# CONSTRUCTION UPDATE

## FOR IN-HOUSE COUNSEL

*Presented by Axley Law Firm & the Wisconsin Department of Natural Resources*

MARCH 17, 2016 | THE MADISON CLUB

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Madison • Waukesha


AGENDA

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|---|---|
| 11:30 A.M. - 12:00 P.M. | **Registration** |
| 12:00 P.M. - 1:00PM | **Lunch & Roundtable** |
| 1:00 P.M. - 2:15 P.M. | **OSHA, Wildlife/DNR, HWY 23**<br>*Attorney Tyler Wilkinson & Attorney Micheal Hahn \| Axley* |
| 2:15 P.M. - 2:45 P.M. | **Construction Law Update**<br>*Attorney Saul Glazer \| Axley* |
| 2:45 P.M. - 3:00 P.M. | **Break** |
| 3:00 P.M. - 3:40 P.M. | **DNR Strategic Alignment Process**<br>*Mark Acquino \| Division of Business Support & External Services* |
| 3:40 P.M. - 4:20 P.M. | **Legislative Update**<br>*Attorney Robert Procter \| Axley* |
| 4:20 P.M. - 5:00 P.M. | **Employment Law Update**<br>*Attorney Troy Thompson \| Axley* |
| 5:00 P.M. - 5:45 P.M. | **Happy Hour** |
| 5:45 P.M. | **Dinner** |

# OSHA DNR HWY 23

# TAB

# OSHA DNR HWY 23 TAB

# The Bottom Line From The Regulatory Update

*Attorney Micheal Hahn & Attorney Tyler Wikinson*
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**Environmental Review Process**

- The NEPA/WEPA review process plays a huge role in determining whether construction projects will move forward.
- Environmental or citizen groups can derail construction projects by attacking flaws or failures in the environmental review process.
- Contractors can play a role in making sure construction projects move forward by monitoring and providing input during the environmental review process.

**OSHA Updates**

- Look for increased OSHA penalties beginning in August 2016 and protect your company against OSHA's Enterprise-Wide enforcement focus.
- Employers will need to regularly submit OSHA 300 or 300A forms to OSHA and OSHA will publish those forms on its website to shame employers into safer work practices.
- The expected OSHA Silica Rules set the new Permissible Exposure Limit for respirable silica dust of 50 µg/m3 and this PEL applies to all industries, including construction.
- We expect that all companies will need to comply within one year of the Final Rule.

**DNR Wildlife Action Plan**

- Wisconsin's Wildlife Action Plan is a strategic approach to preserve and protect "Species of Greatest Conservational Need" and outlines priority conservation actions to protect these species and their habitats.
- This means that zoning and land-use decisions which may affect protected habitats will need to consider and address Wildlife Action Plan guidelines.


## Agenda

- Highway 23 and NEPA/WEPA Challenges
- OSHA Updates
- DNR Wildlife Action Plan

## 1000 Friends of Wisconsin Lawsuit

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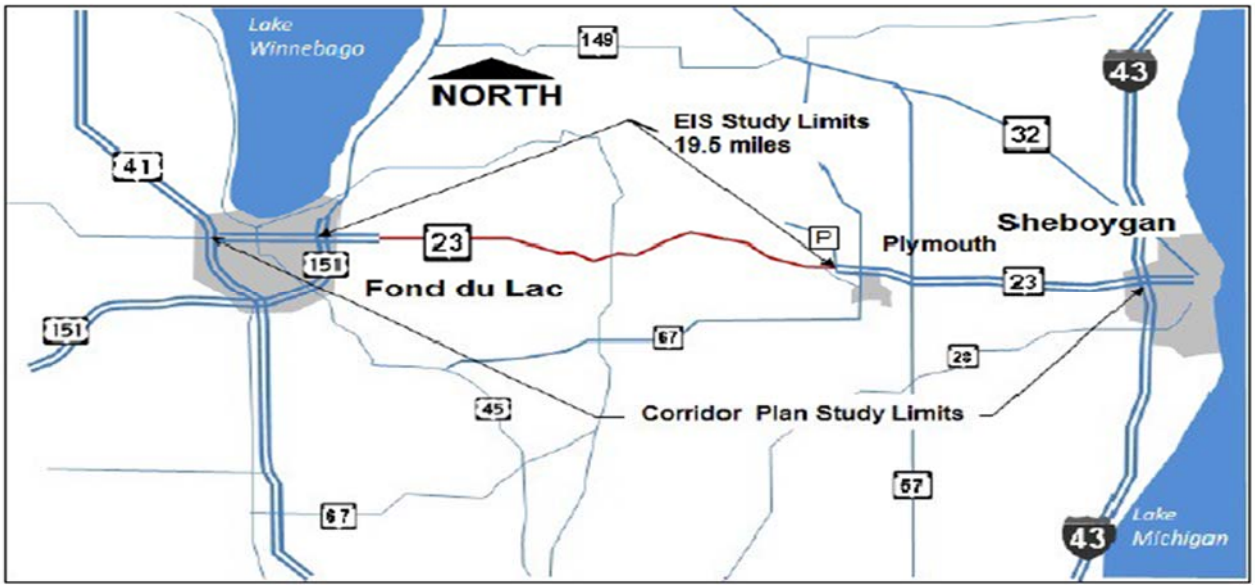




## Highway 23

- NEPA/WEPA Analysis
- The Environmental Group Playbook
- What Contractors Can Do To Help Projects Move Forward

## 1000 Friends Lawsuit

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### Results?

- Lost job opportunity;
- Lost deployment costs;
- Losses to the taxpayers;
- The problems with Highway 23 are not addressed.



## 1000 Friends Lawsuit

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**We came *this close* to the $1.71 Billion Zoo Interchange Project being shut down as well!**

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# NEPA/WEPA Overview

## NEPA/WEPA Overview

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- NEPA establishes national environmental policies
- Helps insure better informed decision-making
- Provides for public involvement
- WEPA is state counterpart – designed to encourage environmentally sensitive decision-making by state agencies

## NEPA/WEPA Terminology

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**Environmental Impact Statement** – full disclosure document that includes:

- Purpose and Need Statement
- Identification and Evaluation of Alternatives
- Analysis of Direct, Indirect and Cumulative Effects of Alternatives, including doing nothing



## NEPA/WEPA – Judicial Review

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Courts review the entire administrative record related to a project

Courts look to whether agency:

- Followed NEPA/WEPA Procedures;
- Adequately reviewed alternatives;
- Adequately reviewed effects and impacts;
- Whether the rationale for decision makes sense.

Courts are looking for clear errors in judgment

## NEPA/WEPA Takeaways

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- Environmental Review is a long, difficult and extensive process that generates a huge record.
- The review generates a lot of issues for agencies to keep track of and a lot of issues for project challengers to attack (i.e., you can always do more).
- This is the first opportunity to sue to stop a project.



## The Environmental Group Playbook

## The Environmental Group Playbook

*Milwaukee Zoo Interchange*


- Milwaukee Inner-City Congregations Allied for *Hope v. Gottlieb* (Eastern District of Wis. 2013)
- Did WisDOT adequately evaluate the project impacts on the environment?



## Zoo Interchange Litigation

*Court Concluded …*

- WisDOT did not adequately consider certain impacts of Zoo Interchange Expansion.
- But, Court was concerned that stopping the project *could* cause more harm than good.
- Parties ultimately settled.

## The Environmental Group Playbook

*Highway 23*

- *1000 Friends of Wisconsin v. US DOT* (Eastern District Wis. 2015)
- Did WisDOT provide its data so the public can fully vet and comment?
- Did WisDOT fully consider new information?



## Not Just Roadbuilders ...

- Railroads – *Freedland v. Wisconsin DNR*
- Hotels – *Friends of the Sturgeon Bay Waterfront v. City of Sturgeon Bay*
- Boat Launches – *North Lake Management Dist. v. Wis. DNR*
- Agricultural Operations – *Family Farm Defenders v. Wis. DNR*

# What Can Contractors Do to Help Projects Move Forward?

## What Can Contractors Do?

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Understand that we're all in this together – need partnerships between Regulators, Contractors, Owners and Trade Associations

**Before projects are bid and let:**

- Establish team of legal, environmental and engineering experts to monitor and participate in the NEPA process on behalf of contractors.
- Monitor projects through state and federal registers and online.
- Attend planning meetings with agencies and public comment hearings.
- Submit comments and data to help push projects forward.
- Lobby for substantive change in Washington and Madison.

## What Can Contractors Do?

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- **During bidding or contracting process:**
  - Check status of NEPA process and potential lawsuits prior to bidding.
  - Draft sub-contracts to allocate and address risk caused by adverse court decision.
  - Add provision in contract providing recovery for extra costs and losses if project is impacted or cancelled due to adverse court decision.
- **After project is let:**
  - Establish team of legal, environmental and engineering experts to address ongoing NEPA analysis and litigation.



## OSHA Updates

- Increased Penalties and Enterprise-Wide Liability in 2016
- New Reporting Rule
- New Silica Rule

## OSHA Increased Penalties

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Penalty increases to take effect by August 1, 2016

| Violation | Current Maximum | Adjusted Maximum |
|---|---|---|
| Non-Serious | $7,000 | $10,500 – $12,740 |
| Serious | $7,000 | $10,500 - $12,740 |
| Willful or Repeated | $70,000 | $105,000 - $127,400 |



## OSHA Enterprise-Wide Focus

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**Enterprise-Wide Inspections** – OSHA finds a violation at one site and then quickly inspects other employer sites for the same violation and then issues "repeat" citations

**Enterprise-Wide Abatement** – OSHA finds a violation at one site and then requests an order compelling employer to abate violation at all sites

## New OSHA Reporting Rules

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- "Improve Tracking of Workplace Injuries and Illnesses" Final Rule expected in March, 2016 (not issued at time of publication).
- Employers with more than 250 employees per establishment must submit OSHA 300 Logs on quarterly basis.
- Employers with 20 or more employees must electronically submit OSHA Form 300A on annual basis.



## New OSHA Reporting Rules

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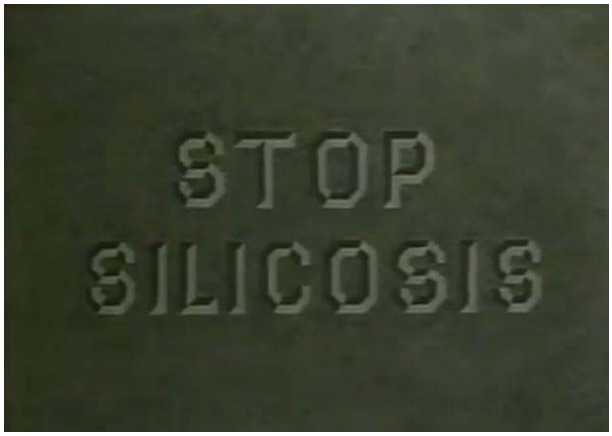
OSHA 300 and 300A forms will be posted on the OSHA website and made publicly-available in an attempt to shame employers into safer work practices.

## History of Silica Regulation

*Governmental Concern Spanning Decades…*




- Federal government has been concern about silica exposure since 1930s.
- Current PEL (Permissible Exposure Limits) has been in place since 1971.

U.S. Department of Labor. "Stop Silicosis." 1938



## Health Effects of Silica Exposure

*OSHA determined that silica is a carcinogen*

OSHA determined numerous studies show respirable silica dust is toxic.

Silica exposure is linked to: silicosis, lung & other cancers, various respiratory diseases, and renal & auto-immune effects.

OSHA determined workers exposed to respirable silica dust are at "significant risk" of adverse health effects.

## What does the proposed rule say?

*Bottom line: the PEL is at least cut in half*

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"The employer shall ensure that no employee is exposed to an airborne concentration of respirable crystalline silica in excess of 50 µg/m$^3$, calculated as an 8-hour TWA."

- This is a *major* reduction.
- Current PEL for construction is equivalent to 250 µg/m$^3$
- Current PEL for general industry is approximately 100 µg/m$^3$
- Action level is 25 µg/m$^3$
- Unlikely to change for final rule
- Only thing that kept proposed PEL at 50 µg/m$^3$ is feasibility



## When does the industry need to comply?

*Proposed rule has strict timelines for compliance*

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- Final rule expected any day
- Rule takes effect 60 days after publishing
- All "obligations" under rule start 180 days after rule takes effect
- All engineering controls must be in place within 1 year

## Initial Monitoring

*First step is to determine employee exposure*


Need to test exposure for ***all*** employees who "may reasonably be expected to be exposed"

Monitoring requirement starts at ***action level***, which is 25 µg/m$^3$

Results of monitoring dictate how company needs to respond

All samples must be sent to an accredited lab as defined by OSHA



## How does OSHA propose to meet the PEL?

*OSHA breaks it down to 3 ways to reduce exposure*

**Engineering Controls**

Upgrades to equipment (exhaust hoods, HEPA filters, etc.)

**Work Practice Controls**

Changes to how work is done (use water to keep down dust)

**Respirators**

If you can't get below PEL, then you need to use respirators

## What does OSHA expect this to cost?

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"[T]he proposed rule would not threaten the viability of any construction industry."

-OSHA Feasibility Analysis

- Annual cost to construction industry **$511 million**
- Annual cost to general industry **$147 million**
- Engineering controls estimate is **$344 million/year**
- Major initial costs will be monitoring and engineering controls



## What does this mean for your company?

*New costs for compliance and legal challenges*

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**"[F]or many operations, a combination of engineering and work practice controls reduces silica exposure levels more effectively than a single control method."**

Once the final rule is in effect, there will be major expenses and changes for all industries. In order to comply with the new rule, companies will need to update equipment, implement new work rules, and revise safety programs.

# DNR Wildlife Action Plan

"Voluntary" plan that could have mandatory impacts.

## What is a Wildlife Action Plan?

*Part of grant program from US Fish & Wildlife Service*

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- Federal grant program to protect endangered and threatened species
- To be eligible, states must submit a Wildlife Action Plan (WAP)
- Must be updated every 10 years
- Purpose is to assess species and habitats that need protection
- Use of the WAP is "voluntary"

## What does Wisconsin's WAP do?

*For the DNR, it's more than just a grant requirement*

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The goal is to protect "species of greatest conservational need" (SGCN). These are animals that aren't yet endangered.

According to DNR, the best way to protect SGCN is through habitat preservation and restoration.

DNR recommends use of comprehensive planning and zoning initiatives to protect important habitats.



## If the WAP is voluntary, what is the big deal?

*It's voluntary… until it's implemented*

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- Problem is with implementation of the WAP
  - In order to protect SGCN, must also protect habitats
  - Goal isn't just preservation, but also restoration
- WAP encourages ***local governments*** to use the WAP for planning
- WAP includes climate change as factor for planning

## What does this mean for construction?

*Need to be prepared to implement the WAP for new projects*

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**DNR recommends development projects use the WAP during planning and design to minimize effects on resources**

The main purpose of the WAP is to preserve habitats of SGCN. That implicates zoning and land-use. In order to limit the impact on construction, trade organizations need to be engaged during implementation.

# CONSTRUCTION TAB

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# RECENT CONSTRUCTION CASE SUMMARIES

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**Issue: Engineer's liability for failure of rain tank that it designed, including issues of reliance on manufacturer's information regarding the tank, standard of care, and contractor's responsibility.** *William H. Gordon Associates, Inc., v. Heritage Fellowship Church*, Supreme Court of Virginia (2016).

Heritage Fellowship Church retained Gordon to conduct various civil engineering tasks associated with the site of a new church. Gordon designed a rain tank that would be located ten feet under the new parking lot—the tank would be an initial collection point for stormwater. As the project proceeded, the contractor raised concerns about the suitability of the rain tank, noting that the local water table was high, and posing questions about the details of installation. Gordon did not re-evaluate the rain tank, or provide any additional information about installation, but did provide assurances to the contractor that the ground water level would not affect the rain tank. Several months after installation, the tank and the parking lot above it collapsed, resulting in a substantial rework, and delays in occupancy of the church.

In subsequent litigation, the contractor and the owner offered expert testimony that Gordon had breached the professional standard of care. In reply, Gordon's experts contended that the failure of the rain tank was the result of construction errors by the contractor, and that Gordon had met its standard of care by relying on the tank manufacturer's product information. The trial court concluded that the contractor had adhered to Gordon's design, and that the sole cause of the collapse was Gordon's failure to meet the professional standard of care. Gordon appealed.

**Decision:** The Supreme Court of Virginia affirmed the lower court's ruling against Gordon. The court examined the record and found ample basis for affirming that Gordon had not met the professional standard of care.

The court noted testimony that the specifications regarding the rain tank were prescriptive, and the contractor's duty was to follow them—refuting the notion that the construction contract had shifted design liability or duties to the contractor. Expert testimony in the trial court had also been critical of Gordon's reliance on manufacturer's generic literature, and failure to conduct due diligence on the tank's location and the impact of the high water table. The design was labeled "not clear, constructible, or very likely to serve its purpose," apparently with respect to lack of direction regarding the need for a very level tank base and "nearly perfectly perpendicular" vertical panels. The engineer's failure to answer the contractor's question regarding installation was criticized.

In general support of the lower court's finding that the engineer did not meet the standard of care, the court cited testimony by an expert that the standard of care requires an engineer "to reexamine its original plan when the contractor submits an RFI about the suitability and performance of a structure." That may have been a valid point in the context of the church project, but perhaps was not intended by the Virginia high court as a new rule of law for design professionals. As another example, the court reported that an expert had opined that "an engineer that adopts the general plans and specifications prepared by the non-engineer manufacturer falls below the standard of care." It would seem reasonable to take this as a project-specific statement regarding Gordon's liability, rather than a holding that has absolute application to all claims against design professionals; in some situations, a design professional's reliance on third-party information may be routine and entirely justified.

**Issue: Bid responsiveness; correction of bid deficiency.** *DeSilva Gates Construction v. Department of Transportation*, Court of Appeal of California (2015).

$34 million state highway contract. Under a California public bidding law that attempts to discourage bid shopping, bidders were required to submit a subcontractor list naming subs that would provide more than 0.5% of the total bid, and indicating each sub's specific percentage. The List could be supplemented with revised percentages within 24 hours after bid opening.

Bid shopping is the practice under which contractors will use a sub's bid amount in the bid to the owner, then shop that price to other subs in search of a lower number. The general contractor, not the owner, reaps the savings attained by bid shopping, and the subs that agree to work for less may cut corners in performing the work. Bid shopping is generally disfavored (including by AGC), but is not illegal in most jurisdictions. A tightly controlled subcontractor listing requirement on a public project can limit bid shopping—the contractor must use the sub that was initially listed, barring a special circumstance.

In this case, DeSilva submitted the required subcontractor list with its bid. Within 24 hours it revised the list to include a new subcontract category, for fences and gates. The owner, CalDOT, considered this to be an impermissible revision to the subcontractor list, and rejected DeSilva's bid as nonresponsive. DeSilva pointed out that in retrospect the new category represented less than the threshold 0.5%, and thus was above and beyond what was required, and therefore irrelevant; but to no avail.

Meanwhile the second low bidder, Papich, had failed to acknowledge Addendum 1 in its bid. CalDOT sent a letter to the second low, stating that the failure to acknowledge an addendum is material and makes the bid nonresponsive; however, CalDOT invited Papich to demonstrate through documentation that it had in fact received the Addendum, and had taken it into account in formulating its bid. Papich provided supporting documentation and received the award of contract. The trial court ordered CalDOT to vacate its award of contract to Papich, and CalDOT appealed to the California Court of Appeal.

**Decision:** The Court of Appeal affirmed the lower court's ruling that DeSilva's bid was responsive, and should not have been rejected. Supplementing the list with the gates and fences subcontract information, well below the 0.5% threshold, was held to be not legally significant. The revision did not involve any suggestion of bid shopping. It was at most a "trivial error" in following the bid instructions, and did not render the bid nonresponsive.

As to Papich, the appellate court noted that allowing Papich to prove it had received and accounted for the addendum was unfair to other bidders. Having seen the bid numbers of other contractors, and with additional time to assess its own bid, Papich had the proverbial "two bites at the apple." It could either choose to proceed with its bid by producing documentation about its receipt of the addendum, or it could back out of the bid without risking its bid bond, by conceding that it lacked the documentation regarding the addendum. The court held that Papich's bid should have been rejected as nonresponsive, based on a material omission.

**Issue: Contractor's Differing Site Condition claim on project with a Geotechnical Baseline Report.** *King County v. Vinci Construction Grands Projets,* Court of Appeals of Washington (2015).

$200 million project that included 13 miles of tunnels for wastewater conveyance. Contract included a Geotechnical Data Report (GDR) and a Geotechnical Baseline Report (GBR). The contractor, a joint venture led by Vinci, encountered difficult subsurface conditions that damaged its two boring machines and substantially impeded the contractor's progress. The work fell behind schedule and ultimately King County replaced the contractor and sought recovery from the performance bond sureties. One defense was a differing site conditions claim focused on an unexpected number of transitions from plastic to non-plastic soils ("plastic" referring to the soil's consistency, which affected the operations of the boring machines). Although

the GBR identified soil groups that the contractor should expect to encounter, on a percentage basis, the GBR did not attempt to quantify, or specifically locate, the transitions between soil groups.

The case included several other issues, and had a complicated procedural history. Among other points, at a trial the contractor was awarded $26 million in damages for differing site conditions arising from deviations from GBR baseline expectations for subsurface pressure conditions and soil abrasivity. At the same time, the jury found that the contractor had defaulted under the contract, and awarded the county $155 million in damages and $14 million in prevailing party attorneys' fees. Both parties appealed.

**Decision:** The court of appeals held as follows regarding the soils-transition differing site conditions claim: (a) The GBR and other contract documents did not indicate the number or frequency of soil transitions, or make location-specific commitments, nor did the GBR or contract documents imply any information about transitions; (b) The County could not be held liable for a differing site condition arising from the difference between the contractor's interpretation or interpolation of data, and actual conditions; (c) the contractor had not relied on contract indications regarding transitions in making its bid—in fact, even contractor's own geotechnical analysts had not predicted or located soil transitions, deeming this to be "difficult, if not impossible" to do; and pre-bid contractor had concluded that knowing the number of transitions was not important to the bid. The court also rejected various "defective specifications" assertions by the contractor, relating to the County's specification of the type of boring machine, finding that these assertions were in essence the same as the differing site conditions claims.

**Issue: Compliance with procedural requirements of performance bond.** *Curtiss-Manes-Schulte, Inc. v. Safeco Insurance Company of America*, U.S. District Court for the Western District of Missouri (2015).

Curtiss-Manes-Schulte (CMS) was the general contractor on a building project. It subcontracted HVAC work to Balkenbush Mechanical, and required Balkenbush to furnish a subcontract performance bond. Balkenbush fell behind schedule, and CMS informed the surety of the deteriorating situation. Ultimately, Balkenbush walked off the job, and its owner filed for bankruptcy. CMS proceeded to complete the HVAC work by retaining replacement mechanical contractors. Later, CMS submitted a claim on the bond, seeking reimbursement of its completion costs.

In court, the surety filed for summary judgment, contending that the terms of the bond required CMS to formally declare Balkenbush in default and give notice to the surety, at which point the surety would have had several options, including completing the work itself; retaining new contractors; financing Balkenbush; making a settlement payment to CMS; or denying liability. Because there was no declaration of default, the surety never had an opportunity to mitigate its damages by selecting a preferred strategy for responding to Balkenbush's troubles.

**Decision:** The federal court granted the surety's motion for summary judgment, holding that the declaration of default of the subcontractor was a condition precedent to a bond claim. It was essential to give the surety the opportunity to handle the completion of the HVAC work under one of its several express options under the bond.

**Issue: Ability of contractor to bring suit involving differing site conditions directly against geotechnical engineering firm.** *Apex Directional Drilling, LLC, v. SHN Consulting Engineers & Geologists, Inc.,* U.S. District Court for the Northern District of California (2015).

Wastewater pipeline project for the City of Eureka, California, using horizontal directional drilling. SHN was the city's geotechnical consultant. Based on a single test bore some distance from the actual route of the pipeline, SHN prepared a Geotechnical Baseline Report (GBR) that was furnished to bidders, including the eventual low bidder, Apex. The GBR indicated stable

soils. According to Apex, the great majority of the soils were in fact mud, flowing sands, and other difficult conditions, and yet SHN insisted that conditions were stable, and issued "illogical instructions" on proceeding with the horizontal drilling.

In reliance on advice from SHN, the city terminated Apex; this led to an arbitration between the city and Apex. On a separate track, Apex sued SHN in federal court based on breach of professional duty and negligent misrepresentation. SHN moved to dismiss the claims against it, citing the lack of a contract or any contractual duty between Apex and SHN.

**Decision:** The federal district court based its decision in Apex's favor in part on the 2014 *Beacon Residential Community Association v. Skidmore Owings & Merrill* case, discussed in a prior case summary, citing that case's recognition of the "declining significance of [contractual] privity" in California construction law. The court noted that Apex and a limited group of other prospective contractors was the intended beneficiary of SHN's geotechnical report. There was no "specter of vast numbers of suits" if the court ruled that a duty of care was owed by SHN to Apex. The court also held that it was significant that Apex and other bidders had only a short amount of time to put together a bid and little practical opportunity to independently investigate the site conditions—thus suggesting that Apex was reasonable in relying on SHN's GBR. The court acknowledged the value of commercial disputes being resolved under a series of related contract claims, but held that in general there was no specific legal requirement that the parties be limited to contract claims.

As to negligent representation, the court held that a 1961 California case, in which an engineering firm (Dames & Moore) was held accountable for a soil report that it had provided to a contractor, was "timeworn" but remained good law.

**Issue: When does the statutory limitations period begin for an action based on a contractual indemnification clause?** *Miller-Davis Company v. Ahrens Construction, Inc.,* Michigan Supreme Court (2014).

Miller-Davis was the general contractor for the construction of a large indoor swimming pool building for the local YMCA. Ahrens Construction was the subcontractor for the project's roof system. After completion in 1999 the building was plagued by severe moisture problems. Accumulated condensation was sometimes so great that it appeared to be raining in the building. When ceiling material was removed it was revealed that there had been significant deficiencies in Ahrens' installation of the roof system, including large gaps and tears in insulation and the vapor barrier.

Despite demands from the general contractor, Ahrens failed to participate in the remedial work. In 2003 Miller-Davis pursued a termination or default of the sub, and also entered into a settlement with the YMCA, under which Miller-Davis rebuilt the undersection of the roof at its own expense (approximately $350,000). The remedial work was successful in ending the moisture problems.

Two years after completing the remedial work, in 2005, the general contractor sued the subcontractor based on breach of contract (failing to construct according to the drawings and specifications) and contractual indemnification. The case wended its way through ADR and the Michigan trial and appellate courts for years. The controlling statute of limitations was determined to be six years from the claim first accruing. The breach of contract claim was rejected because the lawsuit was filed more than six years after completion of the subcontractor's work. The final issue before the state supreme court was when the claim for contractual indemnity accrued. Ahrens contended, and an intermediate appellate court agreed, that the duty to indemnify must have arisen no later than the date that Ahrens' poor workmanship occurred—more than six years prior to filing of the lawsuit. Miller- Davis argued that the statutory period did not begin to run until after it had incurred damages.

**Decision:** The Michigan Supreme Court held that the contractual indemnity claim accrued when the subcontractor "refused to indemnify Miller-Davis for the corrective work" that Miller-Davis has to perform, and that logically this refusal could only have occurred after the nonconforming work was uncovered, in 2003. Therefore the indemnification claim had been asserted within the statutory six-year period.

**Issue: Implication of use of the term "condition precedent" in subcontract payment clause.** *Transtar Electric, Inc. v. A.E.M Electric Services Corporation*, Supreme Court of Ohio (2014).

The payment clause in a subcontract indicated that payment of the subcontractor was conditional on the general contractor receiving payment from the owner, using the words "condition precedent." The subcontractor argued that because the clause did not expressly state that the risk of nonpayment was transferred to the subcontractor, the clause should be construed as a mere "paid when paid" clause, thus giving the subcontractor the right to payment even if the owner ultimately failed to pay the general contractor.

**Decision:** The intermediate appellate court agreed with the subcontractor, holding that more emphatic wording was needed to create an enforceable pay-if-paid clause. The Ohio Supreme Court disagreed, ruling that the term "condition precedent" unambiguously established that receipt of payment from owner was required before the general would have any duty to pay the subcontractor. The court cited precedent from other courts, including a federal court of appeals. Under these decisions the term "condition precedent" is sufficient to convey the pay-if-paid concept. No additional "redundant" wording about risk transfer is needed.

**Issue: Enforceability of liquidated damages of $700/day.** *Boone Coleman Construction, Inc., v. Village of Piketon, Ohio,* Court of Appeals of Ohio (2014).

A modest public works project for construction of a traffic signal and related intersection improvements, for a stipulated price of $683,300. Based on excerpts in the appellate decision, the construction contract appeared to include EJCDC C-520 or similar. The village inserted "$700/day" in the liquidated damages clause governing unexcused contractor delays in completion.

Partly as the result of subcontractor problems, and perhaps because of site difficulties, the contractor was 397 days late in completing the work. The contractor made weak attempts at seeking additional time and compensation, but never complied with the contract's formal notice provisions. At the $700/day rate, the total damages for late completion were liquidated at $277,900.

The village and the contractor made their way to court to resolve the contractor's claims for time and compensation, and the village's claim for liquidated damages. The trial court ruled in favor of the village on both issues, and the contractor appealed.

**Decision:** The court of appeals held that the contractor's claims should be rejected, primarily on procedural grounds. The contractor had not followed the contract's procedural requirements for claims, and did not properly appeal a differing site condition ruling. However, the appellate court held that liquidated damages of more than a third of the total contract price was an unenforceable penalty. The court noted that there was no evidence presented regarding the legitimacy of the $700/day amount. There were no supporting calculations, and no relevant background facts such as a record of accidents at the intersection. The court mentioned that the intersection had never previously had a traffic light, so the lengthy delay merely sustained the status quo.

**Issue: Impact of fraudulent concealment on limitation period for bringing a payment bond claim.** *Minnesota Laborers Health and Welfare Fund v. Granite Re Inc.,* Supreme Court of Minnesota (2014).

Envirotech Remediation Services was the contractor on a bridge demolition project in St. Paul. It obtained a payment bond from Granite Re. In addition to subcontractors, suppliers, and laborers, one beneficiary of the bond was an employee fringe benefit fund. Envirotech concealed payroll records for the project, and failed to make the full measure of payments to the

employee fund, shorting it by $245,000. The fund ultimately brought a claim against the bond. Granite Re responded that the claim was untimely under the bond's one-year period for bringing a claim. The fund countered that the doctrine of fraudulent concealment tolls (in effect extends) the time for bringing an action.

**Decision:** The Minnesota Supreme court acknowledged that Granite Re was innocent of any involvement in the contractor's scheme to underpay the fund. However, the court held that when a choice must be made between imposing a loss on the obligee (here the fund) and the surety, the court would choose the surety. The surety in essence walks in the shoes of its principal, and is bound to the consequences of the principal's conduct, even unlawful conduct. Further, the surety can protect itself through strong indemnity and collateral arrangements with its principal. Finally, the court noted that to avoid this result, sureties could include an express risk-shifting provision in the bond, stating for example that the one year period would be enforceable and would not be tolled even in the case of fraudulent concealment by the principal.

**Issues: (a) Applicable statute of limitations for indemnification claim; (b) contractual stipulations regarding time when limitation period starts.** *15th Place Condominium Association v. South Campus Development Team LLC,* Appellate Court of Illinois (2014).

A few years after completion of a condominium construction project, the condominium homeowner's association discovered design and construction errors involving the balconies, masonry, and garage. Eventually the HOA filed a lawsuit against the developer of the project under various liability theories. After a time the developer brought a third-party action against the architect and the contractor, based on breach of contract, implied indemnity, and in the case of the contractor express indemnity.

(a) Illinois has a statute of limitations that applies specifically to design and construction claims: four years from when the claimant knew or should have known of the wrongful act or omission. The more general Illinois breach of written contract statute of limitations is ten years. Based on the four-year statute of limitations, most of the developer's claims against the architect and contractor were determined to be untimely, and were dismissed. One significant claim remained in question. The construction contract contained an express indemnification clause that gave the developer rights against the contractor in the case of a claim against the developer by the HOA. (The text of the indemnification clause is not reported in the case; presumably it was a relatively broad clause.) The developer argued that the express indemnification claim is governed by the general ten-year contract statute of limitations, and thus was timely. This issue was presented to the court of appeals for resolution.

(b) Meanwhile the dismissal of various claims based on the four-year statute was predicated on contract clauses that stated that all actions accrue no later than the date of substantial completion. Thus although the condo association and the developer might not have known or had reason to know of the defects until long after substantial completion, the four-year claim period would already be running. The issue of the enforceability of the "accrual at substantial completion" clause was also appealed.

**Decision:** (a) The court of appeals held that the special four-year design/construction statute of limitations only applies to issues that emanate from construction-related activity. Acts or omissions in design, planning, supervision, observation, or management of construction would be covered; whereas a commitment to indemnify is not a construction activity. Although this may appear to be a rather fine distinction, the court emphasized precedent indicating that not every obligation in a construction contract is a construction activity.

(b) The court of appeals strongly supported the ability of the parties to a contract to shorten otherwise-applicable statutory limitation periods. The shortened period of time must be "reasonable." A shortened limitation period is enforceable even

if it bars a meritorious claim. The court noted that "Illinois public policy strongly favors the freedom to contract." The lone exception would be contracts of adhesion, in which an unsophisticated party must accept the terms of a contract on a take it or leave it basis (for example, some insurance purchase situations). Since this was a negotiated $34 million construction project, the developer was deemed to be a sophisticated party capable of understanding the "accrual at substantial completion" clause.

**Issue: Subcontractor's disregard of markings on structural drawings.** *Goodrich Quality Theaters, Inc., v. Fostcorp Heating and Cooling, Inc.,* Court of Appeals of Indiana (2014).

For an IMAX theater project, the general contractor retained Wilson Iron Works as the subcontractor for structural steel and roof decking, including joists and joist girders. The contract documents included drawings and the Steel Joist Institute manual. The structural drawings for the roof framing were plan view depictions showing the joist girders. In certain locations on these drawings the architect used a dashed line in the shape of an hourglass, together with the word "opening" and a dimension, to mark where the HVAC ductwork would pass through. The architect's intent was to indicate that these girders should have nonstandard openings.

Wilson Iron Works was not familiar with the hourglass marking, and therefore chose to ignore it. Wilson submitted shop drawings indicating standard joist girders only; the architect approved these drawings. Wilson eventually installed the standard girders. Ultimately these had to be custom-modified in place, at considerable additional expense.

In subsequent litigation, Wilson pointed out that according to the Steel Joist Institute manual, which was an incorporated contract document, the industry-standard marking "SP" is supposed to be used to mark a joist girder that is nonstandard, and there should be an accompanying note or detail drawing showing the manner in which the joist girder is nonstandard. The general contractor contended that a court must strive to treat all parts of a contract as meaningful; thus it would be erroneous to disregard the hourglass markings. Moreover, the general contractor directed the court's attention to the contract clause requiring the contractor (in this case, by flowdown, the subcontractor) to bring contract ambiguities to the attention of the architect for resolution.

**Decision:** The court of appeals ruled in favor of the subcontractor. The court held that there was no ambiguity in the contract documents because the SJI manual stated how nonstandard girder joists should be indicated, and that method was not used. In addition, the court found it persuasive that the hourglass notation was not explained in any legend on the drawings, and that the contractor and architect had approved the shop drawings.

**Issues: (a) duty to continue performance pending resolution of change order issue; (b) contractor's failure to comply with notice requirement regarding differing site conditions.** *JEM Contracting, Inc., v. Morrison-Maierle, Inc.,* Supreme Court of Montana (2014).

Public works project for improvements to 3.6 miles of highway in Montana. The general contractor encountered difficulties with site conditions on the first day and raised the issue in the field. There was no consensus about whether the conditions differed from those shown in the contract documents, but the contractor and the owner's consulting engineer reportedly worked out a deal under which the contractor would be "paid" for the difficult conditions if it could find savings in other aspects of the project, thus keeping the project within budget. It is not clear if the deal was in any way reduced to writing, or if the owner (two Montana counties) was aware of the deal.

The contractor later placed the increased costs in a draft change order for differing site conditions. The owner rejected the change order, and instructed the contractor to continue working. The contractor filed a lawsuit against the owner and the

engineering firm. The contract stated that contractor must continue working pending resolution of disputes. The contractor took the position that the clause was void and unenforceable because of a Montana statute that protects contractors that are not receiving payment from being forced to continue working without pay. The public owner settled with the contractor for an undisclosed amount. The case against the engineering firm continued.

**Decision:** The case ultimately made its way to the Montana Supreme Court. The court noted that the construction contract explicitly allowed the contractor to terminate performance for lack of payment, and thus was in accord with the Montana statute. The issue here was not failure to pay an agreed amount (the focus of the statute), but rather entitlement to a change order for additional compensation. Thus the engineering firm was not liable for its role (if any) in advising the owner to decline payment of the change order and require contractor to continue working. The contractor also complained that it had followed through on its end of the "deal" that allegedly had been brokered in the field, by finding cost savings on other work, and should have been entitled to compensation for the differing site conditions. The state supreme court rejected this, holding that there could be no differing site conditions claim (and apparently no "horse trading" of such a claim), because the contractor failed to give notice of a differing site condition to Owner and Engineer within 5 days, as required by contract.

**Issue: A union contract with a corporation did not address whether retirement health benefits were vested for life, or could be reduced by the company**. *M&G Polymers USA v. Tackett,* United States Supreme Court (2015).

The issue reached the U.S. Supreme Court. During oral argument:

Mr. Justice Scalia: "Both sides know it was left unaddressed, so, you know, whoever loses deserves to lose for casting this upon us when it could have been said very clearly in the contract. Such an important feature. So I hope we get it right, but, you know, I can't feel bad about it."

# DNR ALIGNMENT TAB

# DNR ALIGNMENT TAB

# DNR Strategic Alignment Process

*Mark Aquino*
*Division of Business Support and External Services*

**Goals for this work:**

- Mission, Vision, Values, and One DNR approach.
- Increase alignment.
- Improved workload management.
- Increase efficiency.
- Improve consistency.
- Increase integration and collaboration.
- Increase accountability.
- Increase financial flexibility and sharing of resources.
- Maximize outcomes we can produce.

**Our Core Work Analysis process:**

1. Document the department's core functions.
2. Analyze work effort associated with core functions.
3. Prioritize the department's core functions.
4. Identify opportunities for efficiency.
5. Develop recommendations on the level of investment needed to accomplish priority work.

**Results—Agency priorities are:**

- Leverage Staff Expertise to Accomplish Core Work.
- Focus on DNR's Niche.
- Strategic Investments in Information Technology.
- Improve Service Delivery.
- Enhance Integration.
- Streamline Permitting.
- Streamline Policy Development.

WISCONSIN
DEPT. OF NATURAL RESOURCES

# LEGISLATIVE TAB

# LEGISLATIVE TAB

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# ELU

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## Agenda

- Defining "Success"
- 2015-2016 HR Legal Trends
- Arrest & Conviction Record Discrimination Claims
- Disability & Reasonable Accommodation Discrimination Claims
- OSHA Whistleblower & Safety Violation Claims
- Wage & Hour Claims

## Achieving Success

*in a World of HR Regulatory Risk*

Axley

**Consistent success is most frequently obtained through strong effort over an appreciable period of time with a positive mindset**



## Achieving Success

*in a World of HR Regulatory Risk*

Axley

***We are what we repeatedly do. Excellence, then, is not an act, but a habit*** — Aristotle

***Effort never had a bad day*** — Melissa Thompson

***Whether you think you can, or you think you can't – you're right*** — Henry Ford

## Achieving Success

*in a World of HR Regulatory Risk*

Axley

**Achieving success requires an understanding of the "Rules of Engagement"**

- Statutes
- Regulations
- Executive orders
- Agency interpretations, advisory opinions, and internal enforcement policies
- Case law developments
- Trends



## Achieving Success

*in a World of HR Regulatory Risk*

Axley

**Consistent leadership**

- Individual
- Institutional

**Collective best efforts of the institution**

- With assistance of trusted business advisors
- Officers and directors
- Managers and supervisors
- Rank and file
- Business advisors
- Lawyers, accountants, consultants

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## Achieving Success

*in a World of HR Regulatory Risk*

Axley

**Management and HR responsibilities:**

1. Help others develop the tools to be successful
   - Employees
   - Supervisor/manager
   - Senior leadership
2. Reduce organization's liability exposure
   - Subject matter expert
   - Trusted advisor



## HR Legal Trends

*In 2016*

## HR Legal Trends in 2016

*Trend No. 1*

Axley

# Growth in Arrest & Conviction Record Discrimination Claims



## Source of Law

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**Federal law**

- Title VII of the Civil Rights Act of 1964
  - U.S. Equal Employment Opportunity Commission

**State law**

- Wisconsin Fair Employment Act
  - Wisconsin DWD Equal Rights Division

**Local law**

- Madison Equal Opportunities Ordinance
  - Madison Equal Opportunities Commission

## Source of Law

Axley

**Federal – Title VII**

- No express prohibition against discrimination on the basis of arrest or conviction record
- Prohibits employment policies and practices that have a disparate impact on members of a protected class if not justified by business necessity

*Currently an EEOC area of focus*

- EEOC enforcement guidance on consideration of arrest and conviction records in employment decisions under Title VII of the Civil Rights Act of 1964

*http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm*



## Federal Employer Defense

Axley

**Consideration was job-related and consistent with business necessity:**

- Formal validation of the relationship between the criminal conduct and the duties of the position in question
- Use of targeted exclusions

## Source of Law

Axley

**State law – Wisconsin Fair Employment Act**

- Generally prohibits discrimination on the basis of arrest and conviction record
  - Past arrest
  - Presently pending arrest
  - Past conviction



## Arrest Record

Axley

### Past Arrest Record

- WFEA prohibits inquiries regarding an applicant's past arrest record during the interview process (except when bondability is required for the job)

## Arrest Record

Axley

### Presently Pending Arrest Charges

- Can inquire about a pending charge
  - Can't consider unless the circumstances of the arrest substantially relate to the circumstances of the job at issue
  - When substantial relationship exists, can suspend pending disposition of charges



## Conviction Record

Axley

### Under WFEA, can inquire about past conviction record

- Can't consider unless substantial relationship
- When substantial relationship exists, can decline to hire or terminate employment

## Conviction Record

Axley

**Under WFEA, the substantial relationship analysis is evaluated on an objective basis**

- Not based upon employer's subjective intent
  - EEOC takes opposite view under federal law



## HR Legal Trends in 2016

*Trend No. 2*

Axley

# Growth in Disability Discrimination and Reasonable Accommodation Claims

## Source of Law

Axley

**Federal law**

- FMLA
- ADA
- Collective bargaining agreement

**State law**

- WI-FMLA
- Wisconsin Fair Employment Act
- Wisconsin Worker's Compensation Act
- Policies

**Local law**



## EEOC Focus

Axley

- Maximum leave policies
- Involuntary medical leaves without employee request
- No fault attendance policies
- Full duty/full-time return to work requirements
- Direct threat issues
- Undue hardship

## EEOC Focus

Axley

### Maximum leave policies

- Leave policies that call for automatic termination of employment after a certain period of time violate the ADA
  - Tantamount to a refusal to provide reasonable accommodation



## EEOC Focus

Axley

### Involuntary leaves

- The ADA prohibits disability discrimination
- The ADA requires an employer to provide a reasonable accommodation:
  - Including modification of duties or reassignment
    - Unless doing so would cause undue hardship

## EEOC Focus

Axley

### No-fault attendance policies

- If an employer enforces a no-fault attendance policy, it should ensure that it does not charge an employee for absences that are covered by the FMLA, WI-FMLA, WCA, or federal, state or local disability laws
  - "Clemency and forbearance" from application of the employer's normal attendance policy may be a reasonable accommodation option



EEOC Focus

Axley

### Full-duty ("no restrictions") return to work requirements

- Employers must explore whether a disabled employee with restrictions can return to work with or without reasonable accommodation

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## EEOC Focus

Axley

### Direct threat issues

- Employers run afoul of the ADA if they make decisions based on fears or misconceptions about an employee's disability or medical treatment



## HR Legal Trends in 2016

*Trend No. 3*

Axley

# Growth in OSHA Whistleblower, Worker's Compensation Unreasonable Refusal to Rehire, and Other Retaliation Claims

## OSHA Whistleblower Claims

Axley

**Section 11(c) of the OSH Act protects employees against retaliation for engaging in protected activity:**

- Providing information to a government agency or employer
- Filing a complaint with OSHA
- Testifying in a legal proceeding; and
- Refusing to perform an assigned task



## OSHA Whistleblower Claims

Axley

**Unlawful to take adverse action against employee because employee engaged in protected activity:**

- Discipline and discharge
- Layoff, demotion, and transfer
- Reduction in hours
- Denial of a raise or recall, etc.

## OSHA Whistleblower Claims

Axley

**Employee must establish:**

- S/he engaged in protected activity
- Employer was aware, or suspected, the activity
- Employer took adverse action against employee; and
- Causal connection exists between protected activity and adverse action



## OSHA Whistleblower Claims

Axley

**The burden then shifts to the employer to provide a legitimate, non-retaliatory reason for its adverse action against the employee**

- In absence of documentation, employer opens door to "credibility" disputes

## OSHA Whistleblower Claims

Axley

### OSHA will consider:

- Employer animus toward protected activity
- Proximity between protected activity and adverse action
- Disparate treatment of whistleblower in comparison to other employees



## OSHA Whistleblower Claims

Axley

### OSHA will likely:

- Conduct on-site interviews
- Request copies of performance evaluations, disciplinary warnings, earnings and benefits statements, job descriptions, employee handbooks, unemployment claims and determinations, etc.

## OSHA Whistleblower Claims

Axley

**A systematic approach to performance management reduces likelihood of "credibility" disputes and assists employer obtain prompt dismissal of many whistleblower claims**



## Worker's Compensation

*§ 102.35(3) Penalty Claim*

Axley

Section 102.35(3) of the Wisconsin Worker's Compensation Act makes it unlawful for an employer to unreasonably refuse to rehire or discharge an employee for reporting or suffering a work injury

## Worker's Compensation

*§ 102.35(3) Penalty Claim*

Axley

**Employee must establish:**

- S/he was an employee
- S/he suffered a compensable work injury
- S/he was discharged or denied rehire



## Worker's Compensation

*§ 102.35(3) Penalty Claim*

Axley

**The burden then shifts to the employer to provide "reasonable cause" for its decision to discharge or not to rehire the employee**

- Cannot consider absences attributable to work injury under a no fault attendance policy
- "Reasonable cause" may not be related to the work injury
  - Poor performance
  - Misconduct
  - Lack of work, etc.

## HR Legal Trends in 2016

*Trend No. 4*

Axley

# Wage & Hour Claims



## Source of Law

Axley

**Federal law**

- Fair Labor Standards Act ("FLSA")
- Davis Bacon & Related Acts
- Code of Federal Regulations

**State law**

- Wisconsin Statutes
- Wisconsin Administrative Code

# Common Areas of Liability Exposure

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**Working time issues**

- Preliminary and postliminary activities
- Breaks and meal periods
- Travel time
- Seminars and training

**Misclassification of employees**

**Misapplication of prevailing wage rules**

- Mistakes can result in long “vacations”

**Prevailing wage compliance issues**



## Questions?

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- CONSTRUCTION
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- ENVIRONMENTAL
- FRAC SAND MINING
- HUNTING, FISHING AND TRAPPING
- LIEN CLAIMS
- OSHA/MSHA
- WATER LAW
- WISCONSIN DOT

## EDUCATION

J.D., **University of Wisconsin-Madison**

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# CHARLES (BUCK) SWEENEY

**Buck Sweeney is a partner practicing in the areas of environmental and construction law, and is co-chair of Axley's Construction and Transportation Focus Group. Mr. Sweeney is former chair and current board member emeritus of the State Bar of Wisconsin Construction and Public Contract Law Section. Mr. Sweeney is experienced in handling matters dealing with Resource Conservation and Recovery Act, Superfund, air and water issues. His trial experience includes mediation, arbitration and administrative law hearings in environmental and construction law issues. Mr. Sweeney assists in resolution of construction disputes. He has also testified as an expert witness on behalf of the Aggregate Industry on issues relating to mineral extraction locations. Construction contracting, insurance coverage issues, bid disputes, wetland, OSHA matters, land use matters, siting of gravel pits and other construction law issues make up the balance of his practice. Mr. Sweeney also assists in Wisconsin's growing frac sand industry and has extensive experience against the Wisconsin Department of Justice.**

Mr. Sweeney was formerly an engineer at Martin Marietta Aggregate Corporation and previously owned Edgerton Sand & Gravel, Edgerton Ready-Mix Concrete Company and Administrative Services (president of companies involved in sand and gravel mining, ready-mix concrete industry and operation of a landfill). He once served as director of real estate for ABC Supply, overseeing acquisition of properties throughout the United States, including Brownfield properties. He also represented Daniel Ruettiger regarding the movie "Rudy" and was acting in-house counsel for Lunar Corporation and Bone Care International, Inc.

Mr. Sweeney is an avid hunter and has numerous outside interests including Wetland Conservation Club, LLC, Thiebeau Hunt Club, Exclusive Hunt Club, Deer Creek Hunt Club, Best Days A Field Hunt Club, Ducks Unlimited, Lake Koshkonong Wetland Association and golf.

In addition to his legal practice, Mr. Sweeney serves as the firm's Chief Marketing Officer.

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- BOND & INSURANCE CLAIMS
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- CONSTRUCTION FINANCE
- CONSTRUCTION MEDIATION & ARBITRATION
- CONTRACT NEGOTIATION & DRAFTING
- ENVIRONMENTAL
- GOVERNMENTAL, ADMINISTRATIVE & REGULATED INDUSTRY
- LIEN CLAIMS
- LITIGATION OF DEFECT, DELAY, ACCELERATION & PAYMENT CLAIMS
- PROFESSIONAL NEGLIGENCE
- PROPERTY TAX ASSESSMENTS
- REAL ESTATE, ZONING, LAND USE & DEVELOPMENT
- TRANSPORTATION

## EDUCATION

J.D., **University of Wisconsin Law School**

B.S., **Civil and Environmental Engineering, University of Wisconsin-Madison**

# BRIAN MULLINS

**Brian Mullins is a partner in the firm and prominent member of the firm's Construction Law Team. He is also a member of the firm's Litigation and Business Practice Groups. Mr. Mullins' practice focuses on construction and real estate claims, disputes, contracts and transactional work. He is experienced in civil, commercial and insurance claims, mediation, arbitration and litigation matters.**

Mr. Mullins has over 30 years of experience as an attorney and advocate for contractors, owners, developers, public owners, subcontractors, suppliers, insurers and sureties. Mr. Mullins has been instrumental in the development of construction law in Wisconsin and has been named to the International Who's Who of Construction Lawyers. He has been selected in nearly every statewide survey of lawyers as one of the state's top construction and real estate lawyers, including being named the Best Lawyers® 2015 Construction "Lawyer of the Year," 2014 Real Estate – Litigation "Lawyer of the Year" in Madison. Mr. Mullins is a graduate engineer and has received an AV Preeminent® rating from Martindale-Hubbell® Peer Review Ratings™.

Mr. Mullins has prior experience as a project manager in construction projects. He has represented and counseled owners, developers and contractors on large and small Wisconsin private developments and public works projects in connection with zoning, municipal and government approvals, public and private financing, development agreements, construction contracts, construction claims, dispute resolution and legal affairs. Mr. Mullins also has experience in public procurement, government contracting and EPC (Engineering Procurement and Construction) and Turnkey contracting.

Mr. Mullins is experienced in representing clients in mediation, arbitration and litigation of construction and real estate matters. He has served as a mediator and an arbitrator of numerous construction and real estate disputes. Mr. Mullins was a member of the Dispute Review Board for the Core and South Leg components of the Marquette Interchange, one of Wisconsin's largest public works project; and currently serves as the Chair of the Dispute Review Board for the Zoo Interchange/Watertown Plank Interchange project.

Mr. Mullins has additional industry experience in commercial construction, commercial real estate, condominium development, construction contracts, construction claims and defects, differing site conditions, extras, delay claims, design-build project delivery, insurance coverage and defense, heavy highway and transportation, mold and environmental matters, public construction (hospitals, schools and other facilities), real estate, development and leasing, real estate transactions, tax assessment objections and tax incremental financing.

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- EMPLOYMENT DISCRIMINATION
- EMPLOYMENT LITIGATION
- FEDERAL COURT LITIGATION
- LIEN CLAIMS
- LITIGATION OF DEFECT, DELAY, ACCELERATION & PAYMENT CLAIMS

## EDUCATION

J.D., Order of the Coif, **University of Wisconsin Law School**

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B.S., **University of Wisconsin – Madison**

**Saul Glazer is a partner in Axley focusing on construction and employment law. Mr. Glazer is a co-chair of the firm's Construction and Transportation Focus Group and serves as an attorney for a number of Wisconsin companies – recently serving as interim counsel to a national manufacturer.**

In addition, Mr. Glazer is a seasoned litigator, representing clients in mediation, litigation, and arbitration regarding construction, employment, commercial, dealership, distributorship, and intellectual property. He provides creative solutions for complex problems, and prides himself on his ability to help clients cost-effectively manage difficult situations.

**Construction:** Mr. Glazer regularly represents owners, contractors, subcontractors, engineers and architects in preparation of construction contracts and integrated project delivery documents (including AIA, EJCDC, DBIA and Consensus documents). He also represents clients regarding bid disputes, change orders, construction and design defects, differing site condition claims, delay claims, insurance coverage issues, ATCP 110, and lien law claims.

Mr. Glazer is an associate board member of the Associated General Contractors (AGC) of Wisconsin. He is also the Chair for the Construction and Public Contract Law Section for the State Bar of Wisconsin. He regularly assists contractors and subcontractors through the Associated Builders & Contractors' legal hotline.

**Labor & Employment:** Mr. Glazer's work as an employment lawyer includes representing employers before administrative agencies and state and federal courts. He counsels clients on the Americans with Disabilities Act and other state and federal disability discrimination and accommodation laws. His experience also includes serving as an attorney in cases involving hostile work environments, retaliation, OSHA regulatory compliance, wage and hour laws, arrest and criminal convictions, equal pay, employment contracts, restrictive covenants, confidentiality and non-compete agreements. Mr. Glazer successfully represented a national retailer against a physical appearance discrimination claim before the Wisconsin Court of Appeals.

Furthermore, Mr. Glazer is an editor of the Wisconsin Employment Law Letter, and he contributed to the 2013 publications of Fifty Employment Laws in Fifty States. Additionally, he created the Seven Questions to Use When Disciplining and Terminating Employees seminar, and regularly presents this seminar to national audiences.

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- EMPLOYEE HANDBOOKS, BENEFITS, POLICIES & PROCEDURES
- EMPLOYEE HIRING, DISCIPLINE & DISCHARGE
- EMPLOYMENT CONTRACTS & RESTRICTIVE COVENANTS
- EMPLOYMENT DISCRIMINATION
- OSHA, EMPLOYEE SAFETY & HEALTH MATTERS
- STATE & FEDERAL FAMILY MEDICAL LEAVE ACTS
- WAGE & HOUR
- WORKER'S COMPENSATION & UNEMPLOYMENT COMPENSATION
- WORKPLACE HARASSMENT

## EDUCATION

J.D., **Marquette University**

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# TROY THOMPSON

**Troy Thompson is a partner and practice group leader of the Labor and Employment Practice Group. He is also a member of the firm's Litigation Practice Group. Mr. Thompson represents private and public sector employers in all facets of traditional labor and employment, litigation and other business matters.**

In addition to advising employers on day-to-day issues relating to personnel polices and practices affecting the labor force, Mr. Thompson represents the interests of management in actions pending before federal and state courts, as well as in administrative hearings and appeals. Mr. Thompson has appeared and practiced before the National Labor Relations Board (NLRB), the United States Equal Employment Opportunity Commission (EEOC), the Wage and Hour Division of the United States Department of Labor (DOL), the Occupational and Safety Health Administration (OSHA), the Wisconsin Employment Relations Commission (WERC), the Wisconsin Wage and Hour Division, the Wisconsin Equal Rights Division (ERD), the Wisconsin Worker's Compensation Division, the Wisconsin Unemployment Insurance Division and the Madison Equal Opportunities Commission (MEOC). Mr. Thompson's review of a treatise entitled, "Business and Commercial Litigation in Federal Courts," was published in the Wisconsin Lawyer.

While attending law school at Marquette University, Mr. Thompson served as legal intern to the National Labor Relations Board, and separately with the Wisconsin Court of Appeals, District 1.

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- CONDOMINIUM/HOTEL
- CONSTRUCTION BUSINESS ISSUES
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## EDUCATION

J.D., cum laude, **Boston University**

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# ROBERT PROCTER

**Robert Procter is a partner in the firm licensed to practice in the states of Wisconsin and Illinois. He primarily represents businesses in real estate and construction, distribution, and insurance agency law. Robert is invested in long-term client relations preferring to enter into flat fee and retainer arrangements that reflect the true value of his work rather than the length of a phone call or the number of emails he can send.**

**Real Estate Law:** Robert represents developers and contractors in all aspects of real estate and construction law including land use approvals, tax incremental financing, construction and permitting. Robert is the outside general counsel for the Wisconsin Builders Association and the Government Affairs Director for the Realtors® Association of South Central Wisconsin. Robert is a licensed lobbyist, and regularly advocates on behalf of his clients on land use, construction and real estate legislation.

**Distribution:** Robert represents businesses in all aspects of dealership/distribution law including distribution agreements and networks, dealer terminations, product recalls and regulatory compliance and litigation. Robert has significant experience representing businesses subject to the Wisconsin Fair Dealership Law.

**Insurance Agency Law:** Robert has literally grown up in an insurance agency. He comes from a family that has owned and operated an insurance agency located in South Milwaukee, Wisconsin since 1943. It is the Procter Insurance Agency, currently operated by his brother, Christopher Procter, formerly operated by his father, Robert C. Procter, Jr., and started by his grandfather Robert C. Procter, Sr. Robert's other brother Phillip J. Procter is currently an insurance agent at M3, and only his sister Alessandra has escaped the insurance industry. The Procter family has been involved in the business of insurance for many years; and Robert has a breadth of knowledge and experience including more than a decade of training with Attorney Tim Fenner, the "Godfather" of Insurance Agency Law.

Robert is married, a proud father of four spirited children, has a dry sense of humor that most find not funny, and prides himself on being able to manufacture an analogy to fit any circumstance.

*Admitted to practice in State of Wisconsin, State of Illinois, United States District Court for the Eastern and Western Districts of Wisconsin.*

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- AGRIBUSINESS
- CONSTRUCTION INDUSTRY DISPUTE RESOLUTION
- CONTRACT NEGOTIATION & DRAFTING
- COMMERCIAL LITIGATION
- ENVIRONMENTAL REGULATION & DISPUTES
- GOVERNMENTAL, ADMINISTRATIVE & REGULATED INDUSTRIES
- REAL ESTATE, ZONING, LAND USE & DEVELOPMENT

## EDUCATION

J.D., graduated early with cum laude honors, **University of Wisconsin Law School**

Masters of Science in Education, **Pace University in New York City**

B.A., **University of Wisconsin – Madison**

# TYLER WILKINSON

**Tyler Wilkinson is an attorney with Axley. He specializes in handling and resolving complex disputes and negotiations between businesses, between businesses and insurance companies and between clients and the government. He is a dynamic and in-demand speaker and has presented numerous times before judges, juries, government bodies and business groups. Tyler prides himself on delivering value to his clients through creative and cost-effective solutions to their problems.**

Tyler has handled a variety of complex disputes in his short-time as an attorney. He has tried over ten cases in state and federal courts and has handled numerous hearings in front of various government agencies. He has won cases before both the Wisconsin Supreme Court and the Court of Appeals. He also regularly represents professionals in licensing actions. Tyler has already been recognized for his work by being named one of Wisconsin Law Journal's Up-and-Coming Lawyers, which recognizes the state's outstanding young lawyers, and as a Wisconsin Super Lawyers Rising Star in Business Litigation.

Tyler's roots run deep in Wisconsin farm country. He grew up on a farm in the small southwest Wisconsin community of Muscoda. He is the son and grandson of auctioneers and spent his weekends helping with the family business, Wilkinson Auction & Realty Co.

Tyler believes working at auctions was great preparation for practicing law because both areas require two things: the skills to get the very best result for the client, and the compassion to help that client through a difficult and emotional experience. He still does charity auctions for various groups.

Tyler was a fifth grade teacher before he became a lawyer – another experience that shaped how he practices law. While at UW-Madison, he was recruited by Teach for America, a non-profit organization that selects the best and brightest college graduates to teach in low-income public schools across the nation. He went through six weeks of training in New York City and was then assigned to a class of fifth graders with special needs in Brooklyn. His first hurdle was language: the children spoke Spanish; he did not. But he learned – not just the language but the value of patience, of careful listening, and of seeing a problem from the other side. These skills also translate well into the practice of law, where it's important to find common ground to resolve cases, when possible, without litigation.

Tyler is married to Jackie and has a baby girl named Olivia. He and his family live in Marshall, Wisconsin. In his spare time, Tyler likes to hunt, hike and spend time on the water.

*Admitted to practice in the state courts of Wisconsin, the Western District of Wisconsin and the Eastern District of Wisconsin.*

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MHAHN@AXLEY.COM

## PRACTICE AREAS

- CONCRETE
- CONSTRUCTION
- ENVIRONMENTAL
- LITIGATION

## EDUCATION

J.D., **University of Wisconsin – Madison**

B.A., **University of Wisconsin – Madison**

# MICHEAL HAHN

**Attorney Micheal Hahn is a native of Clinton, WI and a member of Axley's Litigation and Construction practice groups. Attorney Hahn's dedication to his clients and strong work-ethic stems from his service as a Transportation Specialist and Sergeant in the Wisconsin Army National Guard, during which time he completed his Bachelor of Arts in History and Political Science at UW-Madison between two tours to Iraq and Kuwait.**

After leaving the National Guard in 2010, Hahn worked at Holtger Bros., Inc, a De Pere-based utility construction company where he was the safety and training manager before returning to UW Madison to pursue a law degree. During his time at UW Law School, Hahn served as a student attorney for the Wisconsin Innocence Project, appearing in court and securing exoneration for Joseph Frey through DNA testing.

Hahn's hands-on background in the construction industry lends him a unique understanding of the challenges his clients face, and the ability to develop effective, creative solutions to those challenges. In addition, Hahn worked as a law clerk at Axley in 2013 — where he handled complex construction matters side-by-side with the co-chairs of Axley's Construction and Transportation Focus Group, Attorneys Buck Sweeney and Brian Mullins.

Aside from his clerkship at Axley, Attorney Hahn also clerked at the Supreme Court of Wisconsin for Justice Michael J. Gableman during the 2014-2015 term, where he gained experience researching issues before the court and drafting opinions. This clerkship provided Hahn with valuable insight that greatly benefits his litigation clients when a matter is being tried before the court.

*Attorney Hahn is a registered lobbyist and admitted to practice in the courts of Wisconsin and the Eastern and Western Districts of Wisconsin.*

WISCONSIN
DEPT. OF NATURAL RESOURCES

## MARK AQUINO

Mark Aquino holds a Bachelor of Science in Political Science and Economics from the University of Wisconsin – Platteville. Aquino started his career with the state in 1988 with the Legislative Audit Bureau and in 1997 promoted to chief of the Department of Transportation's Strategic Issues Section. He has been a manager at the DNR since 2001 and was named Division Administrator of Business and External Services in July 2015. Prior to that Mark served as the as the South Central Region Secretary's Director as well as many leadership roles both in the field and at Central office.

# ABOUT AXLEY TAB

# ABOUT AXLEY TAB

01

# About Axley

## With foundations based in dedication, hard work and loyalty, Axley offers unparalled representation.

Two Madison Trial Lawyers, Burr W. Jones and Francis J. Lamb, founded Axley over a century ago in 1885. Their philosophy of recruiting only the best legal professionals resulted in making Axley the full-service and well-respected firm that it is known as today.

Founded in 1885, Axley is a full-service law firm with two Wisconsin offices and over 50 attorneys. With more than a century's worth of experience, we pride ourselves on providing timely, quality and cost-effective legal services to a wide-array of clients – from individuals and small business owners to multinational corporations.

Named the #1 Preferred Law Firm by *InBusiness Magazine*'s Executive Choice Award in 2014 and 2015, we are recognized not only for our expertise, but our ability to develop creative solutions to today's legal problems. We believe in hard work, loyalty and aggressive representation; going above and beyond what is required to give clients the results they need.

Holding ourselves to high standards and hiring only excellent attorneys and staff, we continue a tradition that has been upheld since Axley's inception; a tradition that has driven the success of our firm and, most importantly, our clients for over 125 years – and counting.

Our dedication to exceeding client expectations and furthering innovation in the legal field is evident in a variety of unique alternative fee arrangements. We also maintain a complimentary extranet – a virtual storage space protected by top-of-the-line security – where clients can access and download files at their convenience. Last, but not least, we make it a priority to respond to all emails we receive within a 24-business-hour time frame.

Clients that choose Axley can rest assured they will receive unparalleled representation from attorneys with the experience they expect and the innovation they require.

### Connect


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**Waukesha** (262) 524-8500

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facebook.com/axleylawfirm

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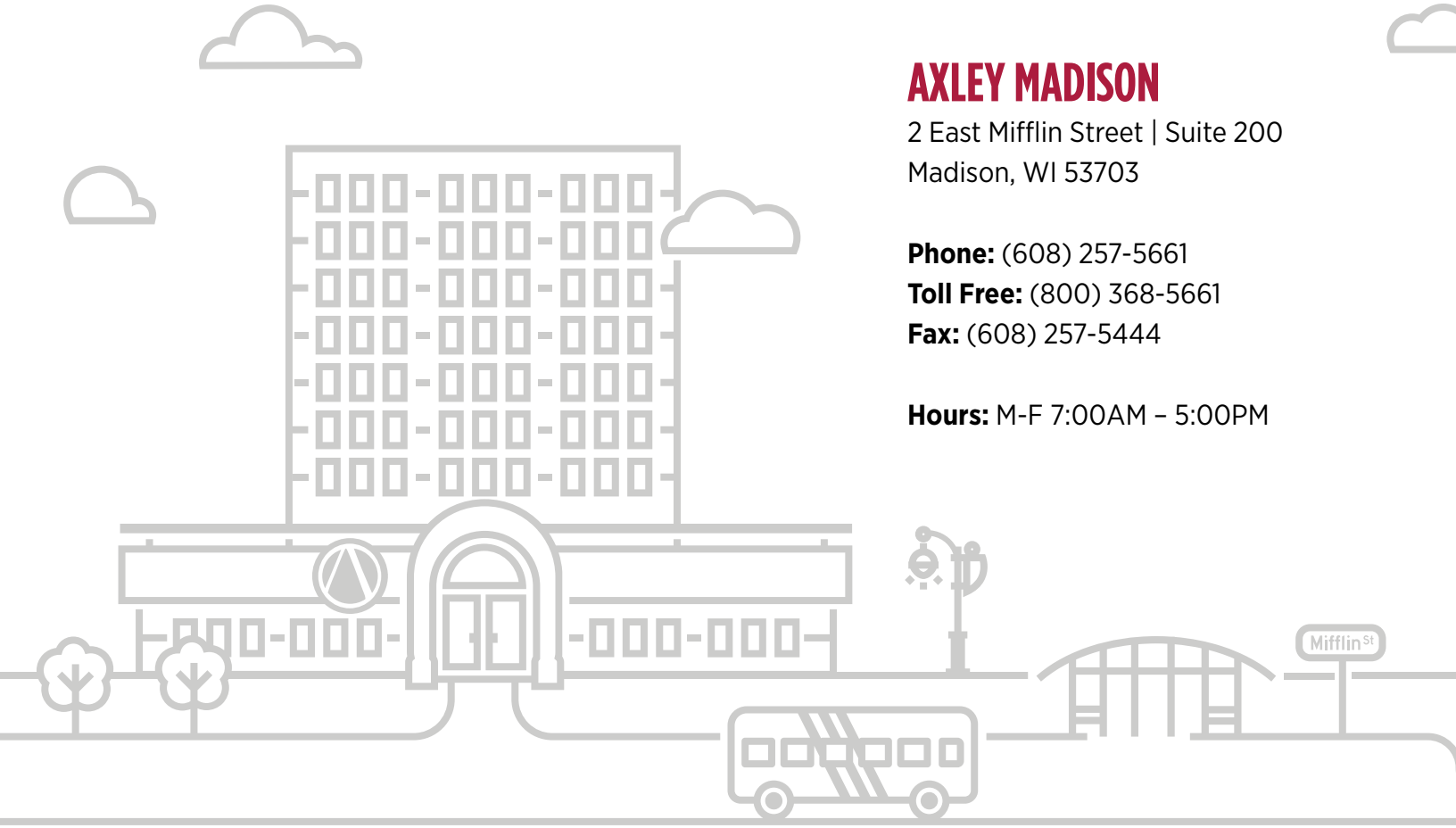


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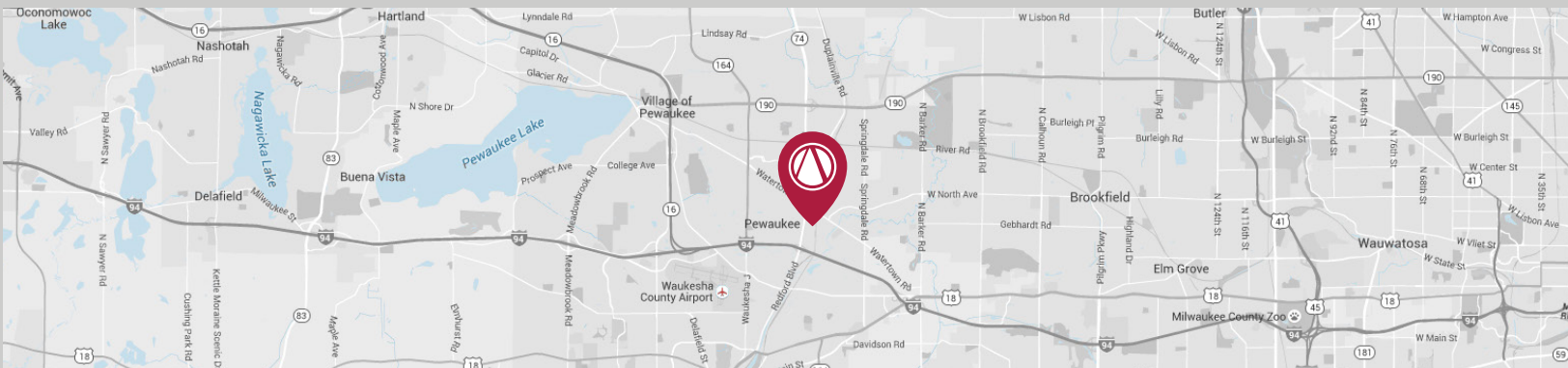

02

# Legal Teams & Attorneys

## No matter the need – Axley has an attorney for you.

Our core practice areas include **Business & Corporate**, **Construction**, **Labor & Employment**, and **Litigation**. In order to provide our clients with the best possible legal representation, these areas are further broken down into specialized teams. The team approach gives Axley clients access to the knowledge, experience, and resources of our entire firm without the added cost. Our attorneys work together to ensure a case is scrutinized from all angles, resulting in quality representation for all legal matters that come through our doors.

## Business & Corporate

*www.axley.com/service/business-corporate-securities*

Our attorneys are sensitive to the ever-changing landscape of federal, state and local business law – giving businesses and individual entrepreneurs a decided edge in the issues that concern them most.

- Agribusiness
- Antitrust, Competition & Product Distribution
- Banking, Lending & Financial Services
- Bankruptcy, Insolvency & Creditors' Rights
- Business Distribution & Franchise
- Business Joint Ventures
- Business Mediation & Arbitration
- Business Succession Planning
- Class Action Defense
- Condominium Development & Conversions
- Condominium/Hotel
- Contract Negotiation & Drafting
- Corporate Law
- Elder Care
- Governmental, Administrative & Regulated Industry
- Insurance
- Limited Liability Companies
- Mergers, Acquisitions & Business Reorganizations
- Private Equity
- Public Utility Regulations, Operation & Financing
- Securities
- Tax Exempt & Not-For-Profit Organizations
- Telecommunications, Cable Television & Internet
- Transportation
- Venture Capital

Have a question?
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jgenda@axley.com • (608) 283-6700

# Construction

*www.axley.com/service/construction*

Axley has the largest collection of attorneys who regularly practice construction law in the state of Wisconsin.

- Aggregate Permitting
- Bid Disputes & Protests
- Bond & Insurance Claims
- Construction Business Issues
- Construction Defect
- Construction Finance
- Construction Mediation & Arbitration
- Contract Preparation & Review
- Differing Site Condition Disputes
- Frac Sand Mining
- Lien Claims
- Litigation of Defect, Delay, Acceleration, Payment & Construction Claims
- OSHA/MSHA
- Permitting & Licensing
- Professional Negligence
- Wisconsin DOT
- Municipal Approvals
- Property Acquisition
- Land Use, Zoning & Entitlement Approvals

Have a question?
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Have a question?
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sglazer@axley.com • (608) 283-2473

# Labor & Employment

*www.axley.com/service/labor-and-employment*

Axley attorneys counsel both private and public sector employers in preparing and implementing effective personnel policies, employee relations procedures and affirmative action programs.

- Civil Rights & Constitutional Issues
- Collective Bargaining & Representation of Management in Union Matters
- Employee Benefits
- Employee Handbooks, Policies & Procedures
- Employee Hiring, Discipline & Discharge
- Employment Contracts & Restrictive Covenants
- Employment Discrimination
- Compliance by Non-unionized Employers with NLRA Obligator
- HIPAA: Health Insurance Portability & Accountability Act
- OSHA, Employee Safety & Health Matters
- Representation of Public Sector Employers
- State & Federal Family Medical Leave Acts
- The Affordable Care Act
- Wage & Hour
- Worker's Compensation & Unemployment Compensation
- Workplace Harassment

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mmodl@axley.com • (608) 283-6702

# Litigation

*www.axley.com/service/litigation*

Axley's reputation as one of Wisconsin's premiere litigation firms is a result of our vast experience handling a wide variety of disputes for a diverse group of clients.

- Administrative & Regulatory Matters
- Appellate Practice
- Bad Faith Insurance Claims
- Class Action
- Commercial Litigation
- Electronic Discovery & Records Management
- Employment Litigation
- Federal Court Litigation
- Insurance Claims & Defense
- Intellectual Property Litigation
- Litigation Distribution & Franchise
- Mediation & Arbitration
- Medical Malpractice Defense
- Premises Liability Defense
- Products Liability Defense
- Professional Liability Defense

Have a question?
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gdubeau@axley.com • (608) 283-6704

# Personal Injury

*www.axley.com/service/personal-injury*

Axley Personal Injury attorneys provide you with a free consultation at no cost and no obligation.

- Bicycle Accidents
- Car & Truck Accidents
- Farm & Construction Accidents
- Injuries from Defective Products
- Motorcycle & Other Vehicle Accidents
- Wrongful Death

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# 03

# Centered on Communication

## Ineffective communication can be an obstacle in any relationship; the attorney-client relationship is no exception.

Axley utilizes technology to ensure effective communication and deliver better legal services.

At Axley, we consistently emphasize the importance of communicating in a timely and comprehensible manner, particularly through the help of advanced technology – though never losing the value we place on face-to-face interactions. Our attorneys are equipped with smart phones that allow for the prompt delivery of messages, and our conference rooms contain computers that allow for video conferencing when meeting in person is not an option. Lastly, our client extranet allows for the instant and secure sharing of documents and files, facilitating timely communication and minimizing billable hours.

In sum, our attorneys make it a priority to ensure clients have a strong understanding of the progression of their matters and the legal services they are receiving. There is no question our attorneys won't make an effort to answer; and no concern that is too small to address. If desired, attorney communication can even include real-time legal updates on relevant issues that directly affect clients or their businesses.

## Axley provides responses within one business day.

The influx of tablets, smart phones and technological advancements demonstrates our world working at a faster pace than ever before. Being legal professionals in 2016, our attorneys take the responsibility to stay up-to-date and uphold proper communications practices with clients.

Our attorneys ensure a response to any inquiry submitted via email within 24 business hours. Whether it is a short update on when to expect a more detailed reply, or the actual reply itself, clients can be assured they will not be kept waiting. If an attorney is planning an extended absence from the office, clients will be notified in advance and given an alternate contact. Attorneys appearing in court will have their legal assistants monitor emails accordingly, or will set up automatic email responses – detailing when they will be able to fully reply to communications received.

**Nicole Stine**
**Manager of Client Relations**
nstine@axley.com
(608) 283-6758

As the Manager of Client Relations, Nicole Stine is always available to assist with communications if a client is having difficulty reaching his or her attorney or legal assistant. She can be contacted using the information above.

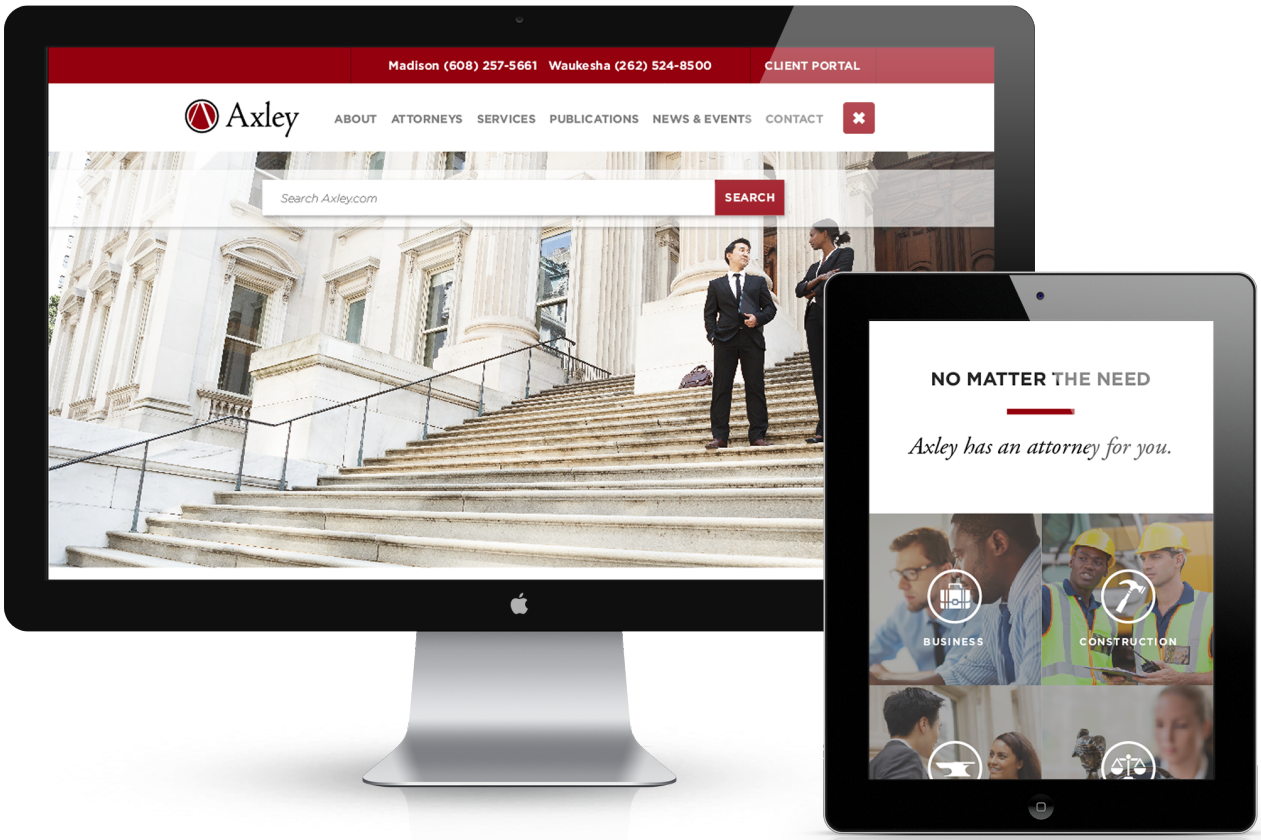
04

# Client Extranet & Technology

## Axley is a cutting-edge leader in using technology to provide quality, timely, efficient and cost-effective legal services.

File size limitations is a frequent issue when sharing documents through email. Since delivering files via CD or flash drive can often slow down collaboration efforts, the Axley extranet is available for clients free-of-charge to facilitate large, instant file sharing.

Designed with top-of-the-line security precautions, Axley's extranet functions much like Dropbox and Google Drive, allowing clients and attorneys the ability to upload, download, and access files 24/7. Security and confidentiality are extremely important throughout our technological infrastructure. Axley incorporates strong security policies and frequent audits in order to maintain high standards in this area.



05

# Alternative Fee Arrangments

Depending on the legal matter, Axley offers legal fee alternatives that deviate from the typical hourly-fee arrangement.

Budgeting for the costs of legal services can be challenging with traditional hourly billing structures. As there is no single fee arrangement that is right for all legal matters, Axley is committed to having a fair and reasonable arrangement for each client. Our firm will work with you to develop an arrangement for a specific legal matter or group of legal matters, that is right for you.

*www.axley.com/alternative-fee-arrangements*

Below are examples of fee arrangements our clients frequently select:

- Agreed Upon Budget
- Blended Hourly Rates
- Contingency
- Fixed Fees
- Frequent Client Matters
- Hybrid Fee Arrangements
- Partial Contingency
- Risk-Sharing Arrangements or Fee Holdbacks
- Success Fees
- Volume Discounts

# 06 COM

Axley prides itself on giving back to the communities in which it serves. Each year, our firm donates both monetary contributions and pro bono legal services to organizations in the community. Our involvement has included the following organizations:

- Access to Independence, Inc.
- Ad2Madison
- American Cancer Society
- American Family Children's Hospital
- American Heart Association
- American Red Cross
- Badger Honor Flight
- Blackhawk Church
- Boy Scouts of America
- Boys and Girls Club of Dane County
- Buckets for Hunger, Inc.
- By Women, For Women, Inc.
- Capitol Off Road Pathfinders
- Carbone Cancer Center
- Clean Wisconsin
- Combat Blindness International
- Community Justice, Inc.
- Cross Plains American Legion
- Dane Co. Bar Association – Pro Bono Breakfast
- Dane County Humane Society
- Delta Waterfowl Foundation
- Doctors Without Borders
- Domestic Abuse Intervention Service
- Ducks Unlimited
- East Troy Wrestling
- Economic Justice Institute, Inc.
- Edgewood High School Drama Department
- FairShare CSA Coalition
- First Congregational United Church of Christ – Prison Ministry
- Fitchburg Days
- Folds of Honor Foundation
- Food Pantry of Waukesha County
- Foundation Fighting Blindness
- Friends of Blue Mound State Park, Inc.
- Gilda's Club
- Gilda's Run
- Goodman Community Center
- Habitat for Humanity
- Hebron House of Hospitality, Inc. – Waukesha
- Henry Vilas Zoo
- Highlands of Seminole Neighborhood Association
- Hope United
- Hospice Care
- Independent Living, Inc.
- Junior League of Milwaukee
- Kennedy Little League
- Kids Building Wisconsin
- Labrador Education and Rescue Network (L.E.A.R.N.)
- Lake Koshkonong Wetland Association
- Leukemia & Lymphoma Society
- Lily's Fund for Epilepsy Research
- MACCC for Benefit for SAIL
- Madison Community Foundation
- Madison Festivals, Inc.

# MUNITY

- Madison Library Foundation, Inc.
- Madison Magnet
- Madison Metro Jaycees
- Madison Museum of Contemporary Art
- Madison Symphony Orchestra, Inc.
- Madison Youth Choirs
- Make A Wish Foundation
- Meals on Wheels
- Middleton Baseball and Softball Commission
- Middleton Youth Hockey
- Monona Grove Youth Soccer Association
- NAMI Wisconsin
- National Multiple Sclerosis Society
- Northwoods Land Trust
- Oakwood Foundation
- Operation Fresh Start
- Orchard Ridge United Church of Christ
- Overture Center Foundation, Inc.
- Pecatonica Educational Charitable Foundation
- Planned Parenthood
- Porchlight
- RASCW
- Recovery Foundation
- Robert Charles Foundation
- Ronald McDonald House Charities
- Safe Harbor Child Advocacy Center
- Salvation Army – Madison, WI
- Second Harvest Foodbank of Southern Wisconsin
- Shop With A Cop
- Southwestern WI Community Action Program, Inc.
- Special Olympics
- St. Vincent De Paul Society of Wisconsin – Madison
- State Bar of Wisconsin Lawyer Hotline
- Stoughton Area School District
- Susan G. Komen – South Central Wisconsin
- Temple Beth El – Madison
- TEMPO Madison
- The American Lung Association
- The Angel Project for Stoughton Area School District
- The Goodman Center
- The Kids' Ranch, Inc.
- Toys for Tots
- United Way of Dane County
- United Way of Greater Milwaukee & Waukesha County
- University of Wisconsin Foundation
- Vera Court Neighborhood Center, Inc.
- Waisman Center
- Waukesha County Community Foundation
- Waukesha Service Club
- Wisconsin Council of the Blind & Visually Impaired
- Wisconsin Equal Justice Fund
- Wisconsin Wetlands Association
- Wisconsin Women's Health Foundation
- WisTAF – Public Interest Legal Services Fund
- Women and Girls Fund of Waukesha County
- Work Plus Incorporated
- Wounded Warrior Project
- Young Women's Christian Association