# EMPLOYMENT LAWSCENE ALERT: THE ELECTION IS ALMOST HERE—VOTING LEAVE IN WISCONSIN

O'NEILCANNON
HOLLMAN DEJONG & LAING S.C.

Tuesday, November 3, 2020 is Election Day. Although early voting is underway and many individuals have already returned their absentee ballots, many people will want to vote in-person on Election Day. All Wisconsin employers are required to provide employees who are eligible to vote up to three consecutive hours of unpaid leave to vote while the polls are open (from 7 AM until 8 PM), and employees must request the time off prior to the election. Voting leave cannot be denied on the basis that employees would have time outside of their scheduled work hours to vote while the polls are open, but employers can specify which three hours an employee is permitted to utilize. Employers may not penalize employees for using voting leave. Although voting leave is unpaid, employers should remember that, under the FLSA, they may not deduct from an exempt employee's salary for partial day absences.

Additionally, all Wisconsin employers are also required to grant an employee who is appointed to serve as an election official 24 hours of unpaid leave for the election day in which the employee serves in his or her official capacity. Employers may not penalize employees for using election official leave. Employees must provide their employers with at least seven days' notice of their need for this leave.

Finally, Wisconsin employers are not permitted to make threats that are intended to influence the political opinions or actions of their employees. Specifically, employers cannot distribute printed materials to employees that threaten to shut down the business, in whole or in part, or reduce the salaries or wages of employees if a certain party or candidate is elected or if any referendum is adopted or rejected.

As always, O'Neil, Cannon, Hollman, DeJong & Laing is here for you. We encourage you to reach out with any questions, concerns, or legal issues you may have.

# EMPLOYMENT LAWSCENE ALERT: WISCONSIN FACE COVERING ORDER ISSUED – EFFECTIVE AUGUST 1, 2020

O'NEILCANNON
HOLLMAN DEJONG & LAING S.C.

Today, Wisconsin Governor Tony Evers declared a Public Health Emergency and issued an Emergency Order requiring individuals to wear face coverings. This Emergency Order goes into effect at 12:01 a.m. on Saturday, August 1, 2020 and will expire on September 28, 2020, unless there is a subsequent superseding emergency order.

The Emergency Order applies to all individuals over the age of five when they are indoors or in an enclosed space with anyone outside of their household, other than when inside a private residence. "Enclosed space" is defined in the Emergency Order as "a confined space open to the public where individuals congregate, including but not limited to outdoor bars, outdoor restaurants, taxis, public transit, ride-share vehicles, and outdoor park structures." Additional guidance included in the Face Covering FAQs states that, even if individuals can socially distance indoors, unless that person is the only person in the room, a face covering must be worn and that the Emergency Order requires face coverings inside businesses and office spaces, unless an exception applies. Exceptions to the face covering requirement include, among other things, the following:

- when an individual is eating, drinking, or swimming;
- when an individual is obtaining a service that requires temporary removal of the face covering, such as dental services; and
- individuals with health conditions or disabilities that would preclude safely wearing a face mask.

Therefore, the Emergency Order will require employees to wear face coverings in most workspaces, unless the employee is in a room and is the only person in that room.

The Emergency Order supersedes local orders that are less restrictive, but those that are more restrictive than the Emergency Order, like that issued by the City of Milwaukee, are not superseded and remain in force. Therefore, it is important to check local guidelines to ensure that all requirements are complied with. The Emergency Order will be enforced by local and state officials, and the penalty for violation of the Emergency Order is a fine of not more than $200.

O’Neil, Cannon, Hollman, DeJong & Laing remains open during this time. We encourage you to reach out with any questions, concerns, or legal issues you may have, including those related to COVID-19.

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# EMPLOYMENT LAWSCENE ALERT: SAFER AT HOME FAQS AND COVID-19 RESPONSE PLANS

O’NEILCANNON
HOLLMAN DEJONG & LAING S.C.

As we blogged about here, the State of Wisconsin issued a statewide Safer at Home Order, which came into effect at 8:00 a.m. on March 25, 2020. Since then, Governor Evers has published Safer At Home FAQs regarding that Order. Some of the highlights are:

- Individuals do not need special permission or documentation to leave their homes, but they must comply with the Order regarding when they are allowed to leave their homes.
- Essential Businesses and Operations, as defined in the Order, do not need documentation or certification to continue work that is done in compliance with the Order.
- Essential Businesses and Operations that remain open must comply with social distancing requirements.
- Businesses that are not Essential Businesses and Operations under the Order can request to be designated as essential by the Wisconsin Economic Development Corporation (“WEDC”) at their website.

Although not explicitly included in the Order or the FAQs, the WEDC encourages businesses to follow best practices related to the development of a COVID-19 response plan. The WEDC recommends that each company develop a written plan, unique to the operations under its control, that documents the identification and mitigation measures taken, including all engineering controls, administrative controls, and safe work practices, and that the company updates that plan on a regular basis for the duration of the COVID-19 Situation. Potential inclusions in such plan include:

- Discontinuations of in-person meetings.
- Body temperature scans.
- Reduction of on-site hours or staggered shifts.
- Staggered use of shared spaces such as bathrooms, lunchrooms, and breakrooms.
- Mandatory work from home for all but essential employees.

- Sanitization processes implemented throughout the company's facilities.
- Banning international and domestic travel and policies for employees returning from such trips.
- Banning all visitors.
- Employee reporting of COVID-19 symptoms and contact with individuals diagnosed with COVID-19.

O'Neil, Cannon, Hollman, DeJong & Laing remains open during this time and is here to help. We encourage you to reach out with any questions, concerns, or legal issues you may have, including those related to coronavirus or the drafting of a COVID-19 response plan.

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# EMPLOYMENT LAWSCENE ALERT: WISCONSIN AND CITY OF MILWAUKEE SAFER AT HOME ORDERS ISSUED – EFFECTIVE MARCH 25, 2020

O'NEILCANNON
HOLLMAN DEJONG & LAING S.C.

The State of Wisconsin has issued a statewide Safer at Home Order, which will become effective at 8:00 a.m. on March 25, 2020, and will remain in effect until 8:00 a.m. on Friday, April 24, 2020, or until a superseding order is issued. The full text of the Order can be found here.

The Order requires all businesses in Wisconsin, except businesses the Order defines to be Essential Businesses and Operations, to cease all activities except Minimum Basic Operations. Essential Businesses and Operations means Healthcare and Public Health Operations, Human Services Operations, Essential Infrastructure, and 26 other categories of businesses. Healthcare Operations, which include hospitals, dental offices, eye care centers, personal care agencies, massage therapists, chiropractors, and veterinary care, among other entities, are exempt from the Order, so those businesses may remain open. Essential Infrastructure may also remain open, including, but not limited to, food production, distribution, and sale; certain types of construction; building management and maintenance; airport operations; operation and maintenance of utilities; and internet, video, and telecommunication systems.

Some of the other businesses and industries that qualify as Essential Businesses and Operations include stores that sell groceries and medicine; food and beverage production,

transport, and agriculture; organizations that provide charitable and social services; gas stations and businesses needed for transportation; financial institutions and services; hardware and supplies stores; critical trades, including, but not limited to, plumbers, electricians, carpenters, cleaning and janitorial staff for commercial government properties, security staff, HVAC, and moving companies;  bars and restaurants for consumption off-premises; supplies to work from home; supplies for Essential Businesses and Operations; transportation; home-based care and services; professional services such as legal, accounting, insurance, and real estate services; child care, subject to the March 18, 2020, DHS limitations; and manufacturing, distribution, and supply chain for critical products and industries.

Essential Businesses and Operations are encouraged to remain open, and to the greatest extent possible, should comply with social distancing requirements, including maintaining a six-foot distance from others, and use technology to avoid meeting in person, including virtual meetings, teleconference, and remote work.

All public and private K-12 schools must close, except for facilitating distance learning and virtual learning. Public libraries are closed for all in-person services but may continue to provide online services and programming. Schools and public libraries may be used for Essential Government Functions and food distribution. Places of public amusement and activity, salons, and spas must also close.

Businesses that are not considered Essential Businesses and Operations must cease all activities, with the exception of Minimum Basic Operations and remote work. Minimum Basic Operations are the minimum necessary activities to maintain the value of the business's inventory, ensure security, process payroll and employee benefits, or for related functions and the minimum necessary activities to facilitate employees of the business being able to continue to work remotely. All businesses, even those that are considered non-essential, are permitted to continue allowing individuals to work from home.

Additionally, all individuals in Wisconsin are ordered to stay at home or at their place of residence, with certain exceptions. People may leave their homes for Essential Activities, Essential Government Functions, Essential Business and Operations, Minimum Basic Operations, Essential Travel, and Special Situations. Essential Activities include health and safety (e.g., obtaining medical supplies or medication, visiting a healthcare professional); obtaining necessary supplies and services (e.g., obtaining or delivering services and supplies such as food and household consumer products); outdoor activity that complies with social distancing (e.g., walking, biking, hiking, running); working at Essential Business Operations and performing Minimum Basic Operations; and caring for others. Essential Travel includes all travel related to the provision of or access to Essential Activities, Special Situations, Essential Governmental Functions, Essential Business and Operations, or Minimum Basic Operations; travel to care for elderly, minors, dependents, persons with disabilities, or other vulnerable

persons; travel to or from educational institutions for purposes of receiving materials for distance learning, for receiving meals, or any other related services; travel to return to a place of residence from outside of Wisconsin; travel required by law enforcement or court order, including transportation of children pursuant to a custody agreement; and travel required for nonresidents to return to their place of residence outside of Wisconsin. All other public and private gatherings of any number of people occurring outside a single household or living unit are prohibited.

The statewide Order is enforceable by local law enforcement, including county sheriffs, and violation and obstruction of the Order is punishable by up to 30 days of imprisonment, or a fine of up to $250, or both.

The City of Milwaukee has issued a city-wide "Stay-at-Home" order, which will become effective at 12:01 a.m. on March 25, 2020, and which is substantially similar to the statewide Safer at Home Order. The Milwaukee Order can be found here.

O'Neil, Cannon, Hollman, DeJong & Laing is considered an Essential Business under both the Wisconsin and City of Milwaukee orders and remains open during this time. We encourage you to reach out with any questions, concerns, or legal issues you may have, including those related to coronavirus.

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## EMPLOYMENT LAWSCENE ALERT: WISCONSIN BANS MASS GATHERINGS OF 50 OR MORE PEOPLE–WHAT DOES THAT MEAN FOR MY BUSINESS?

O'NEILCANNON
HOLLMAN DEJONG & LAING S.C.

Earlier this afternoon, Wisconsin Governor Tony Evers directed Wisconsin Department of Health Services Secretary-designee, Andrea Palm, to order a ban on mass gathering of 50 or more people. Pursuant to the Order Prohibiting Mass Gatherings of 50 People or More, a "mass gathering" is "any planned or spontaneous, public or private event or convening that will bring together or is likely to bring together 50 or more people in a single room or single confined or enclosed space at the same time." This does not affect critical infrastructure and

services such as grocery stores, food pantries, childcare centers, pharmacies, and hospitals. Office spaces as well as manufacturing, processing, distribution, and production facilities are also exempt from the Order. Some affected Wisconsin businesses, including bars and restaurants, will be permitted to remain open provided that they operate at 50% of seating capacity or 50 total people, whichever is less; preserve social distancing of six feet between tables, booths, bar stools, and ordering counters; cease self-service operations of salad bars, beverage stations, and buffets; and prohibit customers from self-dispensing all unpackaged food and beverage. This is intended to encourage social distancing and limit the spread of coronavirus. This Order goes into effect at 12:01 a.m. on Tuesday, March 17, 2020, and will remain in effect for the duration of the public health emergency declared in Governor Evers's Executive Order #72 or until a superseding order is issued. At this time, there is no specific end date to Executive Order #72 or the Order Prohibiting Mass Gatherings of 50 People or More. Failure to comply with this directive could result in fines and imprisonment.

The full Order can be found here.

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# EMPLOYMENT LAWSCENE ALERT: BREAKING NEWS: DOL SETS OVERTIME SALARY EXEMPTION THRESHOLD AT $35,568

O'NEILCANNON
HOLLMAN DEJONG & LAING S.C.

On September 24, 2019, the U.S. Department of Labor announced a final rule to increase the salary threshold necessary to exempt executive, administrative and professional employees from the Fair Labor Standard Act's (FLSA) minimum wage and overtime pay requirements. The final rule raises the annual salary threshold from $23,660 (or $455 per week) to $35,568 (or $684 per week). The FLSA requires covered employers to pay employees a minimum wage and, for employees who work more than 40 hours in a week, overtime premium pay of at least 1.5 times the regular rate of pay. Section 13(a)(1) of the FLSA, commonly referred to as the "white collar" or "EAP" exemption, exempts from these minimum wage and overtime pay requirements "any employee employed in a bona fide executive, administrative, or professional capacity." Now for an employee to qualify for one of the EAP exemptions, generally, that employee has to be paid on a salary basis and earn at least $35,568 per year or $684 per week. The final rule becomes effective January 1, 2020.

The final rule also allows employers to use non-discretionary bonuses and incentive payments (including commissions) to satisfy up to ten percent of the standard salary level as long as such payments are paid annually or on a more frequent basis. In addition, if an employee does not earn enough in nondiscretionary bonus or incentive payments in a given year (52-week period) to retain his or her exempt status, the employer may make a "catch-up" payment up to ten percent of the total salary level for the preceding 52-week period. This "catch-up" payment must be paid within one pay period following the end of the 52-week period. In plain terms, each pay period an employer must pay the EAP employee on a salary basis at least 90 percent of the standard salary level and, if at the end of the 52-week period the sum of the salary paid plus the nondiscretionary bonuses and incentive payments (including commissions) paid does not equal the standard salary level for the 52-week period, the employer has one pay period to make up for the shortfall (up to 10 percent of the required salary level). Any such catch-up payment will count only toward the previous 52-week period's salary amount and not toward the salary amount in the 52-week period in which it was paid.

Today's final rule is the product of the Trump administration's efforts to reset the Obama administration's 2016 final rule that had established the salary threshold at $47,476 per year or $913 per week. The Obama administration's controversial final rule was struck down on November 22, 2016 by a federal district court in Texas because it "makes overtime status depend predominately on a minimum salary level, thereby supplanting an analysis of an employee's job duties." An appeal of that decision is still pending before the United States Court of Appeals for the Fifth Circuit. However, given the release of today's final rule, the DOL will rescind the Obama administration's 2016 final rule making the pending appeal moot.

The final rule also raises the total annual compensation requirement for "highly compensated employees" (HCE) from the currently enforced level of $100,000 per year to $107,432 per year. The HCE salary level of $107,432 is set at the 80th percentile of full-time salaried workers nationally using updated 2018/2019 salary data. However, Wisconsin employers should note that Wisconsin law does not recognize the HCE exemption, and, as a result, Wisconsin employers should not rely or utilize this exemption when classifying employees for wage and hour purposes.

Finally, the DOL's proposed rule published on March 7, 2019 rejected the Obama administration's 2016 rule that provided for automatic adjusting every three years of the salary threshold for the EAP exemptions. Instead, the DOL's March, 2019 proposed rule rejected automatic adjusting and favored that the Secretary of Labor review the salary threshold every four years preceded by a period of public comment. The DOL's final rule, however, reaffirmed the DOL's intent to update the standard salary level and HCE total annual compensation threshold more regularly in the future using notice and comment rulemaking, but declined to make a commitment to do so every four years believing that prevailing economic conditions, rather than fixed timelines, should drive future updates.

# EMPLOYMENT LAWSCENE ALERT: CREATION OF NEW TASK FORCE SIGNALS INCREASED STATE SCRUTINY OF WISCONSIN WORKER CLASSIFICATION

O'NEILCANNON
HOLLMAN DEJONG & LAING S.C.

April 15, 2019 marked not only the end of the 2018 personal income tax season, but also the beginning of a new era of enforcement of Wisconsin employment practices. On that date, Governor Tony Evers issued an Executive Order creating a Joint Task Force on Payroll Fraud and Worker Misclassification (the "Task Force"). This Task Force will focus on workers who should be classified as employees but are misclassified as independent contractors.

The Task Force will be chaired by the Secretary of the Department of Workforce Development ("DWD") and will be staffed by representatives from the DWD, including its Worker's Compensation and Unemployment Insurance divisions, the Department of Revenue, and the offices of the Attorney General and the Commissioner of Insurance.

Background

Similar task forces have been implemented in recent years in Connecticut and Massachusetts (2008), New York (2016), Colorado, New Jersey, Tennessee, and Virginia (2018), and Michigan (2019).

One of the catalysts for the Wisconsin Task Force creation was the finding, under DWD audits from January 2016 through April 2019, of 5,841 misclassified employees and the related under-reporting of nearly $70 million in gross wages and $1.8 million in unemployment insurance taxes. Misclassification of employees also results in the underpayment of Social Security and Medicare-related employment law taxes.

Another impetus for the new interagency coordination is the concern that employers who misclassify workers as independent contractors gain an unlawful competitive advantage that allows them to under-bid or out-compete law-abiding employers.

Prior reviews of employer practices reported by the National Employment Law Project posit that audits of Wisconsin employers have typically revealed worker misclassification in 44% of

investigated cases.

Task Force Mandates

The new Task Force is required to report annually to the Governor by March to describe its accomplishments and recommendation for the prior year. Specifically, the Task Force report must include the amount of wages, premiums, taxes, and other payments or penalties collected as a result of coordinated agency activities, as well as the number of employers cited for misclassification and the approximate number of affected workers. The Task Force must also identify administrative or legal barriers impeding more effective agency coordination. After consultation with representatives of business, organized labor, members of the legislature, and other agencies, the Task Force will also propose changes to administrative practices, laws, or regulations appropriate to:

- reduce agency coordination barriers;
- prevent worker misclassification from occurring;
- investigate potential violations of laws governing worker classifications;
- improve enforcement where such violations are found to have occurred; and
- identify successful mechanisms for preventing worker misclassification.

Key Take-Away

The Wisconsin Task Force is being implemented at a time when recent federal decisions by the National Labor Relations Board and the United States Supreme Court appear to be permitting some gig economy companies to more easily classify workers as independent contractors, rather than as employees.

As a result of the creation of the Task Force, however, Wisconsin employers should expect increased scrutiny from the DWD and Department of Revenue regarding independent contractor relationships.

The Employment Law team of O'Neil, Cannon, Hollman, DeJong & Laing recently presented client seminars in Pewaukee and Green Bay on the many aspects of worker classification and are well-positioned to assist Wisconsin employers in reviewing current arrangements or discussing how the law applies under various circumstances.

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# EMPLOYMENT LAWSCENE ALERT: VOTING LEAVE IN WISCONSIN – WHAT YOU NEED TO KNOW

O'NEILCANNON
HOLLMAN DEJONG & LAING S.C.

With the Wisconsin general election coming up next week on November 6, 2018, now is the time for employers to brush up on their obligations surrounding voting.

All Wisconsin employers are required to provide employees who are eligible to vote up to three consecutive hours of unpaid leave to vote while the polls are open (from 7 AM until 8 PM), and employees must request the time off prior to the election. Voting leave cannot be denied on the basis that employees would have time outside of their scheduled work hours to vote while the polls are open, but employers can specify which three hours an employee is permitted to utilize. Other than the time being unpaid, employers may not penalize employees for using voting leave. However, employers should remember that, under the FLSA, they may not deduct from an exempt employee's salary for partial day absences.

Additionally, all Wisconsin employers are also required to grant an employee who is appointed to serve as an election official 24 hours of unpaid leave for the election day in which the employee serves in his or her official capacity. Employees must provide their employers with at least seven days' notice of their need for this leave. Other than the time being unpaid, employers may not penalize employees for using election official leave.

Finally, Wisconsin employers are not permitted to make threats that are intended to influence the political opinions or actions of their employees. Specifically, employers cannot distribute printed materials to employees that threaten business shut down, in whole or in part, or reduction in salaries or wages of employees if a certain party or candidate is elected or if any referendum is adopted or rejected.

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## EMPLOYMENT LAWSCENE ALERT: RULING ON MARQUETTE PROFESSOR CONTAINS LESSONS FOR PRIVATE EMPLOYERS

O'NEILCANNON
HOLLMAN DEJONG & LAING S.C.

On Friday, July 6, 2018, the Wisconsin Supreme Court determined that Marquette University had breached its contract with tenured professor John McAdams when it suspended him for discretionary cause after he authored a controversial blog post. McAdams claimed that the blog post fell within his rights to protected speech and academic freedom, whereas the University claimed that it was an unprofessional attack that was outside of those protections. Because the Court determined that the blog post was protected by the doctrine of academic freedom, which was guaranteed under the professor's contract and could not be used as a basis for discretionary cause, the Court held that the University had breached the contract because the blog post was a "contractually-disqualified basis for discipline."

The University argued that the Court had to defer to its internal procedures for suspending and dismissing faculty members and could not second-guess its choices unless the University had abused its discretion, infringed on the faculty member's constitutional rights, acted in bad faith, or engaged in fraud. However, the Court found that "the University's internal dispute resolution process is not a substitute for Dr. McAdams' right to sue in our courts" and that it did not have to defer to the disciplinary procedure because 1) it was fundamentally flawed due to the unacceptable bias on the Faculty Hearing Committee (the "Committee"); 2) the Committee had no authority to bind parties to its decision, because the parties had not agreed that the internal dispute process would replace or limit the adjudication of a contract dispute in court, as can be done with an arbitration agreement; and 3) there was no required procedural process to defer to because, although the Committee makes a recommendation, it is the University president that ultimately makes the disciplinary decision, and there were no rules, procedures, or standards that describe how the president was to make his ultimate decision.

This case should serve as a reminder to all private employers that, while courts generally defer to the decisions of an employer, they will not do so if those decisions or the processes underlying the decisions violate a contractual or statutory right of the employee. For example, if your disciplinary process is tainted by improper and illegal bias on the basis of protected class, the court will not disregard that simply because a disciplinary procedure was followed. Employers should make sure not only that they are following their internal disciplinary procedures but that procedures are fair and impartial and that the decisions stemming from those procedures do not violate the contractual or statutory rights of employees.

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## EMPLOYMENT LAWSCENE ALERT: EMPLOYERS

# SHOULD REVIEW THEIR EMPLOYEE NON-SOLICITATION AGREEMENTS

O'NEILCANNON
HOLLMAN DEJONG & LAING S.C.

On January 19, 2018, the Wisconsin Supreme Court issued a decision in *The Manitowoc Company, Inc. v. Lanning* affirming a 2016 Wisconsin Court of Appeals ruling that expanded the scope of Wis. Stat. § 103.465, which governs the enforceability of restrictive covenants, to include employee non-solicitation, or anti-raiding, provisions. We previously posted a blog about the Court of Appeals decision here.

John Lanning, a long-term employee of the Manitowoc Company, signed an agreement whereby he agreed, for a period of two years after the termination of his employment, not to solicit, induce, or encourage any employee of the Manitowoc Company to terminate his or her employment with the company or to accept employment with a competitor, supplier, or customer of the company. After he terminated his employment, he encouraged multiple employees of the Manitowoc Company to terminate their employment and join him at his new employer, which was a competitor of the Manitowoc Company.

The Wisconsin Supreme Court addressed two questions: 1) Whether employee non-solicitation agreements are "covenants not to compete" governed by Wis. Stat. § 103.465; and 2) if they are, was the provision contained in Lanning's agreement enforceable.

In answering whether non-solicitation agreements are covenants not to compete, the Court acknowledged that the statute has been applied to agreements viewed as restraints on trade, which may take many forms, and opined that the focus of the inquiry about whether a provision is a covenant not to compete should focus on the effect of the restraint, rather than its label. Therefore, the Court found that, because the non-solicitation provision restricted Lanning's ability to compete fully with the Manitowoc Company by prohibiting him from soliciting employees and competing in the labor market, it was a restriction on his ability to engage in ordinary competition and was governed by the statute.

The Court stated that the purpose of Wis. Stat. § 103.465 is to invalidate covenants that impose unreasonable restraints on employees. The Court found the employee non-solicitation unenforceable under Wis. Stat. § 103.465 because the non-solicitation provision was unnecessarily broad because it restricted Lanning's ability to compete fully in the marketplace with the Manitowoc Company by prohibiting him from soliciting all employees wherever they might work in the world. Such a restriction does not allow for the ordinary sort

of competition attendant in the free market and, as a result, was an unlawful restraint of trade.

In order to be enforceable under the statute, a covenant not to compete must 1) be necessary for the protection of the employer, 2) provide a reasonable time limit; 3) provide a reasonable territorial limit; 4) not be harsh or oppressive to the employee; and 5) not be contradictory to public policy. Because the Court found that the employee non-solicitation provision that Lanning had signed was not necessary for the protection of the employer, they only addressed that portion of the test. Because words are interpreted to have their plain meaning, the Court found that the words “any employee” contained in Lanning’s agreement prohibited him from soliciting every one of the Manitowoc Company’s 13,000 world-wide employees with no limits as to the nature of the employee’s position, Lanning’s personal familiarity with or influence over the particular employee, or the geographical location in which the employee worked. The company’s contention that it had a protectable interest in maintaining its entire workforce was rejected by the Court, which said that, ordinarily, the protectable interest would be limited to top-level employees, employees with special skills or knowledge important to the employer’s business, or employees with a set of skills that are difficult to replace. Because the employee non-solicitation provision was not limited in any way, the Court found that it was overbroad on its face and unenforceable.

Based on this decision, employers must carefully review their restrictive covenants, particularly employee non-solicitation provisions, to ensure that they are carefully drafted to be necessary to protect their interests and no broader than needed. The focus must be on protectable, identifiable interest of the company. 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.