BEST LAWYERS® HONORS 18 ATTORNEYS IN 2018

O'Neil, Cannon, Hollman, DeJong and Laing S.C. is pleased to announce that 18 lawyers have been named to the 2018 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 over 75 countries.

"For more than a third of the century," says CEO Steven Naifeh, "Best Lawyers has been the gold standard of excellence in the legal profession." President Phil Greer adds, "We are extremely proud of that record and equally proud to acknowledge the accomplishments of these exceptional legal professionals."

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 2018 *Best Lawyers in America* list:

- Douglas P. Dehler – Litigation-Insurance
- 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
- Robert R. Gagan – Municipal Law
- John G. Gehringer – Commercial Litigation, Construction Law, Corporate Law, Real Estate Law
- Joseph E. Gumina – Litigation-Labor and Employment
- 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."

FEDERAL COURT HOLDS WISCONSIN'S RIGHT-TO-WORK 30-DAY REVOCATION PROVISION UNCONSTITUTIONAL

Wisconsin's Right-to-Work law provides employees the ability to choose as to whether they want to become or remain members of a labor union. Intertwined with that decision is an employee's right to decide not to pay union dues. In order for an employee to effectively exercise his or her right not to be a member of a union without coercion or duress is the ability to also timely revoke their dues check-off authorizations so they are not committed to pay union dues when they no longer want to be a member of the union.

Wisconsin's Right-to-Work law was designed to address this issue by prohibiting any dues checkoff authorizations unless such authorizations are revocable upon 30 days' written notice by an employee. This means, under Wisconsin's Right-to-Work law, that an employee can terminate a dues checkoff authorization upon 30 days' written notice and, moreover, a labor union cannot bind an employee to a period of more than 30 days in which to exercise that right. However, this provision under Wisconsin law runs contrary to the federal Labor Management Relation Act (29 U.S.C. § 186(c)(4)) which permits an employee's authorization for dues check-off to be effective for a period of up to one year or up until the termination date of the applicable collective bargaining agreement, whichever occurs sooner.

Recently, a federal district court in Wisconsin addressed this conflict between the two laws and found that the 30-day revocation provision for dues checkoff authorizations under Wisconsin's Right-to-Work law to be preempted by the federal Labor Management Relation Act (29 U.S.C. § 186(c)(4)), and, as a result, unconstitutional under the Supremacy Clause of the U.S. Constitution. The federal district court premised its holding on a finding that a state law *limiting* the irrevocability of dues checkoff agreements to 30 days directly conflicts with the federal law *permitting* unions to bargain for longer periods of irrevocability. The federal district court further held that the fact that this provision was made part of Wisconsin's Right-

to-Work law does not exempt it from federal preemption within the § 14(b) exception to federal preemption.

The federal district court's decision means that a dues check-off authorization that is not revocable for more than one year is lawful and enforceable under 29 U.S.C. § 186(c)(4) despite Wisconsin's Right-to-Work law to the contrary limiting the irrevocability of such authorizations.

The significance of this decision is that labor unions can and will bind employees to continue to pay union dues for up to a year before they can exercise their right to revoke their dues check-off authorization (and usually within a tight revocation window) even though the employee may have decided they no longer want to remain a member of the union. As a result, this federal court decision will have a chilling effect upon employees' right to decide as to whether they want to remain a member of a labor union when they will be compelled by the same union they want to disassociate themselves from into continuing to pay union dues – exactly what labor wanted to accomplish in commencing the lawsuit challenging this provision of Wisconsin's Right-to-Work law.

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.

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.

EMPLOYMENT LAWSCENE ALERT: DANE COUNTY JUDGE FINDS RIGHT-TO-WORK LAW UNCONSTITUTIONAL

On March 9, 2015, Governor Scott Walker signed Act 1 (Wisconsin's Right-to-Work legislation) into law, which allows workers covered by a collective bargaining agreement to not pay union dues if they choose not to do so (our previous blog on the law can be found here). Opponents of the law immediately went to work trying to defeat the new law. In late March, the Dane County Circuit Court denied the Wisconsin State AFL-CIO and two labor unions' bid for a preliminary injunction that would have halted implementation of the law. However, this past Friday, the same Court ruled that Wisconsin's Right-to-Work law is unconstitutional (full opinion here).

The unions argued that Act 1 effects an unconstitutional taking of their property without just compensation in violation of Article I, § 13 of the Wisconsin Constitution by "prohibiting the unions from charging nonmembers who refuse to pay for representative service which unions continue to be obligated to provide" by law. Article I, § 13 of the Wisconsin Constitution provides "[t]he property of no person shall be taken for public use without just compensation therefor." The unions successfully argued that their service of providing collective bargaining representation to all employees constitutes "property" subject to a protectable interest under Wisconsin's Constitution. The unions then successfully convinced the circuit court that Act 1 effectuates a taking of their property by requiring the unions to provide services to non-paying nonmembers, because the exclusivity principle of Section 9 of the National Labor Relations Act requires that a union elected by a majority of workers in a bargaining unit must represent all employees, whether or not such employees support the union. The circuit court then opined that Act 1 creates a "free-rider" problem whereby non-union members could refuse to pay for services that the unions are required, by law, to provide to them under the duty of fair representation.

Right-to-Work laws have been enacted in twenty-four other states, and none have been struck down. The Seventh Circuit, which Wisconsin is a part of, in *Sweeney v. Pence*, 767 F.3d 654 (7th Cir. 2014), rejected similar arguments brought by unions challenging Indiana's recently enacted right-to-work law. The circuit court, however, was not persuaded by the decisions in other jurisdictions and expressly held that it was not obligated to reconcile its decision with the Seventh Circuit's decision in *Sweeney*. In justifying its decision, the circuit court found that one important difference between the Indiana and Wisconsin laws is what qualifies as "just compensation." Applying Indiana law, the Seventh Circuit ruled that the ability to exclusively bargain on behalf of employees was a special privilege that qualified as "just compensation;" whereas, under Wisconsin law, the circuit court rejected such a theory and found that Wisconsin has a long history of equating "just compensation" with the

payment of money.

Wisconsin's Attorney General and the Department of Justice have already stated that the State will appeal the ruling, which is likely to be overturned on appeal. In the meantime, the Department of Justice is likely to file a motion to stay the ruling until a higher court can decide the issue. We will keep you posted as matters develop.

EMPLOYMENT LAWSCENE ALERT: NLRB HOLDS THAT POLICY PROHIBITING RECORDING DEVICES IN THE WORKPLACE VIOLATES EMPLOYEES' SECTION 7 RIGHTS

In a recent decision, the National Labor Relations Board (NLRB) struck down an employer's work rule that prohibited employees from recording workplace meetings and conversations without management approval, finding that such a policy could prevent employees from engaging in protected activity, which is protected by Section 7 of the National Labor Relations Act (NLRA).

In this case, the employee handbook had, like many employee handbooks, a policy prohibiting employees from recording company meetings and other aspects of the workplace. These policies are typically put in place to protect employees' privacy and to protect employers' confidential information and trade secrets. However, a 2–1 majority of the NLRB found that employees could reasonably understand such a rule to prohibit unionization efforts or engagement in other collective or concerted activities to advance their job-related interests. The NLRB held that photo, audio, and video recording at the workplace could be a protected activity under certain circumstances, such as documenting picketing activities, unsafe working conditions, discussions regarding terms and conditions of employment, or an employer inconsistently applying workplace rules. Because the rule in question was simply a blanket rule prohibiting recording, the NLRB ordered the company to remove the policy.

The NLRB is showing no signs of slowing down in its quest to expand the reach of Section 7 far beyond the traditional view of "protected, concerted activity." Employers should carefully review and consider their workplace policies in light of this ruling and other NLRB decisions that have found other workplace rules infringing upon employees' Section 7 rights. Employers' rules restricting use of recording devices need to either be tied to particular employer interests, such as maintaining a customer's privacy or an employer's trade secrets, or be narrow enough to only prohibit recording in limited circumstances. Otherwise,

employers, even non-union employers, could be subject to an NLRB unfair labor charge challenging their workplace recording policies.

ATTORNEYS GUMINA AND REIB PUBLISH LABOR AND EMPLOYMENT LAW ARTICLE SERIES IN INSIDECOUNSEL MAGAZINE

Attorneys Joseph Gumina and Erica Reib authored a Labor and Employment Law article series entitled, “Anticipating and Managing Wage and Hour Pitfalls” on *InsideCounsel.com*. This monthly magazine serves general counsel and other top in-house legal professionals and provides strategic tools to help them better manage their legal departments.

To learn more about the wage and hour topics below, click on the article links. Attorneys Joseph Gumina and Erica Reib can be reached at 414-276-5000 if you would like further information.

- “A primer for inside counsel on donning and doffing under the FLSA,” published 3/20/2015
- “Paying employees correctly under the FLSA with preliminary and postliminary activities,” published 4/3/2015
- “Education on unpaid internships for the in-house counsel,” published 4/17/2015
- “Unpacking the surprisingly tricky ‘regular rate’ in overtime calculation,” published 5/1/2015
- A primer for inside counsel on meeting FLSA overtime exemption tests,” published 5/15/2015
- “Independent contractors—Avoiding misclassification under the FLSA,” published 5/29/2015