


Tips for Minimizing Workplace Drama and Litigation

Presented By:
Attorney Sara Ackermann
October 11, 2023

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Tip No. 1:
“At-will” is not a reason for termination!



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“At-Will” is NOT a Reason For Termination

- General rule: “at will” employment.
- Any reason/any time.
- But...what if employee believes “reason” is unfair reason?
- Employee (or their attorney) will argue the “reason” is pretext for protected class.
- Litigation!
- (Neither is “not a good fit,” “we are moving in a different direction,” or refusing to tell them anything!)



3

Honesty is the Only Policy

- Honesty is often difficult, but necessary.
- Trying to be “nice” can come back to haunt you.



4

Sally has had ongoing performance issues based on lots of personal “drama” going on in her life. Sally has mentioned to Tom she thinks she is depressed but has not asked for any accommodation. Customers have called several times with complaints about Sally’s lack of follow through. Sally’s supervisor, Tom, is fed up. He has not documented anything in writing to Sally. He meets with her and tells her there is going to be a “restructuring” and her position is going to be eliminated.




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After a couple months, Tom posts an ad in the paper for Sally’s position. Sally sees the ad while she is having lunch with her sister Sara, who is an employment law attorney. Sara informs Sally that Tom must have lied to her when he said it was a “reorg” and that Sally should file suit with the EEOC because the real reason the company fired Sally was likely because of her depression or her age.



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What claims can Sally bring?

If Sally brings a claim, what is the company's defense (i.e., the "show and tell")?

What is the problem with the company's defense?


How could the company maximize the chance of early dismissal of the EEOC claim?

LYING about the reason hands the employee a suit!



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John has been with the company for 5 years and has been a solid performer. His last performance review was three months ago. He received a "meets expectations." However, lately he has been unable to get along with his co-workers. John even recently alleged that one of his co-workers was "harassing" him, but after HR investigated the allegation, it was determined that there was no harassment – in fact, John was the one that was being difficult, and several employees have recently complained about his unpleasant attitude.



8

John's supervisor wants to fire John for his attitude problems because he is "at-will." Also, John has been sporadically missing work for the last few weeks (leaving early, arriving late, missed a few days completely). When John's supervisor asks him about the attendance, John says only "I have a medical issue, it is getting better-don't worry about it."

If John is terminated, what claims can he bring?

Can the company invoke the "at-will" defense if he sues?

What is the evidence on each side?

What could Company do here to minimize risk of future litigation?



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**Tip No. 2:
DOCUMENT, DOCUMENT,
DOCUMENT!**



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What is a Good Documentation?

- Justifies why adverse action taken.
- Justifies timing of adverse action.
- **What you write down at the time it is happening is more credible than what you say happened AFTER YOU GET SUED!**
- *Call HR to assist you! (What is in the file?)*



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Management and Documentation

- Communicate problems honestly and clearly to the employee in writing. (*If not in writing, it did not happen!*)
- Work with HR to make sure documentation is done correctly.
- After verbal discussion, if issue does not improve, start documentation to the employee.
- Documentation may vary based on the issue. (E-mail or formal written discipline?)
- Running notes are not sufficient to defend the claim.



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Management and Documentation

- Termination should never be a surprise (exception – true RIF)
- Performance expectations must be consistent and uniform to avoid discrimination.
- Performance Reviews must be honest, accurate, and clear.
- “Meets Expectations” is an A to some/B to most!
- If an Employee is doing D work, then give them a D!
- Do not wait for the Review if employee is doing D work.



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Keys to Good EE Memos (YSL)

- Unless in black and white to them, employee will not “get it!”
- Describe the problem as detailed as possible.
- Describe steps already taken to correct the problem.
- Include timeline.
- Identify consequences for failure to correct the problem.
- Say what you mean.
- Be specific.
- *Prove employee got a copy.*
- *Let them draft a response?*



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Document

- Every document, anywhere, except legal advice from an attorney (*shameless self-promotion but true*) could be “Exhibit A” at trial.
- E-mails, text messages, voice-mails.
- Sarcasm? Frustration?
 - E-mails, text messages, voice-mails.
 - Calendars.
 - Supervisor notes.



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A Note about Notetaking...

- If you write/type something, later we need to prove;
 - Who wrote it?
 - When was it written?
 - Is it a typed summary of another event? If so, when was that event? Who was there? etc.
 - Is it a typed summary of written note? If so, where are those notes and when were they taken?
 - Do not use running notes.
 - Better to send an e-mail to yourself.

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Questions to Ask Before Termination

- Has the employee been given fair warning/opportunity to improve?
- Will the employee know it is coming?
- Have you complied with your own policies and practices?
- If the termination is based on an employee complaint, has there been an investigation (with HR) to confirm the allegations?
- Have you identified any risks?
- If after the employee is gone, a third party reviews his file, will they understand why he was fired, and would they believe it was fair?



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“At-Will”: Then What is it Good For?

- Prevents contract claim.
- Offer letters.
- Employee handbooks.



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**Tip No. 3:
NEVER SAY NEVER TO A
REQUEST FOR
ACCOMMODATION!**



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Definition

- Physical or mental condition that substantially limits a major life activity (such as walking, talking, seeing, hearing, or learning).
- *A record of or regarded as.*
- (EEOC: a disability can be a temporary severe impairment lasting less than 6 months.)
- Anxiety, depression, OCD, PTSD.



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Most Common Disability Claims

- “I am disabled, and my employer refused to accommodate me!”
- **“My employer required me to be 100%!”**
- “My employer failed to offer me additional leave!”
- “I want to work from home!”
- “I want to bring my cat to work!”



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Reasonable Accommodation?

- Not required if “undue hardship.”
- Not required to provide indefinite leave.
- Not required to modify more than 75% of a job.
- Not required to create a new job.
- Not required to transform a bona fide light-duty assignment into a permanent position.
- Not required if reasonable probability of threat to safety of self or others, and accommodation cannot reduce the threat. (Medical documentation required – even for pregnancy!)
- Employee **MUST** request unless need is obvious.



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Reasonable Accommodation?

- Definite unpaid leave (How long? FMLA plus 2 weeks?)
- Modification of workplace policies.
- Modification of hours, schedules, shifts.
- Modification of workplace location.
- Provision of equipment, machinery, assistance.
- Employee does not get to choose...but...
- Employer must be able to prove why it said “no.”
- What about safety concern?



23

EE Entitled to “Room with a View”

Ekstrand v. Sch. Dist. of Somerset

- Teacher requested room with natural light.
- Informed principal because of SAD.
- Two rooms available.
- Doctor supported request.
- ER denied request.
- Teacher claims symptoms worsen.



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EE Entitled to “Room with a View”

- Ultimately, unable to work.
- Sues under ADA for failure to accommodate.
- Court: ER should have granted request absent “undue hardship.”
- Court: Not an undue hardship as other teacher testified willingness to switch rooms and low additional cost involved.
- Reinstatement, three years’ back-pay, \$250,000 in fees.



25

A new employee, Sniffy Susie, approaches you after a Department meeting. She says, “I want you to know I am very sensitive to fragrances. This includes lotion, deodorant, shaving cream, laundry detergent, dryer sheets, fabric softener, hairspray, powder, face cream, perfume, hair gel and mousse. Being in that conference room for that meeting nearly killed me! I will no longer be able to report in person to Department meetings unless you implement a *fragrance-free* workplace. Also, I will need to have access to at least one bathroom that is devoid of any air freshener.”

What do you say?



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a) "Susie, are you nuts? Hell will freeze over before we implement a fragrance-free workplace at Company. Perhaps this isn't the best place for you after all."

b) "Susie, we really need you at Department meetings in-person so we can build relationships and communicate effectively with each other. Is there one person that perhaps is wearing too much perfume? If you let me know who it is, I can talk to them for you."

c) Something else????



27

Joy asks to speak to you privately in your office. You know Joy is struggling with anxiety and depression. Her work performance has not suffered, although she does occasionally need to miss work for appointments.

Joy is excited to tell you about her new pit bull named Killer. She explains to you that Killer is a trained ADA "service animal," and starting Monday, Killer will be coming to work with her every day. Her therapist is convinced Killer will help ease her anxiety in the workplace, which has increased since her recent divorce.

What do say?



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*a) "Who do you think we are, some liberal tech start-up?
No way can you bring a dog with you to work at Company!"*

*b) "Joyce, that is wonderful you have a new pooch!
Unfortunately, we simply will not be able to accommodate you
with a dog here at work—customers and co-workers could be
frightened or allergic. Is there something else we could do for
you as an accommodation?"*

c) Something else????



29

After Joyce starts bringing Killer into the workplace, Rashy Rita comes in your office. She is visibly shaken. She says, "I am extremely allergic to dogs. I am going to have to quit if you are going to allow that crazy dog here. What kind of workplace is this??"

What do you do?



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Practice Tips

- Call HR whenever an employee requests ANYTHING related to a health issue/pregnancy.
- Engage in the “interactive process.”
- What does EE want?
- WHAT CAN YOU DO?
 - *Work from home? (tough to argue!)*
 - *Dogs at work?*
 - *Couch in office?*
- Never say never!
- Doctor? Safety? Undue Hardship?



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FMLA vs. ADA

- **Family Medical Leave Act (FMLA): Serious Health Condition**
 - Leave only—not accommodation.
 - No “magic words.”
 - *Employer burden to notify employee.*
 - Leave can be intermittent (migraines, IBS, etc.)
 - Reinstatement is protected.
- **Americans with Disabilities Act: Disability**
 - Accommodation required—might include leave.
 - *Employee must request the accommodation unless obvious.*
 - Sporadic, intermittent attendance NOT an accommodation.



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Tip No. 4:
DON'T IGNORE
HARASSMENT!



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What is Harassment?

- All protected characteristics (race, religion, etc.).
- Sexual harassment.
- Hostile work environment. (Think Lauer.)
- Quid Pro Quo. (Think Harvey.)



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Unwelcome Verbal or Physical Conduct

- Making of sexual gestures/comments;
- Repeated display of sexually graphic materials; or
- Verbal or physical sexual conduct “whether or not repeated,” that interferes substantially with an employee’s work performance or creates an intimidating, hostile, or offensive work environment.



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Workplace Harassment Simple Test

- Is it unwelcome conduct? (*Hint, we will NEVER KNOW!*)
- Is it sexual?
- Is it tied to the workplace (QPQ or HE)?
 - Co-workers?
 - Customers?
 - Vendors?
 - Management?



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Types of Harassment and Employer Liability

- **Harassment by non-supervisor:** Liable only if “knew or should have known” that harassment was occurring.
- **Harassment by third party:** Same.
- **Harassment by supervisor:** Automatically liable. Does not matter if company “didn’t know” because there was not a complaint.

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Sexual Harassment Where EE Subject to Sexual Comments and Touching by Supervisor

Miller v. Greenfield Veterinary

- Slapped buttocks on two occasions; poked ribs; made comments on two or more occasions regarding the size of the complainant's buttocks.
- “[L]ogically and rationally interpret repeated comments [of this kind] to be sexual in nature, whether or not accompanied by other overt sexual language or conduct.”
- \$15,000 back pay; \$15,000 front pay; \$80,000 attorneys’ fees.

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“Your PJ’s Would Look Good On My Floor”

Harper v. Menard, Inc.

- EE alleged her supervisor made several comments of sexual nature.
- Occasional comments enough to constitute sexual harassment.
- Company liable despite fact that she never complained.
- \$35,000 attorneys’ fees. (No back pay or front pay as employee was fired for unrelated cause.)



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Katie and Matt are both managers in the same department. Matt and Katie often go out to lunch together. They frequently discuss non-work related topics (kids, hobbies, etc.). Recently, Matt has begun to complain to Katie about his marriage. On more than one occasion he has specifically complained about his “sex life” and lack thereof. Katie is uncomfortable during these conversations, and begins to avoid speaking with Matt. The company has a sexual harassment policy that requires employees to bring sexual harassment complaints to either their supervisor or to HR. Katie does not complain.

Is this sexual harassment?

Is the company liable if she never complains?



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Chad and Susie are co-workers and very close friends outside of work. Chad is promoted into management, but Susie does not report to him. Chad and Susie frequently discuss work issues.

One month after Chad's promotion, Susie and Chad are out for drinks at a non-work event on a Saturday night. After a couple of beers, Susie tells Chad that Al, an accountant at the company, is always asking her out, telling her how "hot" she looks, and slapping her on the bottom. She says, "I actually think Al is kind of cute, but I would never date a co-worker."

*Is this sexual harassment?
What should Chad do?*



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Practice Tips

- Contact HR immediately if complaints of harassment/inappropriate behavior are made.
- Even if no complaint, watch for inappropriate behavior.
- Be mindful of comments/teasing about age, disability, religion...not just comments sexual in nature.
- Cannot guarantee anonymity.
- Explain importance of reporting.



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**Tip No. 5:
AUDIT YOUR REGULAR
RATE/TIMECLOCK
PRACTICES**



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Class Action Litigation is HERE!

Regular rate missteps:

- Sign-on bonuses with claw back or paid overtime;
- Referral bonuses with claw back or paid overtime;
- Attendance bonus
- Productivity bonus (percentage exception)
- Other special shift differentials (bi-lingual, etc.)

Review timeclock practices:

- Break must be 30 minutes to be unpaid.
- Must have evidence employee clocked in/out.




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THANK YOU!



Questions?



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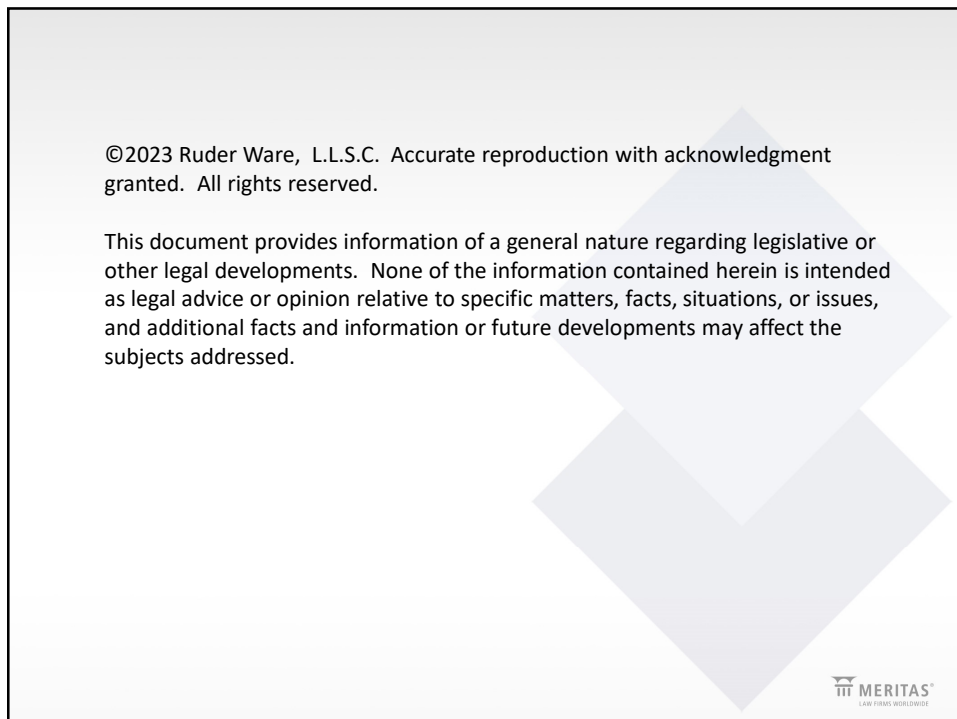
Sara Ackermann
sackermann@ruderware.com



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Sara J. Ackermann
Attorney

500 N First Street, Suite 8000
P.O. Box 8050
Wausau, WI 54402-8050
Phone: 715.845.4336
Toll Free: 800.477.8050
Fax: 715.845.2718

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Sara sees herself as a member of a company's HR team.

Clients utilize her varied background by treating her as a consultant and advisor on employment law topics. Sara counsels HR professionals on the development of proactive policies, procedures, and protocols drafted to retain talent and create a positive work environment. Sara has previous experience working inside a corporation so she understands the myriad of employment issues that HR professionals and business owners face every day. Her focus is on providing proactive advice by identifying issues before they arise so that her clients can minimize their risk and avoid the expensive legal fees associated with litigation.

Sara is a sought after presenter, and presents nationwide on topics affecting HR professionals. Actively involved in the local Society of Human Resource Management chapter, serving as a board member, she is connected to the HR community and is therefore skilled at providing solutions to real-life situations. She counsels clients in the private sector from a broad range of industries. Her experience includes:

- Counseling employers on every aspect of federal and state employment laws, including laws regarding drug and alcohol testing, background checks, employee privacy, wrongful discharge, antidiscrimination, anti-harassment, plant closing and mass lay-off, wage and hour, family medical leave, and reasonable accommodation.
- Representing employers in employment litigation matters and in the administrative setting including Wisconsin and Minnesota state and federal agencies.
- Guiding employers in conducting workplace investigations.
- Representing employers in Office of Federal Contract Compliance Programs (OFCCP) and Department of Labor (DOL) audits.
- Reviewing employer wage and hour practices including, exempt/non-exempt position classifications, meal/rest break practices, off the clock and record keeping issues.
- Drafting employee handbooks, separation agreements, disciplinary memoranda, affirmative action plans, employment contracts, non-compete agreements and independent contractor agreements.
- Conducting employment law training, including but not limited to, sexual harassment training for employees and "employment law basics" training for management.

Sara frequently posts to [The Blue Ink Employment blog](#).

CIVIC ACTIVITIES

- **Keep Area TEENS Safe (KATS)** – Board Member (2021–present)
- **Wausau Area Performing Arts Foundation, Inc.** – Board Member (2012–2015), Fundraising Committee (2012–2015)

- **Wausau Child Care, Inc.** – Past President, Board Member (2005–2011)
 - **Wausau Child Care Foundation** – Member (2012–present)
-

PROFESSIONAL ACTIVITIES

- **Central Wisconsin Society of Human Resource Management** – Board of Directors
- **Society of Human Resource Management** – Member

Education

- B.A., University of Minnesota – Minneapolis, MN (1995)
 - J.D. (magna cum laude), William Mitchell College of Law – St. Paul, MN (2003)
-

Admissions

- Wisconsin Supreme Court
- U.S. District Court for the Western District of Wisconsin

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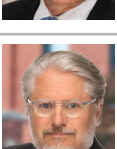
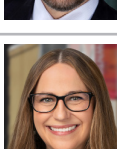
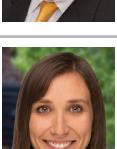
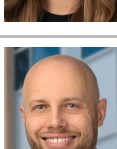
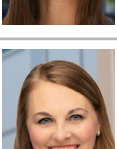
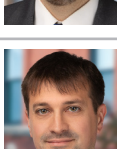
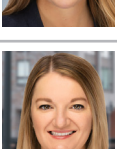
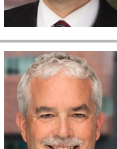
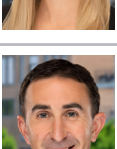
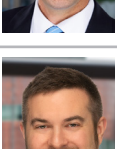

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- Creation of charitable remainder and lead trusts
- Creation of gifts annuities and pooled income funds

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	<p>Sara Ackermann</p> <ul style="list-style-type: none"> • Commercial Litigation • Employment Law <p style="text-align: right;">Wausau</p>		<p>Steve Anderson</p> <ul style="list-style-type: none"> • Commercial Litigation <p style="text-align: right;">Eau Claire</p>
	<p>Mark Bradley, Of Counsel</p> <ul style="list-style-type: none"> • Business Succession Planning • Estate Planning • Fiduciary Services <p style="text-align: right;">Wausau</p>		<p>Matt Cornetta</p> <ul style="list-style-type: none"> • Commercial Litigation • Mediation <p style="text-align: right;">Eau Claire</p>
	<p>Ian Colby</p> <ul style="list-style-type: none"> • Mergers & Acquisitions • Real Estate & Construction <p style="text-align: right;">Eau Claire</p>		<p>Mykayla Dado</p> <ul style="list-style-type: none"> • Agriculture • Estate Planning <p style="text-align: right;">Eau Claire</p>
	<p>Linda Danielson</p> <ul style="list-style-type: none"> • Agriculture • Business Organizations • Estate Planning <p style="text-align: right;">Eau Claire</p>		<p>Amy Ebeling</p> <ul style="list-style-type: none"> • Agriculture • Business Transactions • Estate Planning • Tax Law <p style="text-align: right;">Wausau</p>
	<p>Stew Etten, Of Counsel</p> <ul style="list-style-type: none"> • Banking & Financial Institutions • Bankruptcy & Creditors' Rights <p style="text-align: right;">Wausau</p>		<p>Dave Fenlon</p> <ul style="list-style-type: none"> • Business Organizations • Estate Planning • Real Estate <p style="text-align: right;">Green Bay</p>
	<p>John Fisher, CHC, CCEP</p> <ul style="list-style-type: none"> • Health Care <p style="text-align: right;">Wausau</p>		<p>Anne Flinchum</p> <ul style="list-style-type: none"> • Commercial Litigation <p style="text-align: right;">Green Bay</p>
	<p>Ashley Hawley</p> <ul style="list-style-type: none"> • Agriculture • Estate Planning <p style="text-align: right;">Wausau</p>		<p>Eric Johnson</p> <ul style="list-style-type: none"> • Commercial Litigation <p style="text-align: right;">Wausau</p>
	<p>Melissa Kampmann</p> <ul style="list-style-type: none"> • Business Succession Planning • Estate Planning • Fiduciary Services <p style="text-align: right;">Wausau</p>		<p>J.P. La Chapelle</p> <ul style="list-style-type: none"> • Business Organizations • Business Succession Planning • Estate Planning <p style="text-align: right;">Wisconsin Rapids</p>
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	<p>Andrew Lorenz</p> <ul style="list-style-type: none"> • Banking & Financial Institutions • Commercial Litigation • Real Estate & Construction <p style="text-align: right;">Eau Claire</p>		<p>Ron Metzler, Of Counsel</p> <ul style="list-style-type: none"> • Banking & Financial Institutions • Real Estate <p style="text-align: right;">Green Bay</p>

	<p>Joe Mella</p> <ul style="list-style-type: none"> • Agriculture • Health Care • Mergers & Acquisitions • Real Estate & Construction 	Wausau		<p>Jessica Merkel</p> <ul style="list-style-type: none"> • Agriculture • Elder Law 	Wausau
	<p>Paul Mirr</p> <ul style="list-style-type: none"> • Mergers & Acquisitions • Real Estate & Construction 	Eau Claire		<p>Joe Mirr, Of Counsel</p> <ul style="list-style-type: none"> • Mergers & Acquisitions • Real Estate & Construction 	Eau Claire
	<p>Mark Munson, CELA</p> <ul style="list-style-type: none"> • Elder Law 	Wausau		<p>Brick Murphy</p> <ul style="list-style-type: none"> • Business Organizations • Mergers & Acquisitions • Real Estate & Construction 	Green Bay
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	<p>Derek Prestin</p> <ul style="list-style-type: none"> • Intellectual Property • Real Estate & Construction 	Eau Claire		<p>Eric Preu</p> <ul style="list-style-type: none"> • Business Organizations • Business Succession Planning • Estate Planning 	Wisconsin Rapids
	<p>Ruth Ross</p> <ul style="list-style-type: none"> • Estate Planning 	Wausau		<p>Matt Rowe</p> <ul style="list-style-type: none"> • Banking & Financial Institutions • Corporate Finance & Securities • Mergers & Acquisitions 	Wausau
	<p>Mary Ellen Schill</p> <ul style="list-style-type: none"> • Agriculture • Employee Benefits & Executive Compensation • Employment Law 	Wausau		<p>Jake Schraeder</p> <ul style="list-style-type: none"> • Corporate Contracts • Mergers & Acquisitions 	Wausau
	<p>Paul Schlindwein, Of Counsel</p> <ul style="list-style-type: none"> • Corporate Finance & Securities • Mergers & Acquisitions 	Wausau		<p>Lucas Sczygelski</p> <ul style="list-style-type: none"> • Corporate Contracts • Mergers & Acquisitions 	Wausau
	<p>Chris Seelen</p> <ul style="list-style-type: none"> • Agriculture • Banking & Financial Institutions • Bankruptcy & Creditors' Rights 	Eau Claire		<p>Nicole Stangl</p> <ul style="list-style-type: none"> • Employment Law 	Wausau
	<p>Jordan Sundell</p> <ul style="list-style-type: none"> • Business Organizations 	Green Bay		<p>Bill Tehan, Of Counsel</p> <ul style="list-style-type: none"> • Business Organizations • Commercial Contracts 	Wausau
	<p>Jeremy Welch</p> <ul style="list-style-type: none"> • Banking & Financial Institutions • Bankruptcy & Creditors' Rights 	Wausau		<p>Shanna Yonke</p> <ul style="list-style-type: none"> • Estate Planning • Fiduciary Services • Business Succession Planning 	Wausau

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