

# WELCOME TO THE ACEA ALL MEMBERS MEETING

SPONSORED BY



NOVEMBER 10, 2022  
CHAMPPS AMERICANA, BROOKFIELD

# ACEA 2022 ALL-MEMBERS MEETING

---

## AGENDA

- Welcome – ACEA Executive Director Matt Marcellis
- What WRTP/Big Step Can Do for You – WRTP/Big Step President & CEO Lindsay Blumer
- Understanding Standard Construction Subcontract Clauses – ACEA Executive Director Matt Marcellis
- Legal Update: 5 Walworth, LLC v. Engerman Contracting, Inc.
- Milwaukee Construction Market Trends 2022 – Discussion
- Reception & Networking – Drinks and Appetizers provided



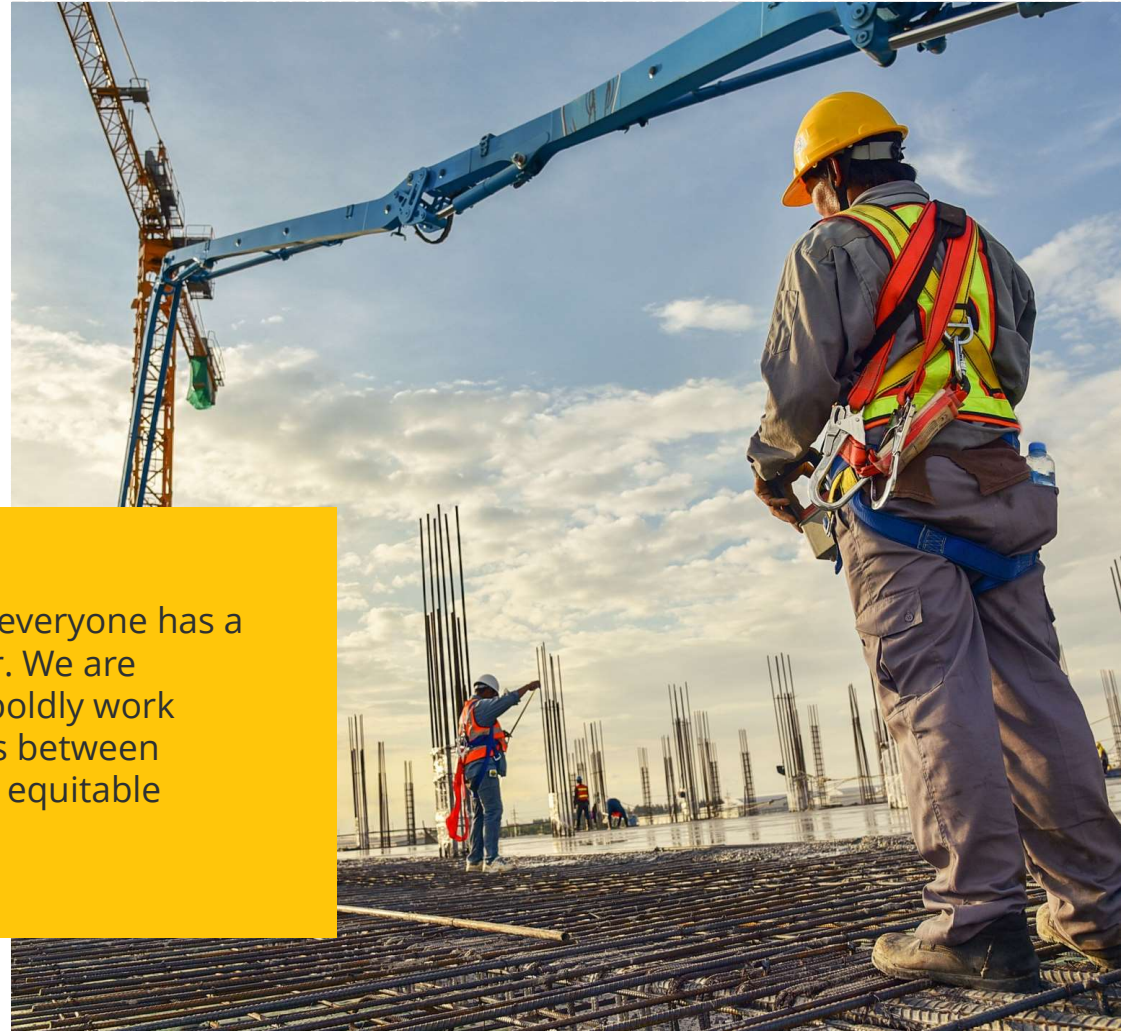
**WRTP | BIG STEP**  
PAVING THE WAY

**ACEA  
All-  
Members  
Meeting  
11/10/22**

WRTP | BIG STEP  
PAVING THE WAY

## WHO WE ARE

WRTP is paving the way to make sure everyone has a pathway to a family-supporting career. We are curious and courageous people who boldly work toward building impactful connections between people and industry in innovative and equitable ways: we are the change-makers.





**WRTP | BIG STEP**  
PAVING THE WAY



# OUR MISSION

To enhance the ability of public and private sector organizations to recruit, develop, and retain a more diverse, qualified workforce in construction, manufacturing, and emerging sectors of the regional economy.

# OUR VISION

Traditionally underrepresented and underemployed people, particularly women and people of color, have access to education, training, and supportive equitable placement opportunities.

Industry employers and labor organizations are full partners in creating career pathways and opportunities that are safe, skill-focused, and culturally competent.

Holistic planning and technical assistance that expands career opportunities for people and industry in a dynamic workforce community.





**WRTP | BIG STEP**  
PAVING THE WAY





# Workforce Policy

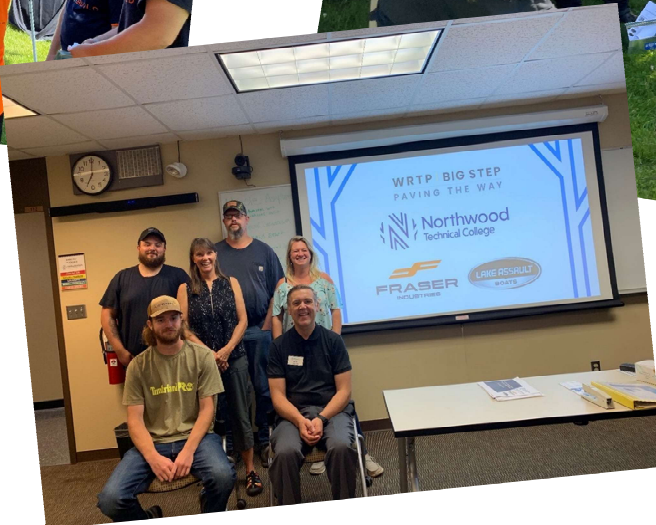
WRTP | BIG STEP  
PAVING THE WAY





# By the Numbers

WRTP | BIG STEP  
PAVING THE WAY







OUR  
WORK



**WRTP | BIG STEP**  
**PAVING THE WAY**

3841 W WISCONSIN AVE, MILWAUKEE, WI 53208 | 414.342.9787 | [WRTP.ORG](http://WRTP.ORG)



# UNDERSTANDING YOUR CONSTRUCTION SUBCONTRACT

ACEA ALL-MEMBERS MEETING

THURSDAY, NOV. 10, 2022

Disclaimer: The information provided is for general information purposes only and is not a substitute for legal advice from your attorney.





# MEET THE PRESENTER



## Matt L. Marcellis

- ❖ Executive Director of the Allied Construction Employers Association (ACEA)
- ❖ Attorney with Management Guidance, LLP
- ❖ Air Force Veteran, Graduate of Chicago-Kent College of Law, & Member of the WI Bar Assn. since 2020
- ❖ Former in-house counsel for a structural steel and glazing subcontractor with \$80+ mil in annual sales



# What is your contract, really?



It is EVIDENCE of your Agreement with the GC

It is NOT your Agreement

You could legally agree to repaint AmFam Field on a handshake\* (don't do this)

So, by definition, your contract only matters when there's a dispute or a problem

\*Statute of Frauds, Wis. Stat. § 402.201





## ❖ FLOW DOWN PROVISIONS/MUTUAL RIGHTS AND RESPONSIBILITIES

- ❖ Example: “Subcontractor shall be bound by the terms and conditions set forth in the Contractor’s agreement with the End-Client (“Prime Contract”) and such terms are incorporated herein...”
- ❖ You’re agreeing to every contractual obligation that the GC has to the Owner and Architect
  - ❖ E.g. Notice requirements, remedies for delay, special legal requirements (Federal projects)
  - ❖ Notice Clause(s), some of the most important clauses in a contract, be aware of notice deadlines both in YOUR contract and the PRIME (delay, *potential* delay, additional work, etc.)
    - ❖ If another subcontractor causes your delay, your contract contains your only remedy^
- ❖ A Subcontractor has every right to review the Prime Contract if they are bound to it
  - ❖ If GC claims confidentiality concerns, request a redacted copy – should be *pro forma*

## ❖ INTEGRATED AGREEMENT CLAUSE/ENTIRE AGREEMENT CLAUSE

- ❖ Prior written or verbal Agreements or understandings are no longer legally valid
- ❖ Example: “This Contract embodies the entire Contract between the parties hereto concerning the subject matter hereof and supersedes all prior conversations... whether written or oral
- ❖ Will list documents incorporated into the Agreement
  - ❖ e.g. Prime Contract, Appendices, etc.
  - ❖ Will often list a hierarchy of controlling documents for when there is a discrepancy
- ❖ However, the Agreement can still be modified after signing, even verbally or by conduct\*

^ *Mechanical Inc. v. Venture Electrical Contractors, Inc.*, 392 Wis. 2d 319, 944 N.W.2d 1, 2020 WI App. 23 (Wis. Ct. App. 2020)

\* *Bacardi U.S.A., Inc. v. Gallo Wine Distributors, L.L.C.*, 829 So. 2d 963, 964 (Fla. Dist. Ct. App. 2002)

❖ COMPLIANCE WITH ALL LAWS

- ❖ Example: “Subcontractor shall comply with all applicable laws, statutes, ordinances, codes, rules, and regulations.”
- ❖ Problem: the clause is VERY broad
  - ❖ Every municipality/county/state/federal has its own building codes & rules, some contradictory
  - ❖ If you unknowingly follow a spec that violates a local code, YOU could be expected to cure
- ❖ In general, the Architect is responsible for code compliance
- ❖ Suggested replacement: “Subcontractor will reasonably rely on the provided specifications re: local ordinances, code compliance . . .”

❖ INDEMNIFICATION CLAUSE/HOLD HARMLESS CLAUSE

- ❖ Indemnification: compensation for harm or economic loss
- ❖ Example: “agrees to indemnify and hold harmless Contractor from any and all claims... due to personal injury or property damage, or both, including loss of use, arising from or on account of the fault of Subcontractor or caused in part or in whole by any act or omission, whether passive or active (of GC)
- ❖ GCs often structure the clause so that a subcontractor is liable for the GC’s own negligence
  - ❖ GC may legally require a subcontractor to indemnify for GC negligence, BUT
  - ❖ Must be explicitly and conspicuously stated\*
- ❖ Suggested replacement: strike GC’s “own negligence” language

*\*Sutton v. A.O. Smith Co. 165 F.3d 561 (7th Cir. 1999)*



❖ CONTINGENT PAYMENT & LIEN WAIVERS IN WISCONSIN

❖ Contingent Payment: Pay When/If Paid

❖ Pay when paid provisions are valid and enforceable in Wisconsin

❖ Example: “Subcontractor shall be paid within (X) days after receipt of payment . . .”

❖ Most WI jurisdictions hold that GCs must pay within a “reasonable period of time”

❖ Pay if paid provisions are unenforceable in Wisconsin\* (but valid in IL, MI & MN)

❖ Example: “payment to the contractor for the subcontractor's work are conditions precedent to the subcontractor's right to payment by the contractor.”>

❖ Lien Rights Provisions

❖ Any waiver of lien rights in a contract is unenforceable in Wisconsin^ (IL & MI?)

❖ GC can request lien waivers after work is completed (and they are enforceable), but subcontractor is entitled to refuse prior to being paid in full

❖ Example: “Subcontractor shall deliver, together with each Contractor’s Invoice, (i) an Interim Lien Waiver from Subcontractor . . . and (iii) a Final Lien Waiver from the Supplier(s)

❖ Subcontractors must take care to preserve lien rights<sup>o</sup>

❖ Must file a claim for lien with the county clerk where work was performed within 6 months

❖ 30 days prior to filing, must serve written notice of intent to lien on the Owner

❖ Be Aware of Wisconsin Law if Dealing With an Out-of-State GC – contract law governed by *state* law

\* Wis. Stat. § 779.135

> *BMD Contractors, Inc. v. Fid. & Deposit Co. of Maryland*, 679 F.3d 643 (7th Cir. 2012), as amended (July 13, 2012)

^ Wis. Stat. § 779.135

o Wis. Stat. § 779.02

- ❖ “HIDDEN” COSTS IN A SUBCONTRACT
  - ❖ Watch what the GC can charge and for limits on what you can collect
    - ❖ No claim for verbal change orders (don’t rely on texts/emails to suffice)
    - ❖ Requirements to cure “defective” work within a set period or GC can offset cost
    - ❖ No cap on indemnification amount
  - ❖ Watch for requirements that should be factored into the bid
    - ❖ Bid bonds, “deductibles” for claims against GC-controlled Builders Risk Policy
    - ❖ Safety req’s: subcontractor paid safety training, drug/physical tests, safety monitoring devices
    - ❖ Fees to use the GC’s preferred payment or contract management software
    - ❖ Shared cost of any Mediation or Arbitration proceeding
- ❖ AMENDING OR “MARKING UP” A CONTRACT PRIOR TO SIGNING
  - ❖ Again, the written contract is only EVIDENCE of your Agreement with the GC
  - ❖ Anything that conveys the intent of the Parties to change contract language is legally acceptable
    - ❖ GCs may have their own preferences for how to amend a contract
    - ❖ Lining out language, adding language along with initials of both Parties is common
    - ❖ Some GCs prefer attaching a contract supplement listing additions/changes
    - ❖ PDF/DocuSign/other electronic contract management tools
  - ❖ Bottom Line: before signing make sure you are comfortable that what is written reflects your understanding and will also reflect that to a third-party (Mediator, Arbitrator, Judge)

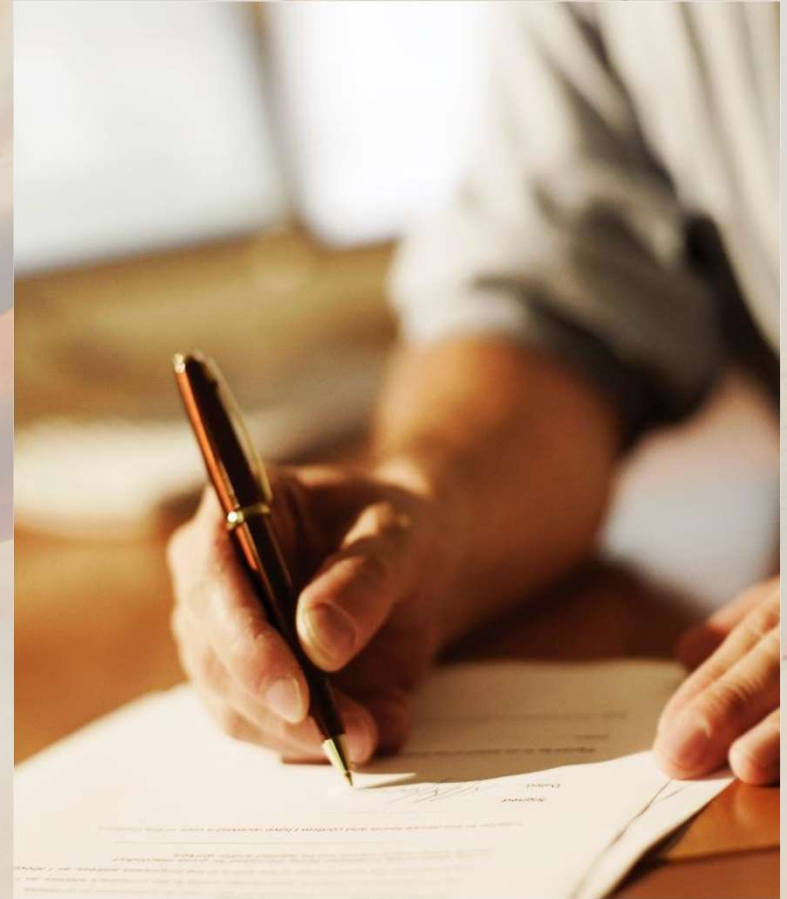


# CONCLUSION



## Know the risks you're taking on!

- ❖ GCs, especially large GCs, will be very hesitant, or even completely unwilling, to change their standard subcontract
- ❖ Battling over every piece of unfavorable contract language risks business relationships and future projects
- ❖ At a minimum, know when something is especially one-sided so you can account (charge \$\$\$?) for the risk
- ❖ Questions?







❖ ACEA Contact Info:

- ❖ Phone: (262) 785-1430
- ❖ Email, Office Manager: [jborgardt@buildacea.org](mailto:jborgardt@buildacea.org)
- ❖ Website: [buildacea.org](http://buildacea.org)

❖ Matt Marcellis Direct Contact Info:

- ❖ Phone: (262) 785-1432, Cell (715) 313-0113
- ❖ Email: [mmarcellis@mguidance.com](mailto:mmarcellis@mguidance.com)

# LEGAL UPDATE: 5 Walworth, LLC v. Engerman Contracting, Inc. et al - WI Supreme Court

- Case Summary
  - Soon after installation, a swimming pool began leaking, undermining the whole pool complex
  - Engineering firms could not determine if the defect was with the shotcrete, its spraying, the rebar, design, etc.
  - Commercial General Liability (CGL) insurers for all parties claimed the damage was result of defective work alleviating their **Duty to Defend**
  - Insurers attempting to extend **Integrated System Analysis** to construction
    - Previously used in the manufacture of vitamin supplements and paving stones\*
- ACEA submitted Amicus Curiae Brief April 7, 2022
  - Various SOWs of a Construction Project ARE NOT the same as the components of a manufactured product
- *Potential* Implications for your CGL Policy
  - Eliminate the Reasonable Expectations Doctrine
  - When fault for a defect is not clear, Insurers can avoid their Duty to Defend leaving all contractors with the up-front **cost of avoiding culpability** in court before getting a payout
- Wisconsin Insurance Alliance (WIA) submitted an opposing Amicus Curiae Brief
- Oral Arguments held September 12, 2022

\*Complete synopsis available at: <https://www.wicourts.gov/sc/orasyn/DisplayDocument.pdf?content=pdf&seqNo=563521>



# Milwaukee Construction Market Trends 2022 Discussion

---

ALL – MEMBERS MEETING



# Total ACEA Hours by Trade, as of Oct. 31, 2022

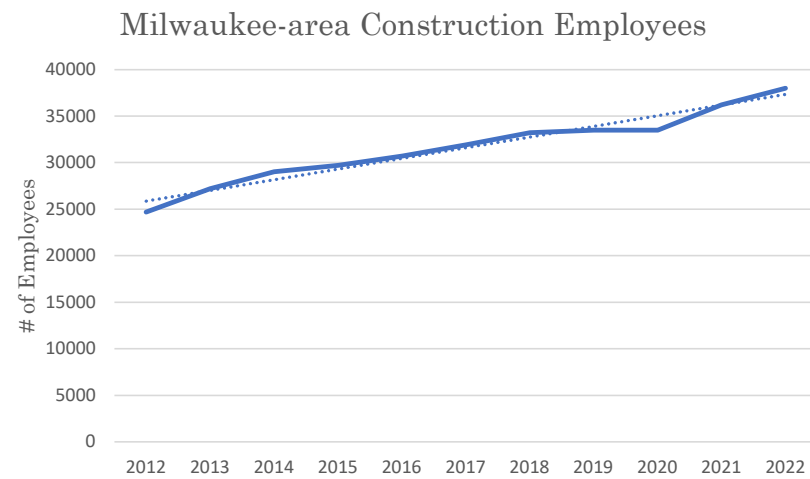
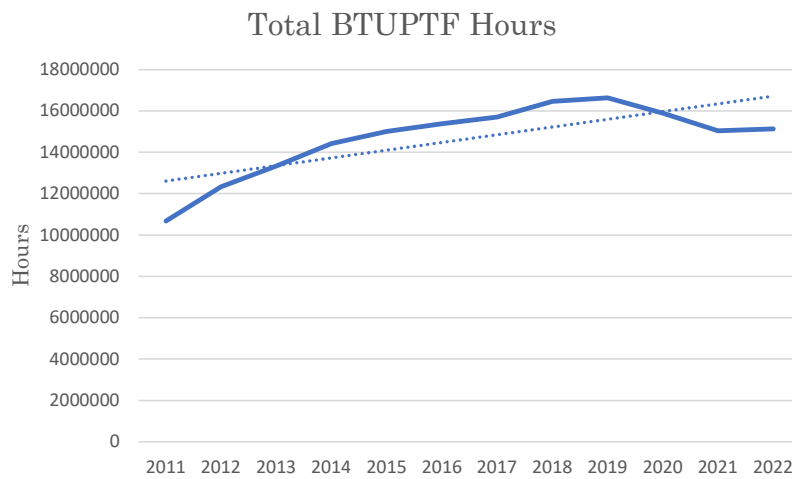
---

	<u>YTD – 2021</u>	<u>YTD – 2022</u>	<u>Change</u>
• Brick Masons	230,913	217,965	-5.7%
• Carpenters	2,316,320	2,157,988	-6.9%
• Carpenters (Outstate)	976,464	1,013,638	+3.7%
• Cement Masons	182,664	199,120	+8.3%
• Ironworkers	683,134	677,885	-0.8%
• Laborers	902,074	952,129	+5.3%
• Millwrights	176,267	181,001	+2.7%
• Op Engineers	186,014	225,632	+17.6%
• Painters	421,466	352,143	-16.5%
• Piledrivers	40,699	58,394	+30.4%
• Plasterers	19,431	14,677	-24.5%
• <u>Tapers</u>	<u>102,506</u>	<u>135,271</u>	<u>+24.3%</u>
• Totals:	6,257,434	6,185,843	-1.2%

Per IAP/CA hours reported to ACEA

# Milwaukee Construction Employment v. Pension/IAP Hours

- BROAD POSITIVE TREND SINCE 2011
- DROP IN HOURS STARTING AFTER 2019
- SIMILAR POSITIVE TREND POST-RECESSION
- NO CORRESPONDING DROP AFTER 2019



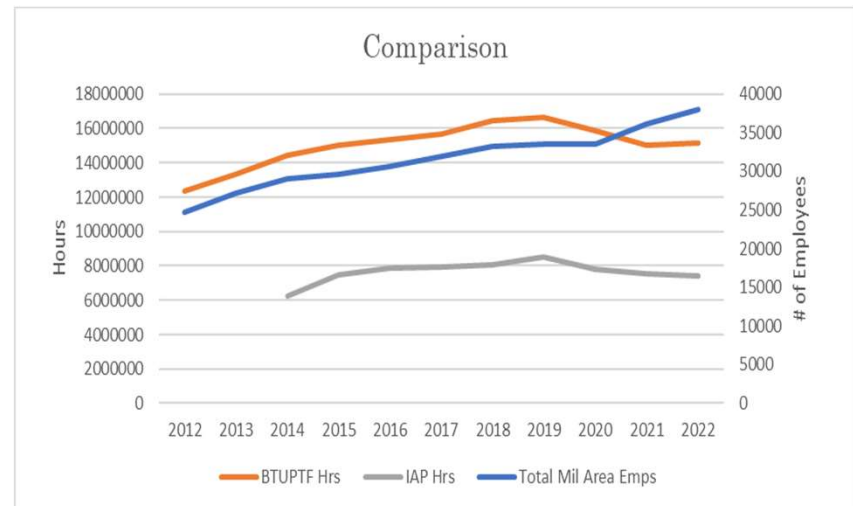
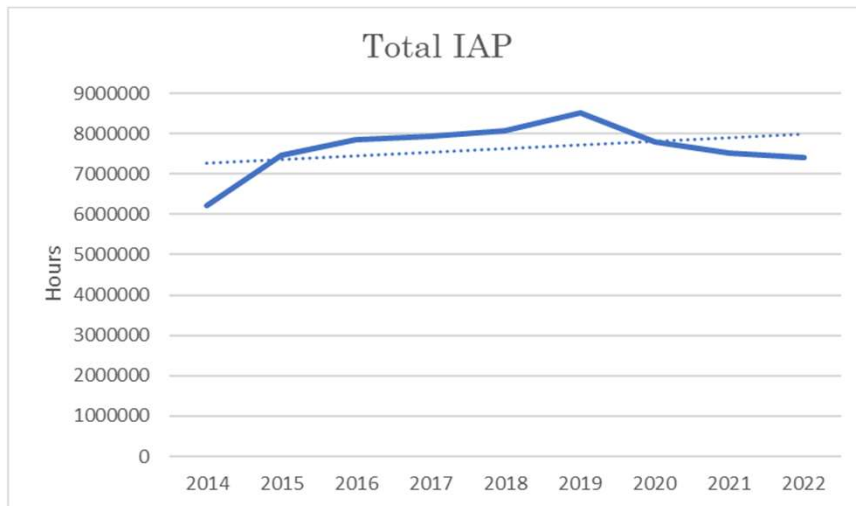
\*BTUPTF Trades: Asbestos Workers, Bricklayers, Carpenters, Cement Masons, Ironworkers, Laborers, Painters, Plumbers, Roofers, Steamfitters, & Tile Layers



# Cont.

- IAP TREND SIMILAR TO BTUPTF
- SIMILAR DROP IN HOURS STARTING AFTER 2019

- 2019/2020 DIVERGENCE BETWEEN THE TREND IN TOTAL EMPLOYEES AND UNION HOURS



\*ACEA IAP Trades: Millwrights, Carpenters (MKE & Outstate), Pile Drivers, Laborers, Ironworkers, Bricklayers, Cement Masons, Plasterers, Operating Engineers, Tapers, Painters

# Building Trades United Pension Trust Fund

Factor	May 31, 2022	May 31, 2021	Change
Total Assets (Market Value)	\$2,978,661,024	\$3,054,715,000	-2.5%
PPA Zone Status	Green Zone	Green Zone	N/A
PPA Funded Percentage	88.65%*	81.9%	+6.75%
Total Active Participants	8,413	8,413	N/A
Total Participants	26,737	26,737	N/A

\*Total assets “reset” to FMV, 5yr smoothing will begin again in 2022 for investment gain/loss.

# Fringe Fund Updates

---

	<u>Assets FMV</u>	<u>As of</u>	<u>Prior year assets</u>	<u>Change</u>
• Carpenters' H&W	\$266,837,541	9/30/22	\$ 283,676,704	-6%
• Ironworkers' 8 Welfare	\$47,696,192	8/31/22	\$ 52,839,941	-9.8%
• IUOE 139 Annuity	\$3,731,409	6/30/22	N/A	N/A
• IUOE 139 Skill	\$22,100,140	5/31/22	\$20,485,778	+7.4%
• IUOE 139 Welfare	\$435,903,034	6/30/22	\$ 479,707,297	-9.2%
• Laborers' Health	\$324,195,994	7/31/22	\$ 349,210,531	-7.2%
• Masons' Welfare	\$25,118,045	8/31/22	\$ 31,293,059	-19.8%
• Painters 781 Health	\$23,877,383	6/30/22	\$ 25,968,489	-8.1%
• Union Ind. Acct. Ret.	\$248,040,285	8/31/22	\$ 252,954,151	-2%



# Thanks for Attending ACEA's 2022 All-Members Meeting

---



BE SURE TO JOIN US AGAIN NEXT YEAR!

Keep an eye out for a post-meeting survey. Let us know what worked with this meeting, what didn't, and how we can do better.