VOLUME 6 ISSUE NO. 5 — SEPTEMBER/OCTOBER 2020

MERIT SHOP

CONTRACTOR

WISCONSIN

FIRING WITHOUT FEAR
REDUCING THE RISK OF EMPLOYEE TERMINATION

COVID-19 AND THE ADA

TARGETING THE
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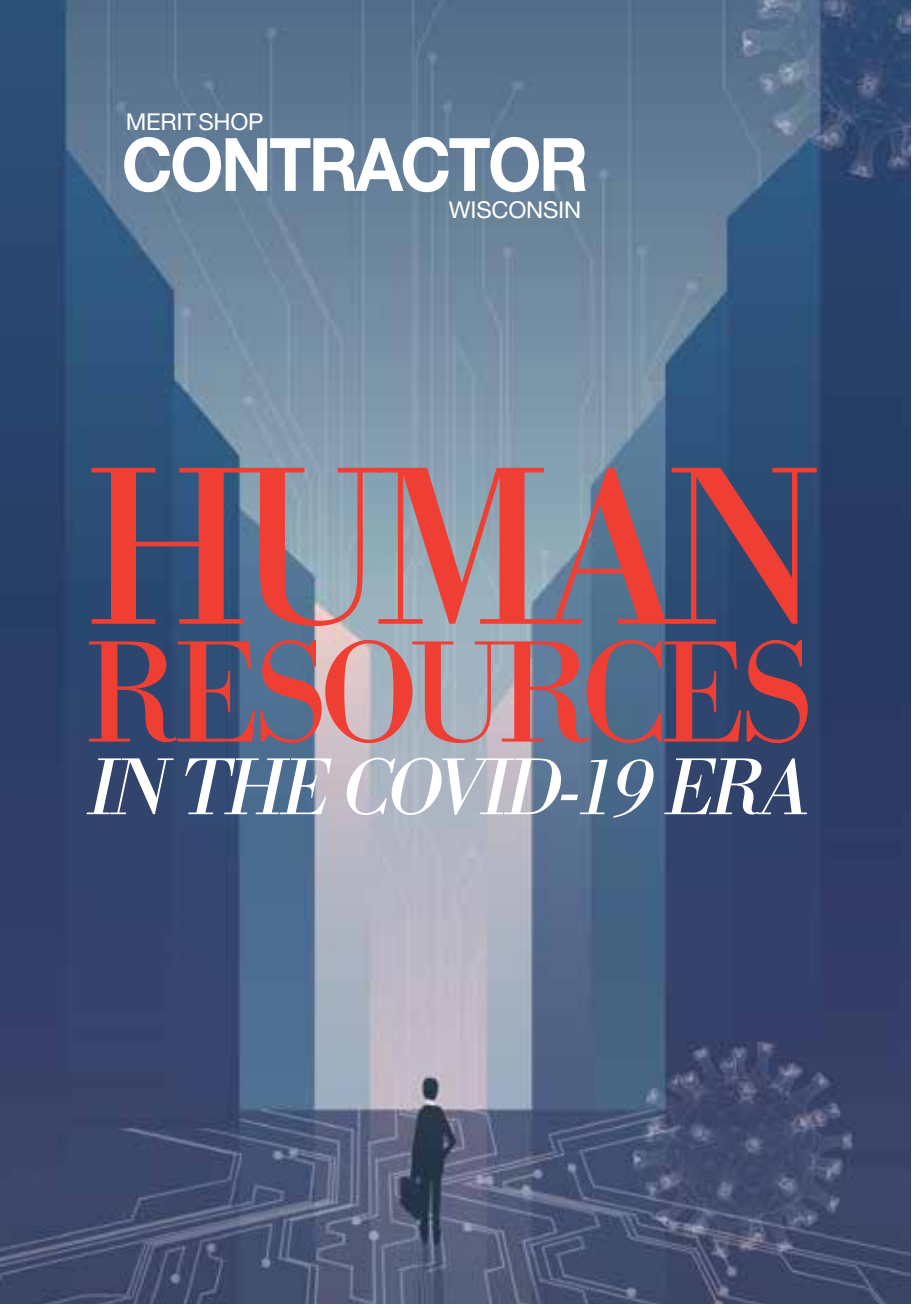

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FROM OUR PRESIDENT

A changing world requires relevant services

OUR WORLD HAS CHANGED. I LIKE TO CONTINUE TO LOOK FOR THE POSITIVE OUTCOMES that can come from the things we have been required to learn or do differently since the pandemic began. In some instances, we have new perspectives on how we can get things done. This can be exciting, but it comes with a learning curve. I'm guessing that's how you and other contractors may feel; you've had to make frequent adjustments during the past several months, which takes time and effort, but there can be some efficiencies created as a result.

The handling of human resources in your offices, though, has never been an easy task. That became more difficult as the pool of good employees began to tighten several years ago. Then the pandemic hit. As if your job isn't tough enough, now there are new challenges.

We were fortunate in our state that the construction industry was deemed "essential" – thanks to advocacy by ABC and other partners – when the pandemic spurred state leaders to temporarily shutter businesses this spring. Being essential, however, came with a whole new set of challenges that prompted contractors to act quickly. At one point, you may have been scrambling to develop "essential" credentials for fleet vehicles when word spread that authorities may stop your employees for being on the road. Then, you had to immediately implement new workforce safety measures to keep employees on the jobsite safe. Now, there's the challenge of ensuring employees follow your protocols to avoid legal liabilities resulting from COVID-19.

So many of these operational issues are closely tied to human resources, which is why ABC is always trying to stay one step ahead to help you with your business operations. This is why ABC places a special emphasis on human resources education and professional development, and it's why we dedicate this entire issue of the Merit Shop Contractor to human resources. It's also why your association holds an annual Human Resources & Accounting Conference (next month), and why we maintain an HR Hotline (simply contact us at ABC of Wisconsin) to provide you with the answers to the questions you need immediately, especially as you're dealing with so many of these new challenges.

As our environment continues to change in ways we never anticipated, ABC of Wisconsin will dedicate itself to being relevant to your needs. That's something that will not change.

— John Mielke

> "THEN THE PANDEMIC HIT. AS IF YOUR JOB ISN'T TOUGH ENOUGH, NOW THERE ARE NEW CHALLENGES.

ABC Wisconsin
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EVENT REMINDERS

- **NETWORKING SOCIAL (HELD OUTSIDE)**
  Sturtevant, Sept. 17
- **OSHA 10-HOUR**
  Fond du Lac, Sept. 17
- **PLANNING & EXECUTION BOOT CAMP**
  Online Series, Sept. 22 (start date)
- **NETWORKING SOCIAL (HELD OUTSIDE)**
  Menomonie, Sept. 24
- **NETWORKING SOCIAL**
  Fond du Lac, Sept. 30
- **OSHA 10-HOUR**
  Marshfield, Oct. 1
- **OSHA 10-HOUR**
  Pewaukee, Oct. 2
- **OSHA 10-HOUR**
  Green Bay, Oct. 2
- **FIRST AID/CPR**
  Green Bay, Oct. 8
- **FIRST AID/CPR**
  Fond du Lac, Oct. 9
- **NETWORKING SOCIAL**
  Onalaska, Oct. 15
- **HUMAN RESOURCES & ACCOUNTING CONFERENCE**
  Online, Oct. 22
- **NETWORKING SOCIAL**
  Green Bay, Oct. 29

CULTURE OF RESPECT

RECRUITING A DIVERSE WORKFORCE IN THE CONSTRUCTION INDUSTRY

By Robert W. Sanders – Attorney, Husch Blackwell

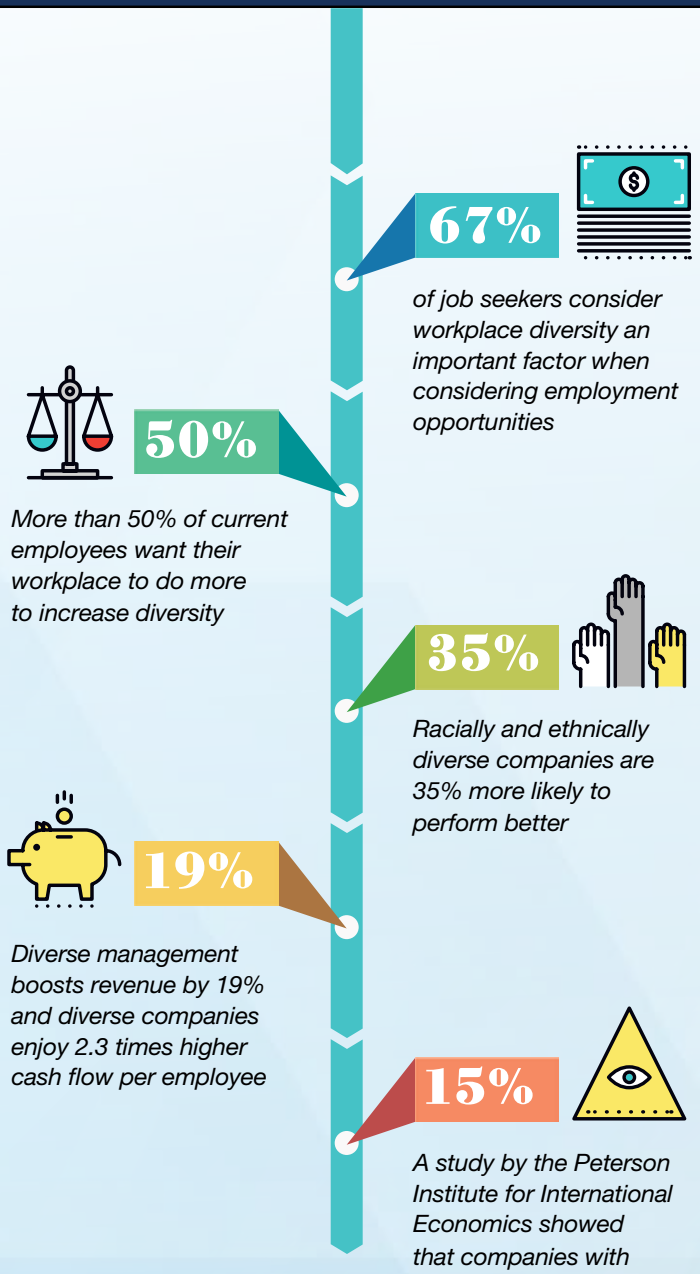
In the wake of the #MeToo movement and the recent racial justice protests following the killing of George Floyd, many companies are looking at their own efforts to promote a diverse and welcoming workforce. In the construction industry, a focus on diversity, equity, and inclusion offers construction companies an opportunity to develop a competitive edge. This is because diversity within the industry has lagged behind other industries for quite some time.

According to the Bureau of Labor Statistics, the composition of the construction workforce in 2019 was 30.4% Hispanic or Latino, 6.4% Black or African American, 1.9% Asian and 88.1% white. Men outnumber women by a ratio of 9 to 1. These numbers are nearly unchanged from 2015 statistics. These numbers reveal a tremendous opportunity to tap into new, diverse talent pools for companies that are struggling to find talent in a tight labor market.

Companies will benefit from such effort. Research has shown that companies that promote a diverse and inclusive workforce have an easier time attracting and retaining talent, perform better, and capture new markets as diverse companies are more willing to engage them.

- 67% of job seekers consider workplace diversity an important factor when considering employment opportunities
- More than 50% of current employees want their workplace to do more to increase diversity
- Racially and ethnically diverse companies are 35% more likely to perform better
- Diverse management boosts revenue by 19% and diverse companies enjoy 2.3 times higher cash flow per employee
- A study by the Peterson Institute for International Economics showed that companies with females in executive-level positions had a 15% increase in profitability

Companies looking to improve their own diversity should first consider where and how they are recruiting. Recruitment efforts should extend to diverse neighborhoods, publications, career fairs, and schools. Job postings should be reviewed to ensure that any inadvertent, gender or racially-biased terms are redrafted so as to not limit the reach of the posting. Of course, a company also can-



not overlook the importance of social media in its recruitment efforts. Social media is often the first place a candidate looks to find out more information about a company. So it is critically important to feature a company's existing diversity on their website and social media pages, promoting the inclusive nature of their workforce.

When interviewing diverse candidates, companies should be mindful that looking for a "culture fit" can lead to searching for candidates that resemble themselves. Instead, interviewers should be trained on recognizing and avoiding unconscious bias and on how to ensure everyone is provided an equal

COMPANIES LOOKING TO IMPROVE THEIR OWN DIVERSITY SHOULD FIRST CONSIDER WHERE AND HOW THEY ARE RECRUITING.

employment opportunity. This includes ensuring that similar core information is elicited from every candidate, by asking appropriate questions that:

- Relate to the requirements of a job
- Elicit information regarding the qualifications sought
- Obtain information regarding prior experience and education
- Seek the reasons for leaving prior employment

Interviewers should have a plan for how to handle uninvited information regarding protected characteristics and avoid asking questions that may invite such information. Questions to avoid asking include:

- Are you married?
- Are you single?
- What are your childcare arrangements?
- Do you have kids / do you plan to have kids?
- Are you affiliated with a church?
- Will you need time off for religious holidays?
- What is your native language?
- Will you require time off for military obligations?

Finally, the best way to improve diversity, is to promote a diverse and welcoming workforce from within. Word travels fast, so companies should ensure that the message that is being shared by current employees to prospective employees is that the company is great place to work and one where everyone feels welcome. From a legal perspective, this is done by:

- Implementing policies and procedures that encourage respect and prohibit harassment of any kind;
- Instituting regular culture of respect training to emphasize the company's expectations on conduct affecting the workplace;
- Empowering anyone who experiences or observes inappropriate behavior to address it;
- Investigating any and all complaints; and
- Consistently enforcing all policies and procedures.

FIRING WITHOUT FEAR:

REDUCING THE RISK OF EMPLOYEE TERMINATIONS

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

A decision to discharge an employee can evolve into major litigation. With increasing regularity, employers have been asked to explain their employment decisions to a judge or jury. Each decision can become the subject of time-consuming and costly litigation — a risk you should not take lightly.

No matter how logical you believe present and past decisions to be, and no matter how certain you are that your motives are just, some risk remains. An ambitious plaintiff's lawyer may be able to convince a jury, consisting of individuals who do not understand your business and who are influenced by emotions, that a management decision made under the pressure of a working environment was wrong.

Additionally, today's workers are more educated and are fully aware of their rights under the employment laws. Today's managers are faced with increasing numbers of laws and legal theories under which employees can sue them. And employees are filing an increasing number of charges and complaints against employers.

The unwritten rule of employment law is that employers must prove that they treated the employee fairly. Although judges and juries do not expect perfect decisions, they do expect employees to be treated fairly.

Employers often view the decision of whether to terminate a bad employee as a choice between no litigation risk of the status quo and the high risk of litigation if the employee is terminated. But that ignores that continuing the employment of a problem employee often increases the risk. Such an employee often collects additional claims and grievances; for example, a work-related injury, claiming a disability or complaining about legal matters to set up a retaliation claim.

A decision to fire such employees should not ignore the risk inherent in continuing to employ such an employee and should not suffer paralysis by analysis.

Progressive Discipline

Problems with employee terminations usually arise when there is lack of a progressive discipline system, lack of notice to the employee, and lack of good documentation supporting the decision. These, and other elements that should be considered before making the final decision to fire an employee, are discussed here.

DISCIPLINARY SYSTEM INCLUDES THE FOLLOWING TYPES OF DISCIPLINE:

- VERBAL WARNING
- FINAL WRITTEN WARNING
- WRITTEN WARNING
- TERMINATION

The company should expect its employees to observe "common sense" rules of honesty, good conduct, general job interest, safe practices and adhere to generally accepted customs of good taste. Following are some examples of violations of work rules that may require disciplinary action.

- Falsifying time cards/time records or personnel, production, or other company records
- Refusing to carry out assignments relating to the work of the company
- Engaging in theft, misappropriation, or concealment of property from fellow employees, the company, or customers of the company as well as theft of government property

Not all rules, however, are common sense. If there are specific rules that you want your employees to know then you must make sure that information is written down and disseminated to the workforce. This is normally done in the form of an employee handbook.

In the event it becomes necessary to discipline an employee, employers should adopt a progressive disciplinary system that typically includes the following types of discipline:

- Verbal warning
- Written warning
- Final written warning
- Termination

While the circumstances of a particular case may result in termination for the first offense, most offenses should be subject to the progressive disciplinary system. Normally, if a problem develops, the employee's supervisor should attempt to correct it with a verbal warning. If improvement is not made, a written warning may result. If disciplinary problems continue, the employee should be given a final written warning. Finally, continued failure to follow company rules should result in termination. In each instance, the employee should be asked to sign the record of discipline, including a verbal warning, which should be placed in the employee's personnel file.

Fairness Questions

Following are questions that will help you prove that a decision to terminate an employee was fair. If you can answer "yes" to these questions, you will have a good likelihood of prevailing in just about any type of lawsuit that could arise out of the termination.

Is the rule or policy in question known to the employee?

- Is it published in a handbook or policy manual?
- Does the employee understand the rule or policy?
- Is the rule reasonable?

Does the employee admit that the act or event occurred? If not:

- Who are possible witnesses?
- Have you interviewed them all?
- Do you have statements from the witnesses?
- Do you have solid evidence that the act or event actually occurred?

What is your past practice?

- Have there been prior incidents of a similar nature?
- Is this a case of first impression?

TODAY'S WORKERS ARE MORE EDUCATED AND ARE FULLY AWARE OF THEIR RIGHTS UNDER THE EMPLOYMENT LAWS.

THE RULE OF THUMB IN EMPLOYMENT LITIGATION OFTEN IS THAT IF IT IS NOT DOCUMENTED, IT DID NOT HAPPEN.

BE SPECIFIC
BE THOROUGH
BE ACCURATE

Have you considered the employee's work record, particularly:

- Seniority?
- Prior disciplinary incidences?
- Prior work performance?

Have you evaluated all facts, prior company practices, employee work history, and the company's reason for the rule or policy? You should also consider and weigh all extenuating circumstances. It can be a good practice to suspend an offending employee before actually discharging him or her.

- Was the investigation of the facts conducted by an unbiased person?

The Termination Meeting

The termination meeting should be conducted in private; in an office that is not visible or accessible to the employee's coworkers. Conduct the termination in a manner that gives the employee dignity and respect. This is important even when the employee has engaged in what you consider to be terrible performance or behavior. A judge or a jury will be impressed if you can show that you took the high road.

- **Two managers should be present at the meeting.** The presence of the second person will likely deter any violent behavior by the employee. Additionally, the second manager can serve as a witness and can thoroughly document the meeting.
- **The meeting should be conducted in a businesslike manner.** The managers should not argue with the employee or lose their tempers.
- **When discussing the circumstances surrounding the discipline or termination,** managers should talk about the person's performance, conduct or behavior rather than about the person himself or herself.
- **Spend time thinking about how you will characterize the reason for the termination.** The reason for a termination is often a key fact in employment litigation. Act as if any termination documentation could be an exhibit at trial. It very well may!

Documentation

One additional key to avoiding and winning employment-related lawsuits is careful documentation. The rule of thumb in employment litigation often is that if it is not documented, it did not happen. To properly document your reasons, you should:

- **Be specific** — Do not use generalities to support your decision. For example, the reasons of "bad attitude" and "poor performance" will not justify a disciplinary decision. Use objective measures when you can. For example, rather than "poor productivity," say units produced were 50% of expectation.
- **Be thorough** — List all the reasons for your decision, not just the ones you believe are most important.
- **Be accurate** — Do not state anything you cannot prove.

Consider alternatives

If you believe that a terminated employee may have a basis for bringing a meritorious legal action, then consider offering the employee a severance package in exchange for a written release of claims. Employers should look at this from a cost-benefit analysis and decide whether it would be more financially beneficial to pay the severance package or to go to litigation. Alternatively, you may want to consider a last-chance agreement.

COVID-19 & THE ADA

By Doug Witte – Attorney, Boardman & Clark LLP

While many employers are tired of hearing about COVID-19 related issues, the issues, like the virus, are not going away. As one of the attorneys responding to questions on the ABC Free Call Service and the ABC HR Hotline, COVID-19 related issues are very hot right now. The issues run the gamut from, "What should I do if an employee is exposed?" to "What type of leave is an employee eligible for?" to "Can I restrict my employees from traveling to certain areas or participating in certain activities or quarantine them if they do?" Navigating all those issues is hard for employers and we are happy to assist you in that process. However, one of the more complicated areas is COVID-19 issues and how they need to be dealt with under the Americans with Disabilities Act (and state law). This article will focus on some of those issues.

As employers continue to bring employees back to work in some capacity during the ongoing public health crisis, among the challenges will be how to return to regular work while ensuring everyone's safety. According to the Centers for Disease Control and Prevention (CDC), certain employees might be at a higher risk of becoming severely ill from COVID-19, such as individuals who are 65 years or older, individuals who have underlying medical conditions such as diabetes or heart conditions, and pregnant women, among others.

The return of in-person employment will give rise to a number of legal issues regarding employers' and employees' rights and obligations under the Americans with Disabilities Act and the Wisconsin Fair Employment Act (collectively, ADA). For example, employers are prohibited from discriminating against individuals with disabilities under the ADA and are also required to provide reasonable accommodations to employees with physical or mental limitations who are otherwise qualified to do their jobs, unless the employer can demonstrate that the accommodation would impose an "undue hardship."

The Equal Employment Opportunity Commission (EEOC), which enforces the ADA, has issued two guidance documents to address these situations related to COVID-19. Significantly, the EEOC has taken the position that, during the time of the COVID-19 pandemic, the ADA does not interfere with or prevent employers from following the guidelines and suggestions made by the CDC or state/local public health authorities regarding the steps employers should take concerning COVID-19 and encourages employers to continue to follow the most current guidance on maintaining workplace safety.

• Can employers screen employees for COVID-19?

According to current CDC guidance, an individual who has COVID-19 or symptoms associated with it should not be in the workplace. However, the ADA generally prohibits an employer from making disability-related inquiries or medical examinations unless they are job-related and consistent with business necessity.

The EEOC has concluded that during the COVID-19 pandemic, because of the nature of the pandemic and based upon CDC recommendations, employers may screen employees to determine whether they have symptoms of COVID-19. Employers can require employees to take their own temperatures before coming to work and can take employees' temperatures at work. Employers can also ask employees if they have symptoms of COVID-19 and may require their employees to self-screen each day and document the results prior to entering the workplace. If an employer decides to require such screening, the employer must do so for all employees and may not single out those employees with health conditions that place them at high risk. Furthermore, because these types of screening tools involve medical information, the EEOC requires that any records generated by the screening be kept confidential and separate from the employees' regular personnel files.

• Can an employer prohibit employees with COVID-19 diagnoses, symptoms, or known exposures from coming to work?

The ADA prohibits an employer from taking an adverse employment action against a person with a "disability." The EEOC has not officially taken a position whether having COVID-19 constitutes a disability. Nonetheless, the EEOC has taken the position that employers may require employees to stay home if they have been diagnosed with COVID-19, have symptoms of COVID-19, and/or have been exposed to someone who has been so diagnosed or exposed.

• Can an employer require "high risk" employees to return to work?

The CDC advises individuals who are at a higher risk for severe illness to take extra precautions to avoid contracting COVID-19. A question employers will face is whether such "high risk" employees can be required to physically return to work. The mere fact that an employee is concerned about physically returning to work because the employee or someone with whom the employee lives is perceived as "high risk" with respect to COVID-19 does not necessarily mean the employee is disabled and entitled to reasonable accommodations under the ADA. Therefore, an employer may require a "high risk" employee return to work. If an employer is not going to return all employees to work, the employer must ensure that its decision about which employees to return is based on objective and non-discriminatory criteria such as experience, specific skill or licensure needs. Employers may not base such decisions on an employee's protected characteristics such as age, disability, pregnancy, or "high risk" status.

• Can an employer prohibit a "high risk" employee from returning to work?

An employer may not prohibit an employee from returning to work or take any other adverse employment action simply because the employee is considered "high risk" related to potential exposure to COVID-19. Unless an employee has been exposed to, diagnosed with, or displays symptoms of COVID-19 or has a disability that poseses a direct threat to themselves, an employer may not prohibit an employee from returning to work or require an employee to work from home indefinitely, solely because of the employee's disability, age, pregnancy, or other protected characteristic, which creates a higher health risk if the

EMPLOYERS MAY REQUIRE EMPLOYEES TO STAY HOME IF THEY HAVE BEEN DIAGNOSED WITH COVID-19, HAVE SYMPTOMS OF COVID-19, AND/OR HAVE BEEN EXPOSED TO SOMEONE WHO HAS BEEN SO DIAGNOSED OR EXPOSED.

employee contracts COVID-19. For example, it would be unlawful for an employer to require all employees above a certain age to continue working virtually while allowing younger employees to physically return to work.

Under the ADA, an employer may prohibit an employee from returning to work if the employee has a disability that poses a "direct threat" to the employee's health that cannot be eliminated or reduced by reasonable accommodation. An employer must show that the employee has a disability that poses a "significant risk of substantial harm" to the employee's own health. This determination must be an individualized assessment based on a reasonable medical judgment about the employee's disability. When determining if a direct threat is posed, the ADA requires an employer to consider the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur and the imminence of the potential harm. Analysis of these factors will likely include considerations based on the severity of the pandemic in a particular area and the employee's own health and particular job duties.

Whether an employee's disability constitutes a direct threat is to be determined based on the best available objective medical evidence. The CDC guidance and advice from other public health authorities are such evidence. Therefore, employers will be acting consistent with the ADA so long as any screening implemented is consistent with advice from the CDC and public health authorities for that type of workplace at that time. A determination of direct threat would also include the likelihood that an individual will be exposed to the virus at the worksite. Measures that an employer might be taking in general to protect all workers, such as mandatory social distancing, also would be relevant to the direct threat analysis.

- **How should an employer determine which accommodation to provide for an employee with a disability?**

Even if an employer determines that an employee's disability poses a direct threat to the employee's own health, the employer still cannot exclude the employee from the workplace unless there is no way to provide a reasonable accommodation, absent undue hardship. The employer will also be required to assess its duty to reasonably accommodate an employee who provides the employer with medical documentation requesting an accommodation if the employee has a condition that constitutes a disability that puts the employee at higher risk if the employee contracts COVID-19.

Under the ADA, a reasonable accommodation is a modification or adjustment in the work environment that enables the employee to perform the essential functions of the job. If an employee requests an accommodation, the employer is entitled to request documentation supporting the request. During the COVID-19 pandemic, an employer may request information from an employee about why an accommodation is needed. Possible questions for the employee might include: (1) how the disability creates a limitation on the employee, (2) how the requested accommodation will effectively address the limitation, (3) whether another form of accommodation could effectively address the issue, and (4) how a proposed accommodation will enable the employee to continue performing the essential functions of his or her position.

Whether an employee's requested accommodation is "reasonable" depends on the specific circumstances of each work setting. When an employee requests an accommodation, the employer must individually examine the employee's request and work with the employee, and often the employee's physician, to determine what accommodation(s) will allow the employee to safely and successfully perform the job. Employees are not necessarily entitled to the accommodation of their choice. Instead, when possible, employers must provide an employee with an accommodation that will allow the employee to safely perform the essential functions of the employee's job while reducing the risk that the employee contracts COVID-19. The ADA also does not require that an employer accommodate an employee without a disability based on the disability-related needs of a family member or other person with whom the employee is associated.

Both the CDC and EEOC encourage employers to adopt flexible workplace policies to mitigate the spread of COVID-19 in the workplace. With respect to COVID-19, reasonable accommodations might include personal protective equipment (e.g., gowns, masks, gloves) beyond what the employer might generally provide to employees returning to the workplace. Accommodations might also include additional or enhanced protective measures; for example, erecting a barrier that provides separation between an employee with a disability and others or increasing the space between an employee with a disability and others. Other possible reasonable accommodations include the elimination or substitution of particular "marginal" functions,

temporary modification of work schedules to decrease contact with coworkers and/or the public, or moving the location where the employee works, including in some circumstances allowing an employee to work remotely.

The ADA does not require the employer to provide an otherwise reasonable accommodation if it would pose an "undue hardship." A determination of undue hardship must be assessed on a case-by-case basis focusing on the employer's resources and circumstances in relationship to the requested accommodation. An undue hardship not only involves financial considerations, but also involves consideration of whether the accommodation would be unduly expensive, substantial, or disruptive, or would fundamentally alter the nature or operation of the employer.

The EEOC advises that employers "must weigh the cost of an accommodation against its current budget while taking into account constraints created by this pandemic." Financial hardships experienced by an employer during the pandemic might further support a determination of undue hardship if an employee requests an expensive accommodation.

If a proposed accommodation creates an undue hardship, employers and employees should work together to determine whether an alternative exists that could meet the employee's needs. If an employer is unsure whether a particular requested accommodation creates an undue hardship, the employer may wish to consult with legal counsel.

Can an employer refuse to hire applicants at greater risk?

It is unlawful for an employer to refuse employment, withdraw a job offer, or postpone an applicant's start date solely because the employer is concerned that an applicant's age, disability, or pregnancy puts them at a greater risk from COVID-19. An employer may screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as it does so for all entering employees in the same type of job. An employer may delay the start date of an applicant who has COVID-19 or symptoms associated with it and may withdraw such an applicant's job offer if it needs the applicant to start immediately.

Conclusion

The new disability accommodation and discrimination issues created by COVID-19 should be a focus of every employer's return-to-work plan. Navigating accommodation requests and creating non-discriminatory policies require an individualized approach adapted to each employer's specific needs. In doing so, employers must not only comply with the ADA, but also their own internal leave and accommodation policies. Because of the complicated nature of the interactions between these laws and policies, employers may wish to work with legal counsel when addressing these issues.

Doug Witte can be reached at 608-283-7529 or dwitte@boardmanclark.com.

COVID-19 & LIABILITY

DON'T LET YOUR FAILURE TO MITIGATE THE RISK OF COVID-19 ON THE JOBSITE BECOME A TARGET FOR YOU BEING SUED

By Joseph E. Gumina – Attorney, O'Neil, Cannon, Hollman, DeJong & Laing S.C.

From the onset of the COVID-19 pandemic in the United States, construction businesses have been deemed to be part of this nation's essential infrastructure allowing construction activities to continue without interruption. While governmental authorities permitted construction employers to continue to conduct business during the initial outbreak of COVID-19, there was little reliable information about how exactly or how easily the COVID-19 virus was transmitted between individuals and definitely little to no industry-specific guidance on how to protect employees on the jobsite; other than to basically cover your coughs, wash your hands, and maintain at least six-foot social distancing from other individuals. The lack of overall and industry-specific guidance for construction employers created frustration for employers and anxiety among employees.

Fast forward to today, with COVID-19 not going away anytime soon, states and municipalities have issued face mask mandates. The Centers for Disease Control and Prevention (CDC) and the Occupational Safety and Health Administration (OSHA) have issued specific COVID-19 guidelines for construction regarding safe work practices to help guide employers to provide an overall safe and healthy workplace. These mandates and industry-specific guidelines now provide construction employers a playbook on how to manage and mitigate the risk of COVID-19 on jobsites. Failing to follow this playbook, however, exposes your business to potential legal liability if an employee or third-party contracts COVID-19 on the jobsite and it is determined that it was one of your employees on the jobsite who was the source in spreading the virus.

COVID-19-related lawsuits by employees and others have already started against employers, based upon the allegation that the employers failed to provide adequate protections in the workplace to mitigate against the risk of human-to-human transmission of COVID-19. The pivotal and most complex issue in this type of litigation is causation. That is, will the individual making the claim be able to establish that he or she actually became infected with the virus from the jobsite as opposed to some other source outside of their employment? Intertwined with the issue of causation is whether the employer breached its duty of ordinary care; that is, did the employer do

something or fail to do something that a reasonable employer would recognize as creating an unreasonable risk of injury?

The element of causation becomes somewhat easier to establish when the employer fails to follow the various COVID-19 mandates and industry-specific guidelines. On the other hand, an employer who implements and enforces the various COVID-19 safety mandates and guidelines on the jobsite will have a greater chance to defend against such a lawsuit. This is because having proactive measures to mitigate against the risk of the transmission of COVID-19 on the jobsite puts an employer in a better position to establish that the cause of the employee's infection came from a source outside of the workplace.

When one of your own employees becomes ill with COVID-19, OSHA has now made it your responsibility, as the employer, to conduct an assessment to determine whether the employee's illness is work-related, and, therefore, recordable on the OSHA injury and illness logs. In other words, OSHA has made it the employer's responsibility to first determine causation as to whether the employee's COVID-19 illness is job-related even before a potential lawsuit is filed.

As a result, this makes an employer's responsibility to adopt and follow legal mandates and industry-specific guidelines related to COVID-19 even more imperative so employers can plausibly assert that an employee's COVID-19 illness was not the result of any exposure on the jobsite. Adopting and implementing CDC and OSHA guidelines, and following Wisconsin's and applicable municipal face mask mandates, will help make the case for your business that the individual's illness is less likely to have originated from your jobsite or work practices, and rather, originated from some other source or environment.

FOR CONSTRUCTION EMPLOYERS, NOT REQUIRING EMPLOYEES TO WEAR A CLOTH FACE MASK ON THE JOBSITE, WHEN APPLICABLE SAFETY STANDARDS PERMIT IT, IS AN INVITATION FOR POTENTIAL LEGAL LIABILITY.

Maintaining a Safe and Healthy Work Environment, Face Mask Mandates and CDC and OSHA Guidelines

For some individuals, choosing whether or not to wear a cloth face mask is a political statement. However, for construction employers, not requiring employees to wear a cloth face mask on the jobsite, when applicable safety standards permit it, is an invitation for potential legal liability. You don't want an individual on the jobsite to become ill with COVID-19 because of your failure to have your employees wear face masks as recommended by the CDC and OSHA.

The state of Wisconsin, city of Milwaukee, and Dane County all currently have legal mandates that require individuals to wear a cloth face mask while indoors or in an enclosed space. There are exceptions, including when wearing a face mask creates a risk to the person related to their work as determined by government safety guidelines. The city of Milwaukee's face mask mandate also requires an individual to wear a face mask even while outdoors. Failing to comply with these state and municipal face mask mandates, when applicable, can subject violators to civil forfeitures. The CDC and OSHA also both recommend, but don't require, that employees engaged in construction activities wear cloth face masks in addition to maintaining social distancing at the jobsite. Although these recommendations are simply suggested guidelines for employers to follow and do not necessarily constitute legally enforceable standards or regulations, they nonetheless set an expected standard of care for construction employers to follow.

In addition, both the CDC and OSHA require construction employers to maintain a healthy work environment during the COVID-19 outbreak and recommend that employers take steps to reduce the transmission risk of COVID-19 among workers at jobsites. These steps include:

- Training employees on the signs and symptoms of COVID-19.
- Encouraging workers to stay home if they are sick.
- Requiring employees/visitors showing signs or symptoms of COVID-19 to leave the jobsite and return home.
- Training employees on proper respiratory etiquette, including covering coughs and sneezes.
- Encouraging workers to wear cloth face masks over their

noses and mouths to prevent them from spreading the virus to others and requiring workers to do so when state or local units of government require it.

• Maintaining social distancing of at least six feet between workers when possible.

• Limiting in-person or toolbox meetings and practicing social distancing during such meetings.

• Limiting tool sharing, and if such tool sharing is necessary, then providing instructions for workers on using alcohol-based wipes to clean tools before and after use.

• Cleaning and disinfecting frequently-touched surfaces.

• Having workers practice proper hand hygiene by either making soap and water available for hand washing, or if water is not available, then making hand sanitizers available that consists of at least 60% alcohol.

• Discouraging employees from ridesharing to the jobsite.

• Encouraging employees to report any safety and health concerns.

A construction employer who does not adopt and follow these basic COVID-19 safe work practices, including requiring its employees to wear face masks on the job as recommended by the CDC and OSHA or as required by either Wisconsin's or the various municipal face mask mandates when applicable, faces potential legal liability. That liability, depending on who makes the claim, can either be made under the worker's compensation statute or as a tort claim for negligence in circuit court. Negligence under Wisconsin law occurs when a person fails to exercise ordinary care, which is care a reasonable person would use in similar circumstances. While damages for a claim under worker's compensation is limited by statute, such damage limitations do not apply in a claim for negligence.

A construction jobsite is unique compared to other workplaces. Oftentimes, employees from other contractors are working at the same jobsite alongside your employees. If another contractor's employee becomes infected with COVID-19 from one of your employees not wearing a face mask on the jobsite, for example, then you face a potential claim for legal liability; if it can be established that you failed to exercise ordinary care by not having implemented a COVID-19 response plan designed to protect workers on the jobsite from the transmission of COVID-19 between individuals. That is, an employer's failure to follow and enforce any of the applicable safe work practices in a COVID-19 environment may open the door for a tort claim for negligence. Although causation, or proving that an individual actually contracted COVID-19 on the jobsite from one of your employees, may be extremely difficult to establish (as opposed to that individual having become infected from some other source like visiting a crowded restaurant or bar, riding mass transit, or coming in contact with another person outside of the jobsite having COVID-19), the potential for legal liability still exists.

OSHA Requires Employers to Investigate Whether Employees' COVID-19 Illnesses are Work-Related

As of May 26, 2020, OSHA obligates employers, who are required to keep OSHA injury and illness logs, to conduct an assessment of every employee who contracts COVID-19 to determine whether the illness is work-related and, therefore, recordable as an OSHA reportable injury or illness. This required assessment is actually an investigation by the employer to determine whether elements and conditions in the employee's work environment were the cause of the COVID-19 infection. OSHA requires that the employer's investigation be reasonable in that the investigation should be conducted in good faith and designed to collect that information which is probative as to whether the employee's illness is work-related. The employer's investigation should consider the type of work performed, the proximity of the work performed to other workers, preventive

measures in place to mitigate against the risk of transmission of COVID-19, and other factors such as ongoing community transmission. OSHA requires an employer to consider an illness, like COVID-19, to be work-related if an event or exposure in the work environment either caused or contributed to the resulting condition or illness. However, it is OSHA's position that if, after a reasonable and good faith investigation, the employer cannot determine whether it is more likely than not that exposure in the workplace played a causal role with respect to an employee acquiring COVID-19, then the employer is not required to record the COVID-19 as a recordable illness.

Whether in a lawsuit for negligence or in a claim for worker's compensation benefits, this required OSHA assessment to determine whether an employee's COVID-19 infection is work-related may be one of the first pieces of evidence that a plaintiff's lawyer attempts to obtain. The lawyer will try to establish causation that the employee's exposure to COVID-19 is directly from the employee's work environment. If an employer's own assessment concludes that an employee's COVID-19 infection is work-related, the road for an infected worker to establish causation may be a little less difficult.

Therefore, having your business implement and enforce safe work practices related to COVID-19 is important. This means requiring your employees to wear face masks when permitted under applicable safety standards. This will allow your business, consistent with OSHA's enforcement policy, to conclude that an employee's COVID-19 illness is not work-related. This is because it will then be plausible that it will be more likely than not that exposure in the workplace did not play a causal role with respect to the employee acquiring COVID-19. However, your business will change the calculus of this determination if, on the other hand, you do not implement the necessary safe work practices on your jobsites related to protecting your employees and others against the risk of infection of COVID-19 between workers.

Conclusion

Having a basic COVID-19 response plan that puts in place specific safe work practices to address the risk of COVID-19 on the jobsite and implementing CDC and OSHA guidelines decreases the risk of human-to-human transmission of COVID-19 on your jobsites. It also provides you with a greater credible opportunity to conclude that an employee's COVID-19 infection is not work-related, and therefore, not recordable for OSHA purposes. If, however, you do not have a basic COVID-19 response plan, and you do not make an effort to implement CDC and OSHA guidelines on your jobsites, then it may be difficult for you to conclude in good faith that an employee's COVID-19 infection occurred from some source outside of the workplace. In that case, you clearly will place a litigation target on the back of your business. Avoid being that target.

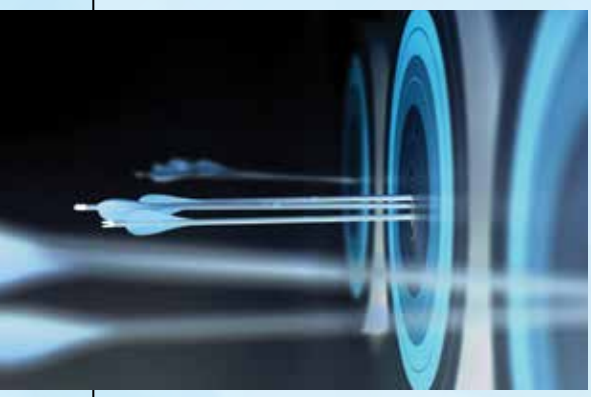
Joseph E. Gumina can be reached at 414-291-4715 or joseph.gumina@wilaw.com.

TARGETING
THE INDEPENDENT CONTRACTOR

AVOID THE RISKS OF MISCLASSIFICATION

By John Schulze – ABC of Wisconsin Director of Legal and Government Affairs

Nearly 20% of jobs in the United States are now some form of non-traditional worker-company relationship, like independent contractor. Independent contractor work can be appealing for both the worker and the company. The worker has the benefit of setting prices, work hours, type of work and completion schedule. The company has the freedom and flexibility to staff to meet their needs and reduce training time and costs. Misclassification occurs when an employer either accidentally or intentionally defines an employee as an independent contractor rather than as an employee. If the person doing the work fits the definition of an employee, the company is required to treat them as an employee, even if they would prefer to be an independent contractor.



Following the lead of at least 16 Democratic governors elsewhere in the U.S., Wisconsin Gov. Tony Evers created a task force to "crack down" on independent contractor misclassification abuse. ABC of Wisconsin Government Affairs has been tracking the task force's actions as it has met regularly over the last year. So far, the task force – whose every public member but one being a construction union official or from a union contractor – is still developing its recommendations, which will likely be part of the state budget Gov. Evers will introduce in January 2021. Proposals expected to be included are a mandatory statewide registry for contractors, increased fines, and general contractor liability for their subcontractors that misclassify. The ABC Government Affairs staff will fight to make sure any proposal does not target merit contractors.

Even under current law, the risks of even accidental misclassification can expose a company to retroactive wage and benefit payments, taxes with interest, monetary penalties and legal defense fees. Unfortunately, there is no single test to evaluate whether a worker is an independent contractor. A Wisconsin employer has as many as five different tests to apply, and each has different requirements and weighs different factors. For example, a company could face a scenario where a worker is an independent contractor for federal income tax purposes but an employee under Wisconsin workers compensation laws.

The difference between an independent contractor and employee is complicated and crucial, so it is important to consult an attorney to address your specific situation. Regardless, there are steps a Wisconsin employer can take to be "safer."

Do not pay an independent contractor like an employee.

- Do not provide independent contractors with W-2 forms, only with 1099s.
- Pay by task or project, not hourly or weekly or on

specific dates or regular amounts. A flat fee payment arrangement makes it more likely that a worker is an independent contractor.
- Require independent contractors to submit invoices.
- Do not provide employee benefits or reimburse for expenses or travel.

An independent contractor should not look like an employee. The independent contractor should not hold themselves out as a company employee.
- Have an independent contractor provide proof that they are running an independent business, such as corporate formation documents, business website, any advertising, or professional licenses. It may be best to only contract with incorporated/LLC independent contractors, not individuals.
- An independent contractor should not have a title with your company, or your company's business cards, or your company's email address.
- An independent contractor should not supervise your employees.
- Do not let an independent contractor work at your office unless necessary.
- Do not refer to an independent contractor as your employee or your company as their employer. Do not invite independent contractors to employee meetings or functions.

Do not train and supervise the independent contractor like an employee. A defining trait of an independent contractor is that they have specialized knowledge or experience needed for a specific project that can be completed without direction.
- Do not supervise either the independent contractor or their subordinates or provide ongoing instructions on how to do the work.
- Do not provide training to the independent contractor.
- Do not establish working hours.
- Do not require the independent contractor to provide status reports.
- Do not discipline or terminate an independent contractor except as set forth in the written agreement.
- Do not provide formal reviews or performance evaluations to independent contractors.

Put it in writing. It does not matter that the written agreement between the person doing the work and the company states that the worker is an independent contractor or a freelancer.
- The written agreement needs to spell out that the independent contractor is responsible for their own expenses, taxes, liability insurance, licenses, and quality of work.
- The agreement should specify that the worker holds the company harmless for any losses resulting from misclassification and specifies that the worker must re-do poor work.
- Do not give the independent contractor new work after the original project is completed without signing a new agreement.

As Bing Crosby sang – Don't fence your independent contractors in. Employees generally work for one employer, but independent contractors provide services to the general public.
- Do not restrict your independent contractor from working for other companies. Avoid giving your independent contractor so much work or such short deadlines that they are working full-time for your company. If you are concerned about the independent contractor giving away business secrets to competitors, include confidentiality language in contracts.
- Limit the duration of projects to avoid open-ended relationships.

Sometimes it is what it is.

All the tests focus on two issues: Direction/control and whether the worker has an independently established business. If you are telling a worker what to do, and/or the worker only works for you and no other contractors, then the worker is an employee, not an independent contractor. There are going to be times when a company cannot keep direction to a minimum, cannot let a worker come and go as they please and cannot allow them to work for other companies. When that is the case, the company needs to treat the worker as an employee, not an independent contractor. ABC Wisconsin

NEARLY **20%**

OF JOBS IN THE UNITED STATES ARE SOME FORM OF NON-TRADITIONAL WORKER-COMPANY RELATIONSHIP, LIKE INDEPENDENT CONTRACTOR.

NEW MEMBERS

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

AUGUST 2020

• Badger State Heating and Air Conditioning
Jennifer Worden
1220 Prairie Creek Blvd. #108
Oconomowoc, WI 53066
Phone: (262) 372-3085
Description: Mechanical Contractor
Sponsor: Eric Wellhouse, Catcon Inc. dba Catalyst Construction
Beam Club Members-to-date: 1

• Brightside Electric, LLC
Sven Hovey
5553 Hovey Valley Road
Mondovi, WI 54755
Phone: (715) 495-1708
Description: Electrical Contractor
Sponsor: Jim Bunkelman, Royal Construction, Inc.
Beam Club Members-to-date: 6

• Dynamic Plumbing
Chris Eckelberg
3150 213th Ave.
Bristol, WI 53014
Phone: (262) 818-1175
Description: Plumbing Contractor
Sponsor: Bill Rozga, Rozga Solutions Inc.
Beam Club Members-to-date: 24.5

• Elite Electrical Contractors of Central WI, LLC
Kevin Rohland
232746 N. 128th Ave.
Marathon, WI 54448
Phone: (715) 432-8561
Description: Electrical Contractor
Sponsor: Steve Klessig, Keller, Inc.
Beam Club Members-to-date: 55

• Genesis Electric, LLC
Caryn Dawson
1006 Elm Ave.
South Milwaukee, WI 53172
Phone: (414) 426-4225
Description: Electrical Contractor
Sponsor: Jay Zahn, R&R Insurance Services, Inc.
Beam Club Members-to-date: 49

• Heinzen Plumbing/Heating, Inc.
Thomas Heinzen
N2038 Highway 45 S.
Antigo, WI 54409
Phone: (715) 623-4196
Description: Mechanical Contractor
Sponsor: Steve Klessig, Keller, Inc.
Beam Club Members-to-date: 56

• Hub International Midwest Limited
John Wallen
2120 Pewaukee Road, Suite 202
Waukesha, WI 53188
Phone: (414) 444-5432
Description: Associate Member - Insurance
Sponsor: Mark Foyse, BMCI Construction, Inc.
Beam Club Members-to-date: 1

• Innovative Plumbing, LLC
Brad Schmidt
2939 Sun Meadow Court
Delavan, WI 53115
Phone: (262) 949-4528
Description: Plumbing Contractor
Sponsor: Tom Gilbank, Gilbank Construction, Inc.
Beam Club Members-to-date: 59.5

• Larson Family Electric
Mark Larson
4606 Meredithe Ave.
Madison, WI 53716
Phone: (608) 444-3073
Description: Electrical Contractor
Sponsor: Brian Wieser, Wieser Brothers General Contractors, Inc.
Beam Club Members-to-date: 49.5

• Mark the Plumber, LLC
Rachel Nelson-Engelke
PO Box 607
Fort Atkinson, WI 53538
Phone: (920) 568-8201
Description: Plumbing Contractor
Sponsor: Jay Zahn, R&R Insurance Services, Inc.
Beam Club Members-to-date: 50

• Mechanical Masters, Inc.
William Shenkenberg
312 S Beaumont Ave.
Kansasville, WI 53139
Phone: (262) 878-0875
Description: Mechanical Contractor
Sponsor: JR Reesman, Reesman's Excavating & Grading, Inc.
Beam Club Members-to-date: 23

• Precision Glass & Door, LLC
Don Turzinski
3101 Post Road
Stevens Point, WI 54481
Phone: (715) 344-8525
Description: Specialty Contractor
Sponsor: Tom Altmann, Altmann Construction Co., Inc.
Beam Club Members-to-date: 40

• Quality Electrical Solutions, LLC
Luke Franseen
W123 State Highway 98
Spencer, WI 54479
Phone: (715) 207-9437
Description: Electrical Contractor
Sponsor: Tom Altmann, Altmann Construction Co., Inc.
Beam Club Members-to-date: 41

• Roecker Electric, LLC
Larry Roecker
10685 S. Sand Lake Blvd.
Solon Springs, WI 54873
Phone: (715) 813-0819
Description: Electrical Contractor
Sponsor: Jim Bunkelman, Royal Construction, Inc.
Beam Club Members-to-date: 7

• Sande Services, LLC
David Sande
2916 W. Sholes Drive
Mequon, WI 53092
Phone: (262) 853-0113
Sponsor: Troy Carlson, McClone, Inc.
Beam Club Members-to-date: 19

• Sippel Electric, LLC
Ben Sippel
N5981 Kohler Road
Fredonia, WI 53021
Phone: (262) 305-9199
Description: Electrical Contractor
Sponsor: Gerry Krebsbach, K-W Electric, Inc.
Beam Club Members-to-date: 31

• Soft Water, Inc.
Steve Mackie
202 Travis Lane
Waukesha, WI 53189
Phone: (262) 547-3866
Description: Mechanical Contractor
Sponsor: Casey Malesevich, Sure-Fire, Inc.
Beam Club Members-to-date: 6

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