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.

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

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.