FOX | O'NEILL | SHANNON s.c.

FOS NEWS - *Our clients come first*

Editor: Diane Slomowitz

Volume 4, Issue 1
Spring 2012

FOS LAWYERS ARE SUPER

FOS congratulates Bruce O'Neill, Matt O'Neill and Ken Barczak for being named Super Lawyers, all for the 6th year in a row. They were formally recognized in the December, 2011 *Super Lawyer* edition of Milwaukee Magazine as top Wisconsin business litigation attorneys.

Senior partner Bruce O'Neill specializes in commercial litigation and family law, and has litigated in trial and appellate state and federal courts throughout the country, achieving favorable results in many high profile lawsuits.

Shareholder Matt O'Neill focuses on commercial litigation and appellate work, as well as campaign finance and election law. He has been involved in several successful high profile appeals.

Of Counsel Ken Barczak is both an attorney and CPA who has made substantial contributions to the field of trusts and estates law.

Super Lawyer is a rating service that uses independent research and peer nominations/evaluations to choose lawyers from 70+ practice areas statewide.

VENUE PROVISIONS— GIVE YOURSELF THE HOME-FIELD ADVANTAGE

By Thomas Shannon

Everyone loves a home-field advantage. In sports, teams strive during the regular season to achieve the tangible and intangible benefits of home-field advantage over their opponents in the post-season playoffs. The fan support and friendly, familiar surroundings give the home team a definite advantage in its battle to come out on top.

The same may hold true for a business that finds itself engaged in litigation with an out-of-state opponent. Litigating a case in the local jurisdiction of one of the parties provides advantages to the hometown litigant in terms of convenience, familiarity, availability of witnesses, representation by the party's regular in-state law firm, and conscious or subconscious preference in favor of the local party by local judges and juries. To lock in those advantages, more and more businesses are including forum selection clauses in their contracts. Consequently, more and more Wisconsin companies are faced with either drafting forum selection clauses or addressing them in contracts presented by out-of-state companies.

A forum selection clause is a contractual provision which requires that any litigation arising out of the contract be addressed in a specific court or in a specified county or state. The clause overrides statutes and other procedural rules that would otherwise govern where a lawsuit is filed. For example, under a contract between a Wisconsin seller and a California buyer with a forum selection clause requiring disputes to be litigated in Wisconsin, the parties would be required to litigate disputes over payment, warranty claims and other contract performance issues in Wisconsin, and not California. In that

Continued on page 2

FOS REMEMBERS KAREN FOX

The FOS family was deeply saddened by the passing of Karen Fox, our founder's wife, on December 31, 2011, after a long and courageous struggle with breast cancer. Over the years, Karen hosted many events for our employees and their families, from holiday parties to summer outings and Great Circus Parade events. She was beloved by all, for her constant cheerfulness and wit, and her uncanny ability to make everyone feel welcome and cared for. Our sympathies go to Bill Fox, their children, and Karen's hundreds of friends who share in our loss. Karen will be deeply missed.

In Karen's honor, FOS will annually sponsor a team to walk in the Susan G. Komen Race for the Cure, held each fall at the Milwaukee Lakefront. Our clients and friends will be invited to join us for this annual remembrance event.

RECENT WISCONSIN TAX CHANGES

By Allan Young

During the past year, several Wisconsin tax changes were enacted. Three deserve special attention.

Deduction for New Employees

Effective for tax year 2011 (tax returns now being filed), businesses that increased the number of full-time equivalent Wisconsin employees may claim a special deduction. The deduction is $4,000 per eligible employee for businesses with gross receipts of $5,000,000 or less. For businesses with gross receipts greater than $5,000,000, the deduction is $2,000 per eligible employee.

The increase in the number of full-time equivalent employees is calculated by comparing the number of employees reported on the business's Wisconsin unemployment insurance wage reports filed during 2011 with the number reported on the unemployment insurance wage reports filed during 2010. Note that for a calendar year employer that files unemployment insurance reports quarterly, the report filed on January 31, 2011 will be for the fourth quarter of 2010. Nonetheless, it is a report filed during 2011 and the employees reported on that report will be considered 2011 employees.

The deduction is claimed on new Wisconsin Schedule JC. S corporations and LLCs can pass the deduction through to their owners.

WDR Must Follow Its Own Rules

Incredibly, when performing audits the Department of Revenue sometimes took positions that were contrary to a rule promulgated by the Department or that were contrary to guidance published by the Department. Effective on March 1, 2012, the Department is prohibited from doing so. In addition, if the Department retracts or amends previously published guidance for a purpose other than to implement a law change or an opinion of the courts or Tax Appeals Commission, the Department must apply the change prospectively only, unless the change is to a taxpayer's benefit.

No Automatic Negligence Penalties

In the past, the Department tended to impose a negligence penalty whenever it made an adjustment to a taxpayer's return. To remove the penalty, it was then up to the taxpayer to prove reasonable cause. Effective on March 1, 2012, the burden is reversed. The Department may not impose a penalty unless the Department affirmatively shows that the taxpayer's action or inaction which gave rise to the audit adjustment was due to the taxpayer's willful neglect and not due to reasonable cause.

Often the imposition of the negligence penalty turned into a bargaining chip to settle an audit assessment, either at the audit level or at the appeals level. It will be interesting to see how the change will work in practice. It may be that Department auditors will still make every effort to assert the penalty. In cases where the auditor's rationale is weak, it would seem likely that the penalty will be abated. But it might be necessary to formally appeal the assessment.

Venue Provisions

(continued from page 1)

example, the Wisconsin business would achieve the home-field advantage over the California party in terms of cost and convenience. If the shoe was on the other foot, and the contract required disputes to be resolved in a California court, the Wisconsin business would be disadvantaged in the out-of-state litigation.

In Wisconsin, forum selection clauses are presumed to be valid, and they will be enforced unless the circumstances show them to be unreasonable. Wisconsin courts have refused to enforce such clauses where they are shown to be unconscionable or contrary to a statute or public policy. This means more than that the clause was buried in the fine print on the back page of a boiler-plate contract.

The time to focus on the validity, fairness and acceptability of a forum selection clause is when the contract is being created. One facing a proposed forum selection clause from an out-of-state business should not naively assume that a court will find the provision unconscionable. The proposed clause should be addressed head-on, to eliminate or modify it. On the other hand, if you can include a Wisconsin forum selection clause in your contract with an out-of-state business, it should be carefully drafted to maximize its enforceability.

FOS is well equipped to help you satisfactorily deal with this important issue. Give us a call.

DON'T FORGET —

This year TAX DAY is

APRIL 17th!

RECLASSIFY INDEPENDENT CONTRACTORS—IS IT FOR YOU?

By Diane Slomowitz

Properly characterizing workers as employees versus independent contractors is a continuing dilemma.

Employees subject employers to financial and record-keeping obligations, involving withholding, payroll taxes, overtime, unemployment compensation and workers compensation. Independent contractors, on the other hand, do not subject employers to many of these obligations.

Generally, the test of employment versus independent contractor status involves the issue of direction and control. Where a business controls the day-to-day duties of its hire, the hire is likely to be an employee. Where the method of performing the ultimate task lays with the hire, the hire is more likely an independent contractor.

In recent years, the IRS and Wisconsin Department of Revenue have engaged coordinated, targeted enforcement efforts against misclassified employees. The penalties for misclassifying an employee as an independent contractor can be substantial. Even employers which are convinced that they have properly classified their workers may worry over the threat of an audit.

The IRS recently instituted a new Voluntary Classification Settlement Program, which allows employers to reclassify independent contractors as employees with, according to the IRS, "minimal" costs. In this program, acceptance into which is discretionary with the IRS, workers previously characterized as independent contractors are reclassified as employees, and the employer pays a "limited" (presumably less than a penalty) employment tax liability for treating the employee in the past as an independent contractor.

According to the IRS, participation in the program will not involve any admission of wrongdoing by the employer. The IRS further takes the position (for now) that it will not share information regarding participating employers with other agencies, such as state tax or withholding authorities. The threat of information sharing, nonetheless, remains real.

While an employer faced with an IRS audit regarding its worker classifications may believe that entering into this settlement program is an easy way to resolve the audit problem, the program may realistically cause more problems than it solves. If the employer's classifications are proper in the first place, the audit should be resolved favorably, without the need for threats of penalties or the "benefit" of the settlement program.

In addition, worker classifications are rarely black or white; they are often ambiguous. The settlement program does not address this basic difficulty.

Moreover, reclassifying an independent contractor as an employee may have unintended consequences. In addition to pure employment tax obligations, an employer reclassifying an independent contractor as an employee may incur past and/or future unemployment compensation, workers compensation and other similar obligations. Employee benefits may be jeopardized.

This is a complex area, best discussed with counsel. Your FOS attorney can help you evaluate whether your worker classifications put you in legal jeopardy; if so, whether the settlement program could benefit you; and, the program's impact on your legal obligations.

EMPLOYEE THEFT SEMINAR A SUCCESS

More than 50 business representatives braved the cold to attend FOS's January 19, 2011 Employee Theft Seminar presented at Wauwatosa's Crown Plaza hotel.

Four FOS attorneys gave presentations at the seminar. Bill Soderstrom described the increasing threat employee theft poses to all companies, particularly private businesses without cross-review procedures. Laurna Jozwiak spoke on intellectual property piracy, and the need for employers to maintain a broad work-for-hire policy. Matt O'Neill's presentation focused on the need and enforceability of properly drafted employee covenants not to compete. Greg Ricci described the types of insurance coverage which employers should obtain to protect them in the event of employee theft.

One of the seminar's repeated themes was that employee theft crosses all boundaries. The person who appears least likely to engage in such conduct may be the employee posing the most serious threat.

If you were unable to attend the seminar, but would like the program materials, or if you would like to be notified of or have an idea for future seminars, please contact Judy Janetski at (414) 273 3939 or jkjanetski@foslaw.com.

FOX O'NEILL SHANNON s.c.

622 N. Water Street
Suite 500
Milwaukee, WI 53202

Phone: 414-273-3939
Fax: 414-273-3947
www.foslaw.com

Fox, O'Neill & Shannon, S.C. provides a wide array of business and personal legal services in areas including corporate services, litigation, estate planning, family law, real estate law, tax planning and employment law. Services are provided to clients throughout Wisconsin and the United States. If you have any questions about these articles or any other legal topics, please call us at (414) 273-3939.

Postage

Address label

IN THIS ISSUE

Page 1
Venue Provisions—Give Yourself The...
FOS Remembers Karen Fox
Page 2
Recent Wisconsin Tax Changes
Page 3
Reclassify Independent Contractors...
Employee Theft Seminar a Success
Page 4
The Great Wisconsin Supreme Court

THE GREAT WISCONSIN SUPREME COURT

By Matthew O'Neill

Our Wisconsin Supreme Court has been much in the news the past few years, and not always in a good light. It is important to remember that the court is a great institution with a proud history.

The Supreme Court was formed in 1853, five years after Wisconsin became a state. The Court originally had three members, but by 1903 had increased to its current size of seven Justices. All are elected to 10-year terms in state-wide elections. The most senior presides as Chief Justice.

I clerked for then-Chief Justice Nathan Heffernan for the Court's 1991-92 term. The Chief was proud of the Court and its history. Over a generous martini, with his dogs at his side, the Chief loved to regale me with the history of the Court and its groundbreaking opinions. In 1854, the Court declared the federal Fugitive Slave Act – requiring northern states to return runaway slaves – to be unconstitutional. In 1863, the Court ruled that President Lincoln could not suspend the writ of habeas corpus. A 1926 opinion granted women the right to sue their husbands, finding the recently-granted right of suffrage carried with it additional rights. During our term, the Court upheld the constitutionality of school choice. And, just last year, in a highly charged case, the Court upheld Act 10, the legislation that reshaped collective bargaining rights for public employees.

From my experience, I know the Justices take their responsibilities seriously, and review cases carefully. The Court chooses which cases to hear, and takes only those with glaring errors or critical public policy issues. In each case, the Court reviews briefs submitted by the parties and holds hour-long oral arguments where the Justices pepper the Lawyers with questions. After the oral argument, the Justices meet privately to debate the case and vote on a decision.

While the opinions and dissents occasionally contain pointed language, the majority of the Court's work is achieved in a collegial and professional manner. And, it beats the alternative – if we didn't have a system of justice that settled disputes with a vote and a written opinion, duels might still be in vogue.

Having been involved in many Wisconsin Supreme Court cases, and having argued four myself (batting a respectable .679), I continue to hold our state's highest court in great esteem, and stand ready to help FOS clients when their case reaches that final level of review.