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FOS NEWS - *Our clients come first*

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Editor: Diane Slomowitz

KEEP YOUR HOLIDAY PARTIES FULL OF LEGAL CHEER

By Jacob A. Manian

Social parties involving alcohol have become as ingrained in our holiday culture as exchanging gifts, overeating and Uncle Larry's ugly sweaters.

Often, questions arise regarding the extent to which a holiday party host who provides alcohol – either at a company work party or a private social gathering – can be held liable for the actions of a party guest who overdoes it and ends up causing injury to a third party.

The most common example is the party guest who drives drunk after the party and injures another person.

Wisconsin Statutes § 125.035 (2) generally grants a party host immunity from civil liability when a guest who consumes alcohol causes harm to a third party.

The law defines "person" broadly to include corporations, partnerships, and associations.

However, § 125.035(2) does not apply to minors. If you know, or should have known, that a person to whom you provided alcohol at a party was a minor, and that minor causes harm to a third person, you could be held liable.

The law allows a minor who is directly supervised by a parent to consume alcohol.

However, "supervision" requires more than the parent simply being present at the party where the minor is drinking.

It will typically require the parent to monitor and control what and how much the minor is drinking.

The surest way to avoid potential civil liability is by taking steps to ensure that minors are not consuming alcohol at all. A party host should never allow underage persons who are not directly supervised by a parent to consume alcohol.

The best way to protect against potential liability is to exercise common sense and good judgment.

This is a far better approach than having to deal with Wisconsin laws after something bad happens.

Contact your FOS attorney for more information to help protect you and yours against potential civil liability this holiday season.

FOS LAWYERS ARE SUPER!!

FOS congratulates FOS shareholders **Bruce O'Neill, Matt O'Neill** and **Shannon Allen**, and FOS of-counsel **Ken Barczak,** for being named Super Lawyers.

FOS also congratulates associate **Jake Manian** for being named a Super Lawyer Rising Star.

All five are formally recognized in the December, 2015 *Super Lawyer* edition of *Milwaukee Magazine* as top Wisconsin 2015 attorneys.

This is the tenth year in which Bruce, Matt and Ken have achieved this honor, and the third year for Shannon.

Super Lawyer is a rating service that uses independent research and peer nominations/ evaluations to select lawyers from more than 70 practice areas statewide.

IN THE SPIRIT OF GIVING

In the holiday spirit, and in lieu of holiday cards, FOS is making a donation to Despensa de la Paz food pantry.

FOS ON THE MOVE

FOS shareholder **Michael Hanrahan** will present "Dividing Stock Options and RSUs (Restricted Stock Units)" at the December 14, 2015 National Business Institute™ Complex Assets in Divorce Seminar to be held at Pewaukee's Country Springs Hotel.

FOS associate **Michael Koutnik** has been appointed to a three-year term on the Board of the Friends of the Haggerty Museum of Art.

FOS shareholder **Diane Slomowitz** profiled FOS shareholder **Laurna Kinnel** for the November issue of the Association of Women Lawyers newsletter. The profile can be accessed at http://www.foslaw.com/news-views/slomowitz-profiles-kinnel-in-association-for-women-lawyers-newsletter.

FOS shareholder **Matthew O'Neill** was a presenter on "Federal Practice Tips" at the Eastern District Bar Association's September 17, 2015 Introduction to Federal Practice Program.

FOS News—*Our clients come first*

DON'T LET YOUR COMPANY'S WELLNESS PROGRAM MAKE YOU SICK

By Michael J. Hanrahan

In the last several years, employee wellness programs have grown rapidly as companies attempt to manage the cost of healthcare.

Currently, a majority of employers with 200 or more employees have wellness programs and use biometric screening in their wellness programs.

Such screenings typically check cholesterol, diabetes and body mass index. In these programs, employees can learn of their health risks and are encouraged to improve their health.

Sounds good, right? Not so fast. In the fall of 2014, the Chicago District of the EEOC filed lawsuits against Honeywell International, Orion Energy Systems and Flambeau Plastics (maker of Dunkin yoyo's), alleging that the companies' wellness programs violated the Americans with Disabilities Act ("ADA").

In each of these cases, the EEOC alleged that the programs were not "voluntary" because they penalized employees who did not participate in the programs.

Generally, the ADA prohibits an employer from making disability-related inquiries or requiring medical examinations unless they are job-related and necessitated by business considerations.

The EEOC asserts that non-voluntary wellness programs force employees to provide information in violation of the ADA.

Under the Honeywell program, an employee would lose eligibility for a $1,500 contribution to the employee's share of premiums and must pay a $1,500 "surcharge" in premiums, if the employee did not complete the wellness program's biometric testing.

Honeywell responded to the lawsuit by asserting that its wellness program is in full compliance with the Affordable Care Act ("ACA").

The EEOC countered that compliance with the ACA does not provide a "safe harbor" from the requirements of other federal laws.

So what should an employer who wants to institute or continue an employee wellness program do to avoid being sued by the EEOC?

Based on recent EEOC guidance, consider the following :

1. *The wellness program must be reasonably designed to promote health*. A program that collects health information without using it to inform and advise employees may not meet the definition of a "wellness" program.

2. *The wellness program must be voluntary*. Employees may not be required to participate in the wellness program and may not be disciplined if they do not participate.

3. *The incentive costs must be limited*. The incentives offered to employees to participate in

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KINNEL "UP AND COMING"

FOS shareholder Laurna Kinnel was honored as a 2015 Up and Coming Lawyer by the *Wisconsin Law Journal* at a September 30, 2015 dinner at the Harley-Davidson Museum.

The *Wisconsin Law Journal* conducted a video interview with Laurna, and a print appeared in a special Up and Coming Lawyer edition.

Both can be found on the FOS website at: http://www.foslaw.com/news-views/kinnel-up-and-coming-lawyer.

IS THERE AN ALTERNATIVE TO THE CLOGGED COURTS?

Litigants often ask why it takes so long for a case to wind its way through a trial court.

One big reason for the courts' snail's pace is the sheer volume of pending cases.

According to the Wisconsin court system, 2014 ended with 121,628 pending cases statewide. And less than 250 civil/criminal judges.

With the clogged court system, more parties are resolving disputes through alternative dispute resolution—mediation and arbitration. Sometimes such procedure is contractually required; other times parties choose such path.

Mediation is a non-binding attempt to settle a dispute through a neutral third-party, often a judge. Arbitration is a binding process which streamlines what would otherwise be a court procedure, through neutral arbitrators.

Each process has its plusses and minuses as compared to each other and the courts. Because foregoing the courts is a significant and impactful decision, it should be made after a full discussion of all ramifications with your FOS attorney.

If the nature of a dispute or the personalities of its parties do not lend themselves to mediation or arbitration, "patience" is the watchword. Many disputes, however, can be efficiently resolved outside the courts.

Your FOS attorney can help you determine whether the court, or an alternate forum, is the best place to resolve your dispute.

IS YOUR INDEPENDENT CONTRACTOR REALLY AN EMPLOYEE?

By Michael G. Koutnik

The United States Department of Labor (DOL) has fired another salvo in its war of employee/independent contractor classification.

As most employers know, independent contractors are not subject to many federal and state employment requirements.

These include minimum wage, overtime compensation, unemployment insurance and worker's compensation requirements.

Employees, on the other hand, are subject to these and other federal employer obligations, with large financial impacts on employers.

The proper classification of workers is critical to avoid employer liability for back wages and other protections offered by federal and state labor laws.

A July 14, 2015 DOL Administrator's Interpretation confirmed the DOL's intent to pull back on a company's ability to classify workers as independent contractors.

The DOL believes that employers are increasingly misclassifying workers as independent contractors, when they are really considered employees.

As the DOL's Interpretation stated, "Most workers are employees."

The Interpretation also raised a new test, the "Economic Realities Test," to determine whether "the worker is economically dependent" on the employer, and so an employee, or "truly in business for him or herself," and so an independent contractor.

This is a shift from the DOL's longstanding "Control Test."

That test, like its name, focused on the employer's control over the worker. The more employer control, the greater likelihood of an employee relationship.

As with most legal tests, the Economic Realities Test comes down to the application of a series of factors:

1. Is the work an integral part of the employer's business?

2. Does the worker's managerial skill affect the worker's opportunity for profit or loss?

3. How does the worker's relative investment compare to the employer's investment?

4. Does the work performed require special skill and initiative?

5. Is the relationship between the worker and employer permanent or indefinite?

6. What is the nature and degree of the employer's control?

These fact-based inquiries are more important than ever, given the DOL's recent Administrative Interpretation.

The Interpretation, while not binding, will still impact a court in a relevant dispute.

For more information on the employee/independent contractor issue, contact your FOS attorney.

Wellness Program

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the wellness programs may not exceed 30% of the total cost of employee-only coverage.

4. *Medical information obtained as part of a wellness program must be kept confidential*. A program that requires participation in a "Biggest Loser"-type of competition may violate HIPAA privacy rules and the ADA.

5. *Employers must provide reasonable accommodations to disabled employees* which allow them to participate in the incentive programs.

There is no question that employers and employees have a vested interest in reducing healthcare expenses, and wellness programs are a method of incentivizing employees to share that responsibility.

However, the EEOC (particularly the Chicago District) has been aggressive in attacking wellness programs that it perceives as penalizing employees.

Also, an employee may pursue an individual ADA claim as a result of a wellness program.

As such, businesses should carefully consider the EEOC administrative guidance and the pending lawsuits when developing a wellness program.

If your company has or contemplates a wellness program, your FOS attorney can help you get through the EEOC's program thicket.

QUESTIONS OR COMMENTS?

CALL US 414-273-3939,

OR EMAIL US info@foslaw.com

HANRAHAN NAMED ONE OF THE "TEN BEST"

FOS litigation shareholder Michael Hanrahan has been named one of 2015's "10 Best" Attorneys in Wisconsin for Client Satisfaction in the area of family law.

The honor was given by the American Institute of Family Law Attorneys.

Recipients have attained the highest degree of professional achievement in the family law field and have impeccable client satisfaction ratings.

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IN THIS ISSUE

TIME HAS RUN OUT ON LOCAL TIME OF SALE REQUIREMENTS

By Francis J. Hughes

For years, municipalities were able to enact various requirements that needed to be met before title to property could be transferred.

These obligations were known as Time of Sale Requirements and their content and enforcement was generally left to the municipality's discretion.

Such requirements could range from having the property inspected to having improvements made (turning a gravel driveway into a paved one, for example).

If the requirements were not fulfilled, the municipality had many remedies, including preventing the sale from closing until the seller complied.

The requirements were particularly common in communities with older houses. For example, Shorewood and Bayside required comprehensive inspections when a property was sold to ensure that the property was code compliant.

However, Time of Sale Requirements added another hurdle to residential closings. Additionally, their local nature sometimes resulted in parties overlooking them until just before closing.

This oversight could result in a seller either having to delay closing or scramble to meet the requirements—at a significant and unexpected cost.

Recognizing these problems, the Wisconsin legislature passed 2015 Wisconsin Act 55, effective July 14, 2015.

The new law broadly prevents local governments (village, city, town or county) from creating or enforcing local Time of Sale Requirements.

Act 55 prohibits enforcement of requirements related to local inspections, improvements or repairs, removing junk or debris, mowing or pruning, maintenance and weatherproofing, and compliance with building codes and other property condition standards.

While the new law eliminates local requirements, it leaves in place statewide Time of Sale Requirements.

One statewide example is the Wisconsin Rental Weatherization Program, which requires that certain non-owner occupied residential properties be inspected for energy efficiency.

FOS lawyers can help you determine which Time of Sale requirements apply to your transaction, ensure a smooth purchase or sale transaction, and resolve municipal attempts to enforce invalid Time of Sale requirements.