EMPLOYMENT LAWSCENE ALERT: WISCONSIN COURT OF APPEALS FINDS NONSOLICITATION OF EMPLOYEES PROVISION UNENFORCEABLE UNDER RESTRICTIVE COVENANT STATUTE

In *Manitowoc Co. v. Lanning*, 2015AP1530 (Aug. 17, 2016), the Wisconsin Court of Appeals ruled—for the first time—that Wisconsin Statute § 103.465, which governs the enforceability of restrictive covenants in employment relationships, applies to employee non-solicitation provisions.

In 2008, John Lanning, an employee at The Manitowoc Co., entered into an agreement that prohibited him, for a period of two years after his employment ended, from either directly or indirectly soliciting, inducing, or encouraging "any employee to terminate their employment with Manitowoc" or to "accept employment with any competitor, supplier or customer of Manitowoc." The Manitowoc Co. claimed that, after leaving the company in 2010 to work for a direct competitor, Lanning communicated with at least nine employees in connection with possible employment opportunities at his new employer. The Manitowoc Co. claimed this was a violation of the employee non-solicitation provision and filed suit against Lanning. The Circuit Court granted summary judgment in The Manitowoc Co.'s favor, awarding damages and attorneys' fees. Subsequently, Lanning appealed to the Wisconsin Court of Appeals, which ultimately reversed the lower court's ruling.

On appeal, The Manitowoc Co. argued that § 103.465 should not apply to employee non-solicitation provisions but, rather, only to covenants not to compete The Court quickly dismissed that argument, stating that any covenant between an employer and employee that "seeks to restrain competition" or operates as a "trade restraint" clearly falls within the confines of § 103.465. The Court noted that the employee non-solicitation provision limited how Lanning could compete with The Manitowoc Co. and "did not allow for the ordinary sort of competition attendant to a free market, which includes recruiting employees from competitors." Therefore, the Court determined that the employee non-solicitation provision had to comply with § 103.465.

With the applicability of § 103.465 to employee non-solicitations decided, the Court then embarked to determine whether the provision The Manitowoc Co. sought to enforce was reasonably necessary to protect the Company's legitimate business interests from unfair competition from a former employee. The Manitowoc Co. argued that it had a legitimate interest in preventing Lanning from "systematically poaching" its employees, and it believed the provision was narrowly tailored to protect it from such a threat.

The Court disagreed, however, determining that the actual terms of the agreement, as written, were far too broad and, therefore, unenforceable. As drafted, the non-solicitation provision prevented Lanning from soliciting *any* employee, whether entry level or a key employee, to leave The Manitowoc Co. for *any* reason, whether to retire to spend more time with family or work for a competitor. Because the Court found that the provision restricted "an incredible breadth of competitive and noncompetitive activity," it concluded that the employee non-solicitation provision, as drafted, did not protect a legitimate business interest and, as such, the provision could not pass the strict scrutiny that § 103.465 required and, accordingly, found the covenant unenforceable.

In light of this decision, employers should review their current agreements that contain employee non-solicitation agreements. Although employers have the right to require employees to enter into agreements with employee non-solicitation provisions, the provisions must be crafted narrowly and carefully—just like covenants not to compete—to meet the strict scrutiny analysis required by § 103.465. To be enforceable, employee non-solicitation provisions must focus on protectable interests, such as restricting former employees from soliciting current employees with whom the former employee had a direct business relationship with from ending their employment in order to engage in direct competitive activity adverse to the employer. An experienced management-side employment attorney can assist employers with drafting such provisions in order to meet the enforceability standards required by the Wisconsin restrictive covenant statute.

TAX AND WEALTH ADVISOR ALERT: BUY-SELL PLANNING: THREE MISTAKES TO AVOID

One of the critical planning tools a closely held business plan should have is a buy-sell plan. A plan that addresses what happens to ownership of the company upon certain "triggering events," such as the death, disability, or termination of an owner. A buy-sell plan is a common document for a closely held business, and these plans often contain the same design flaws.

1. **It provides for a fixed price.** At its heart, a buy-sell plan frequently requires someone (an owner) to purchase the stock of someone else (another owner) upon a specific event (the owner's death). Therefore, the agreement needs to establish the price and terms of the stock sale. Price can be established in one of three ways: (a) an agreement between the parties, (b) a formula, or (c) an independent third party appraisal. It is not uncommon for the business owners to agree between themselves on the value of the business and use that value in the buy-sell agreement. There is nothing inherently wrong with that strategy; if no one knows whether they will be the

buyer or seller when a triggering event happens, both parties should negotiate a fair value. The problem comes when the owners fail to update their buy-sell plan and the so called "stipulated value" becomes stale over time. The solution is not to avoid a stipulated value; rather, it is to put a provision in the agreement that when the stipulation is too old (18 months is common), the business must be valued in an alternate fashion (such as by appraisal).

2. **It is inconsistent with the succession plan.** I work with a second generation company that has done a very good job of bringing the third generation into the business. The new generation had to work elsewhere first, come in on the ground floor, and now are in a position to take the company to the next level. If you asked the second generation, upon a "triggering event," they planned to bring in the third generation as owners. Indeed, most of the long term strategic planning was centered around making the third generation owners. All of that is awesome and well done. The problem? The buy-sell plan had the second generation owner-siblings buying each other's stock. If things played out the way they actuarially should, the youngest second generation sibling would end up owning 100% of the stock. Another problem? A second generation sibling has children in the business, and one of the main ownership transition strategies of using family gifting does not work under the plan.
3. **It is not funded.** Generally, the purchase terms of a buy-sell plan require the purchasing party to use cash or a promissory note to buy the equity. Consider a $5,000,000 business with two owners. If death is a triggering event, and one of the owners passes away, generally the other owner will not have $2,500,000 in cash lying around to purchase the deceased partner's equity. So, under most buy-sell agreements, this purchase would have to be made with a large long-term promissory note.

But let's take a quick look at that transaction post-death. Presuming both partners were critical to the business's success, the business is likely to suffer some economic loss following the death of a partner. If that partner had a large role in revenue generation, the loss could be dramatic. The surviving partner will be in a situation where a weakened company needs to support his household income and service a sizeable promissory note. On the other hand, the financial future of the deceased partner's family is dependent on a weakened company's ability to service the note. Not to mention the fact that there will be little or no capital available to invest in company growth.

It is largely for this reason that I insist my clients fund their buy-sell plans with life insurance. A $2,500,000 life insurance policy gives the survivor exactly what he needs (cash to purchase the decedent's equity), the decedent's family what it needs (risk free cash), and the business what it needs (full access to all of its capital to weather the storm and grow). While life insurance is not free, at least it can be paid for while both partners are alive and the business is not in a post-death weakened condition.

So, for closely held business owners, first make sure you have a plan of ownership and leadership succession. Then make sure the buy-sell plan effectively implements the succession strategy, provides for a fair price at transition, and is appropriately funded.

For more information on buy-sell planning contact Joe Maier at 414-276-5000 or joe.maier@wilaw.com

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CHRISTA WITTENBERG PUBLISHED AN ARTICLE IN WISCONSIN LAWYER MAGAZINE

Christa Wittenberg authored an article entitled “Testamentary Capacity: A Sliding-Scale Approach,” which appeared in the September issue of *Wisconsin Lawyer* magazine. The article discusses the complex estate planning issues and disputes that can arise in families with loved ones affected by dementia or diminished mental capacity. Given increasing life expectancies and the relative frequency with which these issues can arise, this is a situation that many people either have faced or will face in their lifetimes. When these issues arise, it is important to seek good legal advice promptly.

For more information you can contact Christa at 414-276-5000 or Christa.Wittenberg@wilaw.com

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WHAT DOES IT MEAN TO LITIGATE A CIVIL CASE?

Alternative dispute resolution (ADR) is so named because it provides an “alternative” to litigating a civil dispute before a court in a bench or jury trial. The most popular forms of ADR are mediation and arbitration, although other options exist.

Litigation is when a lawsuit is filed in a court of law. A lawsuit typically involves a dispute over a particular state of affairs: a contract breach, an injury suffered in an accident, or some other dispute situation.

Litigation offers certain advantages. Access to the decision-maker, whether judge or jury, is free of charge, except for minimal filing fees. Discovery is part of the litigation process, and can be wide-ranging, allowing the parties to gather a great deal of information. Third parties can be added to a law suit, if appropriate. The rules of evidence and procedure are well-defined. The final decision can be enforced by the court. If a party loses, that party has the right to appeal. And, litigation does not prevent the parties from attempting ADR or negotiating a settlement before, during or even after trial.

Despite these benefits, litigation also has certain disadvantages. The large case load faced by judges, as well as the demands of discovery and procedural issues, can make litigation both slow and expensive. The broad discovery allowed in litigation and the inherently public nature of litigation can expose damaging or embarrassing details, creating brand or reputation management concerns. Highly technical or complex disputes can be difficult to present to a judge or jury in an efficient and accessible manner, as judges and juries may lack the specialized knowledge needed to fully grasp the issues involved in the dispute. Litigation decisions can be appealed, adding additional expense and extending the duration of the dispute.

If you have any question, please contact Grant Killoran *at grant.killoran@wilaw.com or 414-276-5000.*

BEST LAWYERS® HONORS 15 ATTORNEYS IN 2017

O'Neil, Cannon, Hollman, DeJong and Laing S.C. is pleased to announce that 15 lawyers have been named to the 2017 Edition of *Best Lawyers*, the oldest and most respected peer-review publication in the legal profession.

Best Lawyers has published their list for over three decades, earning the respect of the profession, the media, and the public as the most reliable, unbiased source of legal referrals. Its first international list was published in 2006 and since then has grown to provide lists in almost 70 countries.

"*Best Lawyers* is the most effective tool in identifying critical legal expertise," said CEO Steven Naifeh. "Inclusion on this list shows that an attorney is respected by his or her peers for professional success."

Lawyers on the *Best Lawyers in America* list are divided by geographic region and practice areas. They are reviewed by their peers on the basis of professional expertise and undergo an authentication process to make sure they are in current practice and in good standing.

O'Neil, Cannon, Hollman, DeJong and Laing S.C. would like to congratulate the following attorneys named to the 2017 *Best Lawyers in America* list:

- James G. DeJong – Corporate Law, Mergers and Acquisitions Law, Securities/Capital

Markets Law
- Seth E. Dizard – Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law, Litigation-Bankruptcy
- Peter J. Faust – Corporate Law, Mergers and Acquisitions Law
- John G. Gehringer – Commercial Litigation, Construction Law, Corporate Law, Real Estate Law
- Dennis W. Hollman – Corporate Law, Trusts and Estates
- Grant C. Killoran – Litigation-Health Care
- Dean P. Laing – Commercial Litigation, Personal Injury Litigation-Plaintiffs, Product Liability Litigation-Defendants
- Gregory W. Lyons – Commercial Litigation, Litigation-Insurance
- Gregory S. Mager – Family Law
- Patrick G. McBride – Commercial Litigation
- Thomas A. Merkle – Family Law
- Steven J. Slawinski – Construction Law

Since it was first published in 1983, *Best Lawyers* has become universally regarded as the definitive guide to legal excellence. *Best Lawyers* is based on an exhaustive peer-review survey. Over 54,000 leading attorneys cast more than 7.3 million votes on the legal abilities of other lawyers in their practice areas. Lawyers are not required or allowed to pay a fee to be listed; therefore inclusion in *Best Lawyers* is considered a singular honor. *Corporate Counsel* magazine has called *Best Lawyers* "the most respected referral list of attorneys in practice."

ATTORNEY STEVEN SLAWINSKI FEATURED IN BLOG, PUBLISHED BY THE STATE BAR

Attorney Steven J. Slawinski talks about a recent Seventh Circuit Court of Appeals decision in the latest Construction Blog article, published by the State Bar of Wisconsin Construction and Public Contract Law Section.

In this decision, the Seventh Circuit Court of Appeals weighed in on the application of promissory estoppel in the context of construction bidding.

EMPLOYMENT LAWSCENE ALERT: EMPLOYERS

MUST UPDATE THEIR FLSA POSTERS

On August 1, 2016, the Department of Labor updated its mandatory Fair Labor Standards Act Minimum Wage poster. All employers subject to the FLSA must display this newly revised poster in prominent locations in the workplace where all employees and applicants can readily see it. The updates to the newly revised poster include information on the consequences of incorrectly classifying workers as independent contractors, information relating to the rights of nursing mothers, updated information regarding DOL enforcement, and revised information relating to tip credits.

Employers must post the new poster immediately. Although employers are only required to post the poster in English, there are also versions available in Spanish, Chinese, Russian, Thai, Hmong, Vietnamese, and Korean. The new version of the poster can be found here.

EMPLOYMENT LAWSCENE ALERT: INCREASED OSHA PENALTIES NOW IN PLACE

Last November, we alerted you (here) that, in August 2016, OSHA penalties would be increasing significantly. Those new maximum penalties went into effect on August 1, 2016 and can be applied to any citation issued for a violation that occurred after November 2, 2015. The below chart summarizes the previous penalties and the new penalties, which were increased due to a catch-up provision and an additional increase based on the Consumer Price Index:

Type of Violation	Former Maximum Penalty	Maximum Penalty as of 8/1/2016
Willful Violation	$70,000	$124,709
Serious Violation	$7,000	$12,471
Other-The-Serious Violation	$7,000	$12,471
De Minimis Violation	$7,000	$12,471
Failure to Abate Violation	$7,000	$12,471
Repeat Violation	$70,000	$124,709

OSHA penalties will now be increased annually on January 15 based on the Consumer Price Index. Employers must keep a keen eye on safety now more than ever because OSHA's increased enforcement is now coupled with an increase in monetary penalties.

ATTORNEY STEVEN SLAWINSKI FEATURED IN BLOG, PUBLISHED BY THE STATE BAR

Attorney Steven J. Slawinski talks about a recent Seventh Circuit Court of Appeals decision in the latest Construction and Public Contract Law Section Blog article, published by the State Bar of Wisconsin Construction and Public Contract Law Section.

In this decision, the Seventh Circuit Court of Appeals faced the issue of whether a lender’s title insurance policy covers construction liens that arise from the lender’s decision to cease funding its construction loan due to a loan imbalance.

Read Full Article>>

EMPLOYMENT LAWSCENE ALERT: EEOC INTRODUCES PROPOSED CHANGES TO EEO-1 REPORTING THAT COULD REVEAL PAY DISCRIMINATION

Employers, including federal contractors, with 100 or more employees are required to file employer information reports, called an EEO-1 with the U.S. Equal Opportunity Commission (“EEOC”). The data collected currently includes data on race, ethnicity, and gender.

However, under a revised proposal by the EEOC issued on July 14, 2016, as of March 31, 2018, companies will also need to include data on pay ranges and hours worked. This information must be reported by job category and broken down across 12 pay bands. Employers are to gather wage information from W-2 reports from the prior year, and include not only base salaries but also bonuses, incentive compensation payouts, and payments for paid time off. For non-exempt employees, calculation of hours worked will reflect only hours actually worked and not paid time off. Additionally, for exempt employees, employers can chose to either report actual hours worked if that is traced or report 40 hours per workweek for full-time employees and 20 hours per workweek for part-time employees.

Although the first reporting deadline is not until 2018, the reported information will include 2017 wage information. The EEOC plans to use this information to identify pay discrimination.

Therefore, companies need to identify whether there are pay gaps between protected classes that the EEOC might consider suspicious. Companies with pay gaps will need to analyze whether these are caused by legitimate, non-discriminatory, job-related factors such as location, education, or experience. If employers cannot justify wage differences, they will need to consider how to fix the pay gap. Otherwise, there is a real possibility that they will face a pay discrimination suit.

A sample of the proposed EEO-1 Form to collect pay data can be found here and a Q&A from the EEOC regarding the proposed changes can be found here.