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FOS NEWS - *Our clients come first*

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Editor: Diane Slomowitz

THE PERILS OF SEEKING TO HIRE A "DIGITAL NATIVE"

By Michael G. Koutnik

Most employers know that including the phrase "people over 40 need not apply" in a job posting puts the company on the fast track to an employment discrimination claim.

But what about something less blatant?

For example, what about the new buzzword among employers, particularly in the media industries: "Digital Native?"

A "Digital Native" is someone who has grown up immersed in the technological world.

Many employers, especially in media industries, have begun using that term as a buzzword in job postings.

In fact, *Fortune* magazine recently did a simple search for "Digital Native" on a job posting website. It found the term used by "both established media giants and startups of all sizes."

While the U.S. Equal Employment Opportunity Commission ("EEOC") has not taken a position on the legality of "digital native," past precedent suggests that once it does review the term, it will find that it violates the federal Age Discrimination in Employment Act ("ADEA").

The EEOC's compliance manual states that using terms like "young," "college student," or "recent college graduate" may deter individuals who are over 40 years old from applying for a job. As a result, these terms' use would violate the ADEA.

"Digital Native" should raise the same concerns to the EEOC as "college student."

It is particularly important for companies to pay attention to the terms used in job postings, because more and more discrimination claims are being filed with the EEOC.

Over the past 20 years, the number of claims has risen by thirty percent, with 20,588 age discrimination claims filed in 2014.

Employers can reduce the likelihood of being subject to an age discrimination claim by following a few simple guidelines in their job postings.

First, never state an age requirement unless the law only permits people above a certain age to work in the specific position.

Second, focus on the skill or quality that the company seeks, as opposed to a class of people who might possess that skill or quality. For example, instead of

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KINNEL "UP AND COMING" LAWYER

FOS congratulates shareholder Laurna Kinnel for being named a 2015 Up and Coming Lawyer by the *Wisconsin Law Journal*.

Laurna will be honored at a September 30, 2015 dinner at the Harley-Davidson Museum.

The Up and Coming Lawyers award honors the "rising stars of Wisconsin's legal community," according to the *Wisconsin Law Journal*.

Laurna's practice focuses on business law, family law and trademark work. Honoree Laurna joins FOS associate Jacob Manian, who received the award in 2014.

HANRAHAN TOP ONE PERCENTER

FOS shareholder Mike Hanrahan has been selected as a member of the Nation's Top One Percent by the National Association of Distinguished Counsel.

According to the Association, only the top one percent of attorneys in the U.S. are awarded membership in the Association. Mike was selected for inclusion after vetting by a research team, a blue ribbon panel of attorneys, and a judicial review board.

The Association states as its mission the objective recognition of attorneys who elevate the standards of the bar, providing a benchmark for other lawyers to emulate.

COURT STRENGTHENS AT-WILL EMPLOYEE RESTRICTIVE COVENANTS

By Diane Slomowitz

An enforceable restrictive covenant (covenant not to compete) protects an employer's business when an employee leaves the employer to work for a competing business or directly compete with the employer.

A valid covenant prohibits an employee, for a reasonable time and within a reasonable geographic area, from competing with his former employer, including by using proprietary information, trade secrets and/or employer established customer relationships.

A valid restrictive covenant requires "consideration" -- the benefit received by the employee for his promise to avoid post-employment competition.

"Consideration" has been a troublesome issue as to existing at-will employees -- employees without contracts, who can generally quit or be fired for any reason.

In the past, employers paid these employees substantial sums to comply with the lawful consideration requirement.

In a recent game-changing decision (*Runzheimer International, Ltd. v. Freidlen*), the Wisconsin Supreme Court expanded the definition of lawful consideration for existing at-will employees.

Under *Runzheimer,* the employer's promise of continued at-will employment -- its agreement not to immediately fire the employee -- alone may constitute lawful consideration.

Runzheimer is an important "win" for employers of existing at-will employees, especially in high mobility industries.

The decision loosens the "consideration" requirement, making it easier for employers to show that an at-will employee received a lawful benefit in exchange for signing a covenant.

Runzheimer decided only that continued employment yields lawful consideration. It did not decide whether that consideration was adequate or whether the covenant itself was reasonable under its facts.

Employers wanting to take advantage of *Runzheimer* should document in the covenant that continued at-will employment constitutes consideration.

Employers should also act consistently as to all current at-will employees asked to sign a covenant.

Finally, employers should retain an at-will employee for at least a reasonable time after the employee signs the covenant.

Otherwise, the employee may claim that the "consideration" -- continued employment -- was promised in bad faith, or a ruse, or that the covenant was induced by fraud.

Contact your FOS attorney if you have or contemplate restrictive covenants for your employees.

SERVICE DAY

FOS's successful and moving annual service day occurred at the Despensa de la Paz food pantry on June 6, 2015.

FOS greeted attendees and organized, filled and distributed bags of nutritional food to more than 140 families

FOS provided assistance to over 500 individuals.

FOS CONGRATULATES LESTER CARTER

Longtime FOS client and registered pharmacist Lester Carter received an honorary doctorate (Ph.D.) degree from the Medical College of Wisconsin at its summer 2015 commencement ceremonies.

Until his recent retirement, "Dr. Carter," as his customers call him, owned and operated Milwaukee's Carter Drug Store for almost 50 years.

Carter Drug Store was Milwaukee's only African American owned pharmacy for 47 years.

Carter, who graduated from Creighton University's School of Pharmacy is an herbologist in addition to a pharmacist.

In addition to training scores of young pharmacy graduates during his career, Carter developed several formulas which are still used to treat dermatological problems.

POLICE STOPS: PROTECT YOURSELF AND YOUR RIGHTS

By Jacob A. Manian

Any police encounter beyond a smile and a polite wave can be scary.

We have seen in the news recently how traffic stops for minor infractions can escalate to something far more severe.

While it is important to know your rights as a citizen, it is just as important to keep in mind some basic rules if you find yourself the subject of a police traffic stop.

Difficult as it may be, it is always best to be polite and respectful whenever dealing with a police officer, even if you feel the officer's reasons for stopping you were unfair or unlawful.

While it is okay to ask questions, it is never a good idea to engage in an argument with the officer.

If the officer requests it, you must provide basic information, such as identification and proof of insurance.

However, you have a right to decline to answer questions beyond that, such as "where are you coming from?" or "how much have you had to drink?"

Likewise, you can, and should, exercise your constitutional rights by politely denying the officer's request to search you, your vehicle or any item within it.

However, if the officer gives you a specific command, such as "please step out of the vehicle," you should fully comply.

You should NEVER physically resist an officer. Even nonphysical resistance could lead to a charge of resisting or obstructing an officer.

You should always keep your hands visible and avoid any sudden moves or gestures. This is particularly true if you are being pulled over at night.

Under no circumstances should you ever give a statement to police without your lawyer present.

Your lawyer may be able to bring a motion later challenging whether evidence seized pursuant to a police search was obtained lawfully.

By denying consent to search you or your vehicle, you have done your job.

A courtroom is a far better place to litigate the lawfulness of a police officer's actions than in the heat of a police encounter on the side of the road.

Know your rights, but also use common sense and good judgment with regard to the manner in which you exercise those rights.

If you have been detained or arrested, you should call your FOS attorney immediately.

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QUESTIONS?

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OR EMAIL US info@foslaw.com

Digital Native

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seeking a "Digital Native," a company could seek an individual with demonstrable experience "with the use and operation" of the relevant technology.

Third, the managers who are responsible for posting job descriptions and overseeing the recruitment process should be trained and periodically refreshed on the company's age discrimination policies.

Finally, the same criteria should be used to evaluate each candidate who applies and interviews for a particular position.

By following guidelines like these, employers can help protect their company from inadvertently running afoul of the age discrimination laws.

The attorneys at FOS can help you design and implement such policies or defend your company against allegations of age discrimination.

FOS ON THE MOVE

FOS shareholder **Laurna Kinnel,** a *Wisconsin Law Journal* Up and Coming Lawyer, has been elected Secretary of the Milwaukee Young Lawyer's Association.

Laurna is also Co-Chair of the Eastern District of Wisconsin Bar Association's Newsletter Committee.

FOS shareholder **Michael Hanrahan** presented "Exit Strategy & Partnerships" to the Entrepreneur's Club on August 20, 2015 at Milwaukee's University Club.

FOS shareholder **Matt O'Neill** participated in the Milwaukee Bar Association Foundation's Golf Outing on August 5, 2015 at Grafton's Fire Ridge Golf Club.

Proceeds benefit the Milwaukee Justice Center.

If you would like a FOS attorney to speak to your business or group, call (414) 273-3939.

FOX O'NEILL SHANNON s.c.

622 N. Water Street
Suite 500
Milwaukee, WI 53202

Phone: 414-273-3939
Fax: 414-273-3947
www.foslaw.com

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IN THIS ISSUE

REPOSSESSION AS SATISFACTION WITHOUT DEBTOR'S CONSENT—A RECIPE FOR TROUBLE

By Francis J. Hughes

A recent Wisconsin Court of Appeals decision serves as a helpful reminder for secured parties to closely follow the Wisconsin statutes when foreclosing on a debtor's assets after default.

In 2009, James March sold a restaurant to Thomas Linn for a $50,000 down payment and a $160,000 promissory note secured by a security agreement on all the assets that Linn purchased from March.

The security agreement provided that, in the event of default, March "shall have the right to repossess the tangible assets" and the premises.

When Linn defaulted on the payments due under the promissory note, March sued Linn and received the remedy provided by the security agreement: possession of the restaurant and its assets in partial satisfaction of the debt.

March then used the repossessed collateral to operate the restaurant.

Linn appealed, arguing that he never consented to March's possession of the collateral as satisfaction of the debt.

Without such consent, Linn argued, March's repossession of the collateral was invalid under Wisconsin law. The Wisconsin Court of Appeals agreed.

The court held that, despite the language in the security agreement, if a secured party seeks to acquire a debtor's interest in collateral as full or partial satisfaction of a debt, the debtor must consent to the secured party's terms.

Such consent is required by Wisconsin law and cannot be waived.

Wisconsin law would have permitted March to repossess the collateral and proceed to sell it under "commercially reasonable" terms, and apply the proceeds to the debtor's outstanding obligations.

However, because Linn did not consent to March's repossession, March was forbidden from simply retaining the collateral.

The attorneys at FOS can help businesses and individuals effectively navigate these rules to protect their rights and interests.