Here’s To a Prosperous New Year

Dave Nelson,  
IMSCA President

Just a short note to wish all of you in the IMSCA membership a joyous holiday season and a prosperous New Year. I am very optimistic about 2018 and what appears to be ahead for the construction industry. I trust that your firm will enjoy a busy New Year.

Your IMSCA board continues to negotiate for our legislative goals and would like to hear your concerns. So much of what we have gained is a result of your input.

I would like to ask you to do a few things for us in 2018. It will make our job easier and let us serve you more effectively. The better our legislators know us the greater our influence.

First, contact your legislators regularly not only with your requests but also to thank them for something they have done that you agree with.

Second, letters are great but so are phone calls. Don’t be discouraged if you are not able to talk directly with your legislator. They will know of your call.

Third, attend legislative functions and fundraisers to show support of your local legislators. The dollar amount does not have to be great. The fact that you are on their list is important.

Fourth, if possible meet with them personally, and face to face is the best way to get to know them.

Fifth, let them know that you not only represent your local association but also are a part of a large group of contractors represented by IMSCA. The association (IMSCA) represents over 2,000 construction employers in Illinois.

I guess that sums up my request for your assistance as we work for a better year in 2018. Become active in your government affairs and work together for a better business climate in Illinois. We all know we have a lot to do, and we won’t get it all done in 2018, but let’s put a dent in it anyway.
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2018 LEGISLATIVE SCHEDULE
The Changing Landscape of Accommodating Marijuana in the Workplace

As the number of states legalizing and decriminalizing marijuana increases for both medical and recreational use, the legal ramifications of marijuana use continues to grow hazier. Regardless of the expansion at the state level, the simple fact remains that marijuana is illegal under federal law. The contradiction between federal and state laws creates complexities throughout the legal system, and few areas are affected more substantially than the workplace. As marijuana laws expand, so too do the ambiguities and issues for employers. Employers are faced with employees legally consuming marijuana under state law, while simultaneously violating company drug use policies, Federal Drug Free Workplace protections, and zero tolerance policies. Perhaps most perplexing for employers is whether or not there is exposure to a potential discrimination claim for refusing to accommodate marijuana use by an employee with a valid medical marijuana prescription. While years of precedent from various federal and state court proceedings seemed to indicate an employer was safe in terminating an employee for medical marijuana consumption, recent court decisions could be viewed as creating some doubt on this point.

A significant number of states have passed legislation to legalize marijuana for either recreational or medical use, a trend that continued on Nov. 8, 2016, as four more states passed recreational marijuana referenda and will begin the process of formally legalizing it, and three more approved referenda legalizing medical marijuana. Despite the various state laws permitting marijuana use for either medicinal or recreational purposes, marijuana remains a Schedule I drug under the federal law, the Controlled Substances Act, and thus illegal. Marijuana is also a controlled substance under the state law of all but a few states and the District of Columbia.

Decriminalization of marijuana for medical purposes at the state level has not altered the federal law. The U.S. Department of Justice (DOJ) issued a memorandum in 2009 reinforcing that state laws do not change marijuana’s illegal status under federal law, but directing U.S. attorneys to utilize their limited resources prudently, and to use discretion before prosecuting those using medical marijuana in compliance with their state’s statute. Accordingly, despite the changes to state laws, and the disinclination of federal law enforcement to pursue users behaving legally under state law, marijuana remains illegal at the federal level.

While the 2009 memorandum represented federal policy for the last eight years, DOJ enforcement priorities lie entirely within the

“Regardless of the expansion at the state level, the simple fact remains that marijuana is illegal under federal law”
purview of the attorney general. Attorney General Jeff Sessions has stated since taking his post that he will review and evaluate the federal marijuana enforcement practices, and that he would commit to enforcing federal laws regarding marijuana. Known for decades as a staunch opponent to marijuana, it does not appear likely that marijuana will be rescheduled at the federal level while Sessions sits atop the DOJ; however, the extent to which federal enforcement will, or perhaps will not change, remains to be seen. This has been a source of contention between Attorney General Sessions and Congress, where even members of Sessions’ own party have encouraged him not to upset the status quo of the current enforcement scheme. While Sessions has yet to make any progress on his rhetoric about stronger enforcement, that could change at any moment.

Marijuana legalization at the state level has caused a number of issues and uncertainties for employers, but perhaps none more so than its impact on the requirements of providing reasonable accommodations for disabled employees. The Americans with Disabilities Act (ADA), and other similar state anti-discrimination statutes, require that an employer must reasonably accommodate disabled employees, absent a showing of undue hardship by the employer. Medical marijuana statutes have thrown a wrench into traditional accommodation analyses. Plaintiffs in numerous states have challenged their termination for positive marijuana tests, asserting that the marijuana was a treatment for their respective disability, and thus either under the ADA, or the relevant state equivalent, the employers are required to accommodate their usage.

Under the ADA, current illegal drug users are not considered individuals with disabilities. The illegal use of drugs includes the use, possession, or distribution of drugs that are unlawful under the Controlled Substances Act. Accordingly, regardless of the various states laws, marijuana remains illegal under the Controlled Substances Act, and anyone using marijuana, medical or otherwise, is a current illegal drug user that is not entitled to a reasonable accommodation under the ADA. While no court at the federal level has caused an employer to violate the ADA by forcing an employer to accommodate use of a drug that remains illegal at the federal level, two recent decisions—one from the Supreme Judicial Court of Massachusetts and one from District of Connecticut—have cast doubt on whether reliance on federal law under the ADA is sufficient to dismiss a state law discrimination claim.

Until this year, no court had handed down a decision requiring an employer to accommodate marijuana use by an employee. State courts have denied claims under the ADA and their states’ corresponding statute, rejected claims of superseding public policy interests, and interpreted ambiguities in state statutes as complying with federal law. Federal courts have further declined to force employers to accommodate marijuana usage, determining that medical marijuana use does not fall within the ADA exception for drug use “authorized by other provisions of Federal law.” Others have merely interpreted the state law in question to allow private employers to discipline medical marijuana users if they so choose. But the decisions in Barbuto v. Advantage Sales and Marketing LLC and Noffsinger v. SSC Niantic Operating Company appear to have changed this convention.

What these cases illustrate is that the language of the state medical marijuana statutes is key. Most state laws, such as Illinois, Ohio, Georgia, and Washington, explicitly write out the obligation of employers to accommodate in the medical marijuana law itself. Other states, such as Arizona, Delaware, and Minnesota, have taken a contrary approach, and explicitly placed language in their statutes requiring employers to accommodate legal out of work marijuana consumption, unless the employer can show that the usage is negatively impacting performance or job responsibilities. Other states’ statutes fall somewhere in the middle, stating that employers are not required to accommodate any on-site medical marijuana use at any place of employment. Further, some states, such as New York, write into their state discrimination statutes that a certified patient under the medical marijuana statute has a disability. Yet to be seen is how these cases will progress and how other courts will apply these holdings.

The trend is fairly blunt: Marijuana is becoming legalized both medically and recreationally in an increasing number of states. As the states continue to expand marijuana programs, and the federal government maintains its stance of illegality, these complex issues will continue to grow. One thing remains certain: This new and exciting area of law is only going to expand, and employers should continue to re-up on the issue.
Has your company ever had a worker’s compensation injury whereby your company paid the medical bills and did NOT report the claim to your worker’s compensation carrier?

The worker’s compensation statute requires all work related injuries be reported to the employer’s respective worker’s compensation carrier as quickly as possible.

Prompt Reporting of Claims: The insurance industry will confirm that when a claim is reported promptly and they are able to contact the injured worker very quickly the odds are in favor of the injured worker not retaining an attorney and therefore, keep claims cost lower.

Some employers will pay the medical expenses in order to not affect their loss ratio and/or their experience modification calculation.

Understanding why a company would self-pay, I hope you will find it helpful to know what exposure your company has so you can make the best decision for your company.

**SCENARIO:** An employee is injured on the job and your company pays the medical bills and does NOT report the claim to the worker’s compensation carrier.

**RESPONSE:** By not reporting the claim to your insurance carrier, your company violated the insurance agreement between your company and the carrier. At a later date, if the claim becomes more serious and therefore more complicated (i.e. Surgery, Adjustment of Claim etc.) and then your company reports the injury to their worker’s compensation carrier, your carrier has the right to either accept or deny the claim. Since your company self-paid your company acted as the insurance company. (This applies to all insurance policies).

**RECOMMENDATION:**
1. Report all claims to your carrier so your carrier can obtain the proper discounts on the medical bills.
2. Discuss with your carrier to find out if they will accept your company reimbursing them for medical expenses.
   a. This will reduce the medical expense your company would pay; improve your company’s loss ratio and most importantly your company has complied with the policy provisions of prompt reporting and avoided the chance of your carrier denying the claim if it becomes more complicated at a later date.
   b. By reporting the claim promptly to your insurance carrier your company is also complying with the IL Worker’s Compensation Statute.
   c. By allowing your carrier to pay the medical bills, your company would also avoid potential exposure under the Secondary Payer Statute.

Not all carriers will allow reimbursement. If your carrier will not allow reimbursement and your company still desires to pay the medical bills you should talk to your carrier to allow your company to report the injury for “Notice Only”. Your company would be responsible for trying to negotiate discounts on the medical bills with the medical providers. This is not recommended because when an insured self-pays they now have the “Secondary Payer” exposure they need to consider.

What is the SECONDARY PAYER STATUTE? The Secondary Payer Statute was

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There is a trend in the few years with hackers and cyber criminals – they are now turning much more of their efforts to smaller businesses instead of large enterprise corporations. Why? Because small business networks often offer a much easier “lock” to pick, unlike large enterprises who invest far more money and other resources into high security for their network.

“As the security becomes better at large companies, the small business begins to look more and more enticing to computer criminals,” said Charles Matthews, President of the International Council for Small Business, “It’s the path of least resistance.”

**THINK YOUR NETWORK IS SECURE? TAKE A LOOK AT THESE SURPRISING STATISTICS:**

- One-fifth of small businesses don’t have up-to-date antivirus software installed.
- Sixty percent don’t encrypt their wireless links.
- Two-thirds of small businesses don’t have a security plan in place.
- Eighty-five percent of the fraud occurs in small and medium-sized businesses.

Computer users never seem to give enough attention to online security and protection UNTIL a virus or a hacker renders their computer useless or destroys their data. Once this happens, it can be very expensive if not impossible to repair the damages done.

**WHY IS SECURITY SO POOR FOR SMALL BUSINESS? PRIMARILY FOR TWO REASONS:**

First, lack of knowledge. Most small businesses believe that nothing could ever happen to them, and therefore don’t take the necessary precautions to secure their network, monitor their systems, and train their staff.

The second reason is that they are being cheap in the wrong places. Some simply refuse to spend money on securing their network. That’s akin to having a beautiful home full of expensive furnishings and valuables, but refusing to buy a good lock for the door because it “costs too much.”

**SO WHAT SHOULD YOU DO AT A MINIMUM TO PROTECT YOUR COMPANY? HERE ARE 10 FUNDAMENTALS:**

1. Educate your users on security basics such as using strong passwords, shutting down PCs at night, and not downloading “cute” screen savers and illegal music. Some companies make computer security rules part of their standard HR policies and make each employee sign that they understand the rules.
2. Educate your users on common things to look for to prevent phishing attacks.
3. Install a web filtering software to police
users and prevent accidental (or intentional) slip-ups on the above-mentioned usage policies and browsing to web sites that are prone to introduce viruses.

4. Install a good virus protection system on all computers on your network and maintain it.

5. Make sure your email has a quality spam filter as the first line of defense for phishing attacks.

6. Install a firewall and check the logs periodically.

7. Remove all unessential services and applications installed on your servers. After e-mail, this is probably the biggest security vulnerability. If a hacker gets in, this will reduce their ability to use a forgotten service or application to exploit your network.

8. Keep all your servers updated with all the latest security patches.

9. Never keep any of the manufacturer’s default settings on any of the appliances or software you install. Hackers know what these settings are and will use them to gain easy access to your network. This item nags more systems administrators than care to admit.

10. A backup system that takes “snapshots” of your data and system files at least two to three times per day and then sends those backups overnight to a secure data center.

Most companies have some sort of firewall and anti-virus software that is regularly updated and sometimes get a false sense of security that those two factors by themselves will prevent problems. The actual biggest risk comes from items one through three, which are all user-driven. While very few people enjoy having a complex password and having to attend training class, or having restrictions on their Internet browsing, those issues are the weakest link in your security.

This training and software is a small price to pay for the peace of mind you’ll have over your network’s security. And since better than 80% of all security breaches happen because of an end-user mistake, you’ll also be taking a big step towards protecting your assets.

“While very few people enjoy having a complex password ... attend training class, ... restrictions on their Internet browsing, those issues are the weakest link in your security”

Report or Not Report?... That is the Question (continued from page 4)

authorized by the Social Security Act and states that Medicare benefits are secondary to the following lines of insurance:

- Worker’s Compensation
- General Liability and Medical Payments
- Automobile Liability and Medical Payments
- Excess Liability
- Professional Liability
- Self-Insured Plans
- Group Health Insurance

Basically, if the injured party becomes Medicare eligible either by age or disability within 30 months from date the claim is closed, Medicare will file for reimbursement from the PAYER OF MEDICAL BENEFITS.

Section 111 of the Secondary Payer Statute requires the Responsible Reporting Entity aka RRE which can be the insurance carrier or a self-insured entity to report claims to Medicare and Medicaid or CMS which oversees Medicare. If the injury is a worker’s compensation claim, the RRE must report to the IL Industrial Commission if the injured worker misses 3 working days to comply with the IL Worker’s Compensation Statute in addition to file the claim with Medicare/Medicaid to comply with Section 111 of the Secondary Payer Statute.

The Responsible Reporting Entity (i.e. insurance company, self-insured employer or company that self-pays medical bills) must register with the Coordination of Benefits Contractor (COBC).

A penalty for not reporting or late reporting claims to CMS is $1,000 per claimant/day of noncompliance. This penalty is in addition to the other risks such as Medicare reimbursement and/or the costs associated if your carrier denies picking up the claim at a later date.

This is very complicated and to be safe, you should discuss with your carrier to see if they would allow you to reimburse them for incurred medical costs.

If your insurance company will not allow reimbursement the benefits of reporting all claims to your insurance carrier far outweigh the risk of self-paying and not reporting the claim.

Your company purchases insurance for protection from insured exposures. To avoid the exposures mentioned in this article, REPORT EVERY INCIDENT to your insurance company to comply with applicable State and Federal reporting laws.
A recent Illinois Appellate Court decision, AUI Construction Group, LLC v. Vaessen, threatens mechanics lien rights for contractors, material suppliers and subcontractors based on the misclassification of improvements to land as personal property, and the reluctance of Illinois courts to permit mechanics liens against easements. The case decided that a subcontractor who built a large tower supporting a wind turbine had no right to a mechanics lien and so could not recover $3.5 million owed for its work on the tower based on a determination that the tower was personal property and not an improvement to real property.

The developer, GSG 7, entered into an agreement with the owners of farmland, Louis and Carol Vaessen, to develop a wind energy system on their property. The Vaessens granted GSG 7 an easement (similar to a lease) to build and operate a series of large wind turbines on towers. Under the agreement, GSG 7 paid the Vaessens $7,500 per year for GSG 7 to have the right to operate its wind energy system on their property. GSG 7 entered into a contract with Clipper (original contractor) to furnish and install the wind turbine and tower to support the turbine. Clipper, in turn, entered into a subcontract with Postensa Wind Structures US, LLC (subcontractor) to supply the tower. Postensa, in turn, contracted with AUI (sub-subcontractor) to construct the foundation and tower as part of Postensa’s subcontract obligations. Upon completion of the work, AUI was owed a balance of $3.2 million. Unfortunately, Postensa filed a petition in the United States Bankruptcy Court and, AUI was unable to recover from Postensa the unpaid balance due for its work.

AUI filed a complaint to foreclose its mechanics lien against the landowners, Louis and Carol Vaessen and against the easement right of the developer GSG 7. AUI claimed that its work in constructing the tower that supported the wind turbine was a valuable and permanent improvement to the landowners’ property, and that the landowners had benefitted in an amount equal to the balance due to AUI under its contract with AUI.

The trial court agreed with the landowners in deciding that AUI’s mechanic’s lien could not be enforced because the tower was a “trade fixture” rather than a “fixture” and, as such, it was not considered a permanent improvement to the real estate. The Illinois Appellate Court agreed with the trial court, basing its ruling largely on the agreement between the developer and the landowners which described the wind turbines as items that could be removed by the developer.

The appellate court considered that it would be impractical to remove the turbines; in fact, it would require explosives that would substantially diminish the value of the tower and turbine. So, even though, in reality, the developer likely had no intention of removing the large towers and turbines, the fact that the parties’ agreement gave them permission to do so changed the character of the improvement from real property to personal property and, since a mechanics lien

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cannot be enforced against personal property, AUI had no lien rights.

The court observed that the tower was over 500 feet tall with a substantial underground structure which was clearly needed to support the wind turbine. Nevertheless, the court decided the “intent” of the parties as expressed in their agreement “strongly weighs” in favor of the tower being a trade fixture and not an improvement to the real estate. The court held that, because the agreement between the landowners and the developer permitted the developer to remove the tower and wind turbine on top of it, it must be personal property.

The court also decided that because the developer had an easement rather than a leasehold interest in the property, the developer did not have a sufficient property right to contract for improvements that would encumber the property with a mechanics lien. The appellate court was unwilling to accept AUI’s argument that the easement was in essence a lease and therefore, work done for the developer should support a mechanics lien claim.

The court’s holding in AUI Construction Group v. Vaessen should be troubling to contractors, subcontractors and material suppliers who occasionally depend on mechanics lien claims to secure payment. Lien claimants would prefer an approach that would permit a mechanics lien if it was impractical to remove the improvement. If the cost of removing an improvement to property is prohibitively expensive and unlikely to occur, and the value of the improvement is far greater if it remains in place, the court might place more emphasis on those practicalities as indicative of the parties’ real intent, despite a provision to the contrary in the lease or grant of easement. Moreover, if an easement right has mostly the same characteristics as a lease, it should support a mechanics lien. The AUI court observed that the land owners received minimal benefits from the developer for allowing the wind energy system to be built on their property, so it would be unfair to make them liable. Of course, the court is right to consider the fairness of the result, but imposing the mechanics lien on the developer’s interest in the wind turbine and tower would have permitted recovery for AUI while imposing the payment obligation on the developer – the party receiving the benefit of AUI’s work. The fairest outcome would permit mechanics liens despite an unrealistic provision in a private agreement and even though the contracting party’s interest is characterized as an easement.

In the wake of the AUI holding, contractors and subcontractors providing labor and materials on structures that could conceivably be deemed trade fixtures or personal property should consider finding another way to secure payment. They might insist on a surety bond or a guarantee from developers and owners to make payment for their contributions. Consultation with an attorney before making such an investment would be a good way to manage potential risk.
A Look Ahead at the 2018 Election Season

2018 is an election year for Illinois. The primary election will be held March 20th followed by the general election November 6th. We should all prepare ourselves for a very “noisy” election cycle. Illinois is poised to spend the most money in our nation's history for our upcoming gubernatorial election. There will also be a lot of activity in House and Senate districts throughout the state.

IMSCA staff has previously reported on the ongoing dysfunction that exists in our state capitol. The toxic political environment that has existed for a few years is the result of Governor Rauner and Speaker Madigan refusing to work with each other in a meaningful way for the betterment of our state. The ongoing disagreements between the Governor and the Speaker has created problems for Illinois that will take years for us to recover from – specifically the budget impasse that lasted nearly three years. Another result of their behavior is an unprecedented amount of announced retirements from elected officials in the Statehouse.

So far, nearly 40 legislators in the General Assembly have announced they don’t plan to run for re-election. That’s 40 elected officials who are not coming back by choice and we will likely see more announcements in the future. The list of those who have announced includes high-profile names such as Senate Republican Leader Christine Radogno and House Majority Leader Barbara Flynn Currie. The list also includes many other legislators who were supportive of IMSCA’s mission including Rep. David Harris, Rep. Bob Pritchard, Rep. Elaine Nekritz and Rep. Carol Sente.

What can this mass exodus of legislators be attributed to? It’s clear that many of these members are fed up and completely exhausted with Springfield’s toxic

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A Look Ahead at the 2018 Election Season  
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political environment. Many legislators who announced their retirements voted for the income tax increase and were expecting brutal re-election campaigns in 2018. Another factor is Governor Rauner's obsession with defeating as many House Democrats as possible to cripple Speaker Madigan's control over the House. Legislators in these districts simply didn't have it in them to continue the ongoing fight and preferred to leave instead of getting beat up on the campaign trail.

Additionally, some legislators have decided not to run for re-election in the General Assembly in hopes of being elected to higher office, such as Rep. Stratton and Rep. Wallace who are both running for Lieutenant Governor. Rep. Drury and Sen. Raoul are both running for Attorney General after AG Madigan announced that she too is not seeking re-election. Sen. Biss is giving up his Senate seat to seek the Democratic nomination for Governor.

This amount of turnover, coupled with any losses during the election cycle means we will see a lot of brand new faces in the General Assembly in the near future. This also means that most of us will play a role in choosing who those new faces will be. I encourage all members of the construction industry to participate in our upcoming elections. I encourage you to start educating yourselves on the candidates who are going to be asking for your support. It is your right as a citizen to vote, and I hope you exercise that right. Choosing strong and capable leaders for our state is not only important to your business as a sub-contractor, but also for the future of our state. If you have questions regarding candidates as the upcoming election season progresses, please don't hesitate to reach out to IMSCA staff. Also, if you are not currently registered to vote, IMSCA staff is happy to help you get registered.

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The Spring 2018 legislation session will adjourn May 31st.