THE WILAW CONNECTION QUARTERLY NEWSLETTER

Newsletter Article Highlights:

- Firm Opens Green Bay Office
- U.S. DOL Announces That It Will Publish Final Rule to Update Overtime Regulation
- Understanding Alternative Disputes Resolution in Wisconsin: An Overview
- LEGISLATIVE ALERT: New Rules and Procedures Regarding Mortgage Foreclosures
- Choosing a Trustee: It Is All About Trust: Part 1–Discretion vs. Direction
- Proud to Be a Member of Meritas, A Multi-National Network of Business Law Firms

Pleased to Announce:

- Welcome Attorney Robert R. Gagan
- Attorney Seth E. Dizard Joins NAFER
- Attorney Grant C. Killoran Re-Elected to the American Bar Association House of Delegates
- Attorney Erica N. Reib Elected to the Board of the State Bar's Labor and Employment Section

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ATTORNEY CLAUDE J. KRAWCZYK MENTIONED IN THE BIZTIMES REGARDING THE GEORGE WASHINGTON STATUE ON WISCONSIN AVE

Claude J. Krawczyk, president of the Westown Association Board of Directors, was quoted in the BizTimes discussing the refurbishing of the George Washington statue on West Wisconsin Avenue in Milwaukee.

As a life-long resident of Milwaukee, Claude has volunteered for over 30 years, serving as an active volunteer, officer and board member for a number of non-profit organizations including: Westown, the Downtown Neighbors Association, In Tandem Theatre, Milwaukee Christian Center, Walker's Point Development Corporation, Jackson Park Neighborhood Association, St. Josaphat Basilica Foundation and others. Check out the full article here for more details on the project and its significance.

YOUR LEASED EMPLOYEES MAY NOW JOIN A UNION WITH YOUR REGULAR EMPLOYEES – AND THEY DON'T NEED TO ASK YOUR PERMISSION

Today, in *Miller and Anderson, Inc. v. Tradesmen International and Sheet Metal Works International Association, Local Union No. 19, AFL-CIO*, the NLRB decided that, pursuant to the NLRA, temporary or leased employees who work for an employer as joint employees under an agreement with a staffing agency or similar entity do not have to have the employer's consent to join the union that covers that employer's regular employees. The full opinion can be found here. This decision overturns a 2004 NRLB decision, *Oakwood Care Center*, which held that employees who were jointly employed by an employer and a staffing agency could not be in the same bargaining unit without the employer's consent. Today's decision revives a 2000 NLRB decision, *M.B. Sturgis*, which held that both temporary and regular workers could be represented by the same union without the joint consent of the employer and the staffing agency. Under *M.B. Sturgis*, temporary staffing employees could be included in a single bargaining unit with regular employees when: (1) the staffing agency and the employer were determined to be joint employers and (2) the temporary staffing employees shared a "community of interest" with the regular employees. The *M.B. Sturgis* decision by a Clinton-appointed Board upended a 1973 NLRB decision that found that a single bargaining unit of regular employees and leased employees to be inappropriate without the consent of both employers.

The political-weighted pendulum of the Obama-appointed Board continues to swing in favor of the unions by continuing to expand the scope of the NLRA to cover additional employees and additional actions, particularly in the area of joint-employers. This inclusion of leased employees in an employer's bargaining unit is just another step down that road. Employers must be aware of this decision in any situation where they have leased employees in the same or similar positions as regular employees who are represented by a union or wish to be represented by a union.

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SETH E. DIZARD JOINS THE NATIONAL ASSOCIATION OF FEDERAL EQUITY RECEIVERS

Seth E. Dizard of O'Neil, Cannon, Hollman, DeJong and Laing S.C. has joined the National Association of Federal Equity Receivers as an Associate Member. NAFER's mission is to provide a forum for federal equity receivers to consult with one another regarding the legal and practical issues they face in order to develop best practices and common solutions. The goal of NAFER is to improve the quality, standardization, and expertise in the receivership field, to make it possible for those choosing receivers to do so with confidence.

As the head of the firm's Banking and Creditors' Rights Practice Group, Seth E. Dizard regularly serves as a court-appointed receiver throughout the State of Wisconsin for businesses, construction projects, real estate developments, marital and family estates, rental income properties, and high net worth individuals. He also represents financial institutions, secured and unsecured corporate or individual creditors, and financially troubled corporations in both state and federal courts. He also assists business owners by guiding them through the process of informal financial work-outs and refinancing. Seth has extensive experience serving as court-appointed receiver, and representing court-appointed receivers, throughout the state in assignments for the benefit of creditors (Chapter 128 Receiverships), in addition to real estate foreclosures, the winding-up of closely held corporations, and complex post-judgment collection matters. Since joining the firm in 2007, he has managed and transitioned over $100,000,000 in assets. Seth also assists clients with the acquisition or disposition of businesses and/or business assets in insolvency proceedings, as well as representation of both secured and unsecured creditors in bankruptcy proceedings across the country.

By becoming NAFER's first Wisconsin-based member, Seth is expanding upon his experience as court-appointed receiver to better serve those seeking his service and expertise.

Our firm is proud of Seth's admission to NAFER, and of the recognition by this highly respected national organization of Seth's reputation and substantial experience acting as court-appointed receiver.

You can contact Seth by phone at 414-276-5000 or by email at seth.dizard@wilaw.com

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UNDERSTANDING ALTERNATIVE DISPUTE RESOLUTION IN WISCONSIN: AN OVERVIEW

Alternative dispute resolution (ADR) offers a way for parties to resolve business disputes without going through a civil trial. ADR may take place before or after a lawsuit is filed. Many contracts, including construction, securities and Internet terms-of-service contracts, increasingly require ADR before or instead of trial. Generally speaking, courts have found these provisions enforceable.

The phrase "alternative dispute resolution" is an umbrella term covering several different types of proceedings. Direct negotiation, mediation and arbitration are the most popular forms of ADR. Although the rules differ for each, all three are intended to try to resolve a civil legal dispute without going to trial.

In Wisconsin, courts can order parties to participate in ADR. Wisconsin Statute Section 802.12(2) empowers Wisconsin Circuit Court judges to require ADR prior to trial. The parties generally are free to choose the type of ADR they wish to utilize and the ADR service provider, although the judge may make these decisions for the parties if they cannot agree.

Wisconsin judges cannot, however, require that the parties participate in the more expensive types of ADR, including non-binding arbitration, summary jury trials, or multiple facilitated ADR processes (such as both mediation and arbitration), without the parties consent.

Also, while a Wisconsin judge can require the parties to participate in ADR, he or she cannot require them to settle their dispute. In *Gary v. Eggert*, the Wisconsin Supreme Court held that while Section 801.12 allows a judge to require some form of ADR before trial in appropriate cases, it does not allow the judge to require that the parties resolve the dispute, abandon one or more legal positions or settle out of court. The right to trial must remain available to the parties even if they are sent to ADR prior to trial.

Federal courts, including those in Wisconsin, also can order parties to participate in ADR. 28 U.S.C. 651(b) allows federal district court judges to authorize the use of ADR in civil actions and bankruptcy adversary proceedings. In the United State District Court for the Eastern District of Wisconsin, Local Rule 16(d) governs ADR considerations. In the United State District Court for the Western District Local Rule 3 (LR 16.6CJ) governs ADR.

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

SLAWINSKI WINS APPEAL

In a recent article published by *The Daily Journal*, attorney Steve Slawinski successfully represented a client countering an appeal regarding the 833 East curtain wall work. The client was pleased with the results of the case as Slawinski stated “Permasteelisa believes that the decisions of both the district court judge and the 7th Circuit were the correct decisions.”

Mr. Slawinski has been representing clients in complex construction, business, and real estate litigation for 30 years and was named one of the “Wisconsin’s Top Construction Attorneys” by *The Wisconsin Law Journal/Daily Reporter*.

Read the full article here.

ATTORNEY GRANT C. KILLORAN RE-ELECTED TO THE AMERICAN BAR ASSOCIATION HOUSE OF DELEGATES

The law firm of O'Neil, Cannon, Hollman, DeJong and Laing S.C. is pleased to announce that Grant C. Killoran has been re-elected by the State Bar of Wisconsin Board of Governors to serve another two-year term as one of the State Bar of Wisconsin's five Delegates to the American Bar Association House of Delegates.

Established in 1936, the House of Delegates has over 500 members and its actions become the official policy of the ABA, the nation's largest lawyer association. Control and administration of the ABA is vested in the House of Delegates, which serves as the ABA's policy making body.

Mr. Killoran has served as a Delegate to the ABA House of Delegates since 2014. He also served as a Delegate from 1997 to 1999 and from 2003 to 2009.

Mr. Killoran is a shareholder with O'Neil, Cannon, Hollman, DeJong and Laing S.C., where he is the Chair of the firm's Litigation Practice Group. He has diverse trial experience, focusing on complex business and health care disputes.

ERICA N. REIB ELECTED TO THE BOARD OF THE STATE BAR'S LABOR AND EMPLOYMENT SECTION

Congratulations to our very own Erica N. Reib who has been elected to the Board of the Labor and Employment Section of the State Bar.

Erica is a member of O'Neil Cannon's Employment Law Practice Group. She assists clients with employment discrimination litigation, non-competition and trade secret litigation, OSHA matters, wage and hour issues, NLRB and unfair labor practice matters, employment policy

and agreement drafting and review, unemployment compensation, investigations and proper employment practices to avoid litigation. She volunteers her time at Marquette Volunteer Legal Clinic and Milwaukee Justice Center, is part of the Legal Action of Wisconsin Volunteer Lawyers Project, and is a board member and legal committee chair at the Audio and Braille Literacy Enhancement, Inc.

The State Bar of Wisconsin provides opportunities for lawyers to work on issues that matter to them and the public they serve. The Labor and Employment Section includes new and experienced attorneys who practice labor and employment law. The section keeps members up-to-date on recent developments in the law. The section also allows members to exchange information and opinions on various labor topics and legal issues in the workplace.

If you would like to contact Erica, she can be reached at 414-276-5000 or erica.reib@wilaw.com.

EMPLOYMENT LAWSCENE ALERT: YOUR ARBITRATION AGREEMENTS WITH EMPLOYEES MAY BE INVALID

Last week, the Seventh Circuit Court of Appeals issued a decision stating that class waivers in arbitration agreements for employees are invalid. The Court in *Lewis v. Epic Systems Corp.* adopted the controversial position of the National Labor Relations Board (NLRB) and found that a collective and class action waiver in an employer's contract violated Section 7 of the National Labor Relations Act (NLRA) by prohibiting employees from engaging in collective activity and forcing them into individual arbitration for their wage and hour claims.

The Seventh Circuit based its decision on the concept that the NLRA prohibits an employer from barring workers from engaging in concerted activity. The Court's reasoning followed that, because class and collective actions could be considered concerted activity, an agreement that prohibited such activity was a violation of the NLRA. The Court found that individual arbitration was not bargained for by the employees and could not be rejected without penalty to the employees. Because it found that the provision was illegal under the NLRA, the Court held that the Federal Arbitration Act (FAA) did not mandate enforcement because, under the FAA, an arbitration agreement is not valid where grounds exist for the revocation of the agreement. The Seventh Circuit determined that violation of the NLRA constituted such ground for revocation. Use of arbitration agreements with class and collective prohibitions has long been a point of contention with the NLRB, but until now, it had

been an issue that the NLRB was finding little success with in the circuit courts. However, the Seventh Circuit's decision gives the NLRB additional standing for its position, particularly in Wisconsin, Illinois, and Indiana, where the decision applies.

This decision creates a circuit split because the Fifth Circuit has ruled in two separate cases (*Murphy Oil and D.R. Horton*) that mandatory individual arbitration clauses in employment agreements are enforceable. The Fifth Circuit found that the NLRB, in determining that collective and class waivers were illegal under the NLRA, did not give proper deference to the FAA because the NLRA does not contain any specific language that prevents arbitration agreements from being enforced pursuant to their terms. The Fifth Circuit found that the NLRB's interpretation that such clauses violated the NLRA by prohibiting concerted activity was not entitled to the level of deference that the Seventh Circuit found it was. The Second and Eighth Circuits have issued rulings similar to those of the Fifth Circuit. Now with a split in the federal circuits, the issue is ripe for consideration by the U.S. Supreme Court. However, with Justice Scalia's recent death, the Court's precarious 4-4 split, and the political balance of the Court dependent upon the outcome of the Presidential election, the outcome on this issue before the U.S. Supreme is anything but certain, even taking into consideration the Supreme Court's recent strong support for the enforceability of arbitration provisions.

Therefore, until this decision is overruled by the Supreme Court, employers in Wisconsin, Illinois, and Indiana should not limit their employees to individual arbitration or should, at the least, allow employees to opt out of mandatory individual arbitration without penalty.