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**SMART HIRING  
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(AND LITIGIOUS)  
JOB MARKET**

# EMPLOYEES

## FINDING, HIRING, MANAGING & RETAINING YOUR WORKFORCE

**PLUS:**

**CREATING YOUR  
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**CONSIDERATIONS FOR  
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ALSO INSIDE:  
**CONSTRUCTION  
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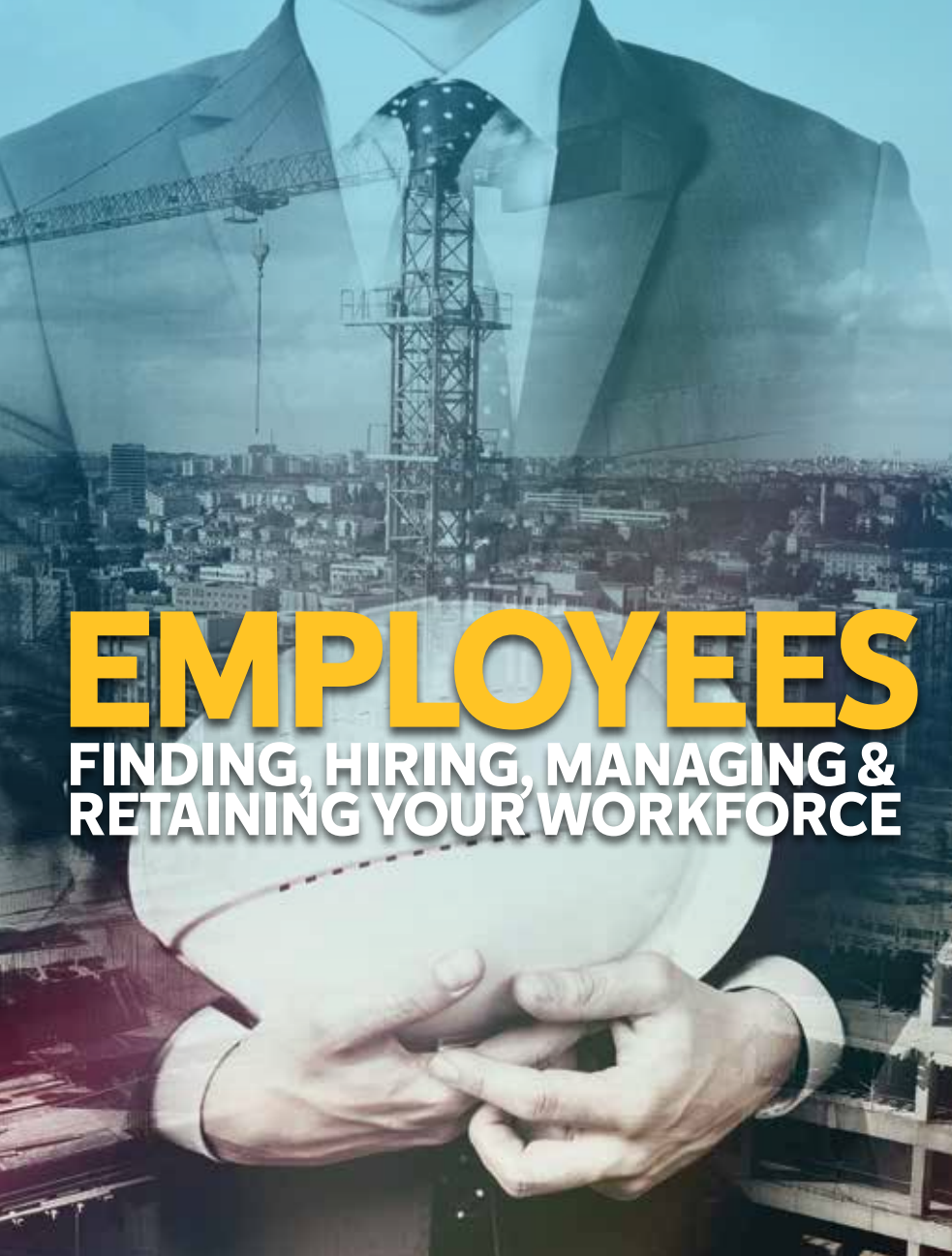
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# EMPLOYEES

## FINDING, HIRING, MANAGING & RETAINING YOUR WORKFORCE

## MERIT SHOP CONTRACTOR

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FROM OUR PRESIDENT

# Construction deserving of the spotlight



**WHEN A HIGH-PERFORMING STUDENT ATHLETE COMMITS TO A UNIVERSITY, IT'S FAIRLY COMMON TO HOLD A "SIGNING DAY" TO MARK THE OCCASION.** These made-for-the-camera events recognize the hard work a student has put into his/her chosen sport and their studies, dedicating countless hours to practice and self-improvement.

In a lot of ways, student athletes have a lot in common with our state's youth apprentices, who begin their careers in high school learning a particular set of skills through extensive study and getting hands-on experience. But this pathway to a successful career often goes unnoticed.



Trey Sloniker (left) being interviewed by WQOW-TV in Eau Claire

We set out to change that last month by holding one of Wisconsin's first-ever "Apprenticeship Signing Day" events at Royal Construction, Inc. in Eau Claire. On Aug. 23, we celebrated as Treyton Sloniker, a youth apprentice in carpentry, who recently graduated from Greenwood High School, signed on to become a registered apprentice during his own "signing day." He'll continue his career through ABC's apprenticeship program at Royal Construction while completing his classroom education at Wisconsin Indianhead Technical College (WITC) in Rice Lake.

High school youth apprenticeship (YA) options are becoming very popular, because they provide businesses another pipeline of workers. In fact, it is

one of the rapidly growing strategies gaining popularity among ABC members. In this formal program, students under the age of 18, who were previously off-limits to contractors, are now able to gain work experience on the jobsite earlier. Students love the fact that they are getting high school credit and get paid to try out a career field. Parents love that their kids are getting exposure to an industry that, for many, was confusing and didn't seem like "the best career option."


There are 11 approved YA occupational areas, and during the 2017-2018 school year, 4,363 high school students participated in youth apprenticeship. The "Architecture & Construction" area grew from 194 students during the 2016-2017 school year to more than 309 this past school year. Unfortunately, construction has a way to go compared with other industries, such as manufacturing, which has 821 youth apprentices. This is where ABC members have an amazing opportunity to work with their local school districts to create and cultivate partnerships.

This issue of the *Merit Shop Contractor* magazine focuses on human resources and how to attract and retain workers. It's getting tougher to attract workers, as you well know. This means we have to engage in unconventional methods and partnerships. We have to spend more time "cultivating" candidates and "selling" our industry to them. Youth apprenticeship is one way to do this.

Your ABC chapter will continue to promote and expand youth apprenticeship as a workforce development tool because more and more members like Royal Construction understand the value, not only for themselves, but for high school students and our construction industry as a whole.

— John Mielke

“  
PARENTS LOVE THAT THEIR KIDS ARE GETTING EXPOSURE TO AN INDUSTRY THAT, FOR MANY, WAS CONFUSING AND DIDN'T SEEM LIKE 'THE BEST CAREER OPTION.'”



# MONEY HELPS,

# BUT IT ISN'T EVERYTHING

## *Attracting and Retaining Construction Employees*

*By Deborah Marshal — Senior Manager, Wipfli*

***To no one's surprise, hiring and retaining good employees is increasingly difficult for employers, but especially in the construction industry. As baby boomers retire and birth rates decline, the U.S. Bureau of Labor Statistics predicts the growth rate of the American labor force will continue to decrease through 2060.<sup>1</sup>***

That's certainly an excellent reason to plan your strategy and tactics for retaining great employees. Among other options we will explore in this article, this may include helping marginally performing employees be more productive, versus struggling to replace them (though keeping a truly "bad apple" is rarely a good move).

### **Compensation Isn't Everything**

We often hear that a common employee retention tactic is to "give them more money." However, compensation is only one aspect of hiring and retention, and it certainly isn't everything. Think of it like your ticket to a baseball game: money buys your entry into the stadium, but it won't win the game for your team. Compensation may attract new employees to your company but time and

again we see that employees stay put for more complex reasons than just money. They also consider:

- How they're treated (respect is critical, in the past and present),
- How important you make them feel about working at your company and
- How you can help them better perform their jobs.

Although it seems simpler to solve retention problems by giving employees more money, it could be better to invest at least some of those dollars in training your managers and supervisors to be the type of boss that makes employees want to stay. In 2009, Google started a project with the goal of "building better bosses" across the organization.<sup>2</sup> Through this exercise, the company uncovered that we all value an even-keeled boss who makes time to get to know us and helps solve problems by asking the right questions, not just dictating answers, and who truly cares about our lives and careers.

<sup>1</sup> "A Look at the Future of the U.S. Labor Force to 2060," Mitra Toossi, U.S. Bureau of Labor Statistics, September 2016, <https://www.bls.gov/spotlight/2016/a-look-at-the-future-of-the-us-labor-force-to-2060/pdf/a-look-at-the-future-of-the-us-labor-force-to-2060.pdf>, accessed March 14, 2018

<sup>2</sup> Adam Bryant, "Google's Quest to Build a Better Boss," The New York Times, March 12, 2011, <https://www.nytimes.com/2011/03/13/business/13hire.html?emc=Int&intemail=0=y>, accessed June 11, 2018.

Dissatisfied employees will research what their value is in the market via crowdsourced or recruiting websites. Even satisfied employees are being regularly wooed by recruiters, who do know the realities of competitive pay. So, although it is certainly in your best interest to know what is happening pay-wise for people in your marketplace, it is even more important to know what your employees truly value in their working relationship with your company.

Retaining employees is a balance between compensation and a workplace culture that makes them *want to stay*.

### Using Retention, Referral and Sign-On Bonuses

Some companies utilize retention bonuses to get employees to stay, but this strategy often comes with a whole host of unintended consequences. You just can't buy people's loyalty — and remember, people talk. Giving some employees retention bonuses can lead to a "domino effect" of others trying the same tactic, which rarely ends well for employers.

If you are in a merger or acquisition situation or have a vital project you need to complete, then retention bonuses may be an effective short-term solution (with appropriate caveats explained in advance). But otherwise, once an employee has gotten to the point of wanting to leave, it's often too late to retain them. Job satisfaction comes from more than money. You want to build a company where people are respected by management and co-workers, valued for their contributions to the success of the organization, and challenged by the work they do.

Referral and sign-on bonuses have a few more "pros" than retention bonuses have, though it is still important to focus on what makes employees want to stay after they have made the decision to join your company. If you're going to implement a referral or sign-on bonus program, your hiring managers need to know all the details, including the number of days it takes to qualify and when bonuses are paid out. Document and communicate this process for your new employees, too, beginning with the offer letter (the details may vary for different jobs, shifts, locations, etc.).

With the recent passage of the Tax Cuts and Jobs Act, we saw several large employers providing one-time bonuses, especially to their hourly/non-exempt employees. This is all well and good, but it really doesn't have much staying power. The "what have you done for me lately" mindset often sets in after the initial satisfaction of getting a bonus wears off. Although concerns about raising base pay and its impact on costs are real, when implemented appropriately, it will likely have a more lasting, positive impact on retention.

If you are considering raising starting pay by 5–10 percent, especially for entry-level jobs, be very careful with the impact of "wage compression." It can easily occur and must be carefully considered for the jobs the next few levels up. New employees can end up making as much or more than those who have been there for a couple of years, which will negatively impact morale and retention. Note that

an increase to starting pay may be appropriate for some jobs, but not all. You must effectively analyze data related to your compensation structures, employee performance, cost pressures from customers and other factors, as well as (and most importantly) exercise good business judgement. Relying solely on published salary surveys (lagging data) or employee-reported sources (often unreliable) is not likely to produce the results you need.

### What You Can Do


You know turnover is expensive, especially when you lose good people. Consider evaluating turnover by supervisor. If people are leaving before six months, evaluate why that is happening. If some supervisors have higher turnover rates, investigate what is causing the issue, just like you would a continuous improvement project. Providing supervisors with effective training on basic skills in communication and respectful behavior can help them become better bosses and could significantly impact retention.

When it comes to compensation, we expect to see more upward pressure on wages over the next few years. Your customers are often asking you to cut costs, not increase them, though it is likely they are having the same problems with employee retention.

## EMPLOYEES ALSO CONSIDER:

- HOW THEY'RE TREATED
- HOW IMPORTANT YOU MAKE THEM FEEL
- HOW YOU CAN HELP THEM BETTER PERFORM THEIR JOBS

You'll need to evaluate the impact of various approaches such as job design (who does what, how and why), automation and process improvement, the potential for implementing price increases, and what can be absorbed out of profit margins.

In the end, compensation has a lot to do with managing employee expectations. Let employees know about compensation opportunities in your organization. Explain why some jobs pay more than others, what employees need to do to attain raises or how they can move into higher-paying positions. Make sure your managers understand the reasoning behind your pay programs and are trained to have effective conversations about pay with their employees. "Trust me" needs to be backed up with good data, training, and solid communications. Having realistic conversations about money can go a long way in managing expectations and helping retain employees. 

*If you want to learn more about compensation strategies and how to attract and retain employees, contact Deb Marshall at [dmarshall@wipfli.com](mailto:dmarshall@wipfli.com).*



# WAGE & HOUR

## LIABILITY CONTINUES

*By Douglas E. Witte — Attorney, Boardman & Clark LLP*

***This summer we noted the 80th anniversary of the passage of the Fair Labor Standards Act (FLSA). This landmark legislation established several long-standing pillars of the modern workplace, including the minimum wage, the 40-hour work week and overtime. Despite the fact the FLSA has been around since 1938, employers continue to struggle with paying their employees correctly.***

These struggles include issues such as whether an employee is exempt or non-exempt for overtime purposes, what constitutes “hours worked” under the FLSA, and how to calculate overtime correctly. In 2017, DOL investigations found more than \$270 million in back wages were owed to employees. The number of wage claims and lawsuits filed by individuals and attorneys continues to grow at an alarming rate.

The Trump Administration has created new strategies and tools for employers to help with compliance of FLSA and correct inadvertent violations. For example, the Wage and Hour Division (WHD) has created a number of training videos and posted them on the DOL website. In addition, the Department of Labor (DOL)

has continued to place helpful fact sheets and other educational materials on its website.

One significant program DOL has instituted this year is the Payroll Audit Independent Determination pilot program (PAID). This is a program where DOL invites employers to voluntarily audit their payroll practices and disclose any non-compliant practices to the DOL. The DOL then reviews the employer records and calculations of what is owed to employees and tells the employer what it thinks the employer owes. The employer then pays its employees and employees sign a release of any FLSA claims against the employer. The employer must also correct the practice moving forward. Participating employers are not subject



to civil monetary penalties and are not required to pay liquidated damages to employees.

### Why is DOL attempting this PAID program?

DOL believes the PAID program has benefits for employers and employees. This program should help employees receive their overtime and minimum wages quicker. Employees will receive 100 percent of the back wages paid without having to pay any litigation expenses or attorneys' fees. DOL recognizes it cannot adequately enforce the laws against all employers. Therefore, DOL believes encouraging more employees to accept payments will help a greater number of employees get money they may be owed.

For employers, the benefits are resolving potential overtime and minimum wage violations expeditiously and without litigation. Additionally, although employers will be required to pay all back wages due, employers will not be required to pay "liquidated damages" or civil monetary penalties. Liquidated damages, or the doubling of the amount owed, is standard practice under the FLSA.

DOL also believes the PAID program will be a win for taxpayers because it will improve overall compliance and allow the WHD to focus more of its resources on bad actors who intentionally violate the law.

### How does the program work?

An employer who wishes to participate in the program must first review the required information and compliance assistance materials on the DOL's website. After reviewing the materials, employers must then audit their compensation practices for potentially non-compliant practices. If the employer discovers any non-compliant practices, the employer must then:

- 1 Specifically identify the potential violations;
- 2 Identify which employees were affected;
- 3 Identify the timeframe in which each employee was affected; and
- 4 Calculate the amount of back wages the employer believes are owed each employee.

After compiling that information, the employer contacts WHD to discuss the issues it seeks to resolve. WHD will inform the employer of the information it must submit, including the calculations accompanied by supporting evidence and an explanation of how the calculations were made. Any action under the PAID program must include former employees in the back-wage calculations.

WHD will then evaluate the information and determine whether it needs additional information from the employer to assess the

## IF THE EMPLOYER DISCOVERS ANY NON-COMPLIANT PRACTICES, THE EMPLOYER MUST THEN:

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**2**  
IDENTIFY WHICH EMPLOYEES WERE AFFECTED

**3**  
IDENTIFY THE TIMEFRAME IN WHICH EACH EMPLOYEE WAS AFFECTED

**4**  
CALCULATE THE AMOUNT OF BACK WAGES THE EMPLOYER BELIEVES ARE OWED EACH EMPLOYEE

### How can employers participate in the PAID program?

All FLSA covered employers are eligible to participate in the pilot program. However, if a claim is already being investigated or litigated, those claims cannot be resolved under the PAID program. Employers who have been repeat or recent violators cannot use the PAID program. The program is designed to allow employers to correct common violations such as "off the clock" work, failure to pay overtime at one- and one-half times the regular rate of pay, or misclassification of employees as exempt from the FLSA's minimum wage and overtime requirements. It is not designed to address more complicated issues such as prevailing wage violations or pay issues with employees working under Visa programs.

back wages. If WHD accepts the employer's proposal, it will tell the employer its proposed scope of the release of liability for the potential violations presented. If WHD discovers additional minimum wage or overtime issues outside the scope of the employer's proposal, WHD will ordinarily attempt to resolve these as part of the audit.

After WHD assesses the back wages due, it will issue a summary of unpaid wages and forms describing the settlement terms for each employee. Employees must sign release forms in order to receive payment, but the release will be limited to the potential violations for which the employer has paid back wages. Employers are responsible for issuing the payments, as WHD will not distrib-

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ute the back wages. If an employer refuses to pay back wages after WHD makes its determination, WHD could use its enforcement authority to recover the wages due. The process should take fewer than 90 days to complete.

**Should employers participate?**

While the program seems like a fairly painless and efficient way to clean up any FLSA violations, the employer may be aware of and may allow it to do so without paying any liquidated damages or penalties, there are some issues employers may want to consider before jumping in.

First, while an employer may identify certain pay practices it is aware of that violate the law, the DOL will conduct an independent review of any issues identified. DOL could broaden the scope of the issues. If the employer doesn't agree with DOL's position, will DOL then take independent enforcement action or threaten to propose additional penalties? This also does not prevent WHD from conducting future investigations.

Second, employees are not required to accept DOL's proposed settlement and release. Some employees who think they are owed a larger amount of money may not want to limit themselves to just getting their back wages paid. They may wish to get liquidated damages. In addition, while the default statute of limitations under

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the FLSA is two years, this can be extended to three years for “willful” violations. An employee may believe that an employer’s actions are willful and may decide that it is better to obtain their own legal counsel and get more money they think they are owed. In this case, the employer has already provided a roadmap for the employees and their attorneys.

Third, employees who accept money under the PAID program will sign a release giving up their claims under the FLSA. The release does not cover wage claims that could be brought under state law. Some states provide a longer statute of limitations and impose their own statutory penalties for minimum wage and overtime violations. So, an employer could settle with employees under the PAID program and may still face a state court lawsuit. A number of attorneys general across the United States have objected to DOL’s program as being unfair to employees because it does not get them all the benefits they would get if they pursued a lawsuit.

### Closing Thoughts

Employers can already correct self-discovered FLSA violations without involving the DOL. That is, if you discover you have been making an improper payroll practice, you can pay the employee back wages. While any release you sign with

an employee for those back wages would not necessarily prevent further litigation by an employee seeking penalties or for a longer period of time, the employer generally will be given credit for any back wages it has paid. Such voluntary payments would also reduce the likelihood that a court would determine a violation was willful and could be a consideration with respect to whether liquidated damages are due.

While the possibility of avoiding potential lawsuits, liquidated damages, and civil penalties is certainly appealing, participating in PAID may not make sense for all employers in all cases. If you suspect you may be out of compliance with the FLSA, you may wish to consult with experienced legal counsel to discuss the benefits and risks of participating in PAID as a way to avoid potentially costly and time-consuming litigation. These cases are not easy. An employer must consider not only legal liabilities, but also the employee and public relations aspects. 

***Doug Witte has more than 28 years of experience representing private and public sector employers in all aspects of labor and employment law. He can be reached at [dwitte@boardmanclark.com](mailto:dwitte@boardmanclark.com).***



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# SMART HIRING

## IN A COMPETITIVE (AND LITIGIOUS) JOB MARKET

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

*Smart hiring is more important than ever. The unemployment rate is at levels not seen for 20 years or more, the baby boomers are retiring and the cost of a poor hiring decision can be extremely high.*

*This article addresses some of the practical steps employers are taking to attract and retain employees along with tips to avoid legal pitfalls when hiring in this challenging labor market.*

What can employers do to attract more candidates and hire more employees in this environment? The two most effective strategies are:

- ❶ **Providing economic incentives.**
- ❷ **Lowering barriers to employment.**

Increasing employees' base salary and hourly rate is a time-

tested way to increase the supply of interested candidates and hold on to current employees. Employers are now also offering signing bonuses, which can be effective. Requiring the employee to promise to repay the signing bonus if they leave employment within a certain period of time after joining the company can help retention. Some

## THE TWO MOST EFFECTIVE STRATEGIES TO ATTRACT MORE CANDIDATES AND HIRE MORE EMPLOYEES ARE:

1

### PROVIDE ECONOMIC INCENTIVES

employers are even offering cash or other incentives simply for filling out an application or going through an interview. Helping employees with transportation and other creative benefits are also becoming more common.

Employers are also scrutinizing their selection process and burning away deadwood that may exclude some applicants.

For example, some employers have eliminated the requirement of a high school degree. Others have decided to take a more liberal approach to employees with a criminal history and have become more creative in providing accommodations to employees with disabilities. The law in Wisconsin already requires employers to ignore certain convictions and to reasonably accommodate applicants and employees with disabilities; but many employers are now going beyond what the law requires to help attract and retain employees.

To avoid an unwise or unsafe hire in this environment, employers must take care. Finding and hiring a qualified applicant for the job can lead to more productivity and can help you avoid the headaches that come with a bad hire, such as employee turnover, poor morale, disputes, and performance issues. Some candidates may lie on their application and may not necessarily have the skills or other qualifications they claim. Others may have committed serious crimes in the past that they may repeat at your workplace if you hire them. Others may engage in disputes that can lead to expensive litigation. For example, a sexual harassment case can cost more than \$100,000 to defend in federal court. Even a run-of-the-mill Wisconsin Department of Workforce Development Equal Rights Division case can be costly to defend.

Avoiding these problems creates a strong incentive to carefully screen applicants. The challenge you face is the patchwork of laws that apply to the hiring process. Here are tips for avoiding common legal issues that can arise:

**Create a good job description.** A job description should accurately describe the job. A good one can be cut and pasted into help wanted ads. And a job description can be an important piece of evidence in litigation that can help or hurt you. A description of job duties can help prove that certain employees are exempt from

2

### LOWER BARRIERS TO EMPLOYMENT

overtime. And if it adequately defines the demands of a job's essential functions, such as physical demands, a job description can help you defend a claim that you have failed to reasonably accommodate a disability.

**Craft your employment applications and interview questions with care.** Good selection processes focus on the ability to do the job. Also, be careful to eliminate questions that could be interpreted as being discriminatory or as inquiring into an applicant's protected status. For example, do not ask about past arrests or whether applicants are married. Include a statement in the application that any omission or false statement on the application is grounds for not hiring or termination whenever it is discovered.

If you have an online application process, make sure it is accessible to all applicants and create alternatives that do not require online accessibility, such as permitting employees to apply over the phone or using special software designed for individuals with vision impairments.

**Conduct drug and alcohol tests and physical exams, but only when appropriate for the job and business needs and proceed with caution.** Such tests are permissible, but conduct them after a conditional offer and on all applicants for a specific job.

**Check applicants' background to avoid hiring a "bad fit" or someone who will pose an unreasonable risk of harm to others.** Avoid negligent hiring. Negligent hiring occurs when an employer fails to take reasonable care when hiring employees and that lack of care causes injury to someone. For example, suppose a company hires an employee with a history of violent assaults and that individual then assaults a customer. When that happens, the employer could be liable for the resulting damages.

You should also inquire whether the candidate is subject to legal obligations, such as being subject to a non-competition or non-disclosure agreement that could be violated by coming to work for your company. When a candidate progresses to the hiring stage, ask him or her to sign a statement to the effect that he or she is not under any such obligation and acknowledging that your company has no interest in any prior employer's confidential information or trade secrets.

*Check applicants' background to avoid hiring a "bad fit" or someone who will pose an unreasonable risk of harm to others.*

The Equal Employment Opportunity Commission's guidance recommends that you perform an "individualized assessment" of the person and the criminal background in almost all cases before deciding to reject an applicant because of a past conviction.

**The individualized assessment should include consideration of a number of factors, including:**

1

THE NATURE AND GRAVITY OF THE OFFENSE

---

2

THE TIME THAT HAS PASSED SINCE THE OFFENSE OR COMPLETION OF THE SENTENCE

---

3

THE NATURE OF THE JOB SOUGHT

**Check references.** Conduct criminal background checks, but be careful to comply with the Fair Credit Reporting Act and Wisconsin Fair Employment Act's rules on when conviction records can be taken into account.

The basic rule in Wisconsin is that you cannot reject a candidate because of a past conviction unless the circumstances of the conviction "substantially relate" to the job in question. The classic example is an applicant for a chief financial officer position who has a conviction in the past for embezzlement. That crime would clearly and substantially relate to the job. But other cases can be more difficult to analyze.

Employers in Madison must also be mindful of the Madison Equal Opportunity Commission's rules, which go even further than the State of Wisconsin's. If hiring outside of Wisconsin, determine whether you need to also comply with ban-the-box laws, which typically forbid inquiring into or checking an applicant's criminal history until after an interview or conditional offer.

The Equal Employment Opportunity Commission's guidance recommends that you perform an "individualized assessment" of the person and the criminal background in almost all cases before deciding to reject an applicant because of a past conviction. The individualized assessment should include consideration of a number of factors, including: (1) the nature and gravity of the offense, (2) the time that has passed since the offense or completion of the sentence, and (3) the nature of the job sought.

When you have made the decision of whom to hire, document it and the reasoning behind it. Remember that if there is litigation, it may not take place until a year or more has passed since the decision and you will want a record of why you decided to hire one applicant instead of others.

**Draft a good offer letter that documents the basic terms and conditions of employment.** That can help you avoid misunderstandings and disputes that can lead to litigation. For employees who will be given specialized training, confidential information or important customer relationships, consider having them enter into a non-disclosure and non-competition agreement, protecting your company's legitimate business interests for a reasonable period of time after the employment relationship ends. If your company has information that qualifies as a trade secret, notify the employee about this and his or her legal obligations towards that information.

**Finally, get receipts for handbooks, harassment policies and the like on the first day of hiring.** They can be important pieces of evidence in litigation. And complete your I-9 obligations, but remember there are exceptions for independent contractors and workers provided by temporary agencies. 🇺🇸

**Mark A. Johnson has a wide range of experience representing businesses in matters involving labor and employment law. He can be reached at [mark.johnson@ogletree.com](mailto:mark.johnson@ogletree.com).**

## EVENT REMINDERS



WWW.ABCWI.ORG

**Construction U Emerging Leader** / Begins Sept. 19 – Madison

**FA/CPR Training** / Sept. 20 – Pewaukee area

**Networking Social** / Sept. 20 – Marshfield

**Crane Operator Training** / Sept. 24-28 – Sun Prairie

**10-Hour OSHA** / Sept. 26 & Oct. 3 – Green Bay

**Plan & Spec Reading** / Begins Sept. 26 – Green Bay

**Construction U Construction Leadership** / Begins Sept. 28 – Madison

**Industrial Wiring & Motor Controls** / Begins Oct. 3 / Madison

**Construction Safety Breakfast** / Oct. 4 – Madison

**Project Coordinator** / Begins Oct. 4 – Madison

**Silica Awareness Training** / Oct. 4 – Madison

**First Aid/CPR Training** / Oct. 5 – Madison

**Construction Safety Breakfast** / Oct. 11 – Pewaukee

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# CREATING YOUR PLAYBOOK

## CONSIDERATIONS FOR EMPLOYEE HANDBOOKS

*By Josh Levy and Robert Sanders — Attorneys, Husch Blackwell*

*Drafting a sound employee handbook is an essential step to make sure your “team” is all playing under the same rules. This is often your first opportunity to communicate your policies, procedures, expectations, and employee benefits to your employees. If you ever face any employment-related claims, your employee handbook will be a key piece of evidence to show that you effectively communicated your policies and procedures. These are some of the critically important reasons that you take steps to ensure your employee handbook is legally sound.*

### ■ Reaffirm the at-will employment relationship

In Wisconsin, courts have held that poorly drafted employee handbooks can be construed to create an employment contract between the employer and the employee. So, if your intention is that the employees remain at-will employees – meaning you can terminate them at any time for any reason or for no reason at all

and, likewise, they can end their employment at any time – you need to make sure your employee handbook contains a specific at-will provision. The at-will provision will inform the employees that they are employed on an at-will basis and nothing in the employee handbook is to be construed as creating an employment contract.



# REASONS TO ENSURE YOUR EMPLOYEE HANDBOOK IS LEGALLY SOUND

1 REAFFIRM THE AT-WILL EMPLOYMENT RELATIONSHIP

2 COMMUNICATE KEY POLICIES/ PROCEDURES

3 EQUAL EMPLOYMENT OPPORTUNITY POLICY

4 IMMIGRATION LAW COMPLIANCE POLICY

5 ANTI-HARRASSMENT POLICY

6 LEAVE OF ABSENCE AND TIME-OFF POLICIES

7 INJURY AND INCIDENT REPORTING POLICY

8 DISABILITY ACCOMMODATION POLICY

9 EMPLOYMENT CLASSIFICATIONS AND EMPLOYEE BENEFITS

10 GIVE YOURSELF THE RIGHT TO MODIFY THE HANDBOOK

11 INCLUDE AN ACKNOWLEDGEMENT FORM

12 WHEN IN DOUBT, CALL THE PROS

## ■ Communicate key policies/procedures

Your employee handbook is a great tool for you to effectively communicate your policies and procedures. It also becomes an important resource for your employees to consult when they have a question regarding work rules. The following is a non-exhaustive list of some policies and procedures to consider including in your employee handbook:

## ■ Equal Employment Opportunity Policy

This policy is essential in communicating your efforts to provide an equal employment opportunity to everyone, in compliance with state and federal law. The Wisconsin Fair Employment Act (WFEA) prohibits discrimination based on age; race; creed; color; disability; marital status; sex; sexual orientation; pregnancy, childbirth, maternity leave, and related medical conditions; national origin; ancestry; arrest record; conviction record; military service; use or nonuse of lawful products off the employer's premises during non-working hours; and declining to attend a meeting or to participate in any communications that are religious or political.

Your Equal Employment Opportunity policy should expressly prohibit discrimination and retaliation and outline the procedure employees should use to report a complaint.

## ■ Immigration Law Compliance Policy

This policy covers your company's compliance with the Immigration Reform and Control Act of 1986 (IRCA) as well as other federal,

state, or local laws that may apply to your business. The policy should address issues related to IRCA's Form I-9 process, E-Verify, Social Security no-match, immigration sponsorship, and avoiding national origin and citizenship discrimination in recruitment, hiring, and termination.

## ■ Anti-Harrassment Policy

In the wake of the "#MeToo" movement, many employers are reviewing their anti-harrassment policies. It is imperative that every employer include a policy prohibiting harrassment in your employee handbook. The anti-harrassment policy should make it clear that you prohibit all forms of workplace harrassment, including racial, sexual or national origin. The handbook will also outline the procedure for reporting complaints, demonstrate your commitment to taking each complaint seriously, and protect all complainants and witnesses from retaliation.

## ■ Anti-Retlatiation Policy

Most anti-discrimination and anti-harrassment policies should include an "anti-retaliation" provision. A stand-alone anti-retaliation policy drives home the point that retaliation is expressly prohibited and outlines the procedure for reporting any form of retaliation.

## ■ Leave of Absence and Time Off Policies

These policies list holiday, paid time off (PTO)/vacation, sick, and other types of leave. The policies should indicate how time off may

be accrued, whether there is any year-to-year carryover, whether accrued but unused PTO/vacation time is paid out upon termination, and any other procedure governing leave. This is also a great place to include your compliance with and procedures related to any federal, state, or local leave laws that apply to your workforce, which may include the Family Medical Leave Act, the Wisconsin Family Medical Leave Act, military service leave, and jury duty leave.

■ **Injury and Incident Reporting Policy**

Make sure your employees know that ALL workplace injuries and incidents must be reported, no matter how large or small they may think it is. This will help you avoid unnecessary delay in reporting claims and assist in disputing questionable claims. The injury and incident reporting policy should outline specific reporting procedures.

■ **Disability Accommodation Policy**

It is often a good idea to let your employees know that you are committed to the Americans with Disabilities Act (ADA)'s and WFEA's requirement that you provide equal employment opportunities to qualified individuals with disabilities and to the ADA's

and WFEA's interactive process. The policy should include how to request a reasonable accommodation, what information may be required, how the policy will be administered, and how accommodation determinations will be made. The policy should also include a "no retaliation" provision. Consult an attorney if you have questions about whether both the ADA and WFEA apply to your business, the interactive process, or your practice/procedures.

■ **Employment classifications and employee benefits**

Your employee handbook is a natural place to list your various employee benefits. It is also often the first place an employee will look to determine whether specific employee benefits apply to them. Therefore, it is essential that you clearly define your various employment classifications (full-time, part-time, exempt, non-exempt) so that your employees know whether they are eligible for the various benefits you offer.

■ **Give yourself the right to modify the handbook**

Policies and procedures change over time. Therefore, it is important that you

clearly remind employees that you (the employer) always maintain the right to change, modify, or delete any provision in the handbook at any time, at your discretion. Any changes, modifications, or deletions of any provisions should be made in writing and should include an employee acknowledgment of the change.

■ **Include an acknowledgement form**

An acknowledgement form is one of the most important aspects of any employee handbook. Because the employee handbook is often used as "exhibit one" in any employment-litigation and/or administrative proceeding, you should have each employee sign, print their name, and date an acknowledgement form indicating that they: (1) received the employee handbook; (2) read it, understood it, and agreed to comply with its provisions; and (3) are employed on at-at-will basis (to again prevent the employee handbook from being construed as an employment contract).

■ **When in doubt, call the pros**

Over the years, we have seen countless employers attempt to cobble together handbooks based on an array of policies collected from a variety of sources. The far better approach is to devote time each year for a review of your handbook in light of changes with your business, the workforce and applicable laws. 🇺🇸

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*For more on your existing employee handbook, policies, or procedures or need assistance in drafting an employee handbook, call Josh Levy or Bob Sanders at Husch Blackwell, 414-978-5458.*

*This information is intended only to provide general information in summary form on legal and business topics of the day. The contents hereof do not constitute legal advice and should not be relied on as such. Specific legal advice should be sought in particular matters.*



**ARE YOUR**

# **SEXUAL HARASSMENT**

## **POLICIES AND PROCEDURES READY?**

*By Bob Gregg — Attorney, Boardman & Clark LLP*

***There has been an explosion of sexual harassment allegations in both the press and in complaints to employers. Famous media figures, politicians, executives, and public and corporate managers have suddenly had to face the ramifications of their improper behaviors.***

Harassment is certainly not new. Yet, now there is a new environment, new support and new motivation to come forth. Organizations, Congress and legislatures are paying attention. Enhanced policies and practices are necessary because new laws and liabilities are coming.

In many organizations, sexual harassment seems all too

common. In others, it rarely arises and is quickly and effectively addressed. What is the difference?

If your organization is one where sexual harassment seems all too common, how do you change and create effective practices to establish a respectful workplace? If your organization is already a respectful workplace, how do you continue and enhance that

## ARE YOU PREPARED?

- 1 A POLICY IS JUST A PIECE OF PAPER. GIVE IT MEANING AND LIFE
- 2 IMPLEMENT MORE DETAILED GUIDELINES
- 3 TRAINING OF ALL EMPLOYEES – REAL TRAINING
- 4 TRAINING OF MANAGERS BEYOND THE GENERAL ALL-EMPLOYEE PROGRAM
- 5 COLLATERAL POLICY COORDINATION
- 6 FOLLOW-UPS TO RE-EMPHASIZE THE TRAINING

status in the light of current developments and upcoming laws and liabilities?

### Your policies and practices are under close scrutiny.

Too many organizations, which did receive complaints, did not properly act. Now prompt and effective actions, or lack thereof, are getting much closer press and legal attention. Unfortunately, too many policies and response practices are not designed to be effective. Many supervisors do not know what to do; some cannot even tell you what the anti-harassment policy covers or what it says! “Oh it’s somewhere in the handbook. I’ll read it if I ever need to.”

### Are You PREPARED?

Here is a checklist:

#### Anti-Harassment Policy.

Courts have recently found a number of policies are inadequate. Is yours current?

- Comprehensive coverage of EEO categories.
- Emphasis to all employees (signed – not just somewhere in the pages of a thick handbook).
- Given to all workers – temps, student/interns/seasonals, etc. (who are often the most vulnerable).
- Prohibits “inappropriate” behaviors – not “illegal harassment” (or you will always be on the verge of illegality) set the level well below “illegal,” to give space for correction – rather than discharge.

- Ease of reporting.
- Designated specific people/positions to report to (not “your supervisor” for a formal complaint).
- More than one way and location for reporting – to provide a way around “blockages.”
- Prompt action promise – with both an informal and formal option (not just “discipline/discharge” for every infraction – no matter how minor).
- Guarantee of no retaliation.

**A policy is just a piece of paper. Give it meaning and life.** Upper management must emphasize its importance.

**Implement more detailed guidelines** to back up the policy; work rules on inappropriate behavior.

**Training of all employees – real training.** The EEOC and other experts have opined that a computer/video/post-test taken by an employee, in a little room alone, is generally ineffective. It is subject to inattention, test answers provided in advance, and may signal this shows the employer is “glossing” the issue as unimportant and pro-forma. Short training of only an hour can be seen as ineffective. It demonstrates the organization’s lack of concern. It is a “gloss,” not a real effort to educate.

*“One and done” is virtually designed to fade and fail over time. Keep the message alive, in small doses over time (articles, clippings, short part of meeting agendas periodically).*

**Training of managers beyond the general all-employee program.** Supervisors need more guidance on how to recognize, report and react to situations.

**Collateral policy coordination.** Other policies may intersect and reinforce harassment policies. The policies on computer/phone/electronic usage; workplace dating/nepotism/favoritism; conflicts of interest; dress code, boundaries with clients, etc. should coordinate with the harassment policy.

**Follow-ups to re-emphasize the training.** “One and done” is virtually designed to fade and fail over time. Keep the message alive, in small doses over time (articles, clippings, short part of meeting agendas periodically).


**Process & Action**

- Thorough review of the process for handling complaints.
  - Review of current process and protocols.
  - Flexibility.
  - Fairness to complainant and those complained about – non-discriminatory; due process.

- Protocols for corrective action and for communicating findings of no improper behaviors.
- Anti-retaliation protocols.

**Processes for handling even more sensitive issues:**

- Child labor/juvenile workers’ complaints, and improper behaviors toward employees by these same juveniles.
- Students, patients, those with special vulnerabilities.

Hopefully, by investing time now in your anti-harassment policies and training, you will be able to avoid becoming a headline. Or, at the very least, you will be in a much better position to defend yourself. This issue is not going away any time soon and employers would be wise to make this a priority. 

***Bob Gregg is a nationally recognized employment attorney for his work on harassment and respectful workplaces, and has helped numerous public and private employers through education and training. He can be reached at [rgregg@boardmanclark.com](mailto:rgregg@boardmanclark.com).***

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## JULY 2018

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*Tad Clark*

3236 W. Provincial Lane  
Beloit, WI 53511

**Phone:** (608) 290-6768

**Description:** Electrical Contractor

**Sponsor:** Kevin Day, Corporate Contractors, Inc. (CCI)

Beam Club Members-to-date: 3

### • American Mechanical, LLC

*Neal Schoofs*

P.O. Box 70680

Milwaukee, WI 53207

**Phone:** (414) 520-6980

**Description:** Mechanical Contractor

**Sponsor:** JR Reesman, Reesman's Excavating & Grading, Inc.

Beam Club Members-to-date: 20

### • Bauer Electrical Services, LLC

*Chris Bauer*

7353 WW

West Bend, WI 53090

**Phone:** (262) 358-2179

**Description:** Electrical Contractor

**Sponsor:** Jay Zahn, R&R Insurance Services, Inc.

Beam Club Members-to-date: 36

### • Borntreger Electric, LLC

*Moses Borntreger*

6073 N. Eagle Road

Janesville, WI 53548

**Phone:** (608) 921-3125

**Description:** Electrical Contractor

**Sponsor:** Kevin Day, Corporate Contractors, Inc. (CCI)

Beam Club Members-to-date: 4

### • Butler Creek Electric, LLC

*Tim Hill*

W1069 County Road S

Hartford, WI 53027

**Phone:** (262) 673-2610

**Description:** Electrical Contractor

**Sponsor:** Jay Zahn, R&R Insurance Services, Inc.

Beam Club Members-to-date: 37

Website: [www.abcwi.org](http://www.abcwi.org)

### • Healthy Home Heating & Cooling, LLC

*Laura Braun*

2323 Woodale Ave.

Green Bay, WI 54313

**Phone:** (920) 884-9119

**Description:** Mechanical Contractor

**Sponsor:** Steve Klessig, Keller, Inc.

Beam Club Members-to-date: 51

### • Mid Wisconsin Concrete & Excavating LLC

*Casey Krause*

P.O. Box 180, S3276 Eagle Road

Spencer, WI 54479

**Phone:** (715) 659-5195

**Description:** Concrete/Site Work Contractor

**Sponsor:** Tim Kreft, Ellis Construction

Beam Club Members-to-date: 1

### • Ogden Construction Group

*Joel Cook*

11113 W. Forest Home Ave.

Franklin, WI 53132

**Phone:** (414) 372-7200

**Description:** General Contractor

**Sponsor:** Mike Schneble, Craftmaster Painting

Beam Club Members-to-date: 1

### • Patriot Plumbing of WI, Inc.

*Dawn Cull*

N92W29700 Center Oak Road

Hartland, WI 53029

**Phone:** (262) 424-2256

**Description:** Plumbing Contractor

**Sponsor:** Dan Bertler, Supreme Structures Inc.

Beam Club Members-to-date: 24

### • Prange Electric, LLC

*Shaun Prange*

390 Clay St.

Kiel, WI 53042

**Phone:** (920) 453-8523

**Description:** Electrical Contractor

**Sponsor:** Stan Johnson, A.C.E. Building Service, Inc.

Beam Club Members-to-date: 26

### • Wiersma Electric, Ltd.

*Jeff Vander Velde*

175 Hopkins Drive

Randolph, WI 53956

**Phone:** (920) 326-5330

**Description:** Electrical Contractor

**Sponsor:** Dan Bertler, Supreme Structures Inc.

Beam Club Members-to-date: 25

## AUGUST 2018

### • Advanced Health and Safety, LLC

*Krysten Schroeder*

5940 Seminole Centre Court, Suite 225A

Madison, WI 53711

**Phone:** (608) 279-0866

**Description:** Specialty Contractor-Asbestos, Lead, Mold

**Sponsor:** Dan Bertler, Supreme Structures Inc.

Beam Club Members-to-date: 26

### • Brock White Co.

*David Ehlert*

2575 Kasota Ave.

St. Paul, MN 55108

**Phone:** (651) 289-1260

**Description:** Construction Materials Supplier

**Sponsor:** Brian Wieser, Wieser Brothers General Contractors, Inc.

Beam Club Members-to-date: 41.5

### • McCoy Plumbing, Inc.

*David M. Strigenz*

2836 F.N. Brookfield Road

Brookfield, WI 53045

**Phone:** (262) 782-5940

**Description:** Plumbing Contractor

**Sponsor:** John Donovan, Donovan Services LLC

Beam Club Members-to-date: 1

### • Strongwood

*Mike Bloom*

711 Shadow Road

Waupaca, WI 54981

**Phone:** (715) 258-4818

**Description:** General Contractor

**Sponsor:** Bill Monfre, Quality Insulators, Inc.

Beam Club Members-to-date: 13

### • Uplands Fire & Security, LLC

*Shelly Eno*

P.O. Box 142

Barneveld, WI 53507

**Phone:** (608) 712-3114

**Description:** Fire and Security System Supplier

**Sponsor:** Dan Bertler, Supreme Structures Inc.

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