



CENTRAL STATES INSULATION ASSOCIATION'S

# INSULATOR

April 2018

Labor and Employment  
Worried That #MeToo  
May Come For You?

Legally Speaking  
ANTI-TRUST "ANTICS"

THOROUGHBRED PARK

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Representing the Region's Mechanical and Specialty Industry



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# INSULATOR

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Central  
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Insulation  
Association

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## INSULATOR

Magazine

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editor  
Rachel Pinkus

The Central States insulation Association is a not-for-profit trade association dedicated to working with its member firms and their labor counterparts, the International Association of Heat and Frost Insulators and Allied Workers, to insure that their customers get the best engineered, installed and maintained mechanical insulation systems.

CSIA is dedicated to keeping its members at the forefront in helping their clients and industry partners realize the full benefits of the positive "Green" impact mechanical insulation systems can have on their power, petrochemical, pulp and paper, refining, gas processing, brewery, health care, institutional, food processing, manufacturing and commercial projects.

**Disclaimer:** The opinions and positions stated in articles published herein are those of the authors and not, by the fact of publication, necessarily those of CSIA. CSIA does not endorse insulating products or systems and shall not be deemed by anything herein to have recommended the use or non-use of any particular insulation system.

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# Presidents Message

*Mike O'Connell - Smart Energy Insulation.*



 **PRESIDENT**  
Mike O'Connell

## Insulation Contractors–Thrill Seekers? ....or Good Listeners?

A few years back....someone I had just met asked me what I did for a living. I explained I managed an insulation contracting company. They asked more about what our company did and more specifically what I did each day. "What do I do each day...?" I asked. "Yes – what do you do (specifically) EACH day at your company?" Wow (I thought) – never been asked that before. Really never thought anyone cared. But as I thought for minute about how to explain what I do each day to someone who knows little about insulation contracting.....a thought came to mind. I likened the daily experience to whitewater rafting. Yeah, at 7:30am every work day our team carries our raft over to the river's edge – and we jump in! SPLASH! We are immediately hit with a wall of water – WHOOSH!! Under water, we hear the roar of the rapids. We emerge just in time to see the big sharp rock we are about to impale. Orders shouted and our team paddles hard and we maneuver away. Bobbing up and down – through the powerful current. Whoosh! Another wall of water hits us! We nearly lose a person from the team as they cling to the side of the raft. Hands reach out to pull them back in. A loud cheer from the team. But the river doesn't wait and we are all back at it again. After hours of fighting rapids, rocks, trees, waterfalls, exhausted we find ourselves on a calm shore. A little bruised, broken and bloody, our day is over. We dry off. Pat each other on the back and get into our trucks, only to return 14 hours later to jump in and do it AGAIN! "WHY??"....asked the person I was talking to. "Why subject yourself to that every day?"

"Sounds so exhausting, unproductive.....seems like torture" they add. Is insulation contracting REALLY as exciting as whitewater rafting? Sure it's a job but there is also a thrill and excitement. Many aspects of our work are like the team whitewater rafting experience. We meet new people, visit different sites every day, feel the rush of selling and getting the P.O., we strategize and map out our course, we learn new skills and techniques to be better prepared and most gratifying of all – we do it as a team. Like whitewater rafting, if you're not prepared or have skills you will get hurt. If you have not trained or planned well, you will certainly find yourself in a peril. There are really many similarities. I don't know of anyone who may have tried whitewater rafting for the first time, did it without an experienced guide and crew. I DO, however, know many who started an insulation contracting business without a guide. No team, little business experience, little guidance and expertise of how

to do it and where to go. There are many books out there on business but there's no book on successful insulation contracting.

Thankfully there is a group you can learn from. A team with great insulation contracting experience and knowledge willing to share their do's and don'ts. These managers and company owners wrote the book on successful insulation contracting. As a member of the CSIA, I found many great ideas for my business. Experience and leadership in Safety programs, estimating and contract negotiations. Sharing ideas with the industry's biggest and smallest companies. I listened...and I learned from everyone I met.

I joined CSIA (over) 20 years ago. Just a kid. Our company was growing. We were garnering some success, but there was SO much more to learn. Joining CSIA showed our company what was possible. Today, I find that I still learn something new to apply to our business at EVERY CSIA meeting. Whether you are a long timer or a first timer – get ready to learn and get ready to grow your business!

I hope to see the many long time CSIA members and first-time members on April 23-25 in Lexington KY at the CSIA Spring Conference. You can always adapt and improve your techniques, strategies, plans and ideas. Listen and learn from your industry peers....talk one on one with some of the most successful insulation companies in the Midwest. We'll see you in April.

"Someone asked me, if I were stranded on a desert island what book would I bring... 'How to Build a Boat.' Steven Wright Comedian

Your President,

**Mike O'Connell**  
Smart Energy Insulation

# Refractory Products

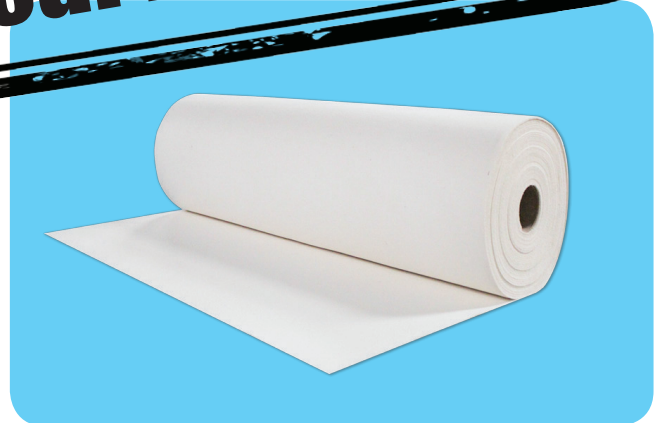
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# Central States Insulation Association

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## Register Today! For the 2018 CSIA Spring Labor Conference



This year the CSIA Spring Labor Conference will be held April 24-25, 2018, at The Marriott Griffin Gate located in Lexington, Kentucky. No matter where you are coming from, it's easy to find and convenient to I-75, I-264, I-64 as well as the Cincinnati, Lexington, and Louisville International Airports.

The Marriott Griffin Gate is a first-class, full-service resort designed to capture the atmosphere and adventure of Bluegrass Country.

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Golfers will enjoy The Griffin Gate Golf Course which is set on 250-acres that embody the tradition of gracious Southern hospitality. Renowned architect Rees Jones, son of the revered Robert Trent Jones, sculpted this very fast track from the rolling hills of Kentucky bluegrass country. This course has a 4-Star Rating from Golf Digest and was 2008-2009 "Best Places to Play" Recognition from Golf Digest.

### Learn More

about the Lexington, Kentucky area and this fabulous resort and golf course, go to <http://www.marriott.com/hotels/travel/lexky-griffin-gate-marriott-resort-and-spa/>



# SPRING LABOR CONFERENCE & SYMPOSIUM

## April 24-25, 2018

### Marriott Griffin Gate Resort & Spa Lexington, KY

*Please print clearly or Register Online at [www.csiaonline.org](http://www.csiaonline.org)  
Use a separate form for each registrant, and duplicate form as necessary.*

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Full Name \_\_\_\_\_ First Name for Badge \_\_\_\_\_

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Contractor Conference Registration <b>A</b>	
	Member Non-Member
<b>Contractor FULL Registration</b> <i>Includes Reception, all educational sessions, golf, breakfast, lunch and beverage cart tickets.</i>	<input type="checkbox"/> \$475 <input type="checkbox"/> \$575
<b>Educational Sessions ONLY Registration</b> <i>Includes Reception, all educational sessions and breakfast.</i>	<input type="checkbox"/> \$350 <input type="checkbox"/> \$375
<b>Contractor GOLF ONLY Registration</b> <i>Includes Reception, golf, lunch and beverage cart tickets.</i>	<input type="checkbox"/> \$175 <input type="checkbox"/> \$225
<b>Contractor RECEPTION ONLY Registration</b> <i>Includes Reception Only!</i>	<input type="checkbox"/> \$100 <input type="checkbox"/> \$150
Associate Conference Registration	
	Member Non-Member
<b>Associate FULL Registration</b> <i>Includes Reception, golf, breakfast, lunch and beverage cart tickets for <b>one</b> person as well as one 6 foot draped tabletop and signage with recognition in pre and post- conference materials.</i>	<input type="checkbox"/> \$650 <input type="checkbox"/> \$750
<b>Associate FULL Registration NO GOLF</b> <i>Includes Reception, breakfast, and lunch for <b>one</b> person as well as one 6 foot draped tabletop and signage with recognition in pre and post- conference materials.</i>	<input type="checkbox"/> \$475 <input type="checkbox"/> \$575
<b>ADDITIONAL Associate Registration</b> <i>Can <b>only</b> be purchased in addition to a Full Registration. Includes Reception Only.</i>	<input type="checkbox"/> \$100 <input type="checkbox"/> \$150
<b>Associate GOLF ONLY Registration</b> <i>Includes golf, lunch and beverage cart tickets.</i>	<input type="checkbox"/> \$175 <input type="checkbox"/> \$225
<b>Subtotal A \$</b> _____	

Sponsorship Opportunities <b>B</b>	
<i>Includes Recognition on CSIA Social Media, in Event Program, Signage, Pre and Post-Conference Materials and a Sponsor Ribbon on Name Badge.</i>	
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Card # _____	Exp. Date _____
Name on Card _____	Billing Zip Code _____

**Cancellation Policy**  
 All cancellations must be received in writing. A \$15 processing fee applies to all cancellations. No refunds will be given after April 16, 2018.  
 All refunds will be processed after the conference.

**RETURN TO: CSIA - 2077 Embury Park Rd. - Dayton, Ohio 45414 or FAX TO: 937-278-0317  
QUESTIONS? Contact Rachel at: 888-294-0084 or [rpinkus@assnsoffice.com](mailto:rpinkus@assnsoffice.com)**





## 2018 CSIA Spring Labor Conference Schedule of Events

### Monday April 23, 2018

3:00 PM CSIA Board of Directors Meeting

### Tuesday April 24, 2018

7:30 AM Registration and Full Breakfast

8:00 AM Welcome from CSIA President, Mike O'Connell

8:15 AM Area Reports by Local

9:15 AM Growing our Shrinking Ranks – Recent Trends and Current Needs

- Current Active Members
- Manpower Needs
- Enhanced Recruitment of New Apprentices –Hiring at Contractor Level
- Organizing

10:00 AM Creating a Flexible and Mobile Workforce through Improved Portability - NUICA

10:45 AM Improving Health & Safety Programs for EVERY Company

11:30 AM Selling the “Union Insulation Quality Difference”

Improving the quality of insulation installations from every company and every insulator to ensure our Union Insulation success.

12:00 PM LUNCH

12:30 PM Improving Competitiveness Against Non-Union by Negotiating Better

Negotiating labor contracts with fewer restrictions, work rules and regulations not found in Non-union companies

1:30 PM Ensuring Fully Funded Pensions at Every Local

Unfunded Liability of Local Pensions is the single biggest deterrent to Organizing. All of the Locals in the Central States territory has Unfunded Pension Liability. Many are defined by the D.O.L as “Critical” while some are “Critical & Declining” or in a “Death Spiral” where they are facing insolvency within 5 years.

2:45 PM BREAK

3:00 PM Supporting Higher Levels of Training at Your Local JATC

3:30 PM Shining a Spotlight on the UGLY side of Value Engineering & its Degradation of our Industry – The true cost of VE

4:00 – 6:30 PM Reception for Registered Attendees

Vendor Tabletop Displays and 50/50 Raffle for the Scholarship Fund

Evening Dinner on your own

### Wednesday April 25, 2018

8:30 AM Registration and Full Breakfast

9:00 AM “Where do We Go From Here?”

A re-cap of Action Items that came out of the previous day’s discussions and the creation of a plan moving forward.

12:00 PM Golfers Lunch Buffet

1:00 PM Golf Challenge SHOTGUN START with Money Hole

February 2018



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LEGAL UPDATE

## CAN A MULTIEMPLOYER HEALTH PLAN OFFER COVERAGE TO NON-BARGAINING UNIT EMPLOYEES?

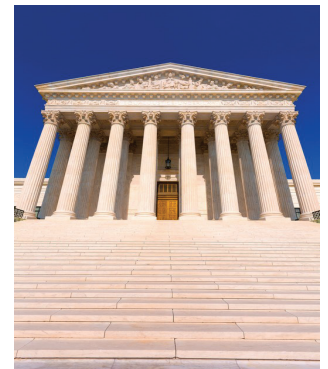
Most multiemployer health plans allow participation by those working in a position outside the collective bargaining agreement. However, plan trustees should be aware of the IRS and ERISA restrictions on this practice. In order to avoid state insurance laws, your plan must be established pursuant to a bona-fide collective bargaining agreement and at least **85%** of plan participants must have a legitimate connection to the bargaining parties. Additionally, the applicable IRS regulations state that plan participants must share an “employment-related common bond,” such as a common employer, coverage under a collective bargaining agreement, or labor union affiliation. In order to comply with the IRS regulations, no more than **10%** of the plan may be comprised of participants who do not share an employment-related common bond.



If you have reason to believe that more than **10%** of your plan participants are non-bargained participants, the issue should be raised with counsel and the plan’s consultant immediately. Steps may need to be taken to reduce this number in order to comply with the applicable IRS and DOL rules.

## FORUM SELECTION CLAUSES & ERISA PLANS

A beneficiary who files a lawsuit against a plan may do so in the geographic area where (1) the plan is administered, (2) the alleged breach of the terms of the plan took place, or (3) the beneficiary lives. This leaves plans vulnerable to being sued far from where the Board of Trustees meet, the plan is administered, or where fund counsel is located, which can increase the cost of litigation. However, courts have recently decided that forum selection clauses in plans—provisions that designate the location where the parties will have their legal dispute decided—are allowed under ERISA. This allows plans to select a court convenient to them. Boards should consider amending their plans to insert a forum selection clause if they don’t want to find themselves bearing the extra costs of defending a lawsuit as far away as Hawaii or Alaska.



## PLAN POINTER

### Consider Offering Free Flu Shots!

This year’s flu season has become an epidemic. Not only is this year’s flu outbreak more widespread, it is also deadlier. U.S. employers are estimated to lose \$9.42 billion dollars as a result of the average employee taking four sick days to recover from the flu. For health plans, the costs associated with complications from the flu, including hospitalizations and prescription drugs, are skyrocketing. Workplace rules requiring employees to get vaccinated are legally difficult. However, health plans can provide a no-cost flu shot annually to all participants. Although there will be upfront costs associated, the plan will save money in the long run and the plan’s participants will hopefully be healthier as a result.

Ledbetter Parisi LLC practices exclusively in the area of Taft-Hartley employee benefits and is one of the country’s largest Taft-Hartley law firms. This newsletter is a periodic publication of Ledbetter Parisi LLC and should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only and you are urged to consult your own advisor about your current situation and any specific legal questions you may have. Many states require that law firms add the statement “THIS IS AN ADVERTISEMENT” on publications of this nature.

## Questions?

If you have any questions about the material contained in this newsletter or any employee benefit questions, contact one of our experienced attorneys.

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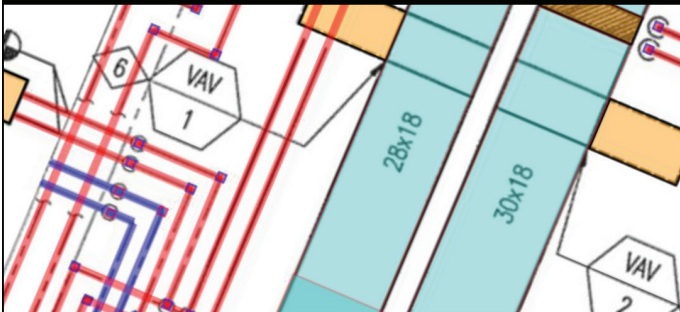
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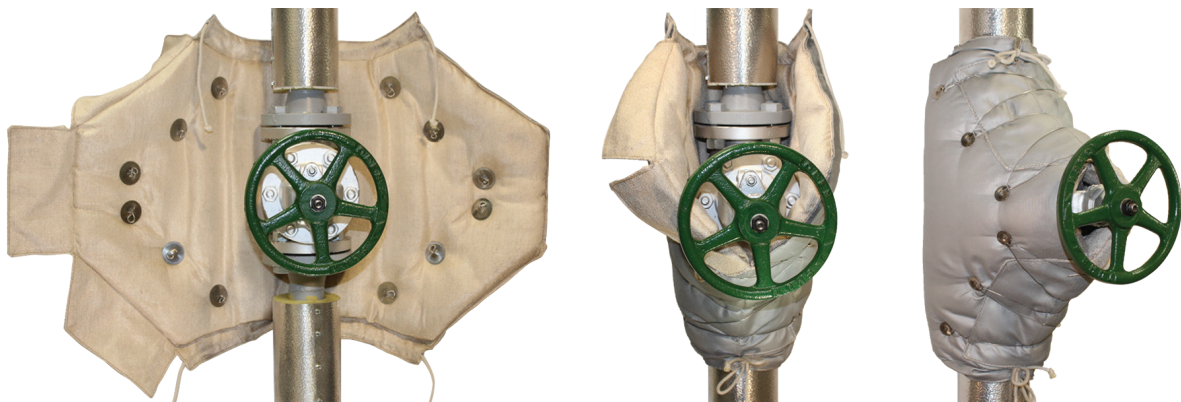


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# ANTI-TRUST “ANTICS”



By: Bob Dunleavy

*Federal and state anti-trust laws have been around a long time and are intended to promote open and fair competition in business.*

some of the “basics” about anti-trust regulations which will help you avoid penalties of up to \$1 million for individuals and \$100 million for business organizations and up to ten years in jail





**Y**ou need to know a little about these laws so you don't find yourself in an awkward position – “jail.” Trade and professional associations are quite vulnerable to claims of illegal restraint of trade even though they are customarily non-profit organizations. The reason for this is that associations are normally comprised of competitors, or potential competitors, and association activities provide an excellent opportunity for them to reach tacit or explicit agreements on a variety of business practices, some of which are illegal. Concerted action which raises prices or lowers the quantity or quality of available goods is always suspect. Here are some of the “basics” about anti-trust regulations which will help you avoid penalties of up to \$1 million for individuals and \$100 million for business organizations and up to ten years in jail. The stakes are high!

Associations and their members are given broad opportunities to engage in joint action such as lobbying, but they must avoid activities which reduce competition among themselves or hold their suppliers or customers to some type of reduced competition. The leaders of the association need to be vigilant to ensure that illegal conduct does not occur. At gatherings of members, we all need to be careful not to say or do something which could be considered an unlawful conspiratorial agreement. For example, at a dinner meeting, one owner of a business told another that he took pricing seriously and planned on implementing a price increase in the near future. The second owner expressed a similar sentiment and prices were actually increased by

these competitors at relatively the same time. The FTC sued both companies. Another potential violation can occur when one manager of a company speaks with a competing manager and urges the reduction in production in order to increase demand and, in fact, that reduction actually occurs.

Not only the individual members can be held liable, but also the association can be held responsible for the discussions its members have. Sometime ago, the National Association of Music Merchants was charged by the FTC with allowing its meetings to serve as a forum for rivals to disseminate or exchange competitively sensitive information. Competing retailers of musical instruments discussed strategies for raising retail prices, margins, minimum advertised price policies, and other related items. The association had sponsored the meetings and set the agenda to assist in discussions. Interestingly, there was no evidence that the discussions, in fact, led to unlawful collusion. This consent decree illustrates that anti-trust considerations in association activities remain alive and well and must be respected by the members and officers of any association. But remember, the discussion doesn't have to come during the actual meeting. Conversations at the bar before or after an event (or on the golf course) can be equally as lethal.

Some of the types of activities which are automatic violations include agreements fixing prices, boycotts of competitors, suppliers, or others (joint refusal to deal), agreements allocating markets, and agreements where a company dominating a market

ties the purchase of one product to the requirement to purchase another. Unlawful pricing agreements can include arrangements on discounts, formulas for establishing pricing, credit terms, warranties, surcharges, mark-ups, understandings regarding advertising restrictions, the limitation of output or production, and an agreement not to engage in competitive bidding.

No poaching of employees agreements between two or more employers prohibiting each other from soliciting or hiring their respective employees can violate anti-trust law under certain circumstances. On January 19, 2018, the Department of Justice announced that it intends to publish additional guidance on the issue and then enhance enforcement efforts. Watch for the developments.

Here are some tips for reducing the risks of anti-trust violations:

- Avoid agreements or understandings related to pricing or advertising.
- Avoid agreements or understandings that result in a boycott of products or services.
- Avoid agreements or understandings allocating markets among competing companies.
- Do not try to prevent your supplier from selling to your competitor.
- Adopt an anti-trust compliance policy to assist your company in compliance.
- Ensure that your association has an anti-trust policy and that the Board members, officers and committee persons are well trained.
- Utilize membership eligibility and expulsion criteria which are objective.
- Follow a well prepared agenda at each meeting which has been

scrutinized in advance for anti-trust concerns.

- Collect and disseminate member survey information through a third party with anonymous participation and aggregated dissemination of the information.

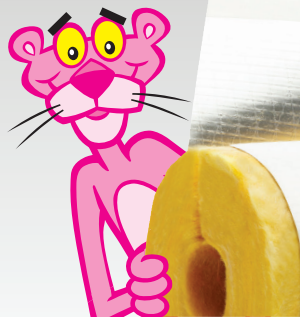
Many associations conduct annual training sessions for their board members and committee persons in order to ensure compliance, and most have strong anti-trust policies. Familiarize yourself with your policy and alert your association staff to any perceived violations promptly.

Training sessions customarily include discussions regarding the responsibilities and liabilities of association directors and officers, anti-trust considerations, and association membership issues. Many associations conduct these types of annual training sessions for their officers, directors and trustees. Good governance

dictates that your company and the associations with which it is affiliated remain ever vigilant to avoid anti-trust antics.

For further information regarding anti-trust matters or for information regarding good governance training sessions for your company and the associations with which you are affiliated, contact Bob Dunlevey at Taft/Law (937) 641-1743.

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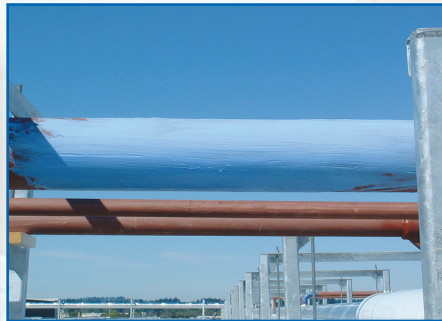
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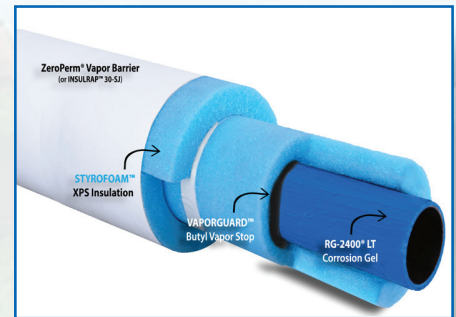
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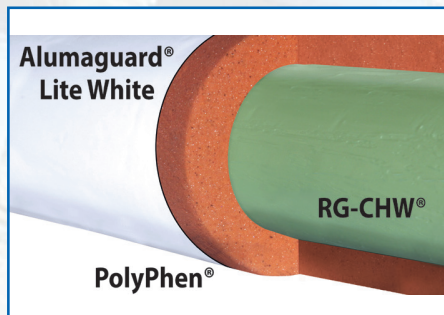
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- c) Not previously awarded a **CSIA** scholarship.

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Telephone Number \_\_\_\_ ( \_\_\_\_ ) \_\_\_\_\_

E-mail Address \_\_\_\_\_

Relationship to CSIA Member Employee \_\_\_\_\_

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Name of **CSIA** Member Employee \_\_\_\_\_

Employer's Name \_\_\_\_\_

Address \_\_\_\_\_

City, State, Zip Code \_\_\_\_\_

Telephone Number \_\_\_\_ ( \_\_\_\_ ) \_\_\_\_\_

Fax Number \_\_\_\_ ( \_\_\_\_ ) \_\_\_\_\_

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## EDUCATIONAL BACKGROUND

High School Name \_\_\_\_\_

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City, State, Zip Code \_\_\_\_\_

Telephone Number \_\_\_\_ ( \_\_\_\_ ) \_\_\_\_\_

Office Contact / Guidance Counselor \_\_\_\_\_

Current Grade Point Average: \_\_\_\_\_ out of a \_\_\_\_\_ scale

Extra Activities, sports, clubs, achievements *(use separate sheet if necessary)*

Probable Field of Study \_\_\_\_\_

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Selected University, College, or Institute \_\_\_\_\_

Date Classes Begin \_\_\_\_\_ / \_\_\_\_\_ / \_\_\_\_\_

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Applicant Signature

\_\_\_\_\_  
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# Worried That #MeToo May Come For You?

*Better Workplace Investigations Can Protect  
Your Company Against Harassment  
(And Other) Claims*

By: Matthew Bakota  
Auman, Mahan & Furry



“The backlash has been so significant that companies are responding to these allegations with swift and serious action”





**M**any companies are facing extremely negative publicity and potential legal liability as a result of the so-called “me too” movement, in which women in various industries are coming forward with allegations that companies failed to do enough in response to alleged sexual harassment in the workplace. The backlash has been so significant that companies are responding to these allegations with swift and serious action, including quick separations of some long-time employees and executives, as part of near-immediate public responses that seem focused mainly on removing a company’s name from the news as soon as possible.

As someone who is trained and certified as a “Civil Rights Investigator” to investigate allegations of harassment, discrimination, and other workplace misconduct – (more on that in a minute) – I offer a few observations about what is going on right now. Doing too little in response to allegations of harassment or other workplace misconduct certainly leaves a company continually exposed to potential legal liability, based on claims under federal and state anti-harassment, anti-discrimination, and anti-retaliation laws. (Not to mention the extremely bad publicity some companies are facing now, years after some of this alleged misconduct reportedly took place.) However, quickly making extreme employment decisions in response to such allegations, perhaps without all the facts or a full response from the person being accused of misconduct, also creates a great deal of risk. Surely wrongful termination lawsuits are not far behind some of the quick employment decisions that are being made today in the wake of the “me too” movement.

So what is the best practice for companies that want to manage and try to limit their risk after they are presented with allegations of harassment or other workplace misconduct? The answer is a timely, well-planned workplace investigation conducted by a qualified investigator, as discussed in more detail below.

### **Who Is An “Investigator”?**

Some background information and context is helpful to answer this question and explain a bit about the “Civil Rights Investigator” certification that I hold.

Even those who work outside of the education sector probably have heard news reports regarding colleges and universities being sued in connection with their handling of alleged sexual harassment and assaults that reportedly have occurred on their campuses. These lawsuits have really “made the news” when they have involved a high-profile school or a well-known athletics program or individual athlete. Sometimes the lawsuit has been filed by the person who reported the alleged assault; but sometimes the lawsuit has been filed by the person accused of it.

Either way, a focus of these lawsuits seeking to hold the school (and even school administrators) liable often is a claim that there were certain deficiencies and/or biases in the investigation process, which, in turn, allegedly led to an erroneous and biased decision on whether the accused party should be disciplined in some manner. Schools have been troubled to find themselves in this difficult spot, facing multi-million dollar, high-profile lawsuits, in which both the accuser and the accused person are putting the school’s investigation process under a microscope. Various federal laws and standards have been developed or interpreted to push schools toward conducting investigations that are demonstrably “equitable” to both parties, but the significant risk of potential legal liability remains. Therefore, many schools continue to invest significant time, money, and training to get ahead of the curve, and make sure that their investigation process complies with the law and, perhaps most importantly, decreases the risk of serious legal claims and potentially significant legal liability.

So what do these challenges faced by colleges and universities have to do with the roofing industry? Quite a bit, actually.

First, the certification I received came through a program geared toward the education sector, developed by an organization that is on the cutting edge of investigation best practices. Those best practices are not unique to the education sector, however, and can be applied to many other industries – including yours.

Second, in the roofing industry, you also can be subject to legal claims by parties on both sides of workplace

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misconduct allegations. Like the school cases, a main focus of those claims often can be whether your company “did enough” in response to the allegations. Therefore, if you develop a practice of responding to such allegations with solid investigations, then you also stand to reduce your risk of legal liability (just like America’s colleges and universities are trying to do). That doesn’t mean your company will never be the subject of a harassment or discrimination charge or an employment lawsuit at some point in its history. But it does mean that your company should be in a much better position to defend not just whatever employment decision it made in response to the allegations, but also the manner in which your company reached that decision. An investigation that produced a result that was based on objective evidence from all interested parties should stand up well to scrutiny whenever and wherever it may come.

### **Why Investigate?**

In the next section below (“Investigation Best Practices”), you will find some additional details regarding what an effective workplace investigation should look like. But, as you may conclude for yourself, the most effective and cost-efficient approach may be to retain an investigator who is already familiar with and trained in using those and other investigation best practices. It can be difficult to “reinvent the wheel” yourself, and the learning curve under these circumstances can be a very dangerous one. In addition, it’s worth pointing out that an investigation actually can be used in one of two ways, both of which can help your company.

In the first scenario, which is the main focus of this article, an investigation can be conducted by an independent investigator who is asked to determine whether your workplace policies or laws have been violated. From there, the investigator makes recommendations for follow up employment action, if any, regarding the parties involved. Using an investigator this way shows those who may scrutinize your actions now or later on (such as a government agency or a court of law) that your company took the allegations seriously; and that you brought in an independent party who does not work with the parties involved on a regular basis and, therefore, is not likely to have some of the biases that such familiarity could generate. The use of an outside investigator can deter potential claims and/or severely undercut them before

they ever really get off the ground.

In the second scenario, an investigator who is also an attorney can conduct an investigation with an eye toward potential litigation. The investigator assesses the parties involved and the facts, for the purpose of preparing to defend a claim that seems likely to result under the circumstances. Such an investigation will not be viewed as neutral or unbiased given its purpose; but it can be equally beneficial, depending on the circumstances and the approach your company would like to take to specific allegations and the parties involved in them. If litigation seems very likely down the road, perhaps your company may prefer to begin circling the wagons and gearing up for potential litigation from the start. To that end, the attorney/investigator in this scenario also can take on the defense of any potential litigation that may arise. That can be a very efficient way to handle things sometimes. In the first scenario, however, an investigator who also is an attorney would not be able to represent the company in subsequent litigation. As indicated, while these two types of investigations have different purposes at the time, they both can be effective in trying to manage the potential risks facing your company.

### **Investigation Best Practices**

When discussing investigation specifics, I have found it helpful to use a hypothetical scenario to provide some additional context. So, here is our hypothetical.

Suppose your company receives a report that your employee, Jane, is being subjected to sexual harassment by one of her co-workers, John. We’ll assume that your company has a solid, updated anti-harassment policy. (If you don’t, this also is something that should be immediately addressed given the current climate.) Because of the circumstances surrounding these two employees, you see that there is risk whichever way you turn.

Jane could be the source of a claim against your company if you do any of the following: fail to take enough action upon receiving the report of sex-based harassment and/or discrimination; permit an environment in which she could be the target of unlawful retaliation for reporting her allegations; or reach a result that she deems unsatisfactory, in terms of the follow up action taken at

the conclusion of the investigation (discipline, etc.).

John also could be the source of a claim, however, depending on what action you take against him. Under our hypothetical, we'll assume that John is a minority or member of another class of workers protected by federal and/or state anti-discrimination laws. Therefore, he is the potential source of a discrimination claim. If he is separated from the company in connection with the current allegations, he may allege that the "real" reason was that he is a member of a protected class. It can be rather easy for him to make such allegations; however, a solid investigation can go a long way to refuting such arguments.

With that, here are some examples of best practices that would be used during an investigation into the allegations concerning these two (hypothetical) employees:

**Consider interim measures even before the investigation begins.** Jumping to a conclusion without investigation creates a risk of liability for your company, but it may not be possible or advisable to have John and Jane around each other in the office while an investigation is underway concerning serious allegations. Therefore, it may be advisable to use some interim measures while the investigation takes place, and before any final employment decisions are made. Keep in mind, however, that any interim measure that seems like a severe penalty and/or a de facto termination (long-term suspension, etc.) can expose your company to liability as well, because it may seem like the company made up its mind prior to investigating.

**Be timely.** Few things frustrate parties dealing with difficult circumstances more than delay. Frustrated employees can become disgruntled employees, and those typically present increased risk to your company. Therefore, it is important to update the involved parties as progress is made and as the investigation gets underway. (And if time and staffing is a significant issue for your company, those can be the most important times in which to consider an outside investigator, who can devote the time and attention needed. Yes, there will be an expense associated with doing that. However, spending a little now can save much more in the long run, because an untimely or otherwise deficient "investigation" can expose

your company to legal claims and a costly employment lawsuit.)

**Make a plan for the investigation.** An investigator should carefully consider what witnesses should be interviewed and in what order? Also what information, if any, should be given to witnesses regarding the allegations or the investigation? What questions should be asked of the witnesses, and in what order? Witness interviews can really backfire if they are not planned with care. On that note...

**Conduct witness interviews carefully.** When it comes to interviews, there are many not-so-obvious tips that can be critical to conducting an effective interview. For example, an investigator seeking to conduct a worthwhile interview will not say or do anything that he/she wouldn't do if the party on the other side of the allegations was in the room. An investigator usually will give the appearance of being neutral, while still being responsive and obviously treating the matter seriously.

An investigator also will use open-ended questions whenever possible. Witnesses must know that they need to be truthful and forthcoming, and that their failure to do so may be cause for separation from the company. But, at the same time, something that feels like an interrogation or a cross-examination may give the impression that the company has already determined the outcome, which is the opposite of what an effective investigation usually should convey.

In addition, open ended questions typically help an investigator avoid inserting facts or assumptions into questions. Doing that can lead to inaccurate responses or give the wrong impression to witnesses. For example, when dealing with witnesses who have been subjected to something that may have been very troubling or even traumatic, it is critical for an investigator not to ask questions in a way that sounds like blame is being placed on them. Compare these two types of questions directed to Jane: (1) "Jane, you said someone came into the breakroom while John was doing this – why didn't you saying anything then?" vs. (2) "Jane, when the person walked into the breakroom while John was doing this, how did you react? What was going through your mind at the time?"

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Surely you can see how questions like those in (2) are more likely to keep the witness talking and elicit valuable factual information than those in (1). Questions like those in (1) are likely to result in an incomplete interview that fails to elicit all the facts that may be helpful to the company's ultimate determination and any employment decisions that need to be made.

**Consider making use of written statements.** Time and time again, we have seen written statements be very valuable in employment law cases. Documentation is the ultimate evidence. Additionally, for difficult interviews, such as an interview with Jane, a written statement can be a good starting point to get critical information while limiting the need to subject the witness to more questions than may be necessary. Some follow up questions to clarify things in the written statement may be all that is necessary. The same can be said of John, of course, who may find the allegations embarrassing, confusing, or otherwise difficult to respond to in the moment.

**Provide witnesses an opportunity to correct the record.** Often, employers who conduct their own investigations and begin to find holes or inconsistencies in an employee's story may be inclined to take action just because of that. They conclude that the employee who seems to have "lied" also must have done what is being alleged.

For example, let's say John provides a story that doesn't match any of the other witnesses, including Jane. Instead of taking action against John with just that information, good investigators are likely to recommend one additional step: circle back and give John an opportunity to correct what he has said. The company may end up with an admission and a resignation, as opposed to having to do a risky termination under facts in which Jane and John have just provided different accounts concerning the allegations.

**Document everything and use dates.** An investigator will document investigation-related interactions and when they occurred. This includes conversations, interviews, phone calls, etc. The bottom line is to show what you did and the results of the efforts. As mentioned, few things are as powerful as documentation. In addition,

the documentation should be preserved and stored in one place. The company should not be left searching for things weeks or months later, trying to cobble together things from several different places. Keeping it all together as the investigation proceeds, and leaving it all together when the investigation is over, is essential.

**Advise the parties when the investigation has concluded and a determination has been made.**

This is an offshoot of the point about being timely. Disgruntlement can occur at the end of investigations as well. Therefore, it is important to update the parties at the end, too. Companies are not required to keep the investigation determination secret or confidential as between the parties. Even so, discretion is still recommended in the amount of information the company discloses to the parties, including as it relates to any discipline that may have been imposed. The point is not to leave anyone guessing about the status of things, because they may be inclined to seek their own legal counsel to get their questions answered. (That usually is not a good thing for the company.) And finally, companies should be sure to follow through on appropriate discipline, if the determination warranted it after the investigation.

**Conclusion**

In today's difficult environment, workplace investigations are a valuable tool, but they must be handled with skilled care. When they are, workplace investigations can help companies that are seeking to (1) limit their exposure to legal liability and (2) respond effectively to allegations that may be levied against them and their employees, both now and in the future.

*Matthew Bakota is an attorney in the labor and employment group at Auman Mahan & Furry, located in Dayton, Ohio. He is certified as a Civil Rights Investigator, and as a Professional in Human Resources (PHR) through HRCI. He can be reached at [mjb@amfdayton.com](mailto:mjb@amfdayton.com) or at 937-223-6003.*

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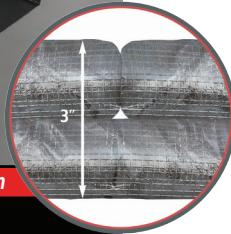


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 CentralStatesInsulationAssociation

## Hotel Reservations

Call 859-231-5100 Room Block: Annual CSIA Spring Conference  
This will secure you the special rate of \$174.00 per night.  
The Cut-Off date is April 2, 2018.

A photograph of a Marriott hotel building at night. The building is multi-storied with many windows, some of which are lit up. The "Marriott" logo is illuminated in red on the upper part of the building. In the foreground, there is a stone pillar and a fountain with water spraying upwards. The sky is dark blue.

**SPRING LABOR  
CONFERENCE AND GOLF TOURNAMENT 2018**

GRIFFIN GATE MARRIOTT  
LEXINGTON, KY

**APRIL 24-25**