Downey & Lenkov LLC

Construction Law Newsletter

January 2025

Firm News

Downey & Lenkov Has Been Named in the 2025 Best Law Firms® Ranking

We're excited to share that Downey & Lenkov has been named in the 2025 Best Law Firms® rankings by Best Lawyers®. This year, we were selected as Tier 1 in Construction Law and Construction Litigation nationally and regionally. Additionally, we've been ranked regionally for Workers' Compensation.

We appreciate the recognition and are thankful for the support! For details about our rankings, visit our profile here: Downey & Lenkov LLC | Best Law Firms.

Kirsten Kaiser Kus and Werner Sabo Recognized in the 2025 Edition of The Best Lawyers in America

We are pleased to announce that Capital Member Kirsten Kaiser Kus and Of Counsel Werner Sabo have been recognized in the 2025 edition of The Best Lawyers in America®.

Kirsten has received this accolade for her work in Workers' Compensation Law – Employers.

Werner has received this accolade for his work in Construction Law and Litigation.

Best Lawyers

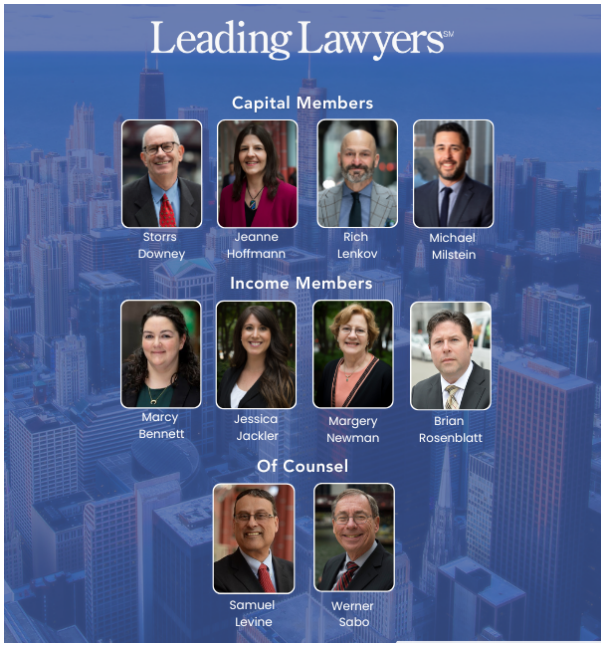
The Best Lawyers in America® recognizes individual lawyers with the highest overall feedback from their peers for a specific practice area and geographic region. The methodology is designed to capture, as accurately as possible, the consensus opinion of leading lawyers about the professional abilities of their colleagues. Learn More: 2025 Best Lawyers Awards.

Leading Lawyers Selection

Ten attorneys at Downey & Lenkov have been selected to Leading Lawyers' 2025 rankings.

Leading Lawyers provides rankings of the most respected and experienced attorneys nationwide. No more than 5% of all attorneys in each state are selected for either distinction.

Please join us in congratulating our selected attorneys! For more information about the attorneys selected, please visit our profile here: Downey & Lenkov LLC | 2025 Leading Lawyers.



2025 ASA Construction Expo & Safety Conference

Join Capital Member Jeanne Hoffmann, Income Member Margery Newman and Associate Frank Swanson at the 2025 ASA Construction Expo on March 4, 2025, from 9 AM to 4 PM in Oakbrook Terrace, IL. Stop by our booth #902 at the show to connect with us and talk all things construction!

Register here: 2025 ASA Construction Expo & Safety Conference

Samuel Levine & Frank Swanson Co-Authored IICLE® Construction Law Disputes Handbook


Of Counsel Samuel Levine and Associate Frank Swanson are co-authors in the 2025 Edition of the IICLE® Construction Law Disputes Handbook, Chapter 3, titled "Subcontractor Claims." This contribution reflects their expertise and dedication to advancing knowledge in construction law.

Jessica Jackler named Income Member

We are pleased to announce that Jessica Jackler has been named an Income Member!

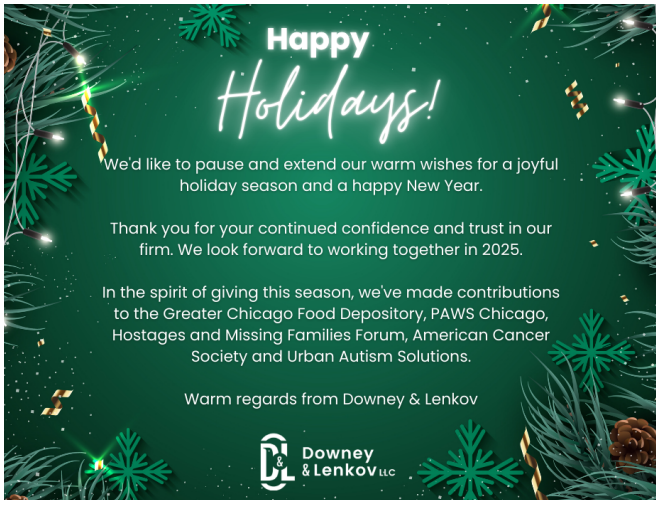
Since joining as an associate, Jessica has demonstrated exceptional dedication and expertise in the defenses and evaluation of employment claims and various issues facing employers, consistently providing clients with cost-effective and practical strategies to mitigate employment litigation risks. Her work in drafting employment handbooks, policies, and agreements, along with her guidance in personnel management and compliance, has been invaluable.

Welcome to the Team

Please join us in welcoming our new Associate Logan March.

Logan focuses his practice on workers' compensation and general liability defense, dedicating himself to protecting his clients' interests. Before joining Downey & Lenkov as a law clerk, Logan worked at a nonprofit medical-legal partnership focused on addressing healthcare issues through a legal approach. He also engaged in civil rights and prison reform efforts.

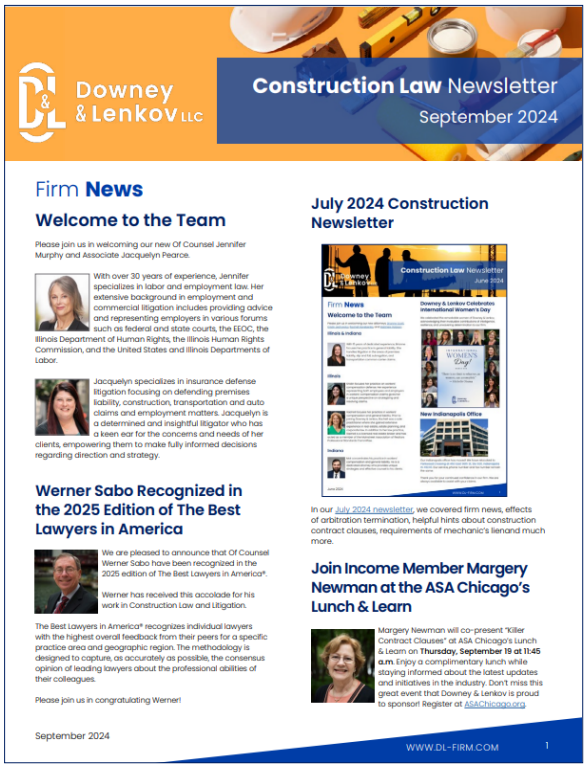
'Tis the Season



Downey & Lenkov Holiday Outing

We're rolling into the season with style! Our team had a blast celebrating the holiday season at 10pin Bowling Lounge. Happy Holidays from all of us to you!

September 2024 Construction Newsletter



In our September 2024 newsletter, we covered firm news, construction negligence in Illinois, important updates on Workers' Compensation claims, tips on contracting with a governmental body and much more.

Legal **Updates**

Beware of Workers' Compensation for Day Labor and Borrowed Employees

By: Frank Rowland

As noted in our March construction newsletter, increases in the minimum wage and other factors have raised the usage of "independent contractors." In addition, various social and economic factors have increased the number of individuals hiring themselves out as "day laborers." Certain provisions under the Illinois Workers' Compensation Act must be kept in mind.

I. Is Your Sub-Contractor Fully Insured?

All contractors need to be fully aware that in addition to providing workers' compensation coverage for your employees, you can be responsible under the Workers' Compensation Act, for injuries to your subcontractor's or even subcontractor's-subcontractor's employees if that subcontractor is not fully insured.

The opening provision of the Act provides for your liability if: "[If an entity] directly or indirectly engages any contractor whether principal or sub-contractor to do any such work, he is liable to pay compensation to the employees of any such contractor or sub-contractor unless such contractor or sub-contractor has insured... or guaranteed his liability to pay such compensation." Avoid the nightmare scenario of a subcontractor providing you with proof of coverage before a job begins only to find out that it lapsed or was canceled the week prior to a covered employee being seriously hurt on your job.

Practice Tips:

1. Secure a copy of any subcontractor's workers' compensation coverage upon retention and verify you are on the policy as a party receiving notice of cancellation.
2. Ensure the policy remains in effect when the job begins and throughout its entire duration.

II. Be Aware Of Loaned-Borrowed Employee Laws

Be mindful of the perils if you lend or borrow an employee to or from another company. This is not unusual in larger multiple-company joint ventures. However, it is not limited to working within such a formal structure. If you ask a subcontractor to "borrow" an employee and that employee is injured, who pays? It could be you, either directly or upon a claim being successfully lodged against you by the "lending" employer. If you "lend" an employee, you are responsible for injuries if the "borrower" cannot or will not pay.

The Act provides: "Where an employer operating under and subject to the provisions of this Act loans an employee to another such employer and such loaned employee sustains a compensable accidental injury in the employment of such borrowing employer and where such borrowing employer does not provide or pay the benefits or payments due such injured employee, such loaning employer is liable to provide or pay all benefits or payments due such employee under this Act."

While various laws may require that certain "borrowing/lending" employer situations be reduced to writing, this often does not occur. It could be as simple as your foreman asking a subcontractor's foreman if one of their employees can do a short and simple task. Unwittingly, that foreman has placed that borrowed employee on your payroll for workers' compensation purposes, and your workers' compensation carrier may have a problem with that.

III. The Perils Of Using Temporary Help Services

There is a rise in the use of temporary help on construction projects. While this is not often directly encountered in larger "union jobs," they are not immune from "day labor" issues that often arise out of such items as trash removal and general pre- and post-construction clean up. Several high-quality temporary help agencies comply with the applicable laws and good practices. However, many do not.

The Act provides: An employer whose business or enterprise or a substantial part thereof consists of hiring, procuring or furnishing employees to or for other employers operating under and subject to the provisions of this Act for the performance of the work of such other employers and who pays such employees their salary or wages notwithstanding that they are doing the work of such other employers shall be deemed a loaning employer within the meaning and provisions of this Section.

Unless the temporary agency has fully agreed to insure workers' compensation risks, odds are good the hiring entity with control over the work (i.e., the site owner or general contractor) will be deemed a borrowing employer and thus have primary workers' compensation responsibility.

The Corporate Transparency Act

By: Margery Newman & Frank Swanson

The Corporate Transparency Act ("CTA") mandates certain non-exempt companies to report the identities of their beneficial owners and applicants for incorporation. The initial reporting deadline was set for January 1, 2025. However, a district court in Texas issued a nationwide preliminary injunction against the enforcement of the CTA, citing constitutional concerns.

The government took an appeal, leading the Court of Appeals to issue a temporary stay that allowed enforcement of the CTA to continue until further notice. This resulted in an extension for companies to comply by January 13, 2025.

However, on December 26, 2024, a separate panel of the 5th Circuit Court of Appeals vacated the temporary stay, maintaining the preliminary injunction. Consequently, the January 1, 2025, reporting deadline is no longer enforceable until the final resolution of the injunction.

Additionally, on December 31, 2024, the Department of Justice sought a stay of the injunction pending the Supreme Court of the United States' final ruling regarding the CTA's reporting requirements. The Financial Crimes Enforcement Network (FinCEN) has stated it will comply with the injunction but encourages companies to voluntarily submit beneficial ownership information reports.

Downey & Lenkov will continue to monitor developments and provide updates as they occur.

Don't Waive a Construction Claim by Waiting Too Long

By: Werner Sabo

When a construction agreement party makes a claim, the statute of limitations needs to be considered in the process. Many construction agreements provide for arbitration instead of litigation for dispute resolution. For instance, the 2007 version of AIA Document A101, the owner-contractor agreement, provides as follows:

> A demand for arbitration shall be made no earlier than concurrently with the filing of a request for mediation, but in no event shall it be made after the date when the institution of legal or equitable proceedings based on the Claim would be barred by the applicable statute of limitations. For statute of limitations purposes, receipt of a written demand for arbitration shall constitute the institution of legal or equitable proceedings based on the Claim.

This means that a demand for arbitration must not be filed later than the applicable statute of limitations, which is different among the various states. For instance, in *Bienville Par. Sch. Bd. V. Thrash Constr. Servs., LLC*, 2024 La. App. LEXIS 2198 (Dec. 18, 2024), the owner hired a contractor to install an all-weather track at a school. During construction and after a major rainstorm, three retaining walls started to move. An engineer hired by the owner reported that the retaining walls would need to be destroyed. The owner then terminated the agreement with the contractor. Prior to the termination, the owner filed suit against the contractor and others, alleging defective design, construction and workmanship of the project.

The contractor and other defendants moved to dismiss or stay the case based on the arbitration provisions of the general conditions. The contract mandated arbitration of disputes, so that litigation is improper under such conditions. On August 7, 2018, the trial court stayed the case pending completion of arbitration. The court case was stayed, meaning that it was not dismissed but rather placed on hold. The owner, at this point, should have initiated arbitration proceedings, but did nothing.

Over five years later, in August 2023, the contractor moved to dismiss the case because the five-year statute of limitations had expired. The owner had never instituted a claim for arbitration and thus, it was argued, had missed the five-year deadline and the claim should be extinguished. The owner opposed the motion, arguing that its timely suit acted as a stay of the limitations period and that its claim was viable pending completion of arbitration. The trial court rejected this argument and dismissed the case.

On appeal, the appellate court reviewed the contract, stating that the agreement has the effect of law for the parties. The parties accepted arbitration as the method of binding dispute resolution. The agreement also stated that the demand for arbitration must be made no later than the date when the institution of legal proceedings based on the claim would be barred by the applicable statute of limitations. The parties conceded that the owner did not make the required written demand for arbitration within the five-year period.

The owner argued it did, in fact, exercise its right by filing suit in 2018. The appellate court rejected this argument as the suit in district court was not in the jurisdiction and venue contemplated by the agreement and thus cannot be deemed as exercising the right. In other words, filing the suit was not a proper replacement for the timely filing of a demand for arbitration. Filing in court did not meet the requirements of the contract. Further, because the agreement states that the parties shall commence all claims in accordance with the requirements of the final dispute resolution method selected in the agreement within the time period specified by applicable law, and any claims not so commenced

are waived. The "applicable law" in this case was the five-year statute of limitations in Louisiana. Because the owner had not filed a demand for arbitration within that five-year period, it had waived any claims it had. There was no arbitration, and the court case was dismissed. The owner was just out of luck.

A party with a potential claim needs to be aware of any contractual provisions that apply to that claim. In this case, the trial court provided the owner with a road map to follow to bring its claim. The owner ignored this and simply waited more than five years, resulting in the loss of its claim.

Wage Differential Awards

By: Logan March

An injured employee who suffers a permanent partial disability (PPD) may receive either a wage differential award or a percentage-of-the-person-as-a-whole award, but not both. Generally, a wage differential award is given when the employee is partially unable to pursue their usual and customary employment and there is a difference in the amount they earned before the injury and the amount they will be able to earn after. A PPD award is given when the employee:

1. Is able to perform the duties of their employment but cannot pursue other occupations or is physically impaired;

2. Cannot complete the duties of their usual and customary employment but is paid the same amount; or

3. Suffers an impairment in earning capacity but waives the right to recover a wage-differential award.

In *Stephen J. Walsh v. The Illinois Workers' Compensation Commission et al.*, 2023 IL App (3rd) 230174WC-U, the Illinois Appellate Court reviewed a Commission decision granting a PPD award and a conflicting Circuit Court decision granting a wage differential award instead. The court clarified that when Petitioner meets the requirements for both, a wage differential award should be granted.

The employer offered a job description at trial reflecting a medium-duty position, requiring Petitioner to drive a truck, climb in and out of the cab several times per day and operate a clutch. Petitioner would have been able to work within these restrictions. However, Petitioner's account of the job reflected a heavy-duty position that also required him to shovel asphalt in and out of the truck. The court resolved the credibility of the accounts in Petitioner's favor and found his job description to be accurate. Accordingly, they held that the job was a heavy-duty position, and Petitioner could no longer perform the role. He had found alternative employment at a gas station for a significantly reduced wage, meeting the requirements for either a wage differential award or PPD. The court affirmed the Circuit Court decision granting the wage differential award.

Wage differential awards are often higher than PPD awards and present greater liability for employers. Employers need to provide accurate job description at trial, including duties not necessarily included in the formal job description but that employees are expected to perform in practice. This will allow defense counsel to argue for a proper award and anticipate potential wage differential liability.

Trump Executive Order Eliminates Affirmative Action Requirements for Federal Contractors

By: Margery Newman & Frank Swanson

On January 21, 2025, President Trump issued several Executive Orders, including the "Ending Illegal Discrimination and Restoring Merit-Based Opportunity" (the "Order"), which can be read here. The Order purports to revoke several previous Executive Orders dating back to those passed in 1965 in the wake of the passage of the Civil Rights Act, including Executive Order 11246, which imposed certain affirmative action obligations on federal contractors and subcontractors. Going forward, all federal offices, including the Office of Federal Contract Compliance Programs ("OFCCP"), are explicitly prohibited from "all discriminatory and illegal preferences, mandates, policies, programs, activities, guidance, regulations, enforcement actions, consent orders and requirements. It further orders all agencies to enforce longstanding civil-rights laws and to combat illegal private-sector DEI preferences, mandates, policies, programs and activities."

As to the OFCCP, the Order directs "immediately cease: (A) promoting 'diversity'; (B) holding federal contractors responsible for 'affirmative action' goals; and (C) allowing or encouraging federal contractors to engage in workforce balancing based on race, color, sex, sexual preference, religion or national origin." The Order also requires that all federal contractors, subcontractors or grant recipients must certify that they do not operate DEI (diversity, equity & inclusion) programs that violate existing federal discrimination laws. Additionally, the Order states that such DEI certifications are "material" to the government's bid selection purposes, thus making a false certification a violation of the False Claims Act. Violations of the False Claims Act can subject private entities to whistle-blower suits and statutory damages.

Analysis: The Trump administration has made clear that the scope of the Order goes beyond the modern understanding of DEI programs and arguably could apply to all post-1965 executive orders or agency actions which are not enshrined into law. At this early stage of the new administration, it remains unclear to what extent the Order will be enforced by the executive branch, its agencies and federal courts. Downey & Lenkov encourages all federal contractors to work to review their existing internal programs, contracts or other such efforts to determine if they comply with the Order and federal law. We offer both construction and employment practice groups who would be happy to assist you with this review.

Who We Are

Downey & Lenkov LLC is a full-service law firm with offices in Illinois, Indiana and Wisconsin. Our expertise spans across several practice areas, providing transactional, regulatory and business solutions for clients across the nation. The firm's continued growth is a result of an aggressive, results-oriented approach. Unlike larger law firms however, we do not face massive overhead and are able to charge more reasonable rates that both small and larger employers can more readily afford.

We evolve with our clients, representing Fortune 500 and small companies alike in all types of disputes. Downey & Lenkov is a team of experienced, proactive and conscientious attorneys that have been named Leading Lawyers, Super Lawyers, Rising Stars and AV Preeminent.

Newsletter **Contributors**

Frank Rowland , Margery Newman, Frank Swanson, Werner Sabo, and Logan March contributed to this newsletter.

View more information on our

Construction Law practice

Our other practices Include:

- Appellate Law
- Business Law
- Condominium Law
- Entertainment Law
- General Liability
- Healthcare Law
- Insurance Law
- Intellectual Property
- Labor & Employment Law
- Products Liability
- Professional Liability
- Real Estate
- Workers' Compensation

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