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FOS NEWS - *Our clients come first*

*Editor: Diane Slomowitz*

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# GONE PHISHING - FOR PAYCHECKS

*By* Matt O'Neill

In the old days, the heavily-armed robbers would wait in the shadows for the Brinks truck to pull up on a payday, then storm their way through the back doors to grab the cash.

Today, the robbers sit at a laptop, eating chips and sipping soda, and fire off spoofed emails to human resources looking for some easy money. And it can work if you are not vigilant.

My friend Dave recently sent an email to his company's payroll department that said:

> "Good Morning, I have recently switched banks, I wish to change my current payroll/benefit information to my new account, my previous account on file will be inactive in 10 days. I need your prompt assistance on this matter."

Except, Dave did not send the email – a hacker sent it in a "spoofed" email.

Dave's payroll department went for it hook, line and sinker and asked for the new account. The hacker reeled it in slowly, with a valid bank account. A few days later, Dave asked why he hadn't been paid. Red faces ensued, while somewhere the happy hacker bought some new phishing gear.

Dave is just one victim of a current trend of human resources phishing scams. They work because many of us are deluged by emails and do not have time to carefully consider and respond to every email when hundreds pile up. The quick reply – "OK Dave, send me your new account information" – seems reasonable and efficient.

What can you do to not be like Dave?

*Watch for errors.* Grammatical errors and misspellings in an email regarding payroll are huge red flags.

*Check the real email address.* The hacker's address may appear when the cursor hovers over the "sender's" name, or "reply" is clicked.

*Don't hit reply.* Instead, forward the email. That requires entry of a new email, which your computer should default to the correct recipient.

*Call.* If an employee wants to change account information, call to confirm. Only Mission Impossible has a magic voice box.

*Get insurance.* If your company does not have a Cyber Policy, call your broker and consider expanding your coverage to include a cyber policy that may cover your losses from email scams.

## KINNEL HONORED AS WISCONSIN STATE BAR'S OUTSTANDING YOUNG LAWYER

FOS shareholder **Laurna Kinnel** has been honored as the Wisconsin State Bar Young Lawyer's Division Tenth Annual Outstanding Young Lawyer.

Laurna received her statewide award at the March 29, 2019 Young Lawyer's Conference in Madison, Wisconsin.

She will again be honored at the June 13, 2019 Member Recognition Ceremony during the Wisconsin State Bar's Annual Convention in Green Bay, Wisconsin.

The Outstanding Young Lawyer honor is awarded each year to the one Wisconsin lawyer who best exemplifies the profession's dedication to serving clients, other attorneys, and the community.

Laurna has been listed as a Super Lawyers Rising Star since 2017 and was honored as an "Up and Coming Lawyer" by the *Wisconsin Law Journal* in 2015.

## JOIN THE "MORE THAN PINK" WALK

On September 22, 2019, FOS's "The Karen Fox Trotters" team will again participate in the Susan G. Komen "More Than Pink Walk" on the Summerfest grounds.

To join FOS's team or contribute to the cause, contact FOS associate and Komen Volunteer and Entertainment Co-Chair **Lauren Maddente** at lemaddente@foslaw.com.

# "JOINT EMPLOYER LIABILITY" RULE TO BE CLARIFIED

*By* Michael G. Koutnik

As more businesses consider changing their staffing models to include (or increase) the use of shared employees or staffing agencies, the Department of Labor (DOL) has proposed a rule to clarify the coverage of "joint employer liability."

The current joint employer rule provides that, if an employee is shared by multiple employers, each employer can be jointly liable for minimum wage and overtime pay violations under federal law.

To avoid joint liability, the existing law requires that the employers be "completely dissociated."

Sometimes this analysis is simple. For example, if an employee works for a construction company during the day and is a waiter at night, there is no connection between the two employers as to that employee.

This analysis becomes more difficult in the franchise and staffing agency contexts, where an employee's work can benefit both the employer and another person or entity.

To clarify the joint employer rule's application, the DOL proposes to focus on a potential joint employer's exercise of control over the terms and conditions of an employee's work.

To that end, the DOL has proposed a four-factor test:

1. Hiring/firing ability;

2. Supervising and controlling work schedules or conditions of employment;

3. Determining the rate and method of payment;

4. Maintaining employment records.

Significantly, the proposed rule tests only an employer's *actual actions* as to an employee.

Under current law, an employer's "theoretical ability" to control an employee could also be considered.

With its proposed rule, the DOL includes several helpful examples of joint employer liability and non-liability.

In one example, a packaging company requests workers daily from a staffing agency.

The packaging company sets hourly pay, supervises work, and adjusts hours based on demand.

In that case, the packaging company is a joint employer of the staffing agency's employees.

In another example, an office hires a janitorial service to clean the building.

The office contracts to pay a fixed fee and may, but need not, supervise the janitorial employees' performance.

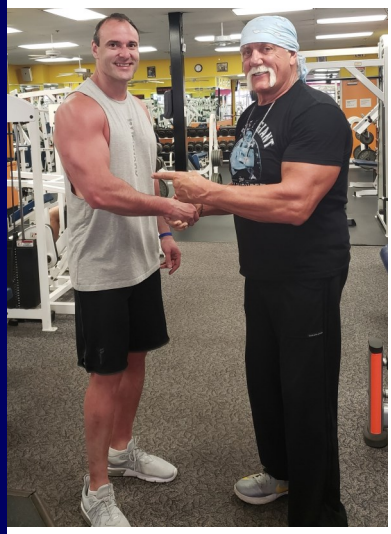
The office does not set pay or schedules and, in reality, does not supervise performance.

Under this example, the office is not a joint employer.

The DOL's proposed rule is currently in the public comment period.

After comments end, a final rule will be issued.

## FOS MEETS HULKAMANIA!



FOS shareholder **Jake Manian** finally fulfilled his childhood dream by meeting iconic pro wrestler Hulk Hogan during a workout at a gym in Clearwater Beach, Florida.

The Hulkster was extremely gracious and shared his memories of Milwaukee.

Jake is pumped to battle for his clients in the courtroom, like Hulk battled in the ring!

## FOS IN THE NEWS

FOS associate **Lauren Maddente** served as judge for the Wisconsin State Bar's Milwaukee Regional High School Mock Trial Tournament, which took place at the Milwaukee Federal Courthouse in February, 2019.

FOS shareholder **Michael Koutnik** gave a presentation on "Real Estate Practice Tips and Pointers for the Family Law Practitioner" to the Milwaukee Society of Family Lawyers on March 20, 2019.

FOS shareholder **Matthew O'Neill** presided over the issuance of the Honorable Terrance Evans Humor Award at the annual meeting of the Eastern District of Wisconsin Bar Association on April 15, 2019.

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# CORPORATE INTERNAL INVESTIGATIONS: A STRONG RESPONSE

*By* Jacob Manian

It can happen to any company: a few rogue employees break the rules and put the whole company at risk.

Could be anything. Theft from a customer, grossly unprofessional conduct, or illegal activities in the workplace. Now, the company might face a potential lawsuit, government investigation, fines, or, worst of all, criminal indictment.

Government agents, armed with grand jury subpoenas for documents and testimony, could come knocking any minute.

Faced with this situation, your company could clam up and retreat into a shell.

Or, it can take control of the problem by having an experienced attorney, from outside the company, conduct a confidential internal investigation on behalf of the company.

Such an investigation will be designed to identify and stop the bad conduct and root out those responsible for it. It will also be designed to identify existing problematic security and personnel issues which helped allow the conduct to occur in the first place.

Why an outside attorney? Can't human resources or in-house counsel handle the investigation?

Properly done, an attorney's work will be shielded by the attorney/client privilege and work product protections, allowing for a full and thorough internal review.

The company can then decide whether to share its internal findings with government investigators, gain credit for cooperating, and hopefully reduce or avoid potential fines or other punishment.

The government will also view an outside attorney as having more credibility than the company's human resources manager or in-house counsel, who may lack independence or want to "help" the company.

The government will therefore be more likely to view the findings of an outside attorney's investigation as credible and reliable.

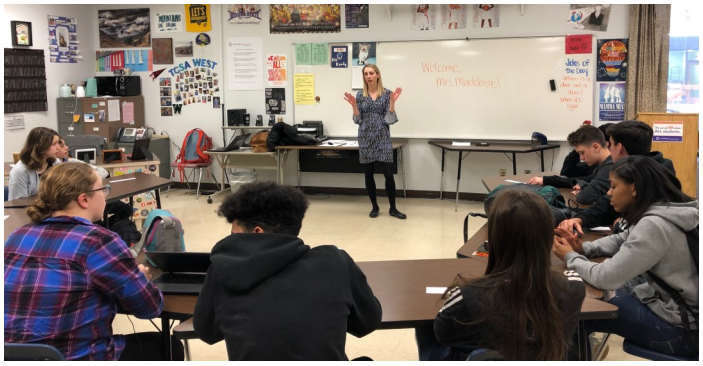
In the end, whether the government has faith that your company's internal investigation is objective, independent, credible and reliable can make all the difference in whether potential damage to the company can be minimized and, in potentially dire situations, the company and its principals can avoid a financial and personal catastrophe.

A swift and robust internal investigation by an experienced outside counsel can be the company's best response to bad employee conduct.

If your company suspects or has discovered employee conduct that could potentially put the company in legal jeopardy, contact FOS.

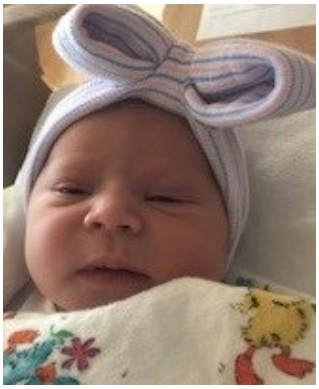
Your FOS attorney will discuss all available options to protect you and your company, and will review with you the safeguards to put in place to avoid future risks.

## MADDENTE EXPLORES LEGAL SYSTEM WITH WAUWATOSA WEST STUDENTS



FOS associate **Lauren Maddente** led a lively discussion regarding the legal system with Wauwatosa West High School students on April 3, 2019. The event was part of the class's analysis of issues of social and legal justice and the role of the jury as raised in the classic book *Twelve Angry Men*.

## FUTURE FOS ATTORNEY BORN!



Congratulations to FOS shareholder **Laurna Kinnel** and husband Jeff on the March 5, 2019 birth of their daughter, Margot Anne Kinnel. The future deal-maker will be drafting asset purchase agreements in no time!

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# SUPREME COURT EXPANDS SEC RULE LIABILITY COVERAGE

*By* Robert Ollman

Almost every corporate principal has heard of the "dreaded" Securities and Exchange Commission (SEC) Rule 10b-5, which makes it unlawful:

> "(a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact . . . , or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit."

Historically, the "maker" of a false or misleading statement has been liable under Rule 10b-5. Liability was restricted to the person or entity with ultimate authority over the statement, including its content and communication.

Whether a statement's "messenger" or other participant could also be liable was an open question.

That changed on March 27, 2019, when the U.S. Supreme Court, in *Lorenzo v. SEC*, expanded the scope of Rule 10b-5 liability.

In *Lorenzo,* the Supreme Court held that in addition to a statement's maker, 10b-5 liability for a false or misleading statement extends to all materially involved in the statement's *dissemination*.

This is a significant ruling, because it expands the scope of potentially liable parties.

It means that those down the chain, including those preparing a statement for distribution, should take reasonable steps to ensure themselves of the statements' accuracy.

In this regard, some companies believe that the anti-fraud provisions of the federal securities laws, including Rule 10b-5, only apply to public companies. That, however, is not the case.

Rule 10b-5 has been applied in administrative proceedings and civil lawsuits for redress against false statements.

The Rule can also be analogized in non-securities cases involving false or misleading statements.

Given *Lorenzo's* broadening of the scope of potential Rule 10b-5 liability, everyone involved in a statement's dissemination should review the statement's accuracy.