

Issue 2017.3

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A day late and a dollar short

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Construction Schedule Contract Clauses and Delay Disputes

*by Larry Watkins
Dover Dixon Horne PLLC*

FOR CONSTRUCTION DELAYS, THE USUAL SUSPECTS ARE THE OWNER, ARCHITECT, ENGINEER, CONTRACTOR, AND SUBCONTRACTORS.

Perhaps the engineer was a month late in approving revised steel fabrication shop drawings, which delayed the steel and concrete subcontractors. The structure delay impacted the critical path on the schedule, and this caused the contractor to miss the scheduled substantial completion date. The owner then assessed liquidated damages, the contractor and subs sued the owner and engineer for damages, and now, unfortunately, there is a multimillion dollar lawsuit. The risk of schedule delays cannot be eliminated, but it can and should be managed.

When a construction project achieves substantial completion after the contract's scheduled completion date, the "day late" costs will likely exceed a dollar. In fact, actual or liquidated

damages could range from \$1,000 per day to \$100,000 per day. The parties to most commercial, industrial, and infrastructure project contracts have agreed to construction completion dates in the contract documents. A contractor's failure to complete the project on time may subject the company to actual, consequential, and liquidated damages – in addition to not timely receiving progress payments, milestone payments, or retention amounts associated with substantial completion.

However, more often than not, when the project misses the completion date and causes financial losses, the owner seeks contractual delay liquidated damages from the contractor. The contractor, in turn, fights this claim, asserts

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its own claim, and then seeks liquidated damages from subcontractors. At this point, mediation, arbitration, or litigation is inevitable – as illustrated by the scenario above. There are two legal sides to this coin: the contract provisions and the delay claim, which are the acts before construction begins and the acts after the construction ends. This article, though it is not legal advice for any specific project, provides information to help parties better understand schedule risks as they relate to construction contract clauses and delay disputes.

The LEGAL Importance of Construction Schedules:

Plan your work and...work your plan

– M. Thatcher

The scheduled substantial completion date is a project's due date, and the construction schedule is the way to get there. Though owners and contractors consider a clear substantial completion date to be an absolute requirement in the contract, they sometimes marginalize the schedule and how it affects that scheduled completion date. Attention to both the provision and the schedule is a must.

Whether using a custom construction contract or an industry form agreement, clearly establishing the substantial completion date in the contract is standard and straightforward. Furthermore, the "shall" in such provisions always obligates the contractor to reach substantial completion on or before a certain date. For example, Section 3.3 of AIA A101 states that the "Contractor shall achieve Substantial Completion of the entire Work not later than...days from the date of commencement..." Section 5.2.1 of DBIA Document No. 525 has this language: "Substantial Completion of the entire Work shall be achieved no later than...calendar days after the Date of Commencement."

However, the contract provides for the scheduled substantial completion date to be moved forward if a change order or other event adversely impacts the schedule. DBIA Document No. 535, for example, provides for "adjustment of the Contract Time [Scheduled Substantial Completion Date]" via a change order. For changes in work, the contractor's increased material & labor costs are easily quantified and demonstrated, but what about a contractor's demonstrat-

ing the need for moving the scheduled completion date forward? The construction schedule – especially a critical path method (CPM) schedule – is the key to the contractor's justification to move this date. And, as discussed later in the delay dispute section, the impacted construction schedule takes center stage in delay claim productions.

The main takeaway here is that if a contractor and an owner agree to a scheduled substantial completion date in the construction contract, there should also be a construction schedule to aid in determining schedule impacts to the scheduled completion date.

Contract Clauses Affecting the Schedule & Completion Date:

An ounce of prevention is worth

a pound of cure

– B. Franklin

Negotiating the construction contract is the best opportunity owners and contractors have to address the project schedule, contractual obligations related to achieving substantial completion on time, and the consequences of schedule delays. Here are the most important contract provisions and practices relating to the schedule to focus on when negotiating contracts.

1. What Schedule?

Besides the contract's clear scheduled substantial completion date language, there should also be a project schedule that is attached as an exhibit to the contract. Projects often have two or more schedules – one for the owner & contractor and another one for the contractor's use in managing the project (the latter schedule, of course, is extremely detailed). Attaching the owner-contractor project schedule as a contract exhibit establishes the parties' agreement on the required primary activities as well as the sequence and logic of those activities. This, in turn, enables the parties to discuss schedule impacts from a common starting point.

2. The Schedule Clock Is Ticking.

In the agreement, there are typically several clauses that start the schedule clock ticking. The first provision is the Effective Date or the contract date line, which, for example, may state "this Contract is made as of January 1, 2017." Next is the Scheduled Substantial Completion Date clause, and this clause guarantees, for example, that the contractor "shall achieve Substantial Completion on or before Eight Hundred (800) Days from" a certain date. This certain date should

not be the contract date or Effective Date – it must be the Notice to Proceed date in the commencement of the work clause. Thus, in this example, the schedule clock begins to tick once the Contractor receives the Notice to Proceed.

3. Does Notice to Proceed Always Start the Schedule Clock Ticking?

In short, no – provided that the contract's Conditions Precedent section addresses this. The last thing contractors want to do is be obligated to begin work before the site is ready or before the owner has closed on financing or real property transactions for the project. Beginning work and getting paid are legitimate concerns to say the least. Even though the Notice to Proceed starts the schedule clock ticking, the Notice to Proceed should not be issued or be enforceable until the owner has met the listed conditions. Here is an example: "The Owner's obtaining financing and reaching financial close for the Project is an express condition precedent to issuance of Notice to Proceed [or "to the Parties' obligations to perform under this Contract]."

4. Time Is of the Essence.

At common law, the time of performance was not a material term in a construction contract, and, therefore, untimely performance was not a material breach. To avoid this problematic legal doctrine, in addition to the schedule & date obligations discussed above, make sure the construction agreement states, for example, that: "The Parties agree that time is of the essence concerning dates and times set forth in this Contract."

5. Schedule Your Updates to the Schedule.

Because construction contracts normally require the contractor to prepare and use a schedule, the same section also requires the contractor to update the schedule monthly. Not only is this a good project management practice, but updating the schedule accomplishes two things: First, the contractor must analyze the impact of recent events on the original or latest schedule. Second, at the progress meetings, the contractor should give the owner a copy of the updated schedule to inform the owner of the schedule impacts. Even if the contract does not require monthly schedule updates or transmitting the update to the owner, contractors should do this anyway – it will ensure everyone is on the same page.

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6. Changing Change Order Management.

All projects will have changes to the Work – minor and major. A number of these changes invariably cause cost and schedule impacts to the project. The Changes in Work contract section sets forth the mechanics of change orders. However, rather than focusing on the standard cost and schedule language, the focus here is on managing change orders – contract administration. Project managers must make sure they identify and timely submit all changes to the owner for a Change Order, considering cumulative impacts to cost and schedule and following the Notice provisions. Contractors should also not sign construction change directives unless contractors agree with the cost and schedule estimates.

7. Force Majeure and Other Delay Forces.

This section of the contract addresses events out of the control of the contractor that subsequently have a negative impact on the project schedule or Contract Time (note that scheduled substan-

tial completion date and Contract Time have the same meaning in this article). For example, a tornado that destroys the project site certainly qualifies. Another event example is an “act or omission by the Owner.” Since this section typically provides that “the Contractor shall be entitled to an extension of the Contract Time” for such events, the important points to remember here are: First, contractors and owners should cap the delay time for such events in order to minimize losses on the project (e.g. “either Party may terminate the Contract for a Force Majeure Event that causes a Schedule Delay of more than thirty (30) Days”). Second, contractors should make sure that they are not prohibited from cost and schedule relief for such an event – as is the case with no-damages-for-delay clauses.

8. Claims, Claims, and More Claims.

Invariably, projects have delay claims. Some delays are caused by the owner, and no subsequent change order extends the scheduled completion date. If the contractor experiences such a delay in the construction that causes a negative impact on the schedule, the contractor must make a Claim for an increase in the Contract Time (e.g. a schedule ex-

tension), which includes cumulative impacts and continuing delays. If the Claim remains unresolved, then the next step for the contractor is dispute resolution. Contractors and owners must remember three things about schedule claims: First, use and update a CPM schedule that was a part of the Contract Documents; Second, keep thorough project documentation relating to the delay; and Third, carefully follow all of the “Notice” requirements in the contract’s claims section, lest you waive your claim. For example, consider this provision from the new AIA A201: “Claims by either party... shall be initiated within 21 days after occurrence of the event giving rise to such claim...”

9. Liquidated Damages – What, When, and How?

Liquidated damages (LDs) are monies that owners are entitled to collect if the contractor does not achieve substantial completion by the scheduled substantial completion date. Although some projects have performance LDs, most LDs are for delay. For example, in the 2017 version of ConsensusDocs 200 owner-contractor agreement, the “Contractor shall pay the Owner [\$]...as liqui-

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dated damages and not as a penalty for each Day that Substantial Completion extends beyond the Substantial Completion date.” LDs are lawful in every state in the US, and in Arkansas LDs are lawful, provided that they pass certain requirements and that they end whenever substantial completion occurs. LDs begin at the scheduled substantial completion date in the contract and end at substantial completion. Owners have two options to obtain these damages. The first option is a setoff in payments owed to the contractor, and the second option is to demand payment from the contractor. The key considerations are the dollar amount & calculation, grace periods, and, of course, whether there is enough float in the CPM schedule in the event the project gets behind schedule.

Delay Disputes in Litigation, Mediation, and Arbitration:

A successful lawsuit is the one worn by a policeman

— R. Frost

Whether a delay claim results in mediation, arbitration, or litigation, parties to the construction contract are rarely “successful” in project delay disputes. Below, in addition to providing a delay dispute overview, the remainder of this article addresses the two major categories of delay disputes: contractor claims based on owner delays; contractor claims based on a delay event such as force majeure; and owner claims based on a contractor delays.

1. More about Schedules.

As mentioned earlier, the contemporaneous project CPM schedule takes center stage during a dispute production. As the parties’ focus shifts from agreements & building to lawsuits & damages, the contract provides the framework for liability and damages, but the schedule is the primary piece of evidence. Secondary to the schedule but also important are the project management documents and expert witnesses. A contractor, for example, may use the minutes of meetings, jobsite journals recording the work and weather, pay applications, and change orders to support its assertion that it is not responsible for the delay and is entitled to delay damages. Expert witnesses sometimes cause more harm than good in construction delay disputes. Scheduling or forensic schedule experts typically opine to the court

about what caused the delay and how the cause impacted the schedule. However, experts tend to discuss the complexity of CPM methodology as it applies to the project claims on each side, introducing confusion rather than clarity to the factfinder. Thus, a schedule expert is a two edged sword, and parties should be wary.

2. The Dispute: Contractor Claims Based on Owner Delays.

Because the contractors and subcontractors have based their workload and cash flows upon on time payments and project completion, delays that owners cause are particularly painful. Here, besides the opportunity cost, the contractor must cover additional overhead, experience negative cash flows, and pay additional interest on construction loans. The common denominator is that the owner or owner’s representative caused the delay – whether it was an owner’s engineer who didn’t approve a submittal on time or the owner was late in closing the real property deal for the project site. With these types of claims, the first issue to resolve is whether a no-damage-for-delay clause precludes recovery by the contractor. If the contractor can recover, the parties will then focus on the project documentation to show the owner caused a delay and that the delay negatively affected the contractor and schedule. The final step in this type of dispute, assuming the owner caused a delay and the contractor can recover, is the calculation of damages caused by the delay. The 1980 Arkansas case of *Whitehall v. Southern Mechanical Contracting* illustrates owner delay lawsuits and contractor recovery.

3. Another Dispute: Owner Claims Based on Contractor Delays.

The most common form of delay claim occurs when the contractor achieves substantial completion after the contract’s scheduled substantial completion date. The owner may seek actual and consequential damages, but usually the construction contract contains the liquidated damages provision discussed earlier in the article. In this type of dispute, either party may initiate the process. If the owner retains LDs from monies it owes the contractor, the contractor may be the plaintiff. On the other hand, if the owner did not set off the LDs but rather seeks payment for LDs from the contractor, then the owner would be the plaintiff. The factfinder must answer three questions. First, did the contractor achieve substantial completion after the con-

tract’s scheduled completion date? Second, was the contractor’s delay excusable? And third, if the contractor was late and the delay was not excusable, when did substantial completion occur for purposes of calculating LDs? A good example of the validity of liquidated damages provisions is the 1980 Arkansas case of *Philips v. Ben M. Hogan Co.*, which also firmly established the AR rule that liquidated damages cannot be assessed after substantial completion (substantial performance).

Concluding Comments

Everyone wants to have an on-time, on-schedule, and on-budget project. This occurs as a result of excellent planning, design, budgeting, risk allocation, and construction management. Yet, projects routinely fall short at best and fail at worst. Regardless of your role on a project, always address schedule risk in the construction contract, including your insisting on a schedule exhibit and reviewing the contract provisions affecting the schedule. If, nevertheless, there is a dispute, there are two types with common components. Don’t wait until you are in a lengthy lawsuit to think about your schedule liability in the construction contract. ■

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Dover Dixon Horne PLLC is a business law firm located in Little Rock, Arkansas. For more information about the firm or the Construction Law Group, please visit www.ddh.law. You can also learn more about construction law at www.constructionlaw-resource.com.

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Is cash still king?

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by Brent Sharpmack
Hudson, Cisne & Co.

SOME OF THE GREATEST BUSINESS MINDS HAVE VALUED CASH ABOVE EVERYTHING ELSE IN THEIR COMPANY. WITHOUT IT, YOU HAVE NO WEIGHT. WITHOUT IT, YOU HAVE NO POWER. WITHOUT IT, YOU HAVE NO GROWTH POTENTIAL.

One of Zig Ziglar's best quotes is, Money isn't the most important thing in life, but it's reasonably close to oxygen on the "gotta have it" scale. Cash is important for a business to operate, but is it the only thing? Is cash still king?

As a CPA for multiple contractors, I am asked a lot of questions regarding cash flow. Cash is everything for a contractor. With cash you feel like you had a great year. And without cash you feel like your hands are tied and you have no options for change. These are just some of the questions you should be asking yourself about your company's cash flow:

How am I showing a profit, but have no cash?

This is especially true when you have taxable profit, meaning you owe tax, and have no cash to match those prof-

its. Before you yell at your CPA, be aware that your business operations and cash flow are related, but they are not directly tied to each other. Some transactions will cause you to show profit, but does not equal cash in the bank. For example, if you perform the work on a job, maybe even bill for the work, but have not collected, then you will show the profit from the job without having the cash.

Another example is using cash to pay down on your equipment notes early. The cash is out of the business, but you receive no deduction for the debt repayment. Instead, you may want to keep the cash in the company as opposed to paying it down early. Once you pay the cash on a note, then it's a lot harder and more expensive to get the cash back when you really need it.

There are ways to protect this dis-

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Cash

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crepancy for tax purposes, but is most commonly used for smaller companies. And even then, the IRS has a “back-door” tax called the alternative minimum tax (AMT) - which nobody likes - that requires you to pay some tax even if your taxable income is zero. The IRS will always get their cash!

How do asset decisions affect cash flow?

Being able to invest back into your company with capital purchases is usually a good sign of expected growth, and you can either choose cash or finance to make this purchase. You could also lease, which is less of a risk than financing but requires more cash. Purchasing a large piece of equipment with cash does not equate to a full deduction in your profit, which is a positive factor. Instead you are required to depreciate the equipment over time. Depreciation factors into your profits, but doesn't affect your cash flow. The downside of this option is having a large amount of your cash tied up in a piece of equipment, which will take multiple jobs to recover your investment.

On the opposite end, you could finance or lease the equipment and hold onto your cash. However, over the life of the agreement you will end up paying more for the same piece of equipment. Be careful when financing equipment

if you are already tight on your working capital. Oddly enough, investing back into your business via financing will lower your working capital. Even more strange, purchasing the equipment with all cash will lower your working capital faster than financing the equipment.

Is cash the only valuable asset I have in my company?

You will always know the value of cash and there is never a discount for it. But what you do with that cash can affect the value of your company. Long gone are the days you can put your cash in CDs and earn enough interest to help your bottom line. You could invest your excess cash, but most contractors need quick access to their cash when a big job is available. A money market is hovering around 1%, which is better than nothing but not ideal.

So, what are some of your options if you have excess cash?

You could invest in capital equipment or build that larger warehouse you have always needed. These capital purchases should appreciate in value over time; however, because of accounting rules, this increase in value is not shown on your company's balance sheet from year-to-year. The value will only be recognized upon sale of the asset or sale of the business.

If you are a contractor who requires inventory to service your business, then you can negotiate bigger discounts by

purchasing larger quantities of inventory at one time. These inventories will sit on your balance sheet until they are used on a job. At that time, they become job cost which will show the job at a higher margin due to the lower cost of inventory being used. The higher margin is then reflected in your increased equity of the company.

You could use the cash to pay down on your open line of credit. This is different than paying down on your equipment notes. Paying down on your equipment notes provides no option to borrow the same amount of cash back when the cash is needed. Paying down the open line of credit still allows you the option to borrow back the needed cash quickly at no cost to the company. This also helps certain financial ratios that banks, insurers and bonding companies favor.

Another option would be to issue dividends or distributions back to the owners. This option does take cash out of your business, but compensates the individuals that have the highest amount of risk in the company.

These options, and there are others, will require you to let go of “the King” in hopes of it returning with multiple crowns in the near future.

Is cash viewed as a sign of growth?

A company with cash is viewed as having the ability to grow. But are there actual opportunities to use the cash for growth? Are businesses looking for ways to expand their footprint, operate in other markets or perform new services? This can be done by acquisitions of existing companies or it can be done by starting a new entity from the ground up. All options take cash to accomplish this growth.

For startup businesses, it takes significant capital up front to survive the expected losses which will occur in the early years before you make any profit. For acquisitions of existing companies, it will usually take a large amount of cash on the front end or some type of financing to purchase the assets or stock of another entity. Being able to accumulate more cash, will give you a stronger buying position because it will require less debt.

However, finding the right market, the new service, or the existing company takes risk. Risk of what exactly? The risk of losing “the King” you worked so hard to build up. Nevertheless, knowing the reward could be exactly what your com-

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pany needs: more jobs, bigger jobs, and better-quality jobs. And yes, more cash.

Is cash the only financial ratio I should be looking at?

Absolutely not. Even the publicly traded companies with the 10 largest cash positions aren't even beating the market on average. However, we still consider these companies as heavy players in the market. So, what else should contractors be looking for when they review their financial statements?

Working capital: This is the most common liquidity ratio that indicates if you can satisfy your current liabilities in the next 12 months, determined by calculating Current Assets over Current Liabilities, with a desired minimum of 1.00. Companies under this mark may need more liquid assets to make their payments to vendors, banks and employees.

Working capital turnover: This indicates the amount of revenue being supported by each \$1 of net working capital employed. Using Revenue over Working Capital, a ratio exceeding 30 may indicate a need for increased working capital to support the future growth of the company.

Return on assets: If you operate with heavier equipment (i.e. highway contractors), then your Return on Assets should be in line or higher than the market. Take your Net Earnings over your Total Assets and this will indicate the profit generated by the total assets employed. Are you getting a desirable return for the amount of money you have invested into your capital equipment?

Equity to overhead: This ratio will indicate how much the owners of the company are funding the level of overhead

expenses each year. Using your Total Net Worth over your Operating Expenses (i.e. rent, utilities, office salaries, etc.) this ratio should be 1.00 or higher. A lower rate may indicate more capital is needed or that a company should be able to operate on lower overhead expenses.

Backlog to working capital: This efficiency ratio will indicate the relationship between signed or committed work and your working capital. Accumulate your Backlog over Working Capital and, in general, a ratio of 30 or less is considered acceptable. A higher ratio may indicate a need for an increase in permanent working capital.

Months in backlog: Do you have enough work going into the next year to "feed the monster" that you created for yourself? This ratio will show the number of months it will take to complete all signed or committed work. By taking your Backlog over your monthly Revenue, a ratio of less than 12 indicates a need to secure new contracts in the next year to maintain a constant level of annual revenue.

Days in contract receivables and days in accounts payable: All contractors say they don't collect on their jobs as quickly as they would like. Slow paying receivables are inevitable, but are you controlling your payments to match your collections? By using your Contract Receivables times 360 over your Revenues, this will give you on average the number of days it takes you to collect on your Contract Receivables. Compare this

to your Days in Accounts Payable by taking your Trade Accounts Payables times 360 over your Total Cost, and this will give you on average the number of days it takes you to pay your subcontractors and vendors. If these days are lower than your days in receivables, then this may indicate a drain on cash flows as you wait for your collections to come in.

Contractors will never shy away from having too much cash in their coffers. Cash is too universal. It is always an option to get what you need, to get where you want to go, and to get the tools you need to accomplish your job. Using the quote from the iconic movie, Wall Street, Money's only something you need in case you don't die tomorrow. Contractors will always bet on next year to be better; therefore, cash will remain "King." How you manage your kingdom will determine how long you will stay in power. ■

Brent Sharpmack is a partner with Hudson, Cisne & Co., which provides tax and financial support to various industry clients with offices in Little Rock, White Hall and Rogers. Brent specializes in helping general contractors, specialty contractors and other supporting firms in the construction industry. You can contact Brent at bsharpmack@hc-cpa.com.



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Risk management and the silica rule

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*by Ryan McClafferty
Risk Services of Arkansas*

CREATING A SYSTEMATIC STRATEGY FOR RISK MANAGEMENT IS THE NEW STANDARD. THE DAYS OF CONSUMERS PLACING THE FULL BURDEN ON INSURANCE COMPANIES HAVE RUN THEIR COURSE.

In our age of data, contractors have a unique ability to separate themselves from their peers and compete with significant advantage by earning a lower cost of risk. This requires more skin in the game through executive time, priority, risk retention, operational improvements, and the humility to admit that changes must be made to earn the results.

The cost for construction continues to climb. This starts with raw materials and continues with sourcing skilled labor, the administration cost of new regulations, and outfitting your company with the latest technology to remain competitive. One area that allows contractors to take control is the way they proactively manage risk. The process of risk management includes identification, analy-

sis, operational planning, financing, and strategically monitoring the progress over time with continuous improvement as the goal. This process increasingly relies on interpreting relevant data to make better decisions. Understanding loss trends, Workers' Compensation Experience Modifiers, and tracking key performance indicators are just the beginning. When studying best-in-class contractors, you will see a distinct safety culture where even the newest employee understands they can ask questions to confirm how to safely proceed.

Increased Accountability

Transferring risk is often the first tactic, but often insurance is not as simple as terms, deductibles, and premi-

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um. I recommend thinking of Workers' Compensation insurance as a financing vehicle for future losses. Categorizing and financing risk are elements to the strategy to reduce the long-term cost of risk. Simply stated, the Workers' Compensation Experience Modifier is a representation of your loss experience compared to others in your field across the country. The data points measured are the actual losses compared to expected losses over a four year period excluding the previous year. Because of the known losses accrued during the year that is excluded, you have the ability to understand the impact headed your way in the future. Managing open claims mid-year is essential to ensure your modifier is accurate and forecasted several months in advance of the next policy year. Most contractors are involved with long-term projects that require bidding during one insurance year; although, the work may not be completed for another insurance year or two. Understanding the detailed mechanics of the modifier is required to forecast labor burden for upcoming insurance years and realize any advantage in modifier reduction or prepare for an increase that may not take effect for over a year.

Modifier sensitivity is now an annual affair. Until 2013, every dollar of the first \$5,000 of every loss was allocated as a primary loss. Since 2013 the primary split-point has grown to include the first \$16,500 as a primary. That dramatic swing has created heavy weighting

on the frequency of workers' compensation losses rather than the severity of the loss. The result is a larger disparity in best-in-class contractors and those often without a risk management strategy. Top contractors will prove to be industry leaders in many ways, preparing for compliance and regulation changes are chief among them. Last summer, we saw a dramatic increase in the OSHA fines and penal amounts. This marked the first significant change since 1990.

Voluntary Drug-Free Workplace Program

One of the hottest topics is the Arkansas Medical Marijuana Amendment (AMMA) and interpreting the employment provisions of Act 593 with its caveat for "safety sensitive positions." As of today, there have been no changes to the Arkansas Workers' Compensation Commission Rule 099.36. This is better known as the Voluntary Drug-Free Workplace Program and it carries a unique benefit allowing participants to receive 5% credit on their Workers' Compensation premium. The purpose of the rule is to promote voluntary drug-free workplaces so that employees have the opportunity to maximize their levels of productivity, enhance their competitive positions in the marketplace, and reach their desired levels of success without experiencing the costs, delays, and tragedies associated with work-related accidents resulting from drug or alcohol abuse by employees. The program requires notice, education, and procedural requirements for testing. This methodology ties in well with traditional safety programs. Many

of the contractors that are leery of increased administration and oversight are often already administering most of the program through their existing process. In my professional experience, this program improves the safety culture, lowers cost, and decreases risk. This legislation dates back to 1999 and closely mirrors the Department of Transportation (DOT) drug regulations so it may be a while before we see any changes.

Fleet Management

Insurance companies are battling low profitability on commercial auto coverage, contributing to this trend are several factors such as higher speed impacts for rear-end collision, increased medical costs, and higher vehicle costs through integrated technology. Distracted driving is certainly the buzz word in the fleet safety conversation. Driver selection can be a major factor influencing future losses. Some employers rely on an insurance company to accept or veto a new driver as opposed to making the selection an integral part of the hiring process. Having excluded drivers on the auto policy certainly complicates the day to day realities of running a project and adapting to a changing job site. The concept of an excluded driver can present logistical challenges of transportation compounded by labor shortages and accelerated schedules. All of this is on top of having the potential self-insured liability that the employee may drive their personal vehicle on company business for a seemingly small task like picking up tools or running an errand on behalf of the company. The solution is creating the internal controls to monitor the Motor Vehicle Record of all drivers and comparing records against an establish standard. Perhaps the day is coming through telematics when consumers will pay for exactly how they use their vehicles. I believe that creating these best practices will be a precursor to help companies prepare for the data based pricing of the future. The immediate benefits will be realized by making intentional decisions on who you allow to take your liability on the road.

Drones in Construction

Adding new risks to an old policy does not always work. When the baseline forms for general liability were created, no one could have imagined the ability and efficiency of modern drones, or unmanned aircraft systems (UAS.)

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Although there are now various endorsements to general liability and drone specific policies, these modern risks are worthy of their own meeting. A surprise to some, but these unmanned aircraft create FAA compliance issues such as Remote Pilot Certificates (RPC) and registration. Physical damage coverage for the drone and camera should be part of the risk identification process.

OSHA's New Crystalline Silica Rule

Exposure to crystalline silica containing materials has proven to cause several health related illnesses. The most common illnesses are kidney disease, silicosis, lung cancer, pulmonary tuberculosis, and airways diseases. Long term exposure to silica may also lead to the development of autoimmune disorders, chronic renal disease, and other adverse health effects.

Compliance Dates

OSHA 29 CFR §1926.1153 was codified and became effective on June 23, 2016. Under the standard, all employer and OSHA obligations were to commence on June 23, 2017 except for requirements for sample analysis in paragraph 1926.1153 (d)(2)(v), which commence on June 23, 2018.

OSHA determined that the construction standard for crystalline silica has a number of unique challenges and warranted additional time for training and development of guidance materials.

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AGC's Challenges OSHA on Silica

On March 25, 2016, the Occupational Safety and Health Administration (OSHA) issued their final rule on respirable crystalline silica. The construction industry standard applies to all occupational exposures to respirable silica in construction work and sets a new Permissible Exposure Limit (PEL) of 50 micrograms of silica per cubic meter of air as an 8-hour Time-Weighted-Average (TWA). The original compliance date was set for June 23, 2017, but was changed to September 23, 2017 to allow the new administration time to review the rule.

AGC of America filed a challenge to OSHA's respirable silica rule back in April 2016 in the U.S. Court of Appeals. AGC joined several other industry partners who are also concerned about the impact of the rule on the construction industry. AGC has identified and outlined the following key concerns:

- OSHA's rule significantly reduces the PEL for silica in the workplace to 50 micrograms per cubic meter of air, which is nearly an impossible standard to achieve in many industries,
- OSHA's rule is not technologically or economically feasible – installing the control systems OSHA requires will cost hundreds of millions of dollars, that most employers, and certainly small businesses, will not be able to afford,
- OSHA relied on aged data and refused to consider modern protective technologies that would make compliance significantly less costly and burdensome,
- OSHA significantly underestimated the cost proposal which will threaten the viability of most of the impacted sectors. Some businesses will be forced to close their doors and some manufacturers will be likely to shift production overseas.

Currently, the enforcement will begin September 23, 2017. The next hearing AGC has will be September 28. At the September 28 hearing, it is not clear that the issue will be resolved. Also, the silica review did not make it on the current regulatory agenda for OSHA. To be on the safe side, it is crucial that contractors prepare for compliance of the new standard by or before September 23.

For more information or to receive updates, contact Joe Morgan, AGC Arkansas' Safety and Training Manager at 501.375.4436 or jmorgan@agcar.net.



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✦ For more information, contact:

Jerry D. Holder, PE | Director of Transportation
JDHolder@GarverUSA.com | 501.376.3633



Silica

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In order to provide the opportunity to conduct additional outreach to the regulated community and to provide additional time to train compliance officers, OSHA delayed enforcement of this standard until September 23, 2017.

Who does the standard affect?

The Crystalline Silica rule was put in place to protect approximately 2 million construction workers who drill, cut, crush, or grind silica-containing materials such as concrete and stone. It is estimated that some 840,000 workers are exposed to silica levels that exceed the Permissible Exposure Limit (PEL.) These workers will be often utilizing construction equipment such as:

- Masonry saws
- Grinders-when grinding silica containing material
- Drills-hammer drills in concrete
- Jackhammers and chipping tools
- Mounted drilling rigs
- Milling and grinding equipment
- Demolition and crushing activities

Tasks such as mixing mortar, pouring concrete, and removing formwork, that typically would remain under the action level, are not required to comply.

Key Provisions

The changes are requiring employers to reduce the exposure limits to the new permissible exposure limit (PEL) for respirable crystalline silica to 50 micrograms per cubic meter of air, averaged over an 8-hour shift.

- Requires employers to implement work methods that use engineering controls (such as water or ventilation) to limit worker exposure to the PEL; provide respirators when engineering controls cannot adequately limit exposure; limit worker access to high exposure areas; develop a written exposure control plan, offer medical exams to highly exposed workers, and train workers on silica risks and how to limit exposures.
- Provide medical exams such as chest x-rays, tuberculosis testing and pulmonary function tests, to monitor highly exposed workers

and give them information about their lung health.

Compliance Methods


Regardless of the exposure control methods chosen, all construction employers with silica exposures are required to perform the following:

- Develop and implement an Exposure Control Plan identifying the tasks involving exposure to silica and the methods chosen to protect these workers. OSHA has developed Table 1 exposures and control methods to assist in this process. In addition, the Exposure Control Plan will require the employers to explain the process for Medical Surveillance for exposed employees.
- Competent persons shall be designated to implement and monitor the Exposure Control Plan.
- Provide medical exams for chest x-rays, pulmonary function and tuberculosis testing to employees required to wear respirators for 30 or more days per year.
- Train employees on possible ex-



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posures from work operations and how to protect themselves through engineering controls or respiratory protection. In addition, train on the medical surveillance requirements.

- Change housekeeping procedures so that dust isn't created while performing operations such as sweeping or vacuuming dust.
- Maintain records of silica exposure and medical exams.

Table 1

Table 1 matches common construction tasks with dust control methods, so employers know exactly what they need to do to limit worker exposure to silica. The dust control measures listed in the table include methods known to be effective, such as using water to keep dust from getting into the air or using ventilation to capture dust. In some operations, respirators may also be needed. Employers who correctly follow Table 1 are not required to measure worker exposure to silica and are not subject to the PEL. This method of compliance does come with some risks associated with employee behaviors and the inability to monitor the effectiveness of controls 100% of the time.

Alternative Control Methods

If employers choose to implement methods other than wet or ventilation, or if not feasible, then the following requirements shall be utilized:

- Provide air sampling to determine that employee exposure is above or below the Action level of 25 micrograms per cubic meter of air, averaged over an 8-hour day.
- Protect workers that have exposure over the PEL of 50 micrograms per cubic meter over an 8-hour day.
- Use wet methods or ventilation for workers exposed above the PEL.
- Provide respirators when dust control methods cannot limit the exposures below the PEL.

For additional information, employers can go to www.osha.gov/silica and look at the specific requirements. Additional information on silica and employee protection can also be found at www.cdc.gov/niosh/topics/silica/.

Marketplace

Ultimately, the entire construction market benefits from keeping our workforce safe, embracing the increased safe-

ty standards, and thoughtfully stewarding the growth of our companies. AGC has incredible benefits for its membership including many free or discounted training opportunities such as the recent Focus Four and upcoming OSHA-10 and -30 classes. Visit www.agcar.net for a full list of upcoming and available safety and training courses. ■

Ryan McClafferty is an advocate for Arkansas construction who represented our AGC chapter last year at the Construction Leadership Council Conference

in Atlanta, GA. He is a Risk Consultant for Risk Services of Arkansas/INSURICA and creates risk management programs exclusively for contractors. He also serves on the Board of Directors at the American Subcontractors Association of Central Arkansas. Contact Ryan at Ryan.McClafferty@insurica.com.



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For more information, please contact:

Joe Morgan

Safety and Training Manager

AGC Arkansas

501.388.2132

jmorgan@agcar.net

ACEF Classes

Contact ACEF at (501) 372-1590 or toll free at (800) 240-2730 for class times and to verify class schedule. Class schedules are subject to change without notice.



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ACEF Education Center – Main Campus 4421 W. 61st Street Little Rock, AR 72209 (501) 372-1590 or (800) 240-2730	Electrical
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Mayflower	
Mayflower High School 15 Old Sandy Road Mayflower, AR 72106	Electrical
Morrilton	
U of A Community College at Morrilton Business and Technology Building 1500 University Blvd Morrilton, AR 72110	Electrical
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Har-Ber High School 300 Jones Rd Springdale, AR 72764	Electrical
North Little Rock	
Pulaski Technical College 3000 W. Scenic Dr. North Little Rock, AR 72118	Electrical
Siloam Springs	
Career Academy of Siloam Springs 700 N. Progress Siloam Springs, AR 72761	Industrial Maintenance
	Electrical
Texarkana	
1918 East St. Texarkana, AR 71854	Electrical

From the Top

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Meet the Advocates

One of AGC Arkansas' primary services is to advocate on behalf of its members in the legislative and public policy arenas. To assist in these efforts, we are fortunate to have the following individuals onboard and engaged to work alongside AGC staff and members.



Allen Gordon

Allen Gordon

agordon@gcvlaw.com

Gordon is a lifelong resident of Morrilton in 1948 and has always had a love of politics. His father served a term as State Representative after returning from World War II. His uncle, Nathan Gordon, served as Lieutenant Governor from 1946 to 1966. Allen paged for Nathan in the Arkansas Senate several times during the early 1960s. Back then, paging was a different experience than today. The pages usually stayed a full week and had plenty of opportunity to observe the process up close. That's when he was bitten by the bug and determined if the opportunity ever arose, he would try to serve in the Arkansas Senate.

After graduating from law school at the University of Arkansas at Fayetteville, he joined the law practice in Morrilton with his father and uncle. The office remains in the same building where his grandfather practiced law. Gordon was elected as a delegate to the Constitutional Convention of 1979 and the experience furthered his interest in running for the legislature.

Every ten years the legislative districts lines are redrawn. As chance would have it, the map adopted after the 1980 census created a Senate district in which he resided that had no incumbent Senator. He ran and was elected. Serving in the Legislature then was a much more part-time commitment than it is today. Since he lived only one hour from the Capitol, he served in the Senate while practicing law. In 1992, Arkansas voters

passed term limits rendered Gordon ineligible to serve in the Senate after 2000. After serving for eighteen years, returned to full-time law practice; particularly since all the Senators he had been elected with where also term limited. However, he knew he would miss being involved in the legislative process. In 2006, he received a call from Dustin McDaniel, who had just been elected Attorney General asking him to join his staff as his Legislative Liaison. Gordon served in that position from 2007 until 2012. Once again returning to the law practice in an "Of Counsel" role along with some contract lobbying, AGC Arkansas became a client in 2013.

Gordon believes there is a common denominator representing clients in a small law practice and lobbying. It is much easier to represent clients you believe in. The companies and individuals that comprise AGC Arkansas are the builders of the highways, schools, churches, commercial buildings and modern energy projects that are moving Arkansas forward. He is proud to be promoting these interests before the Arkansas General Assembly.

Lucas Hargraves

lucas@hargravesconsulting.com

As founder of Hargraves Consulting, Lucas Hargraves has a strong track record on issues at the local, state and national levels. Throughout Hargraves' diverse career, he has built a reputation as a problem solver who sees projects through and delivers results. "We recognize that our clients place a lot of trust in us to advocate for their interests, and that's not a responsibility we take lightly," said Hargraves.

Hargraves Consulting is a full-service public affairs firm, advising clients in legislative advocacy, communication strategy and grassroots engagement. Highway funding issues will be a primary focus of the firm's work for AGC Arkansas. "AGC Arkansas and its members represent a vital industry for our state. We are honored to be part of your team, and we look forward to meeting many of you in the months ahead," said Hargraves.

Hargraves has served as Vice President of Public Policy at the Little Rock Regional Chamber of Commerce, representing business interests to governmental entities and working on economic development issues. He is also



Lucas Hargraves



Amanda Story

a former member of the Little Rock Planning Commission. Hargraves has delivered impressive victories on his clients' behalf, including in the last regular legislative session. For example, he brought stakeholders together to change a long-fought law to allow expanded wine sales in Arkansas grocery stores. He also helped ensure passage of system expansion legislation for natural gas utilities, which will improve energy options and economic development in rural parts of the state.

He has led several successful statewide issue campaigns, as well. In the 2016 General Election, he led efforts to pass Issue 3, a constitutional amendment to enhance economic development opportunities for communities across the state. In 2010, he managed the campaign to pass Constitutional Issues 2 and 3, ending a two-decades' long effort to amend Arkansas' usury law. He was instrumental in developing and implementing outreach strategies for Move Arkansas Forward, the committee that worked to pass Issue 1 for highway funding in the 2012 General Election.

Hargraves graduated from the University of Arkansas in 2000 with a degree in Political Science. He and his wife Megan, have one daughter, Caroline Snow, and a son, Henry. They are active members of St. Mark's Episcopal church and longtime residents of midtown Little Rock.

Amanda Story

amanda@hargravesconsulting.com

Amanda Story, an Associate at Hargraves Consulting, specializes in communication and public outreach. She was instrumental in crafting messaging for the successful Issue 3 campaign on the 2016 General Election ballot. In addition, she helped organize and execute an earned media program for Move Arkansas Forward, the committee that passed Issue 1 for highway funding in the 2012 General Election. Amanda has also worked on many of the Hargraves team's legislative victories over the years. "We believe strong communication is an essential part of effective advocacy," said Story. "AGC Arkansas members have a compelling story to tell, and we'll work to make sure issues most important to you, like highway funding, stay on the front burner," said Story.

Amanda has extensive experience working in media, public relations, and legislative affairs. As communications officer for the Arkansas House of Representatives, she oversaw the implementation of live streaming and broadcasting of all sessions in the House chamber and multiple House committee rooms, giving the public enhanced access to the legislative process. She also led House communication efforts during the state's first-ever legislative fiscal session in 2010. Before serving as a media liaison for the House, Amanda worked at KATV,

Channel Seven in Little Rock, as a general assignment reporter covering the Capitol, and as fill-in anchor.

Amanda has a law degree from the UALR William H Bowen School of Law, and a bachelor's degree in Journalism and Middle East Studies from the University of Arkansas. She and her husband, Bentley, live in Little Rock with their daughter, Virginia.

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Company Morale

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Share the love. We wanted to take a moment to both highlight current members' actions and encourage others to do the same. Take a look at some of the great things our members are doing to boost company morale. We want to hear from you! Send your stories and photos about how you boost company morale, promote health and wellness, and give back to the community to bfranks@agcar.net.

Taking Care of Your Own

From time to time, Nabholz team members experience catastrophic life events and naturally their coworkers want to help out in some way. In the past employees have used email and word-of-mouth to rally support from the team.

However, a year ago Nabholz

launched nabFUND to help facilitate this process and make it easier for employees to participate. With just one call to Employee Services, an employee in need can start a campaign on our internal website; and with just a few clicks, Nabholz employees can make a one-time



donation, which will be deducted from their pay checks—no more sending cash or check via inter-office mail. All donations are voluntary and anonymous.

Since its launch on May 2, 2016, Nabholz employees have donated a total of \$29,260 spread out over eight causes.

Hitting the Gym

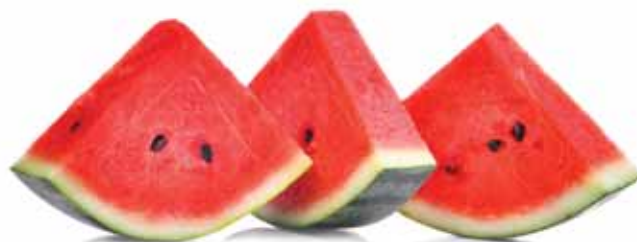
Roberts-McNutt provides free gym memberships to its Employee Owners at 10 Fitness. They've seen great results and the employees that take advantage of the program stay healthy and lean! What is your company doing to keep your team fit?



Taking a Break

Mary Peterson started a new tradition for the team at Peterson Concrete Tank Company a few years ago to make sure their team stayed hydrated and healthy during the hot summer months. Every morning they'll send someone down the road to a small produce shop to pick up two large watermelons. He'll bring them back to the yard and put them in the ice machine tub. At 2:30 p.m., the

whole team stops to take a break and eat ice cold watermelon together. (There is one person that doesn't eat watermelon, so they buy him a couple of oranges so he doesn't feel left out.) The team at Peterson agrees you just can't beat Mary and the way she takes care of them. Small acts of kindness go a long way to keep the team safe and build morale. Pass it on!



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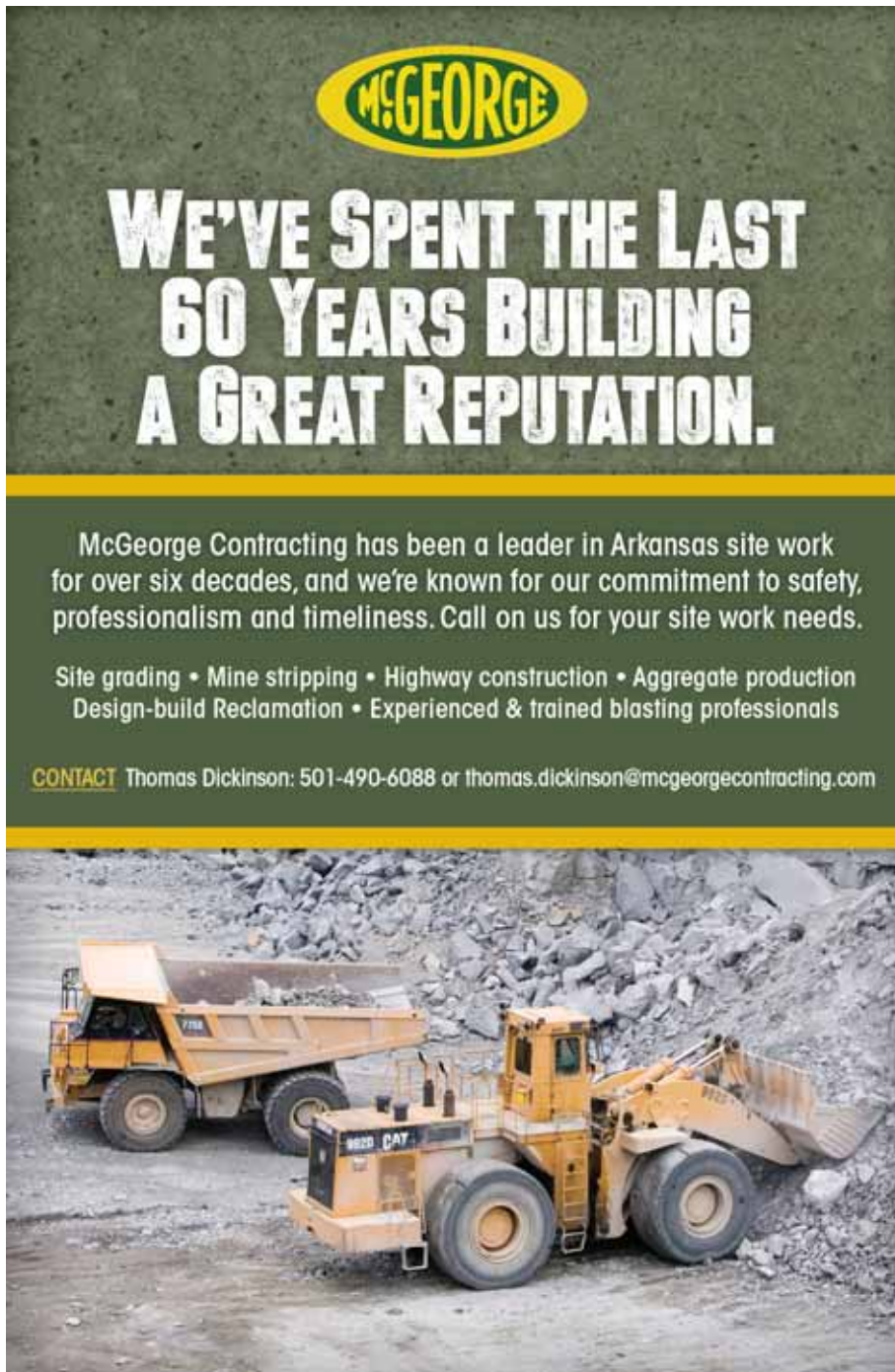
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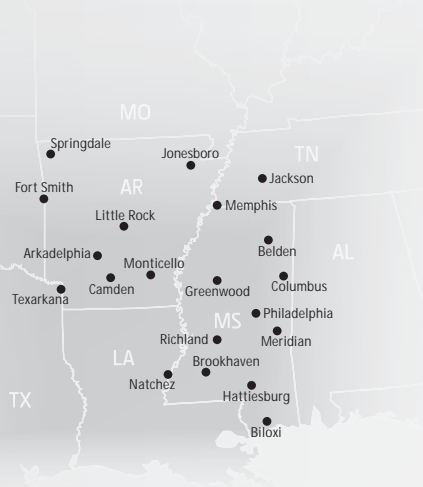
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Comings & Goings

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Job Changes & Employee News

Stribling Equipment is pleased to announce that **Drew Davis** has joined its sales team as a Territory Manager in the North Central Arkansas territory for its Little Rock location.

Congratulations to **Veronica Lilly** with **UAMS** for achieving CM-LEAN certification through AGC Arkansas/AGC of America.

Nabholz Corporation is pleased to announce the hiring of **Lindsay Faulkner** in the role of project manager for its Central Arkansas Environmental Services operation. Faulkner most recently worked for Snyder Environmental, where she served as Vice President of Finance and Administration. Faulkner is also an Arkansas Department of Environmental Quality Certified Asbestos Inspector. With this certification, Faulkner is qualified to perform Indoor Air Quality (IAQ) testing and monitoring. In addition, she is well-qualified to perform mold, lead-based paint, and lead dust sampling. Faulkner is a graduate of the University of Arkansas at Little Rock and obtained a bachelor's degree in environmental health science with a minor in biology from the university.

Kinco Constructors is proud to announce the promotions of both **Jack Wallace** and **Tyson Reimer** to Senior Project Manager. They also welcome **Steve Browning**, **Landon Jones** and **Aaron Young** as Superintendents and **Jared Jacks**, **Steven Ronza**, **Shane Eoff** and **Anthony Kirby** (SPD) as Project Coordinators.

Congratulations to the recent apprenticeship graduations from **Koontz Electric**: **Darrel Egger**, **Zachary Andrews**, **Sammy Clemons**, **Seth Grabher**, **John Cotner**, **Marshall Bryant**, **Scott Borden**, **John Zimmerman** and **Jimmy Tyson**.

Sterling Seacrest Partners announces the addition of **Kimberley Sweet** as an Account Executive

to the team. **Kimberley** is a versatile professional with commercial insurance and customer service experience. She brings more than 15 years of experience working with construction accounts on their insurance issues. **Sterling Seacrest** also welcomes **Brenda Bennett** as an Account Executive. **Brenda** has a wealth of knowledge and is highly respected in the construction industry. She brings more than 15 years of excellent communication skills and problem-solving abilities to be able to assist our construction customers.

Company News

The **Hydco** team of **Jeremy Hyde**, V.P. Operations, **Roger Marlin**, President/CEO and **Barry Hyde**, Chairman, celebrate the company's 30th anniversary.

Stribling Equipment is proud to announce the grand opening of their new location at 10600 Interstate 30 in Little Rock. Be on the lookout for grand opening event information.

Hudson, Cisne & Co., LLP recently acquired **Newton, Owen, Boyd & Smoke, LTD**. This new partnership will create a state-wide network of **Hudson, Cisne & Co.** accounting services for each existing client base.

The **Hudson, Cisne & Co.** leadership team will grow to have six partners, ensuring joint representation of both organizations. In total, the firm will grow to nearly 60 staff members and will have 32 CPAs. Offices in **White Hall** and **Rogers** formerly of **Newton, Owen, Boyd & Smoke** will now operate as normal under the **Hudson, Cisne & Co.** name. The **Little Rock** office of **Hudson, Cisne & Co.** will continue to operate at the same location and serve as the firm's main headquarters.

Newton, Owen, Boyd & Smoke, based in **White Hall** and **Rogers**, offers payroll, sales tax, QuickBooks and outsourced accounting services. **Hudson, Cisne & Co.** provides a full range of accounting services, including but not limited to au-



Bennett



Browning



Cluck



Davis



Derungs



Eggburn



Eoff



Faulkner



Grant



Hubert



Kirby



Lilly



Reimer



Ronza



Runnels

dits, reviews, compilations, tax preparation, business valuations and retirement plan administration.

Sterling Risk Advisors, Inc. and Savannah, GA based Seacrest Partners, Inc. have merged to create **Sterling Seacrest Partners, Inc.** The newly merged firm will employ over 150 insurance agents and service team members with six offices throughout the Southeast United States. Sterling Seacrest Partners, Inc. specializes in construction insurance and surety bonding as well as employee benefits. This merger will provide our team with more resources and allow us to better serve our clients.

Caddell Construction Co. (DE), LLC is proud to announce the opening of a new office in historic downtown Bentonville, Ark., at 107 S. Main Street. Caddell's Bentonville team is focused primarily on private, municipal, and federal construction markets in Arkansas and surrounding states.

The **AGC Arkansas Education Foundation** received numerous impressive applications for college scholarships for the 2017-2018 academic year. Below are those who were selected to receive financial assistance totaling up to \$17,000 for the upcoming school year:

- **Will Cluck** – University of Arkansas
- **Joseph Eggburn** – UALR
- **Chris Ellison** – UALR
- **Emily Grant** – UALR
- **Noah Hubert** – John Brown University
- **Rachel Runnels** – University of Arkansas-Pulaski Tech
- **Magen Schlesier** – UALR

AGC of America's Education & Research Foundation recently announced the recipients for national scholarship dollars for the upcoming school year. We are pleased to report that two undergraduate commercial building students in Arkansas have been awarded scholarships:

- **Juran Smith** – UALR
- **Niklas Derungs** – John Brown University



Koontz



Caddell



Hydco



Jacks



Jones



Schlesier



Smith



Sweet



Wallace



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