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FROM OUR PRESIDENT

Member Legal Education Service gets an update

BASED ON MY INTERACTIONS WITH ABC MEMBERS over the years, I can appreciate that running a contracting business is not easy. Contractors face a myriad of challenges, many of which you can handle; others require assistance.

Legal issues often fall into those challenges that require assistance. This is why our chapter places a strong emphasis on the Member Legal Education Service. Over the past several months, our chapter evaluated the current service and is instituting some improvements to ensure relevancy and access for members.

Our review of the service revealed that the types of legal issues our members are facing have changed significantly over the past few years. Fortunately, our membership today includes many top-notch legal firms with experts in the construction industry who are willing to participate in the Member Legal Education Service across all these various legal areas. For more details, please see the two-page spread in this issue of the Merit Shop Contractor.

The key to an effective service is understanding what it provides members. Members are granted the first call or contact for each legal problem they encounter. However, in defining a "legal problem," it is important to remember the limits the IRS has imposed on the service. ABC may provide education to the industry, but it may not provide individualized legal services. If it does provide individualized legal services, ABC could lose its status as a nonprofit association.

So, it is important to keep in mind that the calls are for general education only. It is not legal advice or counseling, but more to ask a question and get an answer regarding a legal matter. Calls are limited to an hour. If a member has already been educated on a particular type of problem, there is no justification for a second "first call" on a similar or related problem. Those are matters which are beyond the scope of the first call service.

To use the service, the chapter prefers you contact our office first at 608-244-5883 or 800-236-2224. Often, chapter staff can assist members with the issue and will determine whether or not the matter is appropriate for the legal education service. This also provides the chapter an opportunity to be informed of issues members are experiencing, which helps shape educational programs and content we share with other members. Perhaps even more important, we must keep the lines of communication open between members and the attorneys, so members know what they are getting as part of the service and for what they can expect to be charged.

Our member legal firms are limited on the services they may provide on first contacts. For example, they may listen to the description of the problem and the related factual situation; they may describe the legal implications of the problem; and they may describe options available to you for solving that problem. They may not, however, as part of the service, actually help you put into effect one or more of the options to solve the problem.

Legal firms may be retained by members to deal with the issue to a greater extent, but members are under no obligation to retain firms. You are free to retain the attorney of your choice.

We will never be done enhancing this legal education service. I'm sure at some time in the future, we will do another evaluation and make adjustments to keep this valuable service relevant to your challenging work.

— John Mielke

> *"THE KEY TO AN EFFECTIVE LEGAL EDUCATION SERVICE IS UNDERSTANDING WHAT IT PROVIDES MEMBERS."*

IS THAT LEGAL ...

Your questions, our attorneys, no cost to you.

Free legal education for ABC of Wisconsin members

Talk to some of the industry's best attorneys at no cost to you with ABC of Wisconsin's Member Legal Education Service*. ABC members are entitled to a free call for legal education on a specific issue and are not limited by the number of issues they can call about.

The process is simple. Contact ABC of Wisconsin at 608-244-5883 or 800-236-2224 and chapter staff will help you determine if a free legal call is necessary and which attorney can best answer your question.

ABC Wisconsin
Associated Builders and Contractors

** Federal law prohibits ABC of Wisconsin from providing specific legal advice for free, but this service enables members to better understand their legal issue and potential solutions. Call ABC of Wisconsin at 608-244-5883 for more information.*

Member attorneys answering your legal questions:

Area of the Law: Union Organizing, Hand Billing, Pickets & Strikes

Daniel Barker
Jackson Lewis, P.C.
MADISON

Area of the Law: Land Use & Development; Wisconsin Public Projects; Federal Public Projects

John Behling
Weld Riley, S.C.
EAU CLAIRE

Area of the Law: Independent Contractor; Environmental

Jake Curtis
von Briesen & Roper, S.C.
MILWAUKEE

Area of the Law: Transporation; Federal Projects; Alternative Delivery Methods; Bid Protest, Disputes & Mistakes

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MILWAUKEE

Area of the Law: Employee Handbooks Policies & Procedures; Hiring, Discharge & Discipline; Wage & Hour

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Doug Witte
Boardman & Clark, LLP
MADISON

PLA NEUTRAL

HOW TAXPAYER-FUNDED PROJECTS AREN'T ALWAYS SO TRANSPARENT

By Kyle Schwarm — ABC of Wisconsin Marketing & Communications Director

What does the selection of a developer for the Judge Doyle Square project in Madison have to do with bidding on highway projects?

The process the Madison Common Council followed on the controversial Judge Doyle Square (Block 88) project last month is a good example of what can happen when the lowest responsible bidder is not the construction delivery process used on public projects.

Madison Common Council and PLA Neutrality

Several developers responded to a city request for proposals for a quasi-public, mixed-use development above a large underground parking garage downtown next to the Madison Municipal Building. The city received three proposals. In late May, a special city negotiating team recommended the selection of a $40 million proposal by Stone House Development of Madison. Stone House's proposal would have utilized a merit shop, ABC member company as the project's general contractor.

"I think Stone House does good work," Mayor Satya Rhodes-Conway was quoted in *The Capital Times*. "I think they put forward a really good proposal."

That was before the city Finance Committee started receiving pressure from organized labor and unexpectedly delayed its decision.

Andrew Disch, political director with the North Central States Regional Council of Carpenters, was heaping big labor influence on the Madison City Finance Committee in May. Disch said the negotiating team didn't consider hiring and compensation plans for each of the developers' contractors in the selection process. He objected to a merit shop con-

The Judge Doyle Square (Block 88) project in Madison.

"The irony here is we have communities talking about diversity and inclusion ... and right off the bat they are discriminating against half of the companies because they are not union."

tractor being used by Stone House Development and exclaimed, "merit shop" was code for "attacking labor and working standards."

As a result of the influence of Disch and other union representatives, the three developers were asked to provide details on workforce training and compensation employed by each of their respective contractors, which the committee would consider at its June meeting. Stone House Development assured the committee that its contractor would meet or exceed workforce requirements set by the City of Madison, arguably some of the toughest in the nation.

But Disch and other union representatives continued their pressure at the June Finance Committee meeting.

"If the city is going to spend public money to build affordable housing, then the construction workers that

build that housing should be able to afford to live there as well," said an outspoken and emotional Disch.

The Madison assistant city attorney, meanwhile, advised the committee on the city's wishes to require the use of organized labor and to set labor rates on the project. He concluded that to do so would be a clear violation of 66.0134, Wis. Stats. (Project Labor Agreement Neutrality on public projects): "… selecting a developer primarily based on a unionized workforce is no different than having a policy to that effect, which would be illegal," Assistant City Attorney Kevin Ramakrishna wrote in his memo to the committee.

Despite the recommendation for Stone House by the special city negotiating team and the assistant city attorney's cautiously stated warning not to violate the Project Labor Agreement Neutrality law enacted under Gov. Scott Walker in 2017, the Finance Committee voted for a different developer, Gebhardt Development, who indicated it would be using a union general contractor on the project.

The Finance Committee's recommendation advanced to the full common council the following evening. Prior to the council meeting, ABC of Wisconsin President John Mielke expressed concern about the Finance Committee's actions in a letter addressed to the mayor and assistant city attorney.

"A casual observer of the Finance Committee proceedings of June 10, 2019 could conclude that members used other factors as a pretext to steer the decision away from the proposal recommended by city staff, which included non-union contractors," Mielke wrote.

During the common council meeting, longtime Madison Alder Michael Verveer – also a member of the Finance Committee – said he was disappointed to see correspondence objecting to the decision from both ABC of Wisconsin and Stone House Development. He called the correspondence "troubling" and took issue with any implication that labor relations were a major consideration in the decision. He said he was convinced the Finance Committee did nothing wrong.

"... selecting a developer primarily based on a unionized workforce is no different than having a policy to that effect, which would be illegal."

"We can lawfully take into account a company's positive labor relations policies as a factor, among many others, in choosing a developer," Verveer said on the floor of the council meeting.

In what could be viewed as very troubling, Verveer also admitted he met with Gebhardt, the selected developer, privately in April.

"I made a mistake I should have realized because I've been at this for so long," Verveer said. "I want to say though, that this was one of a couple of topics that we talked about. We actually spent just as much, if not more time, talking about a different potential development that Gephardt is pursuing, perhaps, will be definitely pursuing and perhaps will be building, and proposing to us here someday in the fourth aldermanic district."

The co-author of the Project Labor Neutrality law, state Rep. Rob Hutton, R-Brookfield, said he didn't like what he saw from Madison's elected officials.

"This validates why the (PLA) issues had to be addressed," Hutton said. "You have these activist common council members in these local communi-

"It's a slippery slope. Once the DOT does it, soon municipalities will want to do it."

ties predisposed to structuring contracts at the disadvantage of others.

"The irony here is we have communities talking about diversity and inclusion and not alienating anyone and right off the bat they are discriminating against half of the companies because they are not union," Hutton added. "There is a hypocrisy of what they claim to be supporting."

At the very least, it appears that the spirit of the Project Labor Neutrality law – strongly supported by ABC – has been violated. ABC of Wisconsin has filed a public records request with the City of Madison to seek documents and correspondence between city staff and members of the common council and Finance Committee related to the Judge Doyle Square project, which will be reviewed to ensure no laws were violated.

What can be learned for Design/Build?

The Judge Doyle Square project may provide some insight for contractors, legislators and taxpayers as we look toward the introduction of a construction delivery method for Wisconsin Department of Transportation (DOT) projects that does not include the lowest responsible bidder.

With the proposed state budget signed into law, Wisconsin is moving ahead with initiating a pilot program for design-build highway projects. The proposal requires the DOT to keep a list of those highway projects that could be designed and built by the same contractor and allow the DOT to begin using design-build on six projects through 2025.

This could be a big change for the way the DOT awards bids and delivers projects because it could replace the design-bid-build delivery method Wisconsin has always used for highway construction projects.

"This (current) model works well for the various-sized projects that they undertake," said Dan Zignego of Zignego Company in Waukesha, which does a fair amount of highway construction. "It allows small, medium and large contractors to be eligible to bid on these projects."

One argument against design-build is that it provides advantages to larger contractors who can do both the design and construction.

"The design-build model will require the contractor to design the project and hence either hire engineering firms for that portion or employ staff engineers to do it," Zignego said. "This is not economically feasible for the large majority of small- and medium-sized contractors."

Zignego believes the DOT will reserve these initial pilot projects for more complex instances involving bridge construction or sewer and grading projects.

Many design-build proponents argue the delivery method is becoming the industry standard and call design-bid-build antiquated. Most states have allowed the use of design-build on public construction, and Construction Dive estimates more than half of all projects in the U.S. will be design-build by 2021.

One ABC of Wisconsin member predicts design-build will eventually make its way into municipal work.

"It's a slippery slope," said Joe Daniels of Joe Daniels Construction, Madison, who prefers the hard bidding for public projects. "Once the DOT does it, soon municipalities will want to do it."

Current state statute requires municipal projects exceeding $25,000 to be competitively bid. Daniels is fine with design-build being used with private money; he's just concerned when it comes to using taxpayer money.

This also happens to be ABC of Wisconsin's position, which advocates open and transparent competition on public construction projects.

"All things are not equal in design-build," Daniels said. "Everyone does not have the same chance at the work or given the same opportunity. It's going to cost taxpayers more money because it will limit competition."

While many claim design-build saves money, there is no empirical evidence – with statistically-significant results – to support this claim. Conventional wisdom is fewer contractors in any delivery method has a tendency to drive prices higher, not lower, by stifling competition.

The design-build selection process, for contractors who can handle design-build, is made using many subjective criteria, such as qualifications, capabilities and experience. The process becomes less transparent and more subjective for everyone involved, including taxpayers. Government agencies have more flexibility, and biased selections can be justified as "best value" or "best option." There is no third-party design firm providing oversight for the owner (taxpayer).

Critics of the record levels of referendum spending on school construction projects in Wisconsin during the last few years feel the same way. Currently, school projects do not require competitive bidding, which encourages public criticism of the lack of transparency and accountability for taxpayers. Critics argue taxpayers do not always know exactly what they are getting for their money and there are no real checks and balances.

The design-build procurement approach gives taxpayer-funded institutions or agencies more discretion in awarding contracts. That discretion can lead to more deliberation on the prudent use of taxpayer dollars and resources besides looking at only the bottom line number, but it can also lead to influences from other subjective preferences. In the Judge Doyle Square instance, the common council chose the developer using many different criteria, but unfortunately, one was labor preference.

As Daniels said, when design-bid-build is not used on public projects, there's a strong likelihood for favoritism.

"It's a PLA, only in a different way."

ABC Wisconsin
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EVENT REMINDERS

- **TIMBER RATTLERS GAME**
  July 18, Appleton
- **CRANE OPERATOR CERTIFICATION**
  July 22-26, Sun Prairie
- **FIRST AID/CPR TRAINING**
  July 24, Kenosha
- **SOCIAL MEDIA FOR CONTRACTORS**
  July 25, Madison and online
- **NETWORKING SOCIAL**
  July 25, Racine
- **10-HOUR OSHA**
  July 26, Appleton Area
- **FIRST AID/ CPR TRAINING**
  July 31, Pewaukee
- **FIRST AID/ CPR TRAINING**
  Aug. 1, Madison
- **10-HOUR OSHA**
  Aug. 2, Madison
- **10-HOUR OSHA**
  Aug. 5, Eau Claire
- **LA CROSSE QUEEN CRUISE**
  Aug 8, La Crosse
- **NETWORKING SOCIAL**
  Aug 22, Sheboygan Falls
- **FIRST AID/CPR TRAINING**
  Aug. 23, Appleton Area

THREE TRUTHS TO BE A FAITHFUL JURIST

By Justice Dan Kelly — Wisconsin Supreme Court

Justice Kelly (right) is running for State Supreme Court. The election is April 2020.

I have loved the law for pretty much as long as I can remember.

My career has been almost exclusively commercial litigation at one of the state's oldest and finest law firms – Reinhart Boerner Van Deuren. I've represented parties in courts across the country, in both state and federal tribunals. I've tried jury cases, I've argued before both state and federal Courts of Appeals, I've argued at the Wisconsin Supreme Court, and appeared before the United States Supreme Court.

And yet, to this day, I can't walk into a courtroom without my heart skipping a beat. I have always stood in awe of the judiciary. Part of that awe comes from my understanding that law lies at the very foundation of civilization.

And the courts have an indispensable role in upholding the rule of law. With this in mind, I would like to touch briefly on truths about three particular subjects, and how necessary those truths are to serving as a faithful jurist.

❶ The Rule of Law

Let's start with the rule of law, the enforcement of which is the reason our court system exists. "The rule of law" – have you heard that phrase used before? It's a phrase so dry it nearly demands unkind comparisons to a desert. But if it ever fails, you'll soon cry out for its return as desperately as the parched Saharan traveler begs for a taste of water.

The rule of law is the fount of societal stability. It is the promise of method and structure in the relationship between a population and its governors. It is the bane of arbitrariness and the guarantee that reason may inform how we choose to order our affairs. It is the ballast that keeps our lives from being upended by the stormy and unpredictable passions of officeholders and bureaucrats. It is the bringer of order, without which no liberty is possible.

The rule of law is ancient, and yet a mere babe. For several millennia it has struggled for purchase on this world, sometimes successfully, most often not. It enjoyed a fitful relationship with ancient tribes in the Middle East. It rose in Athens, died in Rome, found new life in England and died there, too, only to sprout again in the United States and in other scattered places around the globe. It is a precious commodity, and yet where it exists it seems so ordinary that we barely give it thought. It will not stay where it is not loved, and it will abandon us the instant our attention falters.

❷ The Judicial Role

In its infancy, the United States understood the centrality of the rule of law to a just and orderly society. In fact, we constructed our government so that it would express this principle in every element. We gave it three distinct branches, each with a discrete function corresponding roughly to the temporal framework within which it works. And we assigned them specific responsibilities that, if honored, would prevent the government from second-guessing the wisdom of our decisions.

Thus, in our system it is peculiarly the legislature's province to address the future. It determines what the laws shall be that will govern tomorrow's actions. The executive concentrates on the present; He decides what shall be done, today, to properly carry the existing laws into effect. The judiciary takes for itself matters of the past. The judiciary compares what has already happened against the laws as they existed at the time the acts occurred, and then – to the extent possible – it adjusts the parties' circumstances to match what

Justice Kelly and his family. Kelly was appointed by Gov. Walker in 2016.

Justice Kelly at the range.

they would have been had they followed the rules. The court only enforces adherence to the laws – it does not question the wisdom or desirability of those laws or the results they produce. In honoring this limitation, the judiciary thereby protects the most critical aspect of the rule of law.

"Judges," someone once said, "are like umpires[; they] don't make the rules, they apply them." That's a useful description of how judges are supposed to act.

It is because of the judiciary's backward-looking function that a judge may legitimately be nothing more than an umpire. Changing the decisional standard after the act has already occurred is, by definition, antithetical to the rule of law. So, for example, it is unjust to change the strike zone after delivery of the pitch because it prevents the pitcher from knowing where to throw the ball.

Conceptually, the court does its work in a museum of sorts. Its mind ranges over things already done, actions that are matters of historical fact before they ever come to the court's attention. And the laws it applies must be artifacts it finds there, too; it must bring nothing into the museum. This commitment ensures that our behavior will be judged only according to the rules of which we had reason to know when we acted.

But when the court replaces the laws it finds in the museum, it banishes the rule of law. We are then judged by law that did not exist when we chose our actions, making it impossible to know whether today's legal choices will be declared illegal once they become tomorrow's history. That is why a jurist's first commitment must be to never change what he finds in the museum. But if we maintain the museum's sanctity, then – and only then – will the court preserve, and not endanger, our liberties.

If we don't carry new rules of decision into the museum, we won't have anything to fear from the courts. As Alexander Hamilton explained (if only I had the talent to rap this passage when delivering speeches): "Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them ... It may truly be said to have neither FORCE nor WILL, but merely judgment ..." (Federalist Papers, No. 78). It is the nature of the court's function that makes it the least dangerous. The corollary to this must be that if the court goes beyond the judicial function that it will become dangerous.

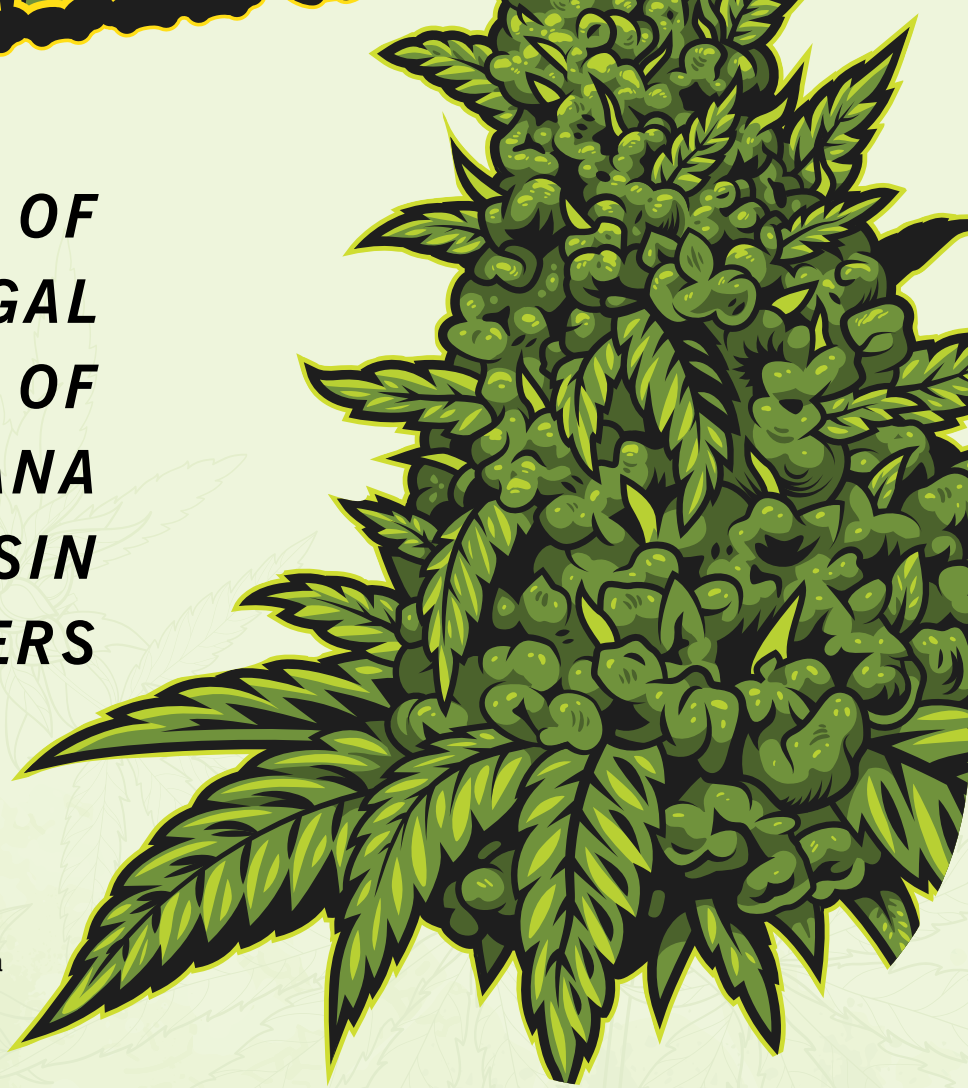
❸ The Public's Role

I saved the best truth for the end. And it is this: The office I occupy is not really about me at all. It is about you, the citizens of Wisconsin and the United States, and the law you give us.

You are the givers of the law, whether through the positive law you authorize your representatives to enact, or the common law. You are the ones from whom I now borrow the authority to carry out the function of the court. It is to you and the law that I answer. And you and the law have every right to expect of me the cardinal characteristic of a good and faithful jurist: Humility.

Humility, it turns out, is easier to live, and much more fulfilling, when the one before whom you are humble, is deserving of respect and admiration. What a joy and honor to serve you and the law as a justice on your Wisconsin Supreme Court.

MARIJUANA



THE IMPACT OF SHIFTING LEGAL STATUS OF MARIJUANA ON WISCONSIN EMPLOYERS

By Josh Levy & Bob Sanders — Attorneys, Husch Blackwell, LLP

The legal landscape in the U.S. relating to marijuana laws changes by the day as more states legalize the use, possession and sale of marijuana in some form, including our neighboring states of Illinois, Michigan and Minnesota. To date, 33 states have legalized marijuana for medical use, 11 states have legalized marijuana for recreational use by adults over the age of 21 and Canada has legalized the sale of marijuana at the federal level. Yet, federally in the U.S. cannabis (marijuana) remains a controlled substance as a Class I drug under the Federal Controlled Substances Act.

Marijuana laws in Wisconsin

Marijuana use is unlawful under Wisconsin law for medical and recreational purposes. Two of the common biologically active compounds in the marijuana plant are tetrahydrocannabinol (THC) and CBD. THC is a psychoactive compound, Class I controlled substance and illegal to possess or attempt to possess under Wis-

consin law. Unlike THC, CBD does not cause a high. In 2017, Wisconsin amended its laws to legalize the use of CBD in a form that lacks any psychoactive effects, for the sole purpose of treatment of a medical condition. Wisconsin law requires patients using CBD to obtain certification from their physician regarding use of CBD to treat a medical condition.

TO DATE

33

STATES HAVE LEGALIZED MARIJUANA FOR MEDICAL USE

11

STATES HAVE LEGALIZED MARIJUANA FOR RECREATIONAL USE BY ADULTS OVER THE AGE OF 21

Employment issues and marijuana use

In contrast to Wisconsin, all of the states surrounding Wisconsin, as well as Canada, have legalized marijuana for medical or recreational purposes or both. This reality leads to the conceivable situation of an employee lawfully using marijuana outside of working hours in a state that has legalized marijuana. Upon returning to Wisconsin, however the employee risks testing positive for marijuana use in a drug screening test because the marijuana metabolites remain detectable in the body anywhere from three to more than 30 days prior to drug screening. Employers should be aware that Wisconsin law strongly supports the employers' right to enforce workplace drug policies.

The Wisconsin Fair Employment Practices Act (WFEA) protects employees from discrimination in employment in the event of the use or non-use of lawful products off the employer's premises during non-working hours. Marijuana is not a lawful product in Wisconsin, and therefore, its use is not protected by the WFEA.

Creative attorneys may attempt to argue that the use of marijuana in states like Michigan (where marijuana is a lawful product) is protected under the WFEA. However, the WFEA explicitly excepts from the protection lawful activity that:

- Conflicts with a federal or state statute;
- Impairs an individual's ability to undertake adequately the job-related responsibilities of their employment;
- Conflicts with a bona fide occupational qualification that is reasonably related to the job-related responsibilities of an individual's employment; or
- Creates a conflict of interest or the appearance of a conflict of interest with job related responsibilities of the individual's employment.

Under the conduct that results in "on the job" impairment exception, an employer is justified in taking adverse employment action against an employee whose lawful use of marijuana in another state resulted in on-the-job impairment. Similarly, the WFEA does not diminish an employer's right to take adverse employment action against an employee who tests positive for marijuana use, whether or not the employee is impaired at work, if such usage conflicts with a bona fide occupational qualification reasonably related to the job, such as safety considerations, or even creates the appearance of a conflict with job-related responsibilities. Of course, the most obvious exception is that the use of marijuana conflicts with federal and Wisconsin law.

Is medical marijuana use protected under the ADA?

No. Under federal disability laws, the federal status of marijuana as a Class I controlled substance prevents the ADA from protecting an employee who uses marijuana to treat a disability because the use of illegal drugs is not protected by the ADA according to EEOC guidelines.

Create a drug policy

The current state of Wisconsin marijuana laws provides employers with the ability to adopt a drug policy that fits their workplace demands, including prohibiting the use of marijuana consistent with state and federal law. Employers should adopt the following best practices to avoid employment disputes relating to the use of marijuana:

- Clearly communicate the drug policy and the use of drug screening tests to employees
- Clearly and consistently apply the drug policy
- Modify job descriptions that have a safety component or require drug screening tests
- Identify the consequences for appearing at work under the influence of drugs including marijuana or testing positive for marijuana.

For questions regarding your drug policy, contact Josh Levy or Bob Sanders at Husch Blackwell, LLP.

COMPANY-SPONSORED SOCIAL EVENTS IN THE ME TOO ERA

By Tom O'Day — Attorney, Godfrey & Kahn, S.C.

LaVar Ball, an infamous father of a basketball star in the National Basketball Association (NBA), got himself in trouble recently. A female ESPN reporter was conducting an interview and told him that she wanted to "switch gears" and discuss another topic. Ball, who is infamous because of his boisterous nature and outlandish comments, responded by saying, "You can switch gears with me any day." The female reporter was shocked by Ball's awkward comment and told him to "stay focused." ESPN later labeled Ball's words as "completely inappropriate" and has taken steps to keep him from being interviewed on the network. Ball contends that his comments were not sexual in nature and that the whole thing is overblown.

We live in a new world with respect to sexual harassment since the "Me Too" movement started almost two years ago. Following allegations of sexual assault against movie mogul Harvey Weinstein, popular Hollywood icons shared their own experiences of sexual assault and/or sexual harassment. Their goal — to draw attention to the prevalence of the issue — hit its mark. The attention given to sexual harassment in the past two years has surpassed that of the previous three decades. It is on everyone's radar now and needs to be on employers' radar as well.

History of Sexual Harassment in the Law

Sexual harassment is not, of course, anything new. Discrimination on the basis of sex was outlawed with the passing of the Civil Rights Act of 1964. Courts, however, took a fair amount of time to come around to the idea that harassment based on sex was covered by the law. Eventually, in the late 1980s and early 1990s, the U.S. Supreme Court addressed the issue.

Wisconsin law includes an express prohibition on sexual harassment. Sexual harassment is defined in the statute as: (1) unwelcome sexual advances; (2) unwelcome requests for sexual favors; (3) unwelcome physical contact of a sexual nature; or (4) unwelcome verbal or physical conduct of a sexual nature. Wis. Stat. § 111.32(13). The statutes go into even greater detail by defining "unwelcome verbal or physical conduct of a sexual nature" as the (1) deliberate, repeated making of unsolicited gestures or comments of a sexual nature; (2) the deliberate, repeated display of offensive sexually graphic materials which is not necessary for business purposes; or (3) deliberate verbal or physical conduct of a sexual nature, whether or not repeated, that is sufficiently severe to interfere substantially with an employee's work performance or to create an intimidating, hostile or offensive work environment. Wis. Stat. § 111.32(13).

In the "Me Too" era, employers must take note of sexual harassment. The newfound attention to the issue has led to an increase in allegations of sexual harassment, litigation surrounding the issue and awareness among employees.

Employers can take steps to identify and prevent sexual harassment. In fact, federal law provides incentive to do so. The U.S. Supreme Court has, in some instances, limited an employer's liability in sexual and other unlawful harassment cases when the employer has an anti-harassment policy in place, actively promotes the policy to its employees, and ensures that employees can easily follow the guidelines established in the policy. In addition to taking steps to train and establish policies surrounding sexual harassment, employers should take proactive steps to eradicate sexual harassment from the workplace in all forms.

The Power of Perceived Sexual Harassment

Recently, I was in the store of a large national retailer waiting for service. There were three employees present in the store behind a large counter, and one of the employees, the lone female, said to the other two: "Goodnight you little monkeys, I am heading out." One of the two male co-workers replied: "If we are the monkeys, does that make you the witch?" There was awkward silence, not just from me. I looked up to see the expression on the female employee's face and saw shock, before she laughed it off and walked out saying another banal "goodbye."

Was the male employee's joke about the female being the "witch"

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sexual harassment? Was LaVar Ball's comment of "You can switch gears with me any day" sexual harassment? Does it matter?

Legally, it is unlikely that either comment was technically "sexual harassment." It still matters. Even though the comments may not have been technical sexual harassment, they were perceived to be inappropriate. Employers must make every effort to keep comments such as these from happening in the workplace. Perception matters, and the perception regarding sexual harassment has, as noted above, changed.

Even perceived sexual harassment can result in staggering costs to an employer. On a number of different levels, perceived sexual harassment disrupts the workplace. It causes stress and angst between at least two employees, and assuming your company is not free of a rumor mill or gossip, it will likely be a story told to many other employees. Each of those employees will take a side, and the stress, angst and disruption will multiply. Damaged relationships at work make for poor production, impacting the bottom line. In addition, there is an economic cost of perceived sexual harassment. The time it takes to address the issue—hearing a complaint, investigating the complaint, seeking resolution, potentially dealing with the legal system—is all a drain on time and another disruption to productivity. There is also the legal cost, even for perceived sexual harassment that is not technically sexual harassment under the law. An employee can easily file a complaint with the Equal Employment Opportunity Commission or Wisconsin Equal Rights Division. When the government agencies get involved, the time and expense of addressing the complaint increases even more.

What may be an innocuous comment or joke by one person may be perceived very differently by another person. This is what happened in the matter involving LaVar Ball, and it was what apparently happened in the situation that I witnessed first-hand in the retail store. Different perceptions of a joke or comment are especially acute when a comment or joke is made by a male to a female. It is heightened even more when the joke or comment is made in the workplace or at an event tied to the workplace.

Sexual Harassment at Company Sponsored Social Events

The relaxed atmosphere of a company picnic, company dinner or other social event sponsored by a company lends itself to inappropriate comments that may be actual or perceived sexual harassment. When alcohol is involved, the likelihood of some foolish comment or joke increases exponentially. In this atmosphere especially, an employer is wise to take proactive steps to prevent these types of issues from occurring.

Unlawful harassment training, including sexual harassment training, is something that every employer should require of its employees on a regular basis. The training should make clear that unlawful harassment, including sexual harassment, can take place outside of the four walls of the office. Employers can be, and have been, held liable for sexual harassment that occurred at company-sponsored events held off site. Regardless of where the event occurs, if it has a connection to the workplace, an employer has potential liability for harassment that occurs. Regular training is a must for all employers, and it should make clear to employees that expectations for appropriate behavior are the same at company events, just as they are in the office.

A reminder from the company ahead of the company-sponsored event is also a proactive step to prevent real or perceived sexual harassment from occurring. This does not need to be a formal memo telling employees not to engage in sexual harassment, but can be a simple email to employees reminding them that the company's normal rules for conduct and behavior toward one another apply at social events just the same as in the office.

Task your managers to be especially vigilant for perceived or real sexual harassment at company-sponsored events. These management employees should already have this responsibility in the workplace. Make sure they understand that the responsibility also attaches at company-sponsored events.

Finally, think about regulating the flow of alcohol at the event. Advance drink tickets, limits on hard alcohol, trained bartenders and other steps can be taken to lower the risk that an individual is imbibing to the point that greatly increases the chance for them to say or do something stupid. Depending on the culture of the past events, you may hear grumbling about these steps ("I can't believe we are getting drink tickets!") but the message will get through.

Once at the event, take steps to respond to inappropriate comments or actions, even if they might not rise to the level of technical sexual harassment. If you hear someone make a comment similar to what LaVar Ball said, or if you hear a joke that is tied to the gender of a co-worker, take steps to make sure that you put an end to it immediately before it escalates.

Even inappropriate but not-yet-illegal jokes and comments can have a significant negative impact on a company. There is no greater breeding ground for those types of mistakes than the company-sponsored social event. In the "Me Too" era, employers are wise to take proactive steps to prevent unlawful sexual harassment, and even just inappropriate comments, from happening.

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Sturgeon Bay, WI 54235
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Beloit, WI 53511
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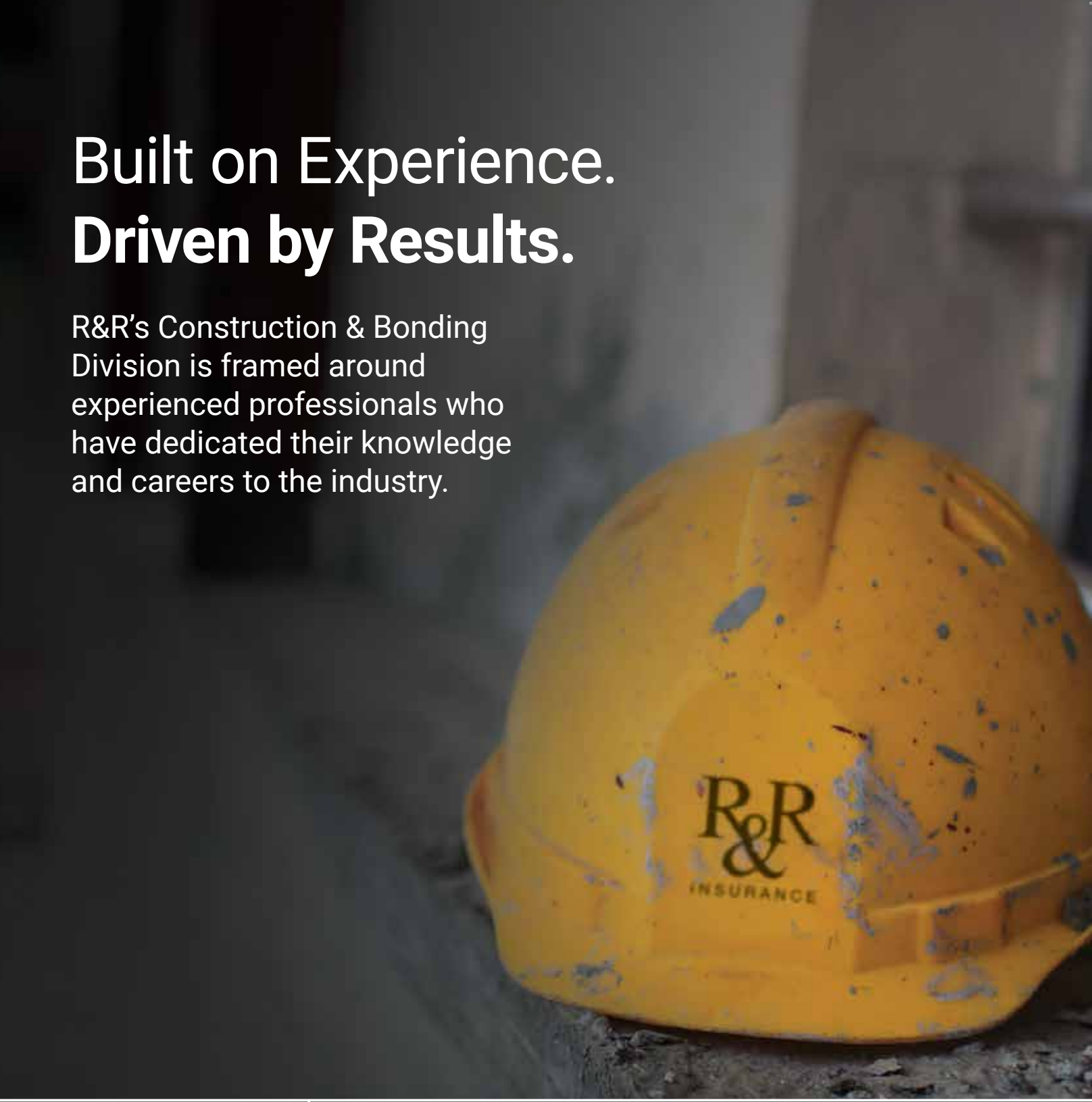

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