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.

TAX AND WEALTH ADVISOR ALERT: CHOOSING

A TRUSTEE: IT IS ALL ABOUT TRUST PART 1—DISCRETION VS. DIRECTION

Virtually all of my clients leave property to the next generation through trusts. Generally, these trusts last for the lifetimes of their children and oftentimes for further generations, as well. We setup trusts this way to protect those children from creditors, predators, and divorcing spouses, and previous blog posts have fully described how and why this works. This blog post covers a different issue—the amount of specific direction the trustee should receive regarding management of trust property.

At one extreme, the client can give the trustee very little guidance and allow the trustee to make all of the decisions over the trust. For example, the trust document can allow the trustee to decide what to invest in, who to retain for advice and counsel to the trust, and when (and for what reasons) to make distributions to the beneficiaries. At the other extreme, the trust document can give very specific direction. For example, the trust document can require that the trustee invest only in ETFs or dividend paying stock, maintain a 60/40 equity to debt allocation, and name specific advisers. The trust document can limit distributions of principal except in times of hardship, require the trustee to distribute an amount equal to five percent of the trust property each year or an amount equal to the beneficiary's W-2 income, or limit distributions for education unless the beneficiary maintains a 3.0 GPA. But, which method is better—discretion or direction?

Clients ask me this question often. I respond by reminding them that their estate plan needs to implement their own strategy to take care of the people they care about. Their strategy needs to be an extension of their parenting beliefs and values; at its best, it should mimic what they would do if they were alive and had no personal economic need for the trust property. With that context in mind, we begin to consider certain scenarios that test those beliefs. The answers to those "what if" questions provide guidance as to the right framework.

An example might be helpful. One of the fears of leaving large sums of money to children is a fear of laziness. To avoid their children becoming "trust fund babies," parents might put a provision in the trust that the trust shall make a distribution to the child each year equal to the child's W-2 income. On one hand, that is a perfect solution; the child is incentivized to be very productive and double his or her income. But, then we start scenario testing. What if your child was a doctor making $500,000 per year and wanted for nothing? If you were alive and had the money available, would you transfer another $500,000 to the child? The answer is consistently, no. What if your child was a teacher making $30,000 and, based on child care needs and the like, needed $50,000 to "make ends meet"? If you had it, would you give $50,000 to that child? Often the answer is, yes. What about a stay-at-home parent without W-2 income? Would you give that child nothing if you had plenty to give?

These discussions often lead to the client envisioning ever more complicated structures. For example, we could solve the doctor problem with a maximum distribution, the teacher problem with a "teacher (or other respected but underpaid profession) multiple," and the stay-at-home problem by creating a "stay-at-home-parent compensation equivalent." But, of course, for every solution, there is another question—what if the teacher is married to a well-paid CEO?

The point of this exercise is to point out the value of being able to solve each of these problems given their unique facts. I might still decide to provide money to the hard-charging doctor who is investing everything into her practice and her retirement to give her family some "fun money" to take a well-deserved vacation. I might decide not to give the teacher anything because he blows his paycheck at the bars and the casino. Simply put, if the test is what the parent would do if he or she were alive, the answer almost always is "we would make each decision as it comes and not constrain ourselves in any way." So, with that in mind, isn't the best trust design to provide the trustee the same full discretion to consider all of the circumstances and make a real-time decision?

The answer is yes, with one huge caveat. Is there a trustee the parents trust? And "trust" is not simply a matter of having a true-north moral compass; trust means the parents have to choose a person who can execute on the parents' values and beliefs. In other words, in the same situation, a trustee that would do what Mom and Dad would have done if they were alive. Perhaps surprisingly, in a vast majority of situations that I deal with, that person exists, and we have the perfect structure: A parental stand on whom we place no restriction. But what if that person does not exist? While some practitioners and clients then want to shift back to specific rules, in my opinion, there is a better way. We should still provide strong discretion to the trustee, but incorporate specific values and beliefs rather than hard or fast inflexible rules. For example, instead of matching the W-2 income, incorporate the parents' value of hard work, disdain for sloth, and respect for a stay-at-home parent. Instead of a hard and fast 3.0 GPA cut off for education expenses, we can provide a values statement that education expenses are an investment in a productive future wherein the child's coordinating investment needs to be hard work and academic rigor. The trustee can then determine whether a 2.5 GPA is the result of a hard-working child overstretching his abilities or a kid on the "Malt Monday, Tequila Tuesday, Wine Wednesday" education plan.

So, my advice: make the trust flexible enough to deal with every changing circumstance and ever-evolving people. Do not restrict the trustee, but rather choose a parenting clone, and if that perfect parent clone does not exist, pick a trustworthy, smart, thoughtful decision maker and have the parents put their values and beliefs in the trust document as a decision-making GPS for the trustee. This is the structure that will best take care of the people the client cares about.

UPCOMING EVENTS—LUNCH AND LEARN: NEW DOL OVERTIME RULES

Please RSVP to Julie Dietz at julie.dietz@wilaw.com or 414-291-4667.

U.S. DOL ANNOUNCES THAT IT WILL PUBLISH FINAL RULE TO UPDATE OVERTIME REGULATIONS

Today, the U.S. Department of Labor announced that it will publish on May 23, 2016 its Final Rule to update the federal regulations defining the overtime exemption for executive, administrative, and professional employees or otherwise known as ”white-collar” employees. The pre-publication version of the Final Rule is, however, available now. The final rule will become effective December 1, 2016.

The Final Rule focuses primarily on updating the salary level requirement for white-collar employees, increasing the salary level requirement from $455 per week ($23,660 annually) to $913 per week or $47,476 annually for a full-year employee. The Final Rule amends the salary basis test to allow employers to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the new standard salary level. The Final Rule also sets the total annual compensation requirement for highly compensated employees (HCE) subject to minimal duties test to $134,004 up from the current $100,000 salary threshold.

The initial increases to the standard salary level from $455 to $913 per week and HCE total annual compensation requirement (from $100,000 to $134,004 per year) will be effective on December 1, 2016. Future automatic updates to those salary level thresholds will be automatically updated every three years beginning on January 1, 2020.

Currently, for an employee to be exempt from the minimum wage and overtime requirements under the Fair Labor Standards Act (FLSA), an employee must be paid on a salary basis meaning that the employee must receive a predetermined amount of at least $455 per week which cannot be subject to a reduction because of variations in the quality or

quantity of the work performed. In addition, the employee's job duties must primarily involve executive, administrative, or professional duties as defined by the regulations ("duties test").

The Final Rule is not changing any of the existing job duty requirements for employees to qualify for the white collar overtime exemption. The Final Rule is also not changing the HCE duties test. The DOL expects that the standard salary level set in the Final Rule and automatic updating will work effectively with the duties test to distinguish between overtime-eligible workers and those who may be exempt.

The effect of the increase in the salary level test from $455 per week to $913 per week will result in certain employees who are now considered exempt under the current regulations to lose their overtime exemption effective December 1, 2016 unless their employers increase their salary level to the new salary level requirement. The DOL estimates that the change in the salary level requirement will permit approximately 4.2 million more employees who are not currently eligible for overtime under the FLSA to be entitled to overtime once the Final Rule becomes effective on December 1, 2016.

O'Neil Cannon will be hosting a seminar on June 8, 2016 at the Country Springs Hotel in Pewaukee, Wisconsin providing important information and insight for employers on the new overtime rules. Please visit our firm website for more information.

ATTORNEY GUMINA AUTHORS IICLE CHAPTER ON GUIDELINES FOR DRAFTING EMPLOYMENT AGREEMENTS

Joseph E. Gumina is a contributing author for the 2016 Edition of the Illinois Institute for Continuing Legal Education's treatise titled "Illinois Contract Law." Attorney Gumina has authored Chapter 8 entitled *Guidelines for Drafting Specific Contract Clauses in Employment Agreements*. This chapter provides a detailed analysis of the anatomy of an effective employment agreement under Illinois law. Attorney Gumina provides practical insight and examples on how to properly draft specific contract clauses in employment agreements. Attorney Gumina also provides an extensive analysis of the developing law with regard to the enforceability of arbitration provisions in employment agreements both under the Federal Arbitration Act and the Illinois Uniform Arbitration Act.

Attorney Gumina leads O'Neil Cannon's labor and employment practice. Attorney Gumina has extensive experience representing management in a vast array of employment and labor

matters. Attorney Gumina has authored articles on various employment law topics in InsideCounsel Magazine, Illinois Bar Journal and the Wisconsin Law Journal. He is also a frequent speaker on the latest topics facing employers. Attorney Gumina is licensed to practice in Illinois and Wisconsin and has represented clients in litigation matters in both state and federal courts in Illinois and Wisconsin.

EMPLOYMENT LAWSCENE ALERT: DEFEND TRADE SECRETS ACT OF 2016: EMPLOYERS MUST INCLUDE NEW WHISTLEBLOWER IMMUNITY NOTICE IN CONFIDENTIALITY OR NON-DISCLOSURE AGREEMENTS

On May 11, 2016, President Obama signed into law the Defend Trade Secrets Act of 2016 ("DTSA") which amends the Economic Espionage Act (18 U.S.C. § 1831, *et seq.*).

The DTSA creates a private cause of action for trade secret misappropriation under federal law and opens a direct avenue for trade secret cases to proceed in federal court. While making it easier for employers to bring suits for trade secret misappropriation in federal court, the DTSA does not replace or preempt state trade secrets laws such as the Wisconsin Uniform Trade Secrets Act ("WUTSA") (Wis. Stat. § 134.90 *et seq.*). This means that an employer who believes that one of its trade secrets may have been misappropriated may proceed under either the DTSA or the WUTSA, or both, to enjoin the misappropriation of a trade secret and remedy the harm.

The DTSA has a similar definition of "trade secrets" that is found in the WUTSA. Like the WUTSA, the DTSA defines the term "trade secret" to include all forms and types of financial, business, scientific, technical, economic, or engineering information where reasonable measures are taken to keep such information secret and the information derives independent economic value, actual or potential, from not being generally known to the public. The DTSA also defines the term "misappropriation" relative to the theft of a trade secret identically to the way it is defined by the WUTSA.

While appearing similar, the DTSA, however, differs significantly from the WUTSA on two fronts. First, the DTSA, unlike the WUTSA, permits an owner of a trade secret to obtain an *ex parte* seizure order providing for the seizure of property necessary to prevent the further dissemination or use of a misappropriated trade secret. Similar seizure remedies are found in

the Copyright Act and the Lanham Act. Such an order could include, for example, an order seizing an employee's computers or smartphone or even an order seizing an employee's new employer's computers if evidence exists that the misappropriated trade secret was transferred and disseminated by a former employee to his/her new employer. This *ex parte* seizure remedy is only available under extraordinary circumstances. Realizing that such a powerful remedy could be subject to abuse, Congress included a provision within the DTSA that permits a person who is subject to a wrongful or excessive seizure to recover civil damages.

Second, the DTSA has a whistleblower protection provision that is not found in the various Uniform Trade Secrets Acts enacted by various states, like in Wisconsin under the WUTSA. Specifically, the DTSA amends 18 U.S.C. § 1833(b) to provide criminal and civil immunity under any federal or state trade secret law for the disclosure of a trade secret that either is made: (i) in confidence to a federal, state, or local government official or to an attorney solely for the purpose of reporting or investigating a suspected violation of law; or (ii) is made in a complaint or other document filed in a lawsuit or other proceeding, if such filing is made under seal.

Overlaying this immunity protection under the DTSA is also a notice requirement. Specifically, starting May 12, 2016 employers must give employees, contractors, and consultants notice of this potential immunity in any contract or agreement that governs or protects the use of a trade secret or other confidential information entered into or amended after this date. The DSTA requires that this whistleblower immunity notice be expressly provided in a contract protecting trade secrets or should at least contain a notice provision that cross-references a policy that contains the employer's whistleblower reporting policy for a suspected violation of law. Failure to provide this notice, however, does not invalidate the enforceability of the agreement or preclude an employer from bringing a claim under the DTSA. Rather, failure to provide the required whistleblower immunity notice simply precludes an employer from recovering exemplary damages or attorneys' fees under the DTSA.

To comply with the new whistleblower immunity notice requirement under the DTSA, all employers must include this notice in any contract protecting the use of trade secrets or confidential information entered into or modified on or after the effective date of the DTSA (May 12, 2016) involving any employee or any non-employee individual performing work as a contractor or consultant for the employer. Employers are not required to amend existing contracts. Employers should take immediate action to incorporate the DTSA's new required whistleblower immunity notice in all new or modified confidentiality or non-disclosure agreements entered into on or after May 12, 2016.