



BASSFORD REMELE

# Legal Foundations

A Publication of the Construction Practice Group

VOLUME 2, ISSUE 2

**JULY 2024**

**The Uncertainty of  
Construction Costs**  
How Can you Adapt?

**The Corporate  
Transparency Act**  
Is on Appeal!

**Independent Worker  
Classification and Earned  
Sick and Safe Time**  
Changes Impacting  
the Industry



# From the Practice Group Chairs

“Change” is a key theme in this edition of *Legal Foundations*. We are proud to announce that positive change is starting right here within our firm.

This spring, the firm elected **Jessica Klander** as its new Managing Partner. **Kyle Willems** and **Casey Marshall** were elected to the firm’s Board of Directors joining **Mark Whitmore** (CEO), **Jeffrey Mulder** (CFO), and **Daniel Olson** (member-at-large).

We are also excited to announce the addition of seven new shareholders. Associates **Tal Bakke** and **Bryce Riddle** were elevated to shareholder at the start of the year. Bryce is a member of the construction practice group, focusing specifically on complex litigation matters such as directors and officers liability, contract disputes, financing disputes, and data privacy.

Five other shareholders come to us from highly respected firms, bringing a wealth of experience across various practice areas:

- **John Holper (formerly Winthrop & Weinstine):** Bolsters our construction and real estate practice, having previously practiced at his former firm for 29 years and led its group in this area. (See a more detailed feature on John Holper on page 4.)
- **Wynne Reece (formerly Dallas-based Thompson, Coe, Cousins & Irons):** Leads our Corporate and Transactions Group and our capabilities in business formation, buy-sell agreements, client relations and disputes, investor growth strategy, intellectual property, and real estate. (See a more detailed feature on Wynne Reece on page 5.)
- **Randy Sparling (formerly Felhaber Larson):** Further strengthens our transactional practice, with substantial experience in business acquisitions and dispositions, and assisting clients in debt and equity financing transactions.
- **James Reece (former founder of Zelle LLP):** A seasoned trial attorney who has represented several Fortune 500 companies on some of their most important and complex cases.
- **John Schulz (formerly McGrann Shea):** A National Board of Trial Advocacy Family Trial Law Advocate and Minnesota State Bar Association Certified Civil Trial Senior Specialist, allows us to offer comprehensive family law services.

Change also came to several Minnesota statutes that impact the construction and real estate industries, as well as notable changes at the federal level.

## Minnesota:

- **Independent Worker Classification:** The historic 2024 legislative session brought modifications to the statutes governing independent worker classification. See Janine Loetscher’s analysis on page 12 for more details.

- **Earned Sick and Safe Time:** Changes were also made to paid family and medical leave, and earned sick and safe time. Beth LaCanne breaks down these updates on page 14.

**Federal Level:**

- **Corporate Transparency Act (CTA):** A recent federal court injunction impacts certain portions of the CTA. Kyle Willems, Wynne Reece, and James Kovacs dive into the judge's ruling and its implications for your CTA compliance obligations on page 10.

You will also find an article on "Adapting to the Uncertainty of Construction Costs." John Holper and Michael Pfau discuss why price escalation clauses are more vital than ever on page 8.

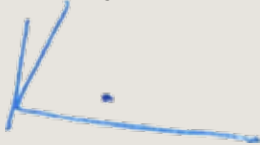
**We're proud to announce that the firm and our practice group has received a few recognitions in the recent reader's choice awards from leading publications, solidifying our position as a trusted partner for your legal needs:**

- **Finance & Commerce & Minnesota Lawyer:** Voted #2 Best Construction/Real Estate Law Firm; Voted #1 Best Litigation Valuation
- **Twin Cities Business:** Ranked in the Top 3 for Real Estate & Construction Law (Gold, Silver & Bronze will be awarded in August)

Lastly, we hope that you save the date for our Mechanic's Lien Primer. It is scheduled for Thursday, October 3, 2024, at our office. More details will be sent out in an invitation.

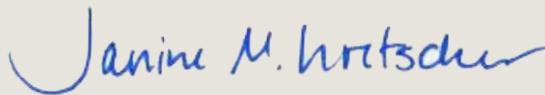
Thank you for your interest.

Best regards,



Kyle Willems

*Construction Practice Group Co-Chairs*



Janine Loetscher



# Team Member Intro

## JOHN HOLPER

### Where are you from?

I was born in Rochester, New York, and grew up in Cottage Grove, Minnesota.

### What do you do in the real estate and construction industry?

I am a construction and real estate trial attorney with experience representing commercial and residential owners, commercial landlords and tenants, lenders, business entities, developers, contractors, subcontractors, material suppliers, architects, and engineers. I work with my clients not only when a dispute arises, but also on the front end by applying this litigation experience to help draft and negotiate construction-related contracts in order to manage risk and avoid litigation. I am experienced and possess expertise in such areas as construction contract formation, review and disputes, construction defects, warranty issues, mechanic's liens, surety, payment and performance bonds, contractor licensing and governmental enforcement proceedings, insurance coverage disputes, landlord/tenant disputes, easements, boundary disputes, condemnation, and restrictive covenants.

### How would you describe your job to a five-year-old?

I help people who aren't getting along.

**Can you tell us about your recent awards?** I was included in the *Best Lawyers in America* for construction litigation and construction law in 2023 and 2024.

### What was your first job?

Door-to-door newspaper delivery

### What did you want to be when you grew up?

Besides a professional football player, I knew from an early age I wanted to be a lawyer.

### What is the best superpower? Flying

**If you could pick up a new skill in an instant, what would it be?** To play guitar

### Have you ever met anyone famous, and who?

Jordan Speith at the Heritage Golf Tournament during a rain delay.

### You can only eat one food for the rest of your life.

**What is it?** Cheesy hashbrowns with frosted flakes on top (my vice).

### What is a weird food you have tried? Fried alligator

**If you could live in any state, which state would you pick and why?**

In the last year I have grown to love Tennessee (Nashville). The music, the vibe and the weather are great. It's hilly and has lakes and is easy to travel to and from. No income tax is a bonus.



### Favorite place you have ever visited?

Hawaii, Kona on the Big Island.

### What is on your bucket list?

I want to travel to and visit Australia.

### Favorite family tradition?

Annual (sometimes semi-annual) ski trip out west (usually Big Sky) with my boys and my sister and her family.

### Have you had your 15 minutes of fame yet?

Not yet. Still waiting for it.

### Do you collect anything?

Golf balls from all the courses I have played. This includes my one and only hole-in-one ball.

### Favorite season? Fall

### Favorite thing you've bought in the past year?

An empty lot near Diamond Lake. I am in the process of planning to build a house on the lot.

### Favorite charity you wish more people knew about?

Camp Knutson, which is a summer camp for children with physical, mental, and emotional health issues located in Cross Lake, MN.

**What is one thing that people would be surprised to learn about you?** I was in a plane crash on a fishing trip to the Artic Circle.

### Anything else you can think of?

I am very competitive and don't like to lose. I gave up playing video games with my boys when they were young because I could not figure it out and they always beat me.

# Team Member Intro

## WYNNE REECE

### Where are you from?

I was born and raised in Minneapolis, and now reside in Excelsior. With that said, part of my heart has always been in the mountains, and while I have only traveled to the collective *them*, I expect that one day you may find me on a ranch, with a horse or two, in the Rockies.

### What do you do in the real estate and construction industry?

As corporate counsel, I've worked on a project basis or as outside general counsel for several design-build firms, contractors, suppliers and manufacturers, which includes drafting, advising on client positioning, vendor relationships, team composition, protection of intellectual property, and risk mitigation. I also counsel in growth strategy, mergers, acquisitions and business succession planning. There is not much that I haven't done from a corporate counsel perspective in this space.

When it comes to real estate, I advise on property portfolios, support in the sale or acquisition of residential and commercial real estate, draft and/or negotiate lease agreements (sublease, lease, transfers, assignment, and short-term rental), and draft tangential, situation specific documents.

### What did you want to be when you grew up?

So very many things – a ballerina, a plastic surgeon for Doctors Without Borders, an owner of many dogs (*yes, as a profession*), and the list goes on. I have always been equal parts dreamer and Type A, which is also perhaps what sets my approach to the law and corporate representation apart.

### What is the best superpower?

The ability to take sickness, pain and anguish away from others. Don't get me wrong, I firmly believe that enduring painful situations makes us stronger and is core in the developmental process, but the two can mutually exist.

### If you could pick up a new skill in an instant, what would it be?

It would be invaluable if I had the skill to look at any situation and within moments, observe, analyze and resolve, akin to Benedict Cumberbatch's Sherlock character, but the dreamer in me would genuinely love to be able to play guitar really well.

### You can only eat one food for the rest of your life.

#### What is it?

Potatoes. Oh, the things that you can make with potatoes!

### If you could live in any country, which would you pick and why?

Canada, to live—specifically Montreal, but to visit and be in, Banff (*and most anywhere*)! From the



breathtaking Canadian Rockies to the picturesque coastlines of the Atlantic and Pacific Oceans, every bit of Canada is both calming and humbling. Additionally, Canada's multicultural society embraces adventure, outdoor recreation and living, diversity, fostering a rich cultural mosaic that celebrates various traditions and backgrounds. Whether it is camping or staying in the heart of a city, there hasn't been a Canadian experience that I haven't loved.

### Favorite family tradition?

Our general family tradition of cribbage tournaments is close to my heart because of the memories it holds from my childhood, but also in that it brings generations together and unearths stories that are foundational to our family. The shared experience of playing and celebrating victories, along with the camaraderie and laughter, makes it a beloved and meaningful tradition.

### Favorite season?

Fall, without question! I love the rainy, cozy season and any excuse to wear a great sweater.

### Favorite charity you wish more people knew about?

The International Justice Mission which combats human trafficking. Its mission "is to protect people in poverty from violence by rescuing victims, bringing criminals to justice, restoring survivors to safety and strength, and helping local law enforcement build a safe future that lasts".

### What is one thing that people would be surprised to learn about you?

I throw out the instructions from Lego sets and build from the picture—I *heard the gasps from the builders in this readership!* I enjoy the challenge.

# Bassford Remele in the Community

## Association of Women Contractors Scholarship FUNdraiser Golf Event



*Photo caption, left to right, from back*

**Amanda Kelsey, Associate-at-Large, AWC**  
Project Manager, PCL Construction

**Janine Loetscher, Legal Advisor, AWC**  
Shareholder and Construction Practice Group  
Co-Chair, Bassford Remele

**Kendra Kron, Past President, AWC**  
Owner, InSite Contracting

**Karen Aho, Woman-Business-Owner-at-Large, AWC**  
Owner, Dell-Comm

**Devi James, Vice President, AWC**  
President, Minnesota Demolition Co. & Scrapbusters

**Kathy O'Connell, President, AWC**  
President, Elevator Advisory Group

**Ashley O'Neill, Associate-at-Large, AWC**  
VP Marketing, HR & BD, O'Neill Electric

**Glen Miron, Secretary, AWC**  
Client Executive, Holmes Murphy & Associates

**Barb Lau: Executive Director, AWC**

**Minnesota Builders Exchange**  
Bassford Remele, member

**NAIOP Minnesota | Commercial Real Estate  
Development Association**

Kyle Willems, John Holper and Bryce Riddle,  
members

**Minnesota Real Estate Journal**  
Mid-Year Forecast Summit, sponsor

## Let's Play Hockey!

The 26th annual Barrister's Cup, which pits hockey-playing lawyers from Ramsey County, Hennepin County, Duluth, and Thunder Bay, Ontario against one another in a grueling and competitive one-day tournament, took place this spring. Lawyers from Hennepin County graciously hosted at the world-famous Mariucci Arena on the University of Minnesota campus.

Team Ramsey County, with the help of Bassford attorneys Steve Sitek and James Kovacs (Kyle Willems played in the Cup last year), took first place after defeating a strong group from the Iron Range and their neighbors from Hennepin County. Fans were treated to some fantastic hockey and cheered on these outstanding hockey players! Bassford looks forward to contributing towards another Barrister's Cup victory next season.



*Photo caption, left to right*

James Kovacs, Steve Sitek and Kyle Willems

# Accolades



Bassford Remele received a Metropolitan Tier 1 “2024 Bet-the-Company Litigation” ranking by *The Best Lawyers in America*.



**Kyle Willems** was a Real Estate Lawyer of the Year finalist for the 2022 and 2023 Minnesota Real Estate Awards. He has been named to the Minnesota Rising Stars list by *Super Lawyers* and Best Lawyers: Ones to Watch. Kyle has also been selected to the *Minnesota*

*Monthly* Top Lawyers list in Construction Law and Construction Litigation. This list was generated from a survey collectively run by Professional Research Services and *Minnesota Monthly* in which actively practicing attorneys were eligible to vote for their fellow attorneys that they believe are the best in their field of law. Kyle serves on the Minnesota State Bar Association Construction Law Section Council.



**Steven Sitek** was selected to the *Minnesota Super Lawyers* list and named to *The Best Lawyers in America*. Steve is a Minnesota State Bar Association Certified Civil Trial Specialist, a certification awarded to less than 3% of trial attorneys in Minnesota.



**Wynne Reece** was named to the Top Woman Lawyer list by *Minneapolis/St. Paul Magazine* and to the Minnesota Rising Stars list by *Super Lawyers*. Wynne is also recognized as a North Star Lawyer by the Minnesota State Bar Association (“MSBA”) and serves as a MSBA Mock Trial Committee Member.



**Janine Loetscher** was named the 2024 Top Woman in Construction in the Professional Services category by *Finance & Commerce*. She was also named to the *Minnesota Super Lawyers* and *Best Lawyers* lists. Janine serves as the Legal Advisor to the

Association of Women Contractors.



**Bryce Riddle** was named to the Minnesota Rising Stars list by *Super Lawyers*.



**Andrew Marshall** was named an Attorney of the Year by *Minnesota Lawyer*. Andy is committed to serving the community in which he works and lives and is also recognized as a North Star Lawyer by the Minnesota State Bar Association.

The program recognizes members who provide 50 hours or more of pro bono legal services per year to people who otherwise could not afford representation. Andy was also selected to the *Minnesota Super Lawyers* list and is rated AV Preeminent® by Martindale-Hubbell®.



**James Reece** was recognized as a North Star Lawyer by the Minnesota State Bar Association.



**John Holper** was named to *The Best Lawyers in America* in construction law and construction litigation. John has also been selected to the *Minnesota Super Lawyers* list and *Minnesota Monthly* Top Lawyers list. He is rated AV Preeminent® by Martindale-Hubbell®.



**Beth LaCanne** was named to the Minnesota Rising Stars list by *Super Lawyers*. Beth is in her second year of a four-year term serving on the Commission on Judicial Selection for the Tenth Judicial District. Beth is also a Board Member and Secretary of the Hennepin County Bar Foundation. Beth is a member of

the American Bar Association Forum on Construction Law, Division 6, Labor & Employment Section.

# Recent Articles

## Adapting to The Uncertainty of Construction Costs: Why Price Escalation Clauses Are More Vital Than Ever

By John C. Holper and Michael J. Pfau

Long over are the days of predictability in construction prices. The construction industry witnessed prices drastically fluctuate throughout the COVID-19 pandemic. Unfortunately, that reality has remained. Contractors and owners alike have not fully adapted to this new reality, instead relying on old form contract clauses that give a false sense of protection. These clauses generally fall short, and the new reality demands a new approach.

### Price Volatility in the Construction Industry

Prices in the construction industry are at the mercy of varying factors, whether it be the price of raw materials, labor, equipment, or gas and energy that affect the transportation of materials. In effect, this can drastically increase or decrease the costs during the course of the project.

Labor availability and price increases for construction materials and other inputs remains the top two concerns for the construction industry as a whole outside of customer demand. The U.S. saw construction costs increase at an average of 4% in 2023 and costs are set to increase between 3-6% in 2024. In Minneapolis, the cost is predicted to escalate by 4.5%.

### The Status Quo of Construction Contracts

Price volatility has meant that certain materials can see a drastic increase in cost during a project and before a contractor has ordered such materials, often leaving them with the burden. Generally, construction contracts are either cost-plus contracts or a fixed-price contract. In a cost-plus contract, the owner agrees to pay the contractor's direct and indirect expenses plus an additional, separate fee representing the contractor's profit. Due to the uncertainty of costs, this option often leaves owners feeling apprehensive to choose this option. On the other hand, under a fixed-price contract, the owner and contractor set a fixed price to complete the project. This type of contract relies on change orders to deal with the change of scope or prices of materials. Obviously, this option is advantageous for owners but increases risk for the contractor who may either underestimate the total price or be faced with rapid increased prices in materials.

As previously mentioned, one method that has been used to combat price increases is by executing a change order. While simple in theory and par for the course as the owner revises the scope of work or unforeseen circumstances such as surprise foundation



Price escalation clauses are unique in that they protect both contractors and owners by allocating risk up front for unanticipated and/or uncontrollable price fluctuations in material or other costs.

issues necessitate it during the project, owners may not be amenable to signing a change order to increase the cost simply due to the increase of material costs during the project. This predicament increases the risk of a dispute between the owner and contractor down the road.

Another commonly relied upon clause is the *force majeure* clause, which may allow the contractor to an equitable adjustment of the contract price caused by unforeseen circumstances beyond the control of the contractor. While this was certainly applicable during the COVID-19 pandemic, courts around the country have made clear that a *force majeure* clause generally will not protect contractors for rapid price increases due to market volatility absent express language in the *force majeure* clause.

### Protecting Both the Contractor and the Owner: Price Escalation Clauses

Price escalation clauses are unique in that they protect both contractors and owners by allocating risk up front for unanticipated and/or uncontrollable price fluctuations in material or other costs. If prices increase, the owner must pay accordingly, and the contractor's bottom line is protected. Contrarily, if prices decrease, the owner enjoys the benefit, and the contractor still retains its profits. In either scenario



both sides can make business decisions regarding the level or risk they are willing to bear with respect to unanticipated and/or uncontrollable price escalations after the contract is signed.

To be effective, a price escalation clause should set a baseline price as established by the schedule of values, an escalation ceiling price, and an escalation floor price. It should also be reciprocal and include language that protects both contractors, increasing the baseline price in the event of cost increases, and owners, decreasing the baseline price in the event of cost decreases. Moreover, the price escalation clause should state that any changes, increases or decreases, to the baseline price are based on an objective index, such as a consumer or producer price index, which the parties agree to during the contract formation stage.

Price escalation clauses are generally conditioned on an increase in prices based on a percentage rather than a set sum. The clauses should also include language that protects the owners so that any price increase is not the result of the contractor, such as by contractor unexcused delays in ordering materials. Some clauses will specify materials for which it would apply to such as lumber, plywood, steel, sheet metal, fuel, manufactured products, etc. Thus, the price for any materials to be used on the project increases by a certain percentage or more between the time the contract is signed and materials for the project are purchased. In such a case, the owner shall pay to the contractor, on request, all sums by which the cost to the contractor for any item of materials has increased beyond the certain percentage.

Price escalation clauses offer protections for both the contractor and owner that a typical cost-plus contract lacks. The cost-plus contract still leaves open the uncertainty of costs and does not offer the general price base line and protections that a price escalation clause does.

### Conclusion

Because price volatility in construction projects is here to stay, relying on old contract clauses often fails to fully afford protections to both the contractor and owner. Incorporating price protection clauses into construction contracts, especially those in connection with prolonged projects, will ensure both the contractor and owner are protected from price volatility. Moreover, price protection clauses will bring a level of certainty in terms of risk and avoid potential disputes as the project proceeds.

[The full article, including footnotes, can be accessed on the Construction Practice Group page at bassford.com.](#)



## Case Law Update

### **Bassford Defends the Construction Industry's Interests Before the Minnesota Supreme Court**

Bassford Remele construction practice group co-chair Kyle Willems and team members Jim Kovacs and Michael Pfau have teamed up with the Associated General Contractors of Minnesota (AGC) and Minnesota Asphalt Pavement Association (MAPA) to defend the construction industry's interests before the Minnesota Supreme Court.

AGC and MAPA jointly support a road construction contractor's appeal to the Minnesota Supreme Court to reverse a Court of Appeals decision that increases uncertainty in the construction industry's time-tested practices for evaluating business risks, bidding, and contracting.

In this case, a highway contractor won a MnDOT bid for roadwork, but its haul routes were rejected because, per the jury, MnDOT wanted to accommodate a county official's concerns about the impact on the road and difficulty working with MnDOT. Changing the haul routes increased the cost of the project about 20% and MnDOT denied a change order. The contractor sued and the jury agreed with the contractor, finding that MnDOT breached the implied covenant of good faith and fair dealing. MnDOT appealed, and the Court of Appeals reversed in a precedential opinion. If the case stands, it threatens to significantly undermine the bidding process—essentially giving owners or developers, including MnDOT, huge discretion to change the scope of work or risks without compensating the contractor.

[A copy of Bassford's petition for amicus can be found on the Construction Practice Group page at bassford.com.](#)

# Recent Articles



## **The Corporate Transparency Act is on Appeal! How That Impacts Your Business Plans**

By Kyle S. Willems, Wynne C. S. Reece and James C. Kovacs

The Corporate Transparency Act (“CTA”), which went into effect January 1, 2024, represents a significant shift in the regulatory landscape for small businesses in the United States. It is aimed at increasing transparency in corporate ownership to combat illicit activities. More specifically, enacted as part of the National Defense Authorization Act for Fiscal Year 2021, the CTA mandates the reporting of beneficial ownership information to the Financial Crimes Enforcement Network (“FinCEN”), to make it more difficult for individuals to use complex corporate structures to facilitate illegal activities, evade taxes, or launder money.

As is common with new laws, the CTA is currently being challenged in the courts. This article is intended to summarize what the CTA is, why it is being challenged, its current legal status, and what you should do moving forward.

### **The CTA: A Primer**

The CTA is a law that requires certain businesses and their owners to disclose information to FinCEN. The CTA applies to any entity that can be defined as a “reporting company”, which is any domestic or foreign entity that registers to do business in the United States by filing a document with the Secretary of State or similar office. Common types of reporting companies include limited liability companies, limited liability partnerships, and business trusts.

If a company can be defined as a reporting company, the “beneficial owner”, on behalf of the reporting company, must timely file a beneficial ownership information report (“BOI Report”) with FinCEN. The reporting company must also monitor its BOI Report to make sure it is up to date and accurate. Noncompliance with the CTA’s reporting requirements may result in civil and criminal penalties.

A more detailed breakdown of the CTA can be found on the Construction Practice Group page at [bassford.com](http://bassford.com).

### **Some Courts Begin to Take Issue with the CTA**

On March 1, 2024, a ruling came down against the CTA. This case, challenging the CTA’s constitutionality and scope, was brought before the U.S. District Court for the Northern District of Alabama by the National Small Business Association and its member, Isaac Winkles.

In *National Small Business United, et al. v. Yellen, et al.*, the plaintiffs argued that the CTA’s requirements for reporting beneficial ownership information exceeded Congress’s constitutional powers and infringed on several constitutional amendments. Judge Liles C. Burke ruled in their favor, holding that the CTA overstepped Congress’s powers under the Constitution’s Commerce Clause and the Necessary and Proper Clause, and was not sufficiently related to tax enforcement to be justified under the taxing power.

Judge Burke’s ruling resulted in an injunction preventing the enforcement of the CTA against the plaintiffs and a great deal of buzz in corporate and small business communities. However, an unfortunate side effect is the misunderstanding that compliance with the CTA was put on hold, when in fact all other

As is common with new laws, the Corporate Transparency Act is currently being challenged in the courts.

entities, aside from the named plaintiffs, are still required to comply at this time. FinCEN actually issued a statement on March 4, 2024, clarifying this exact point, that the injunction was limited in nature and that other entities must continue to comply with the CTA's reporting requirements.

On March 26, 2024 the Small Business Association of Michigan ("SBAM") also filed a lawsuit that challenges the constitutionality of the CTA. SBAM, representing over 32,000 small business owners, argued that the CTA violates the Fourth Amendment's protections against unreasonable searches and seizures. The lawsuit, filed in the U.S. District Court for the Western District of Michigan, contends that the law forces businesses to disclose sensitive personal information without any accusation of wrongdoing, effectively creating a massive database for law enforcement use without proper oversight. The plaintiffs again sought to invalidate the enforceability of the CTA.

On the same day it filed its lawsuit, the SBAM moved the court for a preliminary injunction to stop the government's right to force compliance with the CTA. On April 26, 2024, Judge Robert J. Jonker denied the plaintiffs' motion for a preliminary injunction, ruling that the plaintiffs did not demonstrate a likelihood of success on the merits of their constitutional challenges to the CTA. Judge Jonker acknowledged some privacy concerns raised by the plaintiffs but ultimately concluded that the plaintiffs' arguments were insufficient to justify blocking the enforcement of the CTA at this stage. Therefore, the law remains in effect while the case proceeds through the courts.

On April 15, 2024, the government (here, the Department of Justice ("DOJ")), made it clear that it will defend the CTA in its entirety. The DOJ appealed Judge Burke's ruling to the U.S. Court of Appeals for the Eleventh Circuit. The appeal is supported by three *amicus curiae* briefs (i.e., a brief from a person or organization that is not a party to the lawsuit, but that is allowed to submit briefing to help the court better understand the issues on appeal). All the briefs share a similar argument: Congress had sufficient legislative power to enact the CTA, which was enacted to combat the use of anonymous shell

companies that threatened national security, interstate and foreign commerce and U.S. tax interests. The DOJ's appeal is being considered on an expedited basis, but it will almost certainly be months before the Eleventh Circuit issues its opinion.

### How Does CTA-Related Litigation Impact Me?

The short answer is that it probably doesn't. As mentioned above, the CTA remains in full force and effect for all those but the plaintiffs in *Small Business United, et al.* This means that any person or business affected by the CTA should still comply with its requirements.

### What Happens Next?

We don't know, but we're closely monitoring CTA-related litigation and legislation. What we do know is that there will be more CTA-related lawsuits and new court rulings—notably out of the Eleventh Circuit and the Western District of Michigan. We also expect that some states may pursue their own corporate transparency statutes, potentially creating a patchwork of state-level regulations that businesses must navigate. New York, for example, has already enacted its LLC Transparency Act, which mirrors many provisions of the federal CTA and takes effect in December 2024. Other states are likely to follow suit, further complicating the regulatory landscape.

For these reasons, it's not enough to fully comply with the CTA. Affected individuals and businesses should remain vigilant and up-to-date on further legal and legislative developments, and guidance from regulatory bodies.



# Recent Articles

## Changes to Minnesota's Independent Contractor and Employment Laws Impacting the Construction Industry

By Janine M. Loetscher

As anyone working in or with the construction industry knows, the 2023 Minnesota legislative session resulted in changes drastically impacting businesses across many genres—and the construction industry was no exception. Not to be outdone, the 2024 Minnesota legislative session brought even more changes that will likely impact the construction industry as well.

Some of the more significant changes likely to impact the construction industry starting in 2024 are the changes to Minnesota's independent contractor and employment laws. Effective July 1, all employers, as well as their owners, will face substantially increased penalties for misclassifying employees as independent contractors. Undoubtedly created with the noble intention of protecting workers from being forced into unfair working conditions, this change appears to follow the trend from 2023's changes concerning MN's wage theft laws. However, the new law will likely create tremendous burdens on employers and owners not only to ensuring their own company complies with the new rules, but also to ensure its independent contractors or subcontractors are also in full compliance. Construction industry employers should endeavor to ensure their contractors are properly classified.



### I. Prior Law

Prior to the 2024 change in the law, the question of whether or not an individual providing commercial or residential building construction or improvement services was an employee or an independent contractor was determined under a nine-factor test under Minn. Stat. § 181.723. The test primarily evaluated the autonomy of the individual in performing its duties, its manner of compensation, and the nature of its business. If an individual did not meet all nine criteria, then the individual was presumed to be an employee.

Effective March 1, 2025, determining whether a construction industry worker is an employee or an independent contractor will be determined under a new 14-factor test. The test focuses on whether the individual is operating a separate business entity and whether the contractual relationship is a legitimate business-to-business transaction “at the time the services were provided or performed.”

Importantly, among many other requirements, an independent contractor needs to operate under a written contract that is signed and dated by both the independent contractor and the person for whom services are provided, and needs to provide for compensation on a commission or per-job or competitive bid basis and not on any other basis.

The fourteen-factor test applies to everyone who provides or performs building construction or improvement services anywhere in Minnesota. Building construction or improvement services include all public or private sector commercial or residential building construction or improvement services except for the following:

1. The manufacture, supply, or sale of products, materials, or merchandise;
2. Landscaping services for the maintenance or removal of existing plants, shrubs, trees, and other vegetation, whether or not the services are provided as part of a contract for the building construction or improvement services; and
3. All other landscaping services, unless the other landscaping services are provided as part of a contract for the building construction or improvement services.

### II. Implications

Under the new law, all employers are subject to liability for: (1) failing to classify, represent, or treat an individual as an employee under local, state or federal law; (2) failing to report or disclose a person as an employee to any government agency when required; or (3) requiring an individual who is an employee to enter into an agreement or complete paperwork that misclassifies an individual as an independent contractor. In general, the following penalties for noncompliance include the following:

1. Compensatory Damages: These may include, among other things, employee benefits.
2. Fines for Misclassification: Each worker incorrectly classified can result in a fine between \$5,000 and \$10,000.

3. General Violation Fines: Each specific violation of these rules can result in up to a \$10,000 fine.
4. Non-cooperation Penalty: Anyone who hinders the investigation into violations under this section is subject to a \$1,000 fine for each day they delay or obstruct the process.

Effective July 1, 2024, employers may face penalties of up to \$10,000 for each individual violation. Individual owners, officers, or agents who knowingly or repeatedly engage in any of the prohibited activities may also be held liable.

In addition, the Department of Labor and Industry (“DOLI”) may order the employer to pay compensatory damages to each affected worker, including those for minimum wage, overtime, shift differentials, vacation pay, sick pay, health insurance, life and disability insurance, retirement plans, savings plans and other employment benefits, as well as employer contributions to unemployment, Social Security, and Medicare.

There are also substantial construction industry-specific liabilities, fines, and fees imposed by the new law. For example, construction contractors may also incur liability by: (1) misrepresenting themselves as independent contractors even those that do not meet the fourteen-factor test articulated above; (2) requiring an individual who is an employee to register with DOLI as a construction contractor or agree to be classified as an independent contractor as a condition of payment; or (3) requiring an employee to register as a construction contractor. And in addition to the penalties available in general industry, construction contractors may also face penalties of up to \$10,000 each time a person is misclassified under the fourteen-factor test, or for each employee they require to register as an independent contractor. Construction contractor owners, officers, or agents who knowingly or repeatedly engage in any of the prohibited activities may be held individually liable.

General contractors in particular are subject to increased liability for misclassifying those who perform construction services for them. For instance, if a subcontractor fails to meet each of the fourteen factors **at the time the services were provided**, all its employees will be deemed to be employees of the business entity with whom it contracted.

### Conclusion

Contractors in the construction industry operating in Minnesota need to carefully evaluate their independent contractors and whether those with whom they conduct business are properly classified under Minnesota law. Prior to March 1, 2025, construction

contractors should review their contracts and paperwork to ensure that their subcontractors meet **every** prong of the new fourteen-factor test **at the time their services are provided**. This includes, among other things, ensuring they have in place for every independent contractor a written contract that is signed and dated by both the independent contractor and the person for whom services are provided. Such contract must, among other things, provide for compensation on a commission or per-job or competitive bid basis—and not on any other basis. In addition, construction contractors will need to ensure that their subcontractors’ registrations and licenses remain valid for the duration of time when they are performing work for the contractor, as lapses in registrations or licenses could lead to significant misclassification concerns, which in turn could lead to significant fines and damages assessed against the contractor.

*This article was published in the June 2024 Associated General Contractors of Minnesota newsletter.*

## Presentations

**Office Market Update**, Minnesota Real Estate Journal Mid-Year Forecast Summit  
June 2024 (Kyle Willems, panel moderator)

**Effectively Working with Opposing Counsel**, Trial Preparation for Minnesota Legal Assistants, Halfmoon Publications  
June 2024 (Kyle Willems)

**Choice of Entity and Business Formation—Governing Laws, Structures and Key Governance Issues**, Business Law Institute  
May 2024 (Wynne Reece)

**Ethics**, Minnesota Probate Process from Start to Finish Seminar  
May 2024 (Steve Sitek)

**Best Practices for Construction Collections**, MSBA Construction Law Section Meeting  
April 2024 (Jeffrey D. Klobucar, Chair, Bassford Bankruptcy and Creditors’ Remedies Practice Group)

# Recent Articles

## New Legislative Changes to Earned Sick and Safe Time Impacting the Construction Industry

By Beth L. LaCanne

### INTRODUCTION

Just as employers are getting acclimated to Earned Sick and Safe Time (“ESST”), the Minnesota legislature added some new twists during the recent legislative session. While some of the changes may be a relief to employers, others are not as friendly. Below is a summary of the most significant changes to ESST.

### **Remedies**

The most significant addition is the liability risk to employers for non-compliance. Employers who violate the ESST law are subject to a liquidated damages penalty in an amount equal to the ESST that should have been provided under the law, effectively imposing a double-damages penalty. An employer is also liable for liquidated damages if it does not maintain the necessary records to determine the amount of ESST accrued and owed. The employer will be liable to employees for the equivalent of 48 hours of ESST plus an equal amount of liquidated damages.

### **Qualifying Purpose**

Bereavement leave is now a qualifying use of ESST. An employee may use ESST “to make arrangements for or attend funeral services or a memorial, or address financial or legal matters that arise after the death of a family member.”

### **Qualified Individual**

The definition of “employee” previously only excluded independent contractors and airplane flight deck or cabin crew members. The new definition added three more exclusions: volunteer firefighters, elected officials, and farm employees performing less than 28 days of work each year. Additionally, flight deck and cabin crew members are no longer excluded from the definition of “employee.”

Finally, for temporary and part-time employees, if an employer *anticipates* the employee will perform at least 80 hours of work per year in Minnesota, the employee is eligible for ESST.

### **Earning Statements**

Paystubs no longer need to include both accrued and used ESST totals. However, if an employer removes the information from paystubs, the employer must provide the information to employees in an alternative means, including access to the information through separate electronic means. Employers are also required to preserve all electronic records of ESST information for *three years*.



### **Rate of Pay**

To clarify the rate at which ESST must be paid, the amendment removed references to “hourly” and replaced them with “base rate” which is a newly defined term. The definition of “base rate” clarifies the rate at which ESST must be paid for salaried individuals, individuals who are paid hourly but whose hourly rate varies, and commissioned individuals. Additionally, for employers who use the 48-hour accrual method, unused ESST must be paid at the employee’s base rate of pay.

### **Increment of Use**

ESST must be used in the same increment of time at which an employee is paid. However, the new language permits an employer to require ESST be used in 15-minute increments, even if the employer pays in smaller increments. The cap on the maximum increment an employer can require an employee to use remains at 4 hours. In other words, an employer cannot require an employee to use more than 4 hours of ESST if the employee does not need more than four (4) hours. For example, if an employee has an appointment that will last less than an hour, the employer must pay in increments of four hours before it can require the employee to use four (4) hours of ESST for that appointment.

### **Documentation**

The three-day waiting period for requesting documentation has been revised to three *consecutive scheduled* days. In other words, if an employee working Monday through Friday, uses ESST on a Friday, they must also use ESST on Monday and Tuesday before an employer can request documentation to support the requested leave.

Additionally, an employee using ESST related to domestic violence matters may submit a written statement if they are unable to get other documentation within a reasonable time or without added expense.

**LEGISLATIVE CHANGES BEYOND ESST**

In addition to the changes to ESST, the Minnesota legislature passed other employment-related provisions that impact the construction industry, such as worker classification; pay transparency; standard minimum wages; child labor; oral fluid testing for drugs, alcohol and saliva; captive audience signage; OSHA; continuation of insurance benefits during pregnancy; access to personnel records; surgical smoke evacuation systems; and non-solicitation provisions. More information regarding these changes is available on Bassford Remele’s website. Below is a chart of the laws and their effective dates.

**CONCLUSION**

The 2024 Minnesota legislative session served up new laws and amendments to others. Bassford Remele is prepared to discuss how the new laws and amendments may impact your business. Should you have any questions regarding any of the legislation, please reach out to the Employment Law practice group at Bassford Remele!

*This article was published in the June 2024 Associated General Contractors of Minnesota newsletter.*

**2024 Employment-Related Legislation Summary**

<b>Effective May 25, 2024</b>	
ESST Amendments (Minn. Stat. §§ 177.50 and 181.9445, et seq.)	Minnesota Paid Leave Law Amendments (Minn. Stat. Ch. 268B) *The amendments do not change the date that employers are required to provide paid leave which remains January 1, 2026.
<b>Effective July 1, 2024</b>	
Non-Solicitation in Service Contracts (Minn. Stat. § 181.9881)	Worker Classification (Minn. Stat. §§ 181.722 and 181.723) *The new construction-specific classification criteria will be effective March 1, 2025.
<b>Effective August 1, 2024</b>	
Credit Card Tips (Minn. Stat. § 177.24)	Oral Fluid Testing (under DATWA) (Minn. Stat. §§ 181.950 and 181.953)
Pregnancy Leave and Pregnancy Accommodation Amendments (Minn. Stat. §§ 181.939, 181.941 and 181.943)	OSHA Amendments (Minn. Stat. Ch. 182)
Personnel Records (Minn. Stat. § 181.960, et seq.)	Child Labor Law Amendments (Minn. Stat. §§ 181A.08 and 181A.12)
<b>Effective October 1, 2024</b>	
Captive Audience Meeting Mandatory Signage (Minn. Stat. § 181.531)	
<b>Effective January 1, 2025</b>	
Pay Transparency - Salary Range in Job Posting (Minn. Stat. § 181.173)	Minimum Wage Regardless of Employer Size (Minn. Stat. § 177.24)
Surgical Smoke Evacuation Systems (Minn. Stat. § 182.678)	



# Save the Date

## UPCOMING EVENTS

**Mechanics' Lien Primer**  
October 3, 2024

**Exploring the Ethical Labyrinth: Navigating  
*AI's Pitfalls and Promises in Your Practice***  
Tuesday, August 20, 2024  
11:30 AM-1:00 PM  
(1.50 ethics CLE credits will be applied for)

**Women's Leadership Summit**  
***Amplifying Allyship: Embracing Risk and Vocal Advocacy***  
Thursday, September 26, 2024  
3:00-4:30 PM: Summit  
4:30-5:30 PM: Social

### MODERATOR

**Kathy Robideau**, Chief Growth Officer, Versique Search  
& Consulting (formerly Market President & Publisher,  
*Minneapolis/St. Paul Business Journal*)

### PANELISTS

**Kendall Mark**, Host, myTalk 107.1  
(formerly Reporter, Host, and Emcee in the Minneapolis/  
St. Paul Area, The Jason Show)

**Lani Basi**, Owner and Co-Founder, The BWC—  
The Business Women's Circle

**Margaret LeVasseur**, Global Senior Director of  
Marketing, Medtronic

**Darcy Dahl**, Financial Advisor, Financial Planning  
Specialist, Morgan Stanley

*Women and men are welcome*

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