for employees to report concerns about discrimination or harassment which assures employees that there will be no retaliation for making reports or claims. But a handbook policy is only the start of a commitment to equal employment opportunity. While plenty of employers have lost employment discrimination cases in part because they had no EEO policies, no employer has ever won an employment discrimination case by simply pointing to its handbook policy. Rather, to be truly effective, a company must make its commitment to equal employment part of its culture. This means conducting regular training and reinforcing the commitment through various corporate initiatives. It's not hard to add EEO topics to a periodic manager's meeting and to have foremen give a tool-box talk on EEO issues once or twice a year. Companies that take these extra steps to demonstrate a commitment to non-discrimination tend to fare better when facing employee claims or charges than those that do nothing other than include a policy in a handbook.

2. LEAVE OF ABSENCE AND DISABILITY ACCOMMODATION POLICIES

Employees may need time away from work for any number of reasons, and the first place they look for guidance is usually the employee handbook. Thus, having a handbook that describes an employer's leave benefits is an important way of communicating with employees. Likewise, the handbook is also the first place that most supervisors will look when an employee mentions that they need a leave of absence. In these cases, the handbook provides good guidance to supervisors as well, and helps them understand the basics of an employer's policy.

While leave of absence and FMLA policies are often fairly straightforward, there is one big bear trap that employers can fall into if they are not paying attention. All too often, supervisors read an FMLA policy and conclude that an employee has no right to leave after their allotment of FMLA leave runs out or if the worker does not meet the threshold eligibility criteria in the first place. But this is not always true. Instead, employees are often legally entitled to leave as a disability accommodation even if they do not qualify for FMLA leave. A simple sentence in a handbook reminding employees and supervisors that additional leave may be provided in appropriate circumstances as a disability accommodation can remind a supervisor of this obligation and help provide an extra line of defense against an inadvertent, but potentially costly, legal violation.

HAVING A **HANDBOOK** PROVIDES A **READY RESOURCE** TO COMMON EMPLOYEE **QUESTIONS**, HELPS ESTABLISH A CORPORATE CULTURE, **PROVIDES GUIDANCE** TO SUPERVISORS AND HELPS PROMOTE CLEAR, CONSISTENT **DECISION-MAKING.**

3. PAID TIME OFF / VACATION POLICIES

Policies that clearly explain paid time off are another critical part of an effective employee handbook. Wisconsin law provides that accrued vacation time is a form of wages that must be paid out upon termination or when otherwise provided for by the employer's policy. A well-drafted vacation or PTO policy with clearly defined limits on accrual of vacation, carryover and policies concerning use, forfeiture and payout on termination will help prevent disputes and wage claims down the road.

4. WAGE & HOUR POLICIES

Incorporating carefully designed pay practices and policies in a handbook can help prevent and defeat a number of wage and hour claims. For example, a written policy about the rules for on-call time can be instrumental in preventing disputes where an employee might later claim that on-call time should be compensable. Careful attention to legal rules in this area, however, is absolutely critical, as poorly drafted wage and hour policies can be the basis for significant class-wide legal liability.

5. CONDUCT RULES

While just about every handbook contains a laundry list of employee conduct rules, many of these intuitive rules which seem like no brainers actually violate the National Labor Relations Act. In the past decade, the National Labor Relations Board has heavily scrutinized employee conduct rules that could be read by employees as prohibiting them from joining together to make workplace complaints. This scrutiny applies to union and non-union employers alike.

For example, rules prohibiting employees from discussing their pay have been long held to be unlawful because they chill the formation of unions. While there are dozens of rules that the NLRB will scrutinize, a few more examples of rules that generate intense scrutiny are as follows:

- Confidentiality of information policies
- Civility and "respectful workplace" policies
- Media relations policies
- Rules of conduct that prohibit "bullying"
- "No gossip" policies
- Policies concerning use of computers, email and bulletin boards
- No solicitation – no distribution policies
- Chain of command policies
- Policies prohibiting audio/video recordings in the workplace
- At-will employment disclaimers

At first glance, most rules on these subjects seem straightforward, intuitive and job-related. But that does not mean that the NLRB will find them legal. Instead, the opposite is often true. For example, the NLRB's General Counsel has said that a rule requiring employees to be "respectful to the company, other employees, customers, partners, and competitors" was unlawful because it could be read as prohibiting employees from criticizing the company. At the same time, the NLRB's General Counsel has approved rules which require employees to "work in a cooperative manner with management/supervision,

AN **EMPLOYER** THAT IS **NOT WILLING** TO FOLLOW ITS OWN HANDBOOK OR AN EMPLOYER THAT CREATES INNUMERABLE "EXCEPTIONS" TO THE WRITTEN **RULES** IS **BETTER OFF NOT HAVING ONE.**

coworkers, customers, and vendors." The salient point here is that the lines between permissible and impermissible are often fine, and sometimes impossible to predict. As such, review by a competent professional with special knowledge of labor law is an important part of a handbook review.

6. CONTRACT DISCLAIMERS AND ACKNOWLEDGMENTS

Just about everyone knows that a handbook should always contain a disclaimer stating that it does not create a contract of employment. Most people also know that it is important to obtain a written acknowledgment to prove that any given employee received the handbook. But many form acknowledgments go one step too far and contain a statement in which an employee states that they have received the handbook and "agree to comply" with all the policies and rules in the handbook. A form which requires an employee to agree to comply with all policies has the potential to undo all the disclaimers stating that the handbook is not a contract. Fortunately, the fix is easy. There is no need to get fancy with acknowledgments. A handbook acknowledgment form need only, and should only, state that the employee acknowledges receipt of the handbook.

To sum up, creating an employee handbook can have great benefits for an organization. At the same time, however, a botched handbook can create more problems than it solves. Thus, as with anything worth doing, it is worth doing right.

The ACA IN 2016 WHERE ARE WE NOW?

By Karen Breitnauer — M3 Insurance

The Affordable Care Act (ACA) has been with us for nearly seven years and the law continues to change. This past year included a flurry of activity for employers, including the daunting task of reporting offers of health coverage to employees. And now that we are in an election year, we see the ACA being used as a talking point for candidates of both parties. Regardless of the results in November, the law will continue to see some form of change.

Within this environment, now is a good time for everyone in the construction industry to look at important provisions of the law and assess where we are and what changes may be on the horizon.

Identifying 30+ Hour Employees

One of the key provisions of the ACA requires employers to provide an offer of health insurance coverage to full-time employees or subject themselves to certain penalties. Currently the law identifies any employee who works an average of 30 or more hours per week as "full-time". For purposes of determining which employees are eligible for coverage, employers are required to use one of two counting methods: the look-back measurement method, or the monthly measurement method.

The look-back measurement method requires an employer to designate a 3-12 month time period during which employee hours are averaged. This period is followed by a stability period, which in essence "locks" a 30+ hour employee in for a period of time at least as long as the measurement period. Employers also have the option of including an administrative period which can be used to generate the 30+ hour list, make offers of coverage and enroll eligible individuals.

A sample look-back method time period might look like this for a calendar year plan:

November 1, 2015 – October 31, 2016
Measurement Period

November 1, 2016 – December 31, 2016
Administrative Period

January 1, 2017 – December 31, 2017
Stability Period

These time periods should be used year-after-year to determine employee status for the purpose of offering coverage.

Seasonal Employees

One common challenge for contractors is how to handle the seasonal aspect of their business. It's normal for a contractor to utilize layoffs during slow periods, then recall employees when business picks up. This allows you to retain staff without terminating the employment relationship.

In layoff situations, employees are still technically employed and, for purposes of coverage, should be treated as to the status determined by the previous measurement period. The complexity with this situation is that within many insurance contracts, there is language that states a reduction in hours is a COBRA-qualifying event. This means that active coverage should be terminated and an offer of COBRA made to the laid-off employee.

This situation creates a double-edged sword for a contractor as the COBRA offer is an offer of coverage which allows the employer to avoid coverage penalties. However, COBRA is not deemed "affordable" under the law, and for the time of the layoff, the employer is at risk for an affordability penalty.

Once an employee returns to work, employers should determine if the employee should be treated as a continuing employee. Generally speaking, the threshold is 13 weeks before the employer would be allowed to treat the returning employee as a "new" employee.

"ALL EMPLOYERS SHOULD HAVE AN OVERALL PLAN TO HANDLE THE CHALLENGES OFFERED BY ACA."

For purposes of an offer of coverage to a new employee, contractors are only able to categorize a worker as "seasonal" if he/she is scheduled to work full-time hours for six months or less and the work is tied to a season. In this situation, the "seasonal" employee would be tracked in his or her own initial measurement period before coverage would need to be offered. If an employee is hired full time and the seasonal definition does not apply, the employee must be offered coverage within the first three months of employment in order for the employer to avoid penalties.

Union Employees

As long as a worker meets the definition of a common law employee, union status is irrelevant when it comes to the ACA. What does matter is whether their union provides an offer of health insurance and whether the employer financially contributes to that coverage.

If the employer contributes, they don't need to offer coverage to that employee. However, the employer would still need to provide a 1095C to the employee and report that an offer of coverage was made by the union.

1094/1095C Reporting

In early 2016, employers faced the task of information reporting to the IRS for Employer Shared Responsibility purposes on 2015 employee activities. As part of the ACA, employers are required to file 1095C forms for each full-time employee and provide information as to the offer of health coverage made in each case.

The purpose of the reporting is to provide the IRS with the information needed to assess penalties for employers not offering affordable coverage to employees; and for employees to report coverage on their individual tax returns. Due to the new implementation in 2016, the deadlines were extended. Moving forward, however, employers would be wise to plan to deliver individual forms to employees by January 31 and the mass transmittal to the IRS by March 31 each year to avoid penalties.

Cadillac Tax

In late 2015, Congress delayed the implementation of the Cadillac Tax until 2020. This development put the provision on the backburner and discussion surrounding this provision has tapered off. The original intent of the Cadillac Tax was to put an excise tax on "costly" health insurance coverage. The definition of "costly" in 2010 was any plan that surpassed the following premium limits:

- Single coverage: $10,200 annually
- Family coverage: $27,500 annually

The intent was to tax excess amounts over the limits at a 40 percent rate, multiplied by the number of people enrolled in each coverage type. Employers have tried to get ahead of the curve by utilizing creative solutions such as a high-deductible health plan partnered with a health savings account to offer value while lowering their risk of taxes.

Moving forward, the future of this provision is mixed. Apart from two IRS notices issued in 2015 and the eventual delay in October 2015, no additional guidance has been issued. In a rare note of bi-partisanship in Washington, the Cadillac Tax appears to be unpopular on both sides of the aisle. The future of the tax, whether the limits being adjusted, the tax being eliminated or another change happening is completely unknown at this juncture.

Key Takeaway: Throughout the ever-changing ride of the ACA, all employers should have an overall plan to handle the challenges offered to them by the implementation of the law. If you don't have a plan in place, you should contact your attorney or insurance professional to do so today.

72 members saved

$252,000

with Verizon Wireless

51 members saved

$73,185

with Aramark®

110 members saved

$23,800

with FedEx®

ABC Wisconsin members saved

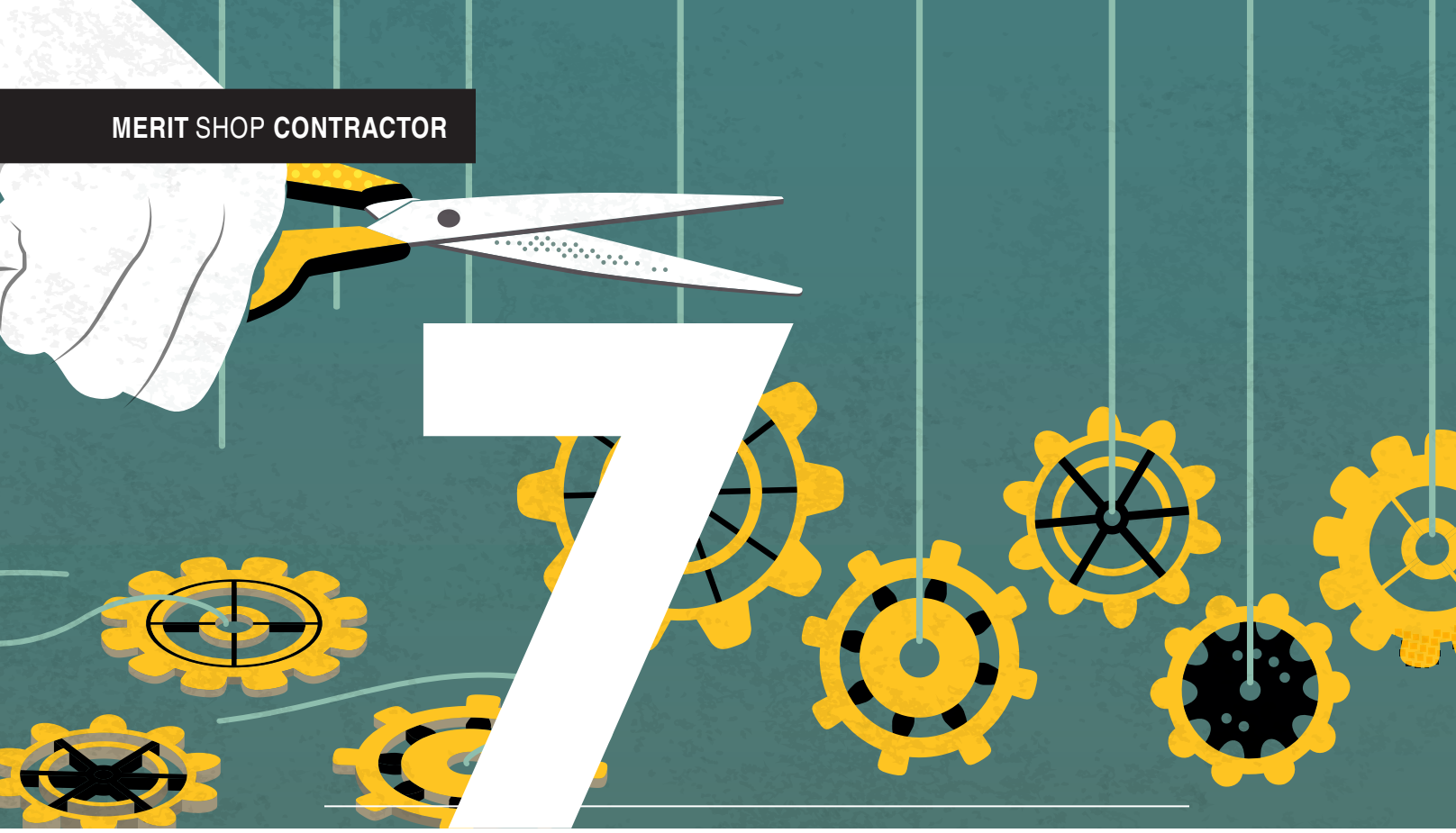
$1.1 Million

last year with National's discount programs available to businesses and employees.

To learn how your company and EMPLOYEES can save, visit **abc.org/discounts**.

Total savings are based on program averages.

ABC
Associated Builders and Contractors, Inc.



7 QUESTIONS YOU SHOULD ASK BEFORE DISCIPLINE OR DISCHARGE

By Mark A. Johnson — Ogletree, Deakins, Nash, Smoak & Stewart, P.C.

When facing a difficult discipline or discharge decision, a key question an employer must answer is whether its decision is "fair." Why? Because administrative agencies, courts and juries often seem to bend over backwards to give the employee the benefit of the doubt. Rather than decide the case based on what the employee did or did not do, they often seem to decide the case based on their perceived notions of fairness. Fortunately, you can take steps to ensure your decision-making process and its result are fair. This article will discuss seven questions you should answer before taking action to discipline or discharge an employee. Answering these questions can significantly limit the risk of liability if litigation results from the discipline or discharge. If the answer to one or more of the following questions is "no," you should reconsider your decision:

1 *Did the employer give the employee advance notice or warning of the possible consequences of the employee's conduct?*

If you are faced with defending disciplinary action or a discharge, you want to be able to say that you warned the employee he or she would be disciplined or discharged for the conduct in question. This warning or notice can be provided in the form of written rules or policies in an employee handbook. Have employees acknowledge in writing that they have received and understand your rules, policies and procedures.

If you use written warnings and progressive discipline, give the employee advance warning in writing of the potential consequences of further problems. It is usually understood that all employees should know that serious misconduct such as fighting, drug use or insubordination warrants serious discipline or discharge, even without advance notice from the employer.

2 *Was the company's rule, instruction or policy reasonable?*

You should be able to explain how the rule, instruction or policy the employee violated was related to the orderly, efficient and safe operation of your business, and the performance you can properly expect of the employee. Especially in cases where significant disciplinary action is proposed for a violation of a rule, the rule should be directly and unquestionably related to your business.

3 *Did the employer make an effort to discover whether the employee did in fact violate or disobey the rule, instruction or policy?*

Although you are not required to investigate every lead to exhaustion, you should avoid taking action based on hearsay, rumors and speculation. Before taking action, make an effort to obtain evidence that the employee actually engaged in the conduct in question.

4

Was the employer's investigation conducted fairly and objectively? Get all the relevant facts straight before making a decision. Make sure that whoever investigates the matter can be unbiased. At times, it may be necessary to bring an investigator in from outside to accomplish this. Part of the investigation should include asking the employee for his or her side of the story. If necessary, investigate it, including interviewing all relevant witnesses. It is better to learn about this at this stage than to first hear it when a lawsuit is filed.

5 *After any necessary investigation, do you have substantial evidence or proof that the employee was guilty as charged?*

Substantial evidence does not mean proof beyond a reasonable doubt. The workplace is not a courtroom. But decisions made in the workplace might later be questioned in court. If you were a judge or jury, how would you view the level of proof of the employee's conduct that is the basis for the discipline or discharge? If you do not have solid evidence, ask yourself how you can defend the decision if there is later litigation.

6 *Has the employer applied its rules, orders and penalties even-handedly and without discrimination to all employees?*

Look to past practice and treatment of other employees in the same or similar circumstances to ensure that the employee is not being treated worse than others who engaged in the same or similar conduct. An employee who appears to be singled out, for whatever reason, will often complain later that he or she was singled out for an unlawful reason (such as race, sex, color, religion, national origin, age or disability). Answering this question will help you assess whether there is a risk of a discrimination charge.

7 *Does the punishment fit the crime?*

This question is designed to make sure there is a reasonable relationship between the seriousness of the offense and the punishment. For example, stealing is unquestionably serious, but should you terminate an employee who takes a co-worker's bag of potato chips at lunch? A trivial offense usually does not warrant discharge, the industrial equivalent of capital punishment. As part of this inquiry, you should also ask whether there are circumstances that warrant a reduction in the penalty. For example, an employee with a long history of good performance may be given an additional chance, while an employee with a long history of disciplinary problems may not. The more serious the conduct, the less latitude is usually appropriate – even for long-term employees.

OVERTIME CHANGES

TAKE EFFECT DECEMBER 1, 2016

By Doug Witte — Boardman & Clark LLP

The United States Department of Labor issued new regulations on May 18, 2016 governing the application of minimum wage and overtime pay requirements to certain "exempt" employees.

Background

The Fair Labor Standards Act (FLSA) is a federal law that sets minimum wage, overtime pay, equal pay, recording and child labor standards for employees who are covered by the Act. Employees who are covered by the Act fall into two categories: Non-exempt and exempt. Exempt employees are exempt from the minimum wage and overtime provisions, but are still subject to the other FLSA requirements. Wisconsin has its own wage and hour regulations and employers must comply with the stricter of the state or federal law.

White Collar Exemptions

The presumption is that all employees are not exempt unless specific criteria are met. To qualify for a white collar exemption, an employer must prove an employee meets all of the following requirements:

1. *Be paid on a salary basis.* Employees must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed.

2. *Meet a minimum salary requirement.* Currently the salary level is $455 per week (equivalent to $23,660) but will increase on December 1, 2016 to $913 per week (equivalent to $47,476 per year).

3. *Perform the exempt work as the primary duty.*

Salary Basis Requirement

An exempt employee must be paid on a salary rather than an hourly basis. An employer must pay the employee's salary for any week he or she performs work without regard to the number of days worked or the quality or quantity of the work performed.

An employer violates the salary basis requirement and jeopardizes an employee's exempt status if it makes certain deductions from the salaries that are not permitted under the regulations. An employer may make deductions from an employee's salary (1) for absences of one or more full days for personal reasons other than sickness or disability; (2) for one or more full days when an exempt employee is absent because of sickness or disability and the deduction is made pursuant to a bona fide plan, policy or practice obtained wage replacement benefits; (3) if an exempt employee is absent from work for less than one week for jury duty, as a witness of paying for military duty (any compensation received for such duty may be offset from the employee's salary); (4) for a violation of a major safety rule, the employer may make partial deductions from salary; (5) for one or more full days as discipline for violation of workplace conduct rules; (6) for full days in the initial or last week of employment; and (7) for reduced or intermittent leave under the FMLA, the employer may make partial day deductions.

Employers can also deduct from salary for partial day absences if taken from leave banks such as PTO. You can even let employees go negative in their leave banks but you cannot deduct from a final paycheck any negative balance due to partial day deductions.

Isolated or inadvertent deductions will not jeopardize the exempt status if the employer has a clearly communicated policy that prohibits improper deductions; reimburses employees for improper deductions; and makes a good faith commitment to comply in the future. Employers should implement a FLSA Safe Harbor policy as a precaution.

Salary Level Requirement

The salary level requirement will increase from $455 per week to $913 per week effective December 1, 2016. This new amount

was established by using the 40th percentile of earnings of full-time salaried workers from the lowest census region (currently the South). Salary levels will be updated every three years starting January 1, 2020. Employers will be given at least 150 days' notice of the increase.

The new rules also allow employers to meet up to 10 percent of the weekly salary requirement through non-discretionary bonuses, incentive payments or commissions. These bonus amounts will need to be paid at least quarterly and a catch-up payment should be made if the bonus falls short.

Primary Duty Requirement

The new rules did not change the primary duty requirement and this is an area where many employers do not focus enough attention. Titles do not control; it is the duties performed. Two employees with the same title may not both be exempt.

Executive Employee. An executive employee is an employee whose primary duty is the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof, and who customarily and regularly directs the work of two or more other employees; and who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

Administrative Employee. An administrative employee is an employee whose primary duties in the office are the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers, and whose primary duties include the exercise of discretion and independent judgment with respect to matters of significance.

An employee's exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. This exercise of discretion and independent judgment must be more than the application of procedures or specific standards described in manuals or other sources. The FLSA regulations include a long list of factors to consider in determining whether an employee exercises discretion. It is important to note, however, that an employee's decisions based on discretion or judgment are not required to be final. The use of discretion and judgment may result in recommendations for action, rather than final action and the exemption is not jeopardized.

Professional Employees. A professional employee's primary duty is the performance of work requiring knowledge of an advanced type in the field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor. While the professional exemption is usually limited to those employees who have obtained knowledge through specialized academic training, an advanced degree is not necessarily required to meet this exemption. Work experience can potentially substitute for some intellectual instruction.

Options for Affected Employees

There are a number of different options for employers if they determine that an employee who was exempt under the former regulations now may be non-exempt under the new regulations.

(1) Raise the employee to the new salary threshold. Employees must still meet the duties test. There may be significant employee-relations effects if an employee earning $35,000 is given an increase to $48,000 to retain eligibility for exempt status but a co-worker earning $50,000 receives no increase.

(2) Reduce or limit overtime hours. Some employers may hire more employees to perform the same amount of work. Other employers may just limit employees to a strict 40 hours per week.

(3) Reclassify employees to non-exempt. This will generally require changes to timekeeping and payroll practices. Employers will need to track hours worked and determine which activities the employee engages in are compensable and which are not. This will require not only employee training but supervisor training for employers who are not accustomed to tracking their time. In addition, many employees consider being classified as a non-exempt employee as a demotion or a loss of prestige and morale may suffer.

(4) Recalculate pay to attempt to equal current salary. This will require an employer to reverse-engineer straight time and overtime hours to figure out what the new hourly wage rate should be. An employer will still have to track weekly hours and pay overtime.

(5) Use the "fluctuating work week" pay method, whereby employees are paid at a half-time rate (rather than time and one-half) for overtime hours because the straight time rate is already included in the weekly salary. There are a number of variations concerning the fluctuating work week pay method.

(6) Use of independent contractors. Employers should be very careful in their use of independent contractors as a number of state and federal agencies are cracking down on enforcement from what they consider an abuse of the use of independent contractors to perform work for an employer.

CONCLUSION

These final rules present a good opportunity for employers to audit their exempt/non-exempt classifications generally and to correct any misclassifications or update classifications of jobs that may have changed over the years. It is also an opportune time to audit payroll practices to ensure that all working time is recorded and paid, all compensation is properly included in overtime calculations and that exempt employees are truly paid on a "salary basis."

RECENT OSHA DEVELOPMENTS FOR CONTRACTORS

By Josh Levy & Tiffany Hutchens — Husch Blackwell LLP

Safety is the most important aspect in construction. The commitment to safety is conspicuous from ABC's banner ads on our website ("ABC MEANS SAFETY") to the core values of every member firm. Nevertheless, the Federal government has decided to add recordkeeping requirements and employment protections to this already scrutinized concern. In May 2016, the Occupational Safety and Health Administration (OSHA) published a final rule that requires construction contractors to (1) electronically submit workplace injury and illness information to be published at www.osha.gov; and (2) implement procedures to encourage employee injury and illness reporting.

According to OSHA, these increased disclosure requirements will "nudge" employers to reduce work-related injuries and illnesses.

Electronic Reporting Requirements

While current regulations require contractors to maintain records of workplace injuries and illnesses, OSHA typically reviews these records only when it conducts a site inspection. The new rule now requires all employers in the construction industry regardless of size to make electronic submissions. The information will be submitted by employers through a secure website, but the agency will make the injury and illness data public, as encouraged by President Obama's Open Government Initiative. After removing any Personally Identifiable Information (PII) that could be used to identify individual employees, OSHA will post the data on its website. Interested parties will be able to search and download the data. OSHA believes that posting timely, establishment-specific injury and illness data will provide valuable information to employers, employees, employee representatives and researchers. Certain commentators have expressed concern regarding the new electronic submission requirement, suggesting that OSHA is attempting to use a "public shaming" mechanism to coerce employers into making workplace changes that may be more extensive than required under the applicable rules. In addition, there is some concern that the new rule will have the unintended effect of actually discouraging employers from providing complete and accurate information. Although this new rule becomes effective Jan. 1, 2017, the electronic submission requirements will be phased in over the next three years.

Anti-Retaliation Measures

The new rule also creates more robust employee protection in order to ostensibly facilitate complete and accurate injury and illness reporting. Contractors will be required to post OSHA's *Job Safety and Health: It's the Law* poster, available at https://www.osha.gov/Publications/poster.html, if they have not already done so. (Versions of this poster from April 2015 and later are current.)

In addition, contractors will be subject to enhanced anti-retaliation provisions that prohibit retaliating or discriminating against employees – whether in the form of termination, pay reduction, less-favorable job reassignment or other adverse actions – for reporting workplace injuries and illnesses. Notably, under the final rule, OSHA will be able to cite an employer for retaliation if the employer has a program or policy that OSHA believes deters injury or illness reporting through the threat of retaliation even if the employee did not file a complaint with OSHA.

Post-Incident Drug Testing Policies

In furtherance of its goal of more complete and accurate reporting, OSHA has made clear that policies that "discourage" employee reporting of illnesses or injuries are prohibited. Though not included in the text of final rule, OSHA has specifically addressed employer drug testing policies in the comments to the final rule. Because this new rule will undoubtedly impact how post-incident drug and alcohol testing policies are crafted and implemented, contractors should take note. Of particular concern for OSHA are blanket policies that mandate drug and/or alcohol testing after any accident or injury and thus arguably deter accident or injury reporting by employees. OSHA states that employers should implement policies that limit post-incident drug testing to "situations in which employee drug use is likely to have contributed to the incident, and for which the drug test can accurately identify impairment caused by drug use." The rule, however, does not affect testing that is required by state or federal laws or regulations, such as worker's compensation laws; rather it is aimed at prohibiting the use or threat of drug testing as a form of retaliation against employees who report workplace incidents. In light of OSHA's comments, contractors may want to consider revising their post-incident policies and tailoring them such that there is a "reasonable possibility that drug use by the reporting employee was a contributing factor to the reported injury or illness before

requiring testing" and implementing or increasing random drug testing programs in order to attempt to detect and deter illegal drug users before accidents occur.

Incentive Plans

In the final rule, OSHA also addressed the "retaliatory nature" of certain types of incentive programs that deny employee benefits if a certain injury or illness rate is exceeded. The anti-retaliation provision does not categorically ban all incentive programs, but they must be "structured in such a way as to encourage safety in the workplace without discouraging the reporting of injuries and illnesses." Accordingly, employers should consider OSHA's new interpretation when reassessing their incentive programs to ensure they may be construed as discouraging injury and illness reporting by employees. For example, incentive programs could be adjusted to provide benefits for complying with safety rules, attending safety trainings or excelling on safety quizzes.

Challenges to the New Rule

On July 8, 2016, the National Association of Manufacturers, Associated Builders and Contractors, Inc., as well as several national, state and local business groups, jointly filed a lawsuit in the U.S. District Court for the Northern District of Texas, challenging OSHA's prohibition of mandatory post-accident drug testing and employer safety incentive programs. Among other claims, the Plaintiffs asserted that OSHA's restrictions on post-accident drug and alcohol testing improperly limit an employer's ability to investigate an incident and interfere with state workers' compensation laws requiring or encouraging employers to conduct post-accident drug testing. While it remains to be seen whether the district court will grant the request for injunctive relief, OSHA has postponed the effective date of the anti-retaliation provision in the final rule to November 1, 2016.

What Should Contractors Do Now?

- Train managers and employees on the new rules and when they go into effect.
- Ensure that employees understand that they will not be retaliated against for reporting work-related injuries and illnesses and are, in fact, encouraged and required to report them.
- Re-train the employee(s) responsible for injury and illness recordkeeping on the basics of recordkeeping and provide thorough training on the new rule with an emphasis on protecting personally identifiable information to the extent possible while remaining in compliance with the new regulatory requirements.
- Review and revise drug testing and injury reporting policies to bring them into compliance with the requirements of the new rule.

"THERE IS SOME CONCERN THAT THE NEW RULE WILL HAVE THE UNINTENDED EFFECT OF ACTUALLY DISCOURAGING EMPLOYERS FROM PROVIDING COMPLETE AND ACCURATE INFORMATION."

NEW MEMBERS

*For membership information contact **Deanna Regel**,*
Membership Coordinator – Associated Builders & Contractors of WI – 608-244-5883

JUNE 2016 NEW MEMBERS

• 3 Phase Power
Clint Raabe
221 N 66th Street, Milwaukee, WI 53213
Phone: (414) 350-9793
Description: Electrical Contractor
Sponsor: Gerry Krebsach, K-W Electric, Inc.
Beam Club Members-to-date: 25

• Comfort By Design, Inc.
Gabe Reid
240 N Broadway, Ellsworth, WI 54011
Phone: (715) 273-3658
Description: Mechanical Contractor
Sponsor: Tom Derrick, Derrick Companies
Beam Club Members-to-date: 20

• Harbor City Plumbing
Scott Nelson
821 W Grand Ave, Port Washington, WI 53074
Phone: (262) 689-4042
Description: Plumbing Contractor
Sponsor: **Robb Steiner, Steiner Electric, Inc.**
Beam Club Members-to-date: 10

• Laufenberg Enterprise dba
Laufenberg Electric Enterprises
Lucas Laufenberg
29535 Odyssey Rd., Cashton, WI 54619
Phone: (608) 343-0968
Description: Electrical Contractor
Sponsor: Eric Bauer, Brickl Bros., Inc.
Beam Club Members-to-date: 13.5

• Mach IV Engineering & Surveying LLC
Joel Ehrfurth
211 N. Broadway, Ste. 114, Green Bay, WI 54303
Phone: (920) 569-5765
Description: Civil & Environmental Engineering Firm
Sponsor: Heidi Cabout, The Blue Book Building & Construction Network
Beam Club Members-to-date: 1

• No Shorts Electric LLC
Brett Hanson
1768 Kaase Rd., Stoughton, WI 53589
Phone: (608) 205-9999
Description: Electrical Contractor
Sponsor: John Ehrmanntrant, Viking Electric Supply
Beam Club Members-to-date: 1

• Pella Windows & Doors Of Wisconsin
Barry Schoening
500 Pilgrim Way, Green Bay, WI 54304
Phone: (920) 435-3791
Description: Window & Door Supplier
Sponsor: Stan Johnson, A.C.E. Building Service, Inc.
Beam Club Members-to-date: 20

• Prairie Fire Protection, LLC
David Maier
E10248 State Road 60, Sauk City, WI 53583
Phone: (608) 643-5409
Description: Mechanical Contractor
Sponsor: Betsy Freiburger, Krupp General Contractors, LLC
Beam Club Members-to-date: 1

• Redeker Dairy Equipment Inc.
Kurt DeBoer
W12287 Liner Rd., Brandon, WI 53919
Phone: (920) 346-5576
Description: Electrical Contractor
Sponsor: Joel Sterk, SIA Insurance Services
Beam Club Members-to-date: 18.5

• Schmitt Electric
Charles Schmitt
6922 Sandy Lane, Waterford, WI 53185
Phone: (414) 406-3716
Description: Electrical Contractor
Sponsor: Jay Zahn, R&R Insurance Services, Inc.
Beam Club Members-to-date: 23

• Sterr Crazy Plumbing, LLC
Diane Cull
W295 N7833 Camp Whitcomb Rd.
Hartland, WI 53029
Phone: (262) 538-1541
Description: Plumbing Contractor
Sponsor: Bill Monfre, Quality Insulators, Inc.
Beam Club Members-to-date: 11

• Tillema Electric
Kevin Tillema
502 E. Winnebago St., Friesland, WI 53935
Phone: (920) 382-3911
Description: Electrical Contractor
Sponsor: Joel Sterk, SIA Insurance Services
Beam Club Members-to-date: 19.5

JULY 2016 NEW MEMBERS

• A & A Plumbing Of Milwaukee
Val Anderson
9401 W. Beloit Rd., Ste. 114
Milwaukee, WI 53227-4357
Phone: (414) 546-0382
Description: Plumbing Contractor
Sponsor: Bill Rozga, Rozga Plumbing & Heating Corp.
Beam Club Members-to-date: 21.5

• Berge Plumbing Plus, LLC
Jessica Berge
W4954 Farm Village Lane, Elkhorn, WI 53121
Phone: (262) 903-8536
Description: Plumbing Contractor
Sponsor: Dan Bertler, Supreme Structures Inc.
Beam Club Members-to-date: 9

• Complete Plumbing Systems, LLC
Ben Magnuson
5192 County Rd J, Mount Horeb, WI 53572
Phone: (608) 438-6945
Description: Plumbing Contractor
Sponsor: Dan Bertler, Supreme Structures Inc.
Beam Club Members-to-date: 10

• Cornerstone Restoration LLC
Kyle O'Brien
901 Front St., Sullivan, WI 53178
Phone: (262) 893-9623
Description: Concrete/Masonry Contractor
Sponsor: JR Reesman, Reesman's Excavating & Grading, Inc.
Beam Club Members-to-date: 16

• Electric 1 Inc.
Tyler Kamrath
221 E. Albert St., Portage, WI 53901
Phone: (608) 742-2222
Description: Electrical Contractor
Sponsor: Dan Bertler, Supreme Structures Inc.
Beam Club Members-to-date: 11

Erspamer Plumbing, Inc.
Mia Erspamer
S47 W30760 State Road 59, Unit #105
North Prairie, WI 53153
Phone: (262) 392-3476
Description: Plumbing Contractor
Sponsor: Mike Schmitz, Cox Plumbing Co. Inc.
Beam Club Members-to-date: 1

• Fox Plumbing & Water Care, LLC
Mandy Fox
N7208 Colbo Rd,
Burlington, WI 53105
Phone: (262) 939-1979
Description: Plumbing Contractor
Sponsor: Lindsey Yoder, The Blue Book Building & Construction Network
Beam Club Members-to-date: 1

• Hanson's Quality Plumbing, Inc
Mark Hanson
550 N Bluemound Dr.,
Appleton, WI 54914
Phone: (920) 730-0205
Description: Plumbing Contractor
Sponsor: Troy Carlson, McClone
Beam Club Members-to-date: 6

• **Lueder Electric LLC**
Catherine Lueder
N1204 Poeppel Rd, Fort Atkinson, WI 53538
Phone: (920) 723-0508
Description: Electrical Contractor
Sponsor: Brenda Rozelle, Delta Electric
Beam Club Members-to-date: 1

• **M.G.E. Company LLC**
Michael Edwards
5920 Deer Road, Wisconsin Rapids, WI 54494
Phone: (715) 424-5539
Description: Electrical Contractor
Sponsor: Tom Altmann, Altmann Construction Co., Inc.
Beam Club Members-to-date: 23

• **Midwest Plumbing LLC**
Rich Price
W24653150 Industrial Lane, Waukesha, WI 53189
Phone: (262) 522-7494
Description: Plumbing Contractor
Sponsor: Brett Felsman, Enterprise Fleet Management
Beam Club Members-to-date: 1

• **Modern Heating & Cooling Inc.**
David Olson
10050 Hwy 14, Black Earth, WI 53515
Phone: (608) 767-2689
Description: Mechanical Contractor
Sponsor: Ross Kraemer, Kraemer Brothers
Beam Club Members-to-date: 4

• **Prime Plumbing LLC**
Jim Kirby
21690 W. Amor Drive, New Berlin, WI 53146-2314
Phone: (414) 550-1080
Description: Plumbing Contractor
Sponsor: Bill Rozga, Rozga Plumbing & Heating Corp.
Beam Club Members-to-date: 22.5

• **Riberich, Inc.**
Bob Riberich
2160 E. Main St., Reedsburg, WI 53959
Phone: (608) 524-2416
Description: Plumbing Contractor
Sponsor: Tom Derrick, Derrick Companies
Beam Club Members-to-date: 21

• **Simply Wilkins LLC**
Adam Wilkins
505 S East Street, Plainfield, WI 54966
Phone: (715) 340-4885
Sponsor: Tom Altmann, Altmann Construction Co., Inc.
Beam Club Members-to-date: 24

• **Team Industries, Inc.**
Lynn Ebben
1200 Maloney Rd., Kaukauna, WI 54130
Phone: (920) 766-7977
Description: Equipment Supplier
Sponsor: Steve Klessig, Keller, Inc.
Beam Club Members-to-date: 40

• **V & H Inc.**
Steve Biechler
1505 S. Central Ave., Marshfield, WI 54449
Phone: (715) 486-8800
Description: Truck & Equipment Supplier
Sponsor: Jim Juneau, Sunbelt Rentals. Inc.
Beam Club Members-to-date: 1

AUGUST 2016 NEW MEMBERS

• **Alden Electric**
Chad Alden
7265 County Rd B, Siren, WI 54872
Phone: (715) 222-2830
Description: Electrical Contractor
Sponsor: Tom Derrick, Derrick Companies
Beam Club Members-to-date: 22

• **Boucher Electric**
Andy Boucher
N871 Outagamie Rd.,
Kaukauna, WI 54130-8831
Phone: (920) 277-1101
Description: Electrical Contractor
Sponsor: Stan Johnson, A.C.E. Building Service, Inc.
Beam Club Members-to-date: 21

• **Hendricks Commercial Properties, LLC**
Brenda Brandt
525 Third St., Ste. 300, Beloit, WI 53511
Phone: (608) 361-6770
Description: Real Estate Development
Sponsor: Andrea Gordon, Corporate Contractors Inc. (CCI)
Beam Club Members-to-date: 3

• **Jon DeBelak Plumbing & Heating**
Jon DeBelak
N63 W24043 Main St.,
Sussex, WI 53089
Phone: (262) 375-4460
Description: Mechanical Contractor
Sponsor: Jay Zahn, R&R Insurance Services, Inc.
Beam Club Members-to-date: 24

• **Komfort Heating & Cooling Inc.**
Nick Malmin
5384 State Road 11,
Elkhorn, WI 53121
Phone: (262) 723-2662
Description: Mechanical Contractor
Sponsor: JR Reesman, Reesman's Excavating & Grading, Inc.
Beam Club Members-to-date: 17

• **Midwest Roofing & Construction, LLC**
Dudley Fowler
4949 County Road 42,
Dodgeville, WI 53533
Phone: (800) 551-8251
Description: Roofing, Metals, Wood Contractor
Sponsor: Dave Rule, Rule Construction Ltd.
Beam Club Members-to-date: 1

•
Myre Electric Inc.
Rick Myre
2185 White Rd, Tomahawk, WI 54487
Phone: (715) 453-2062
Description: Electrical Contractor
Sponsor: Tom Altmann, Altmann Construction Co., Inc.
Beam Club Members-to-date: 25

• **Wisconsin Kitchen Mart, Inc.**
Jeff Rossman
3601 W. Wisconsin Ave.,
Milwaukee, WI 53208
Phone: (414) 342-3300
Description: Complete kitchen and bath remodeling since 1951.
Sponsor: Jay Zahn, R&R Insurance Services, Inc.
Beam Club Members-to-date: 25

EVENTS

Check www.abcwi.org/events for more information

10 Hr. OSHA Construction Training
Fond du Lac
Sept. 23 & 30, 2016
7 am – 12:30 pm

Elecrical Code Class: Grounding & Bonding
Madison
Sept. 26 & Oct. 3, 2016
5 pm – 8 pm

Arc Flash Training
Eau Claire
Sept. 27, 2016
8 am – 2:30 pm

Confined Space Training
La Crosse
Sept. 27, 2016
9:30 am – 4 pm

Residential Wiring, Pt. 1
Madison
Sept. 28 – Nov. 16, 2016
5 pm – 8 pm

Residential Wiring, Pt. 1
Milwaukee
Sept. 29 – Nov. 17, 2016
5 pm – 8 pm

FA/CPR Training
Appleton
Oct. 4, 2016
12:30 pm – 4:30 pm

Construction Safety Update Breakfast
Brookfield
Oct. 5, 2016
7 am – 8:30 am

10 Hr. OSHA Construction Training
Madison
Oct. 6 & 13, 2016
3:30 pm – 9 pm

10 Hr. OSHA Construction Training
Green Bay
Oct. 7 & 14, 2016
7 am – 12:30 pm

Elecrical Code Class: Conductor Installations
Madison
Oct. 10 & 17, 2016
5 pm – 8 pm

Construction Safety Update Breakfast
Appleton
Oct. 11, 2016
7 am – 8:30am

Confined Space Training
Madison
Oct. 11, 2016
9 am – 3:30 pm

Confined Space Training
Milwaukee
Oct. 12, 2016
9 am – 3:30 pm

Networking Social
La Crosse
Oct. 12, 2016
5 pm – 6:30 pm

Arc Flash Training
Stevens Point
Oct. 17, 2016
8 am – 2:30 pm

HR Conference
WI Dells
Oct. 20, 2016
7 pm – 4:30 pm

Construction Safety Update Breakfast
Eau Claire
Oct. 21, 2016
7 am – 8:30 am

Qualified Rigger & Crane Signal Person Training
Appleton
Oct. 25, 2016
7:30 am – 4 pm

Confined Space Training
Appleton
Oct. 25, 2016
8 am – 2:30 pm

FA/CPR Training
Eau Claire
Oct. 25, 2016
8am – 12pm

Confined Space Training
West Bend
Oct. 26, 2016
9 am – 3:30 pm

Construction Safety Update Breakfast
Madison
Oct. 27, 2016
7am – 8:30am

*For additional information contact **Deanna Regel**, 608-244-5883*

Does your insurance company offer

protection for your family pet?

WEST BEND DOES.

West Bend also offers a discount just for members of the **ABC of Wisconsin.**

Call an Official Supplier of the Silver Lining® to find out what else West Bend's Home and Highway® has to offer.

WEST BEND®

THE SILVER LINING®

Visit **thesilverlining.com** for the name of the agency nearest you.

FAITH TECHNOLOGIES®

WWW.FAITHTECHNOLOGIES.COM

LEAD WITH INNOVATION.

With over 40 years of expertise, Faith Technologies continues to deliver innovative solutions to some of the nation's most vital operations - from data centers to children's hospitals and high rise structures.

And that translates to success.