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2020 BEST PLACES TO WORK

FOS NEWS - *Our clients come first*

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YOUR JOB APPLICANT HAS A RECORD. NOW WHAT?

By Lauren Maddente

Many employers routinely conduct background checks before hiring prospective employees.

What if an applicant has an arrest or conviction record? Such information can be a significant red flag.

Can an employer rely on it to reject a prospective employee?

In Wisconsin, an employer generally discriminates if it refuses to hire an applicant because of their arrest or conviction record. Wisconsin law contains no express exceptions for particular offenses.

However, an employer does not discriminate for refusing to hire an applicant due to the individual's arrest or conviction record, so long as the offense substantially relates to the position at issue.

A recent Wisconsin Court of Appeals decision, *Cree, Inc. v. LIRC,* describes the analysis required of an employer in this situation.

In *Cree*, a prospective employee sued a company that rescinded a job offer as an applications specialist based on the individual's domestic violence convictions, including for strangulation/ suffocation, fourth degree sexual assault, battery, and criminal property damage.

The court held that the company wrongly discriminated against the applicant because it could not demonstrate that the past domestic abuse was substantially related to the applications specialist position.

The court noted that the legislature did not exempt domestic abuse convictions from the discrimination statute, and the employer presented no evidence that the applicant was violent in any other circumstance, or that he would be working closely with female employees as part of his duties.

As such, the court stated that it would require a "high degree of speculation and conjecture" to conclude that the applicant would develop a romantic relationship on the job from which he could engage in the conduct for which he was convicted.

What should employers take away from *Cree*?

In reviewing applications and considering applicants, employers should ensure they have and can articulate non-discriminatory reasons for not hiring or rescinding job offers.

Employers should also document their non-discriminatory analyses

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OWNERS: BE AWARE OF ORDINANCES' POTENTIAL IMPACT ON PROPERTY

By Michael Koutnik

Where the use and development of property is concerned, sometimes a simple project can become unbelievably complicated.

Take the case of Michael Anderson, who only wanted to divide his Lake Mildred lakefront property (north of Rhinelander), with its 250 feet of lake frontage, into two parcels.

Simple and do-able?

Not according to the Town of Newbold and the Wisconsin Supreme Court.

The town's Plan Commission rejected Mr. Anderson's request, because the town's subdivision ordinance requires each lakefront lot to be a minimum of 225 feet wide.

Mr. Anderson's proposed lots would not meet that standard.

Not so fast, said Mr. Anderson.

A state statute, which is supposed to control over municipal ordinances, prohibits a municipality from implementing shoreland zoning ordinances that are more restrictive than the regulations established by the Wisconsin Department of Natural Resources' regulations.

Those regulations would have allowed the proposed division.

The Wisconsin Supreme Court, however, determined that the ordinance was, in fact, not a shoreland zoning ordinance but a subdivision ordinance, because it did not restrict the use of the property.

Therefore, the statute upon which Mr. Anderson relied, which referred to shoreland ordinances, was inapplicable, and the town properly

Owners, cont. on pg. 2

CORPORATE TRANSPARENCY ACT BATTLES ENTITY OWNERS' SECRECY

By Robert Ollman

Business entities such as corporations and limited liability companies are formed for many reasons, including to shield their owners from personal liability for corporate acts.

Until recently, an additional benefit was shielding the identities of entity owners from disclosure, including from the government.

Despite the majority of honest, law-abiding entity owners, some owners have abused this protection to conduct or facilitate illegal conduct such as money laundering or tax fraud.

To address this problem, Congress has taken steps to create a centralized database of entity owners' identities.

On January 1, 2021, Congress overrode former President Trump's veto of the 2021 National Defense Authorization Act, which included the Corporate Transparency Act (the "Act").

The Act directs the U.S. Department of the Treasury to create and maintain an identification registry for each "beneficial owner" of **all** current and future corporations and limited liability companies in the United States. Each entity will be required to provide the full legal name, date of birth, current address and unique identifying number, such as from a current driver's license or passport, for each "beneficial owner" of such entity.

A "beneficial owner" includes any individual who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise (i) exercises substantial control over an entity or (ii) owns or controls at least 25 percent of its ownership interests.

A major exception to these requirements is an entity that:

(i) employs more than 20 employees on a full-time basis in the United States;

(ii) filed U.S. income tax returns in the previous year demonstrating an aggregate of more than $5 million in gross receipts or sales, including those of other entities (a) owned by the entity and (b) through which the entity operates; and

(iii) has an operating presence at a physical office within the U.S.

There are over 20 additional exceptions to the requirements which mainly cover broad classes of regulated, publicly traded, nonprofit or government entities, including banks, insurance companies and political organizations.

To implement the law, the federal Financial Crimes Enforcement Network ("FinCEN") will establish a registry and the Secretary of the Treasury will prescribe regulations by the end of 2021.

Within two years of the effective date thereafter, existing entities must report the required information to FinCEN.

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and reasons in their hiring processes. If an instance arises where an employer decides not to hire an applicant because of an arrest or conviction record, the employer should take a pause to articulate and document its reasoning.

The employer should be able to explain and support the direct link between the duties and circumstances involving the position at issue and the applicant's specific arrest or conviction record.

A petition for review with the Wisconsin Supreme Court is pending. *Cree* remains law unless the petition is granted and it is reversed.

ALS "An Evening of Hope"

FOS shareholder **Matt O'Neill** will be co-emcee of the virtual event on March 13, 2021.

Per Matt, virtual attendees can wear pajamas or formal wear. "We won't judge."

For information, contact Melanie@alsawi.org.

Owners, cont. from pg. 1

denied the proposed land division.

Not everyone on the Wisconsin Supreme Court agreed with the majority's decision.

According to Justice Brian Hagedorn, the subdivision/shoreland distinction was not dispositive, and "if towns can do via subdivision authority exactly the same things that the state says they cannot do" in shoreland zoning ordinances, the law is simply being ignored.

Despite the dissent, the majority's holding is the law in Wisconsin.

The case is a good reminder that local ordinances are often technical, complex and confusing in their application.

This is especially true in the context of their supposedly governing state statutes.

FOS can cut through your confusion and explain how local ordinances may affect your desired use of your property.

ARE EMPLOYEES EVER "OFF DUTY" UNDER EMPLOYER CODES OF CONDUCT?

By Laurna Kinnel

Calling 2020 a year of substantial change would be a wild understatement.

We grappled with a pandemic, protests and hotly-contested elections.

This year of change caused many individuals to reevaluate their core values.

Employers, too, have been revisiting and even revising their companies' core values.

Established core values help employers make decisions about long-term company goals and employment.

They give employers benchmarks to determine whether a proposed action or policy fits in with "who the company is" or "the company's culture."

In this regard, employers and employees are largely familiar with employment codes of conduct and employment handbooks.

It is generally accepted that employers can – and should – use such documents and policies to set expectations for employee behavior while at work.

But can these policies extend beyond waking hours to apply when employees are "off the clock?"

As always, it depends.

Employers, of course, cannot dictate all aspects of employees' non-work behavior.

But employers may legally govern certain employee off-duty activities – a common example is a "drug free" workplace policy.

On the other hand, a blanket prohibition of alcohol consumption outside of work may be illegal in states allowing its consumption by those over a certain age.

And as suggested by Lauren Maddente's Page 1 article, *"Your Job Applicant Has a Record. Now What?,"* some non-work conduct including that which leads to arrests and convictions, might not be used as a basis for discipline unless it is substantially tied to an employee's duties.

More generalized off-duty conduct by employees can potentially trigger an employer's less-defined core values such as, for example, integrity, inclusivity, respect and fairness.

This is particularly true given the expanding use of social media to criticize, disparage and troll other users.

Even aside from social media, individuals' off-duty conduct is increasingly coming under scrutiny.

Cell phones, with their cameras, are seemingly everywhere, ready to catch any perceived inappropriate statement or action.

Once videos go viral, public pressure may be placed on employers to take disciplinary actions against employees, irrespective of their employer handbook policies.

Employers considering policies which could police non-work conduct should act carefully and deliberately, to avoid restricting an employee's free speech or other rights.

Any policy, of course, should be clearly disclosed to all employees.

An employer issuing a code of conduct or employment handbook addressing off-duty conduct should ensure that the policy is specific, reasonable, explainable, non-discriminatory, and tied to the employer's reputational or employment needs.

This is true even for at-will employees.

At-will employees can be terminated for any reason or no reason, but not for a discriminatory reason.

In all this, reasonableness should be the watchword.

Even employers with established codes of conduct or handbooks, governing aspects of employees' off-duty conduct, should "pick their battles" in enforcing them. What the employer views as a reasonable regulation may be viewed by an employee as an unreasonable intrusion unrelated to employment duties.

This is a complicated area.

It has been made even more complicated over the past year by the increased stresses placed on everyone, employers and employees alike.

If you are revisiting your company's code of conduct or employee handbook, FOS can guide you through the process.

Transparency Act, cont. from pg. 2

So far, no formal guidance exists on the states' responsibilities with respect to the implementation of the Act, although formal guidance is anticipated by the time entities must begin their reporting.

One question is how an entity is to determine whether a non-owner exercises "substantial control" over the entity so as to make the person a "beneficial owner" under the Act.

The reporting requirements should only create a minimal administrative burden for many small businesses.

Reported information will be confidential and disclosed in limited circumstances.

These include federal agency requests regarding national security, intelligence or law enforcement, and where financial institutions are subject to customer due diligence requirements under applicable law (e.g. the Bank Secrecy Act).

If you have any questions regarding the Act or any other legal matter, contact FOS.

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IN THIS ISSUE

WILL BUSINESS COURTS PROVIDE EFFICIENT, FAIR DISPOSITIONS?

By Jacob Manian

For any business, the potential for litigation looms like an ever-present dark cloud.

A lawsuit can mean years of unending document demands, depositions, motions, and a trial.

Legal fees mount while your everyday business operations twist in the winds of uncertainty.

To address these concerns, the Wisconsin Supreme Court created a pilot program of dedicated trial courts throughout the state to handle limited types of commercial litigation.

These "Business Courts" handle larger complex business fights, shareholder disputes, antitrust allegations, non-compete agreements and disagreements within a business organization.

The Business Court judges have specific experience and expertise in business and commercial litigation.

Program proponents say that such judges can more effectively and efficiently streamline larger, complex commercial litigation.

Critics fear that business interests have too much influence over the selection of the program's judges, who may favor large businesses over individual litigants.

The Business Court judges insist that the courts are designed to apply even-handed justice to individuals and businesses alike.

Time will tell whether the program is successful and will be made permanent.

In the meantime, litigation may become necessary for your company despite its best efforts to avoid a courtroom.

If appropriate, a Business Court may move your case along more effectively and efficiently and bring about a quicker resolution (through settlement or a trial), than traditional courts.

If your company finds itself in a business dispute, FOS's business attorneys can guide you through the litigation process.

FOS Shareholders Earn *Pro Bono* Certifications

FOS Shareholders **Matt O'Neill** and **Jacob Manian** have been certified to the Wisconsin 2020 *Pro Bono* Honor Roll.

To obtain certification, Matt and Jake each performed at least 50 hours of qualifying *pro bono* legal services during 2020.