FOX | O'NEILL | SHANNON s.c.

FOS NEWS - *Our clients come first*

Volume 8, Issue 4
Winter 2016

Editor: Diane Slomowitz

A YEAR OF CHANGES

By William R. Soderstrom

2016 has been a year of great change at FOS.

First and foremost, one of our beloved founders, Bruce O'Neill, passed away after a long struggle with ALS.

Bruce was both a great lawyer and a wonderful friend to us all, and watching his courageous struggle inspired us. He, of course, will be greatly missed.

In April, Mike Hanrahan, who had been part of our litigation team for almost 20 years, received an appointment to the Milwaukee County Circuit Court.

This had been one of Mike's lifelong ambitions, and we were very pleased that he received this appointment.

We are also pleased that Mike could join another of our partners, Jeffrey Kremers, on the Milwaukee bench.

Our volume of work has continued to increase with Milwaukee's economic recovery, and we have added new attorneys to handle this work.

We hired Bailey Larsen to join our estate planning and tax group. Bailey is a CPA who had formerly worked at Deloitte & Touche.

Bailey joins Al Young and Greg Ricci in our tax group, both of whom are CPAs as well.

Then, we once again tapped Marquette Law School and hired Lauren Maddente, who began work with FOS in September.

Lauren has a sterling academic background, and will be working with all of our practice groups.

This year has taught us more than ever that the only thing certain in life is change, and at FOS we have embraced that.

We are proud that this firm has remained independent, and are now in our 54th year.

We believe our independence allows us to provide sophisticated legal services in a way that larger firms just cannot do, or certainly cannot do at a price that makes sense for most people.

As always, the client comes first.

On behalf of everyone at FOS, we would like to wish you a prosperous and healthy 2017.

NEW FEDERAL LAW ADDS TO COMPANIES' TRADE SECRET ARSENALS

By Lauren E. Maddente

If your business maintains trade secrets related to services or products intended for use across state lines, you may now have new remedies and a direct route to federal court in the event of misappropriation.

Wisconsin's trade secret statute, § 134.90, has been in place for many years. It provides compensatory and potential punitive damages for trade secret misappropriation. The state statute applies to trade secret thefts occurring in Wisconsin. It does not always apply to Wisconsin trade secrets misappropriated outside Wisconsin.

The new Defend Trade Secrets Act (DTSA) creates a civil cause of action for misappropriation if the trade secret relates to a product or service in commerce in more than one state. Because the DTSA does not preempt the Wisconsin statute, employers now have more options to explore in pursuing remedies in the event of trade secret misappropriation.

Because the DTSA creates original federal jurisdiction, Wisconsin businesses now have a direct path to federal court for the violation.

This may be particularly helpful in technical trade secret cases given many federal judges' experience hearing patent and copyright cases.

The DTSA and the Wisconsin statute, though worded slightly differently, have similar content. The DTSA, however, differs in several respects.

One of the DTSA's potentially most helpful and controversial provisions permits *ex parte* (without notice to the defendant) motions for an order seizing property necessary to prevent trade secret propagation or dissemination.

Also, while Wisconsin law allows a reasonable royalty only if there are no other means to prove damages

Continued on page 2

FOS News—*Our clients come first*

YOUR NON-SOLICITATION AGREEMENT MAY NOT BE ENFORCEABLE

By Matthew W. O'Neill

Employers beware, employees rejoice!

A recent Wisconsin Court of Appeals decision casts doubt on the enforceability of common employee non-solicitation agreements.

Employers routinely ask employees to sign non-competition agreements, limiting the employee's ability to work for a competitor for a period of time.

Wisconsin courts have upheld such agreements, if reasonably necessary to protect an employer's legitimate interests, and fairly limited in length and territory.

Non-compete agreements often also include non-solicitation agreements, which limit an employee's post-termination ability to solicit other employees to leave the company and move to a competitor.

It had long been an open question whether such provisions were subject to the same scrutiny as non-compete agreements.

In *The Manitowoc Company v. Lanning*, 2015 AP 1530 (Aug. 17, 2016), the Court emphatically answered "yes."

John Lanning, a long-time, respected employee of The Manitowoc Company, left to work for a competitor in 2010.

Manitowoc alleged Lanning actively helped his new employer woo three Manitowoc employees to jump ship to the new employer.

Manitowoc sued, claiming Lanning violated his non-solicitation clause, that he would "not, either directly or indirectly, solicit, induce or encourage any employee to terminate their employment" or "accept employment with any competitor, supplier or customer of Manitowoc."

Manitowoc won big time in the trial court: $100,000 in damages and over $1 million in attorneys' fees (all over three employees!).

The Court of Appeals, however, reversed, concluding that the non-solicitation agreement was unenforceable.

The Court first held that non-solicitation agreements are subject to Wisconsin Statute § 103.465, forbidding "unreasonable restraints" in non-compete agreements.

The Court then held that the Manitowoc agreement unreasonably "restricts an incredible breadth of competitive and noncompetitive activity."

Most offensive to the Court were the restrictions' prohibition of "any employee" from working for even a non-competitive employer, like a supplier or customer.

Given the massive attorneys' fee award, Manitowoc has petitioned the Wisconsin Supreme Court to reverse the decision. That Court's current make-up suggests a good chance exists that the Court may take the case and reverse the Court of Appeals, making broad non-solicitation agreements once again enforceable.

Or the parties may settle, leaving the Court of Appeals deci-

Continued on page 3

New Federal Law

Continued from page 1

above that amount, the DTSA allows a plaintiff to choose a reasonable royalty as its damage measure.

Finally, the DTSA provides immunity, under any federal or state trade secret law, for employees who disclose trade secrets solely for the purpose of reporting illegal activity to the government.

The DTSA requires employers to inform employees of this "whistleblower protection" as a condition to receiving punitive damages or attorney's fees. Also, employers must include this notice in all confidentiality contracts that protect trade secrets entered into or revised after May 11, 2016. Failure to do so will prevent employers from recovering punitive damages or attorney's fees under the DTSA.

Both statutes are available where trade secrets exist and such secrets are misappropriated. Without diligently identifying and protecting trade secrets, including through confidentiality policies, your business may be throwing away the laws' protections.

KEEP YOUR HOLIDAYS SAFE AND MERRY

Holiday parties.

Love them or hate them, they're a year-end ritual.

Almost all of us host or attend at least one festive function during the season.

Food, music, alcohol. What could go wrong?

Plenty, if you don't monitor your own and others' actions.

Hosting a party?

Watch out for thirsty teens. Wisconsin's host immunity statute generally does not protect a host from liability for the acts of a minor who, after consuming alcohol, injures a third party.

Attending a party?

Don't drink and drive. Catch a ride with a friend or family member, turn the party into a sleepover, or call Uber.

And if you do imbibe, keep those pent-up resentments against other guests in check.

The holidays should be a time of giving, not collecting bail money.

Use your common sense. Don't turn an event of good cheer into a lump of coal.

Volume 7, Issue 4

BRUCE C. O'NEILL: THE BEST

Our hearts broke September 3, 2016, when we lost our beloved litigator, partner, mentor, counselor, orator, toastmaster and friend, Bruce O'Neill. He passed away from ALS, a loathsome disease deserving of banishment to Dante's ninth ring of hell.

Bruce was among the very best litigators in Wisconsin. A superlative strategist, gifted writer and peerless speaker, Bruce thrived in the courtroom. He loved to try cases. Justice, to him, always won out when adversaries had their fair day in court. Win or lose, when the system worked – and it always did for Bruce's clients – the clients knew they received justice.

Bruce gave the best toasts. At every firm event, Bruce's speech invariably thrilled us and brought us to tears, in equal measure. He had the knack for capturing the essence of every person, every moment, every emotion, everything that was *important*. He was the very heart of the firm.

Bruce was generous with his time. His crowded office was filled with *pro bono* work selflessly performed for friends, family, and causes near to his heart. He mentored almost everyone at the firm at one time or another, and we are all the better for it.

Bruce was our friend. Our best friend.

FOS LAWYERS ARE SUPER!!

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

Matt and Shannon received special recognition as part of the Super Lawyers Wisconsin "Top 50" and "Top 25 Female," respectively.

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

All four are formally recognized in the December, 2016 *Super Lawyer* edition of *Milwaukee Magazine* as top Wisconsin 2016 attorneys.

This is the eleventh year in which Matt and Ken have achieved this honor, the fourth year for Shannon, and the second year for Jake.

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

FOS IN THE NEWS

FOS shareholder **Matthew O'Neill** presented "Minority Shareholder Rights in Wisconsin" at the December 2, 2016 Wisconsin State Bar program "Trending Topics in Business Litigation."

Your Non-Solicitation Agreement

Continued from page 2

sion intact.

For now, any non-solicitation provision which prohibits more than the simple enticement of a limited set of highly valuable employees to move to a competitor, is *presumptively unenforceable.*

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.

END TO VALUATION DISCOUNTS?

By Allan T. Young

A common technique to minimize gift and estate taxes on the transfer of a family business to younger family members may soon be ending.

When an ownership interest in a family business is transferred, its value is usually discounted for lack of control and/or lack of marketability.

The discounts typically range from 30% to 40% of the fair market value of the business.

In August, the IRS issued proposed regulations to eliminate most discounts.

The regulations will be effective 30 days after they are issued in final form.

A public comment period ended December 1, 2016.

The regulations will soon be issued in final form, and will likely be effective during the first part of 2017.

The final regulations may be somewhat different from the proposed regulations.

But until the final regulations take effect, taxpayers can take advantage of valuation discounts when transferring ownership interests in family businesses.

If you have questions about valuation discounts or wonder whether you can or should take advantage of them now or in the near future, given the proposed regulations, contact your FOS attorney.

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

Fox, O'Neill & Shannon, S.C. provides a wide array of business and personal legal services in areas including corporate services, litigation, estate planning, family law, real estate law, tax planning and employment law. Services are provided to clients throughout Wisconsin and the United States. If you do not want to receive future newsletters from Fox, O'Neill & Shannon, S.C. please send an email to info@foslaw.com or call us at (414) 273-3939.

Postage

Address label

IN THIS ISSUE

SIGN OF THE TIMES: TIME TO UPDATE WORKPLACE POSTERS

By Michael G. Koutnik

Those signs hanging in the employee break room may be due for an update.

The U.S. Department of Labor (DOL) released three new or revised posters that, as of August 1, 2016, apply to most employers.

The first poster relates to new Fair Labor Standards Act (FLSA) regulations issued earlier this year.

This new poster includes sections on nursing mothers' rights and the difference between employees and independent contractors. These sections join those contained on the previous poster, such as minimum wage and overtime requirements.

The second poster covers employee and applicant rights under the Employee Polygraph Protection Act (EPPA).

The EPPA prohibits most private employers from using lie detector tests during pre-employment screening or employment itself.

While these issues may seem minor, employers are still required to display the EPPA poster in a readily observable location to both employees and employment applicants.

The final poster pertains to rights under the Family and Medical Leave Act (FMLA).

The new poster removed much of the "legal" language contained in the previous poster.

Use of the new FMLA poster is not mandatory if the employer is already using an FMLA poster that provides the same information.

However, because the revised poster is more reader-friendly, some employers may elect to implement it.

Keep in mind that the FMLA poster, like the EPPA poster, must be displayed in a location visible to applicants as well as employees.

Generally, the three posters must be displayed in a conspicuous location for employees (lunch/break room, kitchen, near a time clock, etc.).

All of these posters can be downloaded from the DOL's website at https://www.dol.gov/ whd/resources/posters.htm.