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MILWAUKEE BUSINESS JOURNAL BPtW 2020 BEST PLACES TO WORK

FOS NEWS - *Our clients come first*

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PRESIDENT BIDEN ISSUES EXECUTIVE ORDER ON NON-COMPETES

By: Lauren Maddente

A non-compete agreement is one tool employers use to prevent departing employees from working with former customers or giving competitors information obtained during their former employment.

Non-competes are intended to protect a former employer's legitimate business interests, including the time and money invested in the departing employee and the confidential information the employee learned during the employment.

Wis. Statute § 103.465, for example, enforces non-compete covenants which cover a specified territory during a limited time, if its restrictions are "reasonably necessary for the protection of the employer."

In Wisconsin, provisions which do not comply with the statute are unenforceable in full.

A recent presidential executive order ("Order") may signal the beginning of an eventual resetting of Wisconsin's and other states' non-compete laws.

This provision encourages the Federal Trade Commission ("FTC") to use its rulemaking authority to ban or limit non-compete agreements and "other clauses or agreements that may unfairly limit worker mobility."

These "other clauses or agreements" could include provisions preventing or limiting employees from soliciting their former employer's employees and/or customers.

Given its general language, what does the Order do, and what does it not do?

Importantly, the Order does not change existing law, including Wis. Stat. § 103.465.

No changes of any kind could occur until the FTC engages in the rulemaking process, which would take several months and involve public notice and comments.

To avoid states' legal challenges, such rules might be limited to companies doing business with the federal government.

Even so, changes may be afoot, as Illinois recently made its statute more restrictive as against employers. (*See Illinois Amendments Tighten Allowable Non-Competes,* below.)

Obviously, many questions remain unanswered.

Will the FTC issue any rules?

Executive Order, cont. on pg. 2

FOS WELCOMES JAMIE BARWIN

Fox, O'Neill & Shannon welcomes Attorney **Jamie Barwin** to an associate position with the firm.

Jamie provides services primarily within FOS's taxation, estate planning and business groups.

Jamie is a CPA as well as an attorney.

Before joining FOS, Milwaukee native Jamie practiced law in Michigan and Illinois.

She also worked for a "Big 4" accounting firm, and as a Controller for a prestigious Chicago family office.

FOS welcomes Jamie "back home" and to the firm!

ILLINOIS AMENDMENTS TIGHTEN ALLOWABLE NON-COMPETES

By Robert Ollman

The accompanying article, *President Biden Issues Executive Order on Non-Competes*, addresses potential regulations aimed at restricting employers' use of non-compete and non-solicitation agreements.

Illinois has already acted to limit Illinois employers' use of both agreements, by amending its Freedom to Work Act ("Act").

Companies with offices and/or employees in Illinois should take heed at this legislation which, upon the governor's expected signature, will be effective January 1, 2022.

A few important provisions follow.

Illinois Amendments, cont. on pg. 3

RANSOMWARE ATTACKS ARE ON THE RISE

By Laurna Kinnel

Colonial Pipeline. JBS Foods. Universal Health Services.

Just a few of the estimated hundreds of ransomware victims in 2021 alone.

Ransomware is defined by the U.S. Government's Cybersecurity and Infrastructure Assurance Agency as:

> "an ever-evolving form of malware designed to encrypt files on a device, rendering any files and the systems that rely on them unusable. Malicious actors then demand ransom in exchange for decryption."

Many ransomware attacks go unreported, often so the victimized company can avoid embarrassment or the loss of customers or business.

Make sure that you and your business are not next on the ransomware hit list.

The ever-evolving nature of this crime is one of the factors that makes it so difficult to prevent, much less fight.

Hackers are always upping their game – so you and your company need to be constantly and consistently vigilant.

This is particularly true, since the initial "infection" often spreads to connected systems, creating an even bigger headache.

Often, the delivery vehicle for the ransomware looks totally legitimate.

An email from an old colleague with a link to some pictures.

Or, a scary demand letter alleging copyright infringement with a link to the allegedly infringing.

So, what can you do to ensure that you and your business are not next on the ransomware list?

1. **Watch out for phishing emails.** Use caution when clicking on links or opening attachments, even if the sender appears to be someone you know or the email looks legitimate.
2. **Verify, verify, verify.** If you have any question whether an email or link is legitimate, contact the sender directly.
3. **Consider software and filter programs** to help to protect against attacks.
4. **Obtain insurance** if available.

Estimated losses from ransomware attacks last year neared $1.4 billion.

Don't give the hackers a chance to take any of your or your company's hard-earned money.

Stay alert to the threat and don't hesitate to ask for verification – any legitimate source will be happy to provide it.

And contact your insurance agent to see if coverage is available.

If you have any questions or concerns about ransomware attacks, contact FOS.

Executive Order, cont. from pg. 1

If it does, will they ban non-competes altogether or just limit them?

Would such rules address non-solicitation provisions in addition to non-compete provisions?

Could such rules legally affect states', as opposed to federal, laws?

Despite these uncertainties, employers can be proactive by revisiting and, if necessary, revising existing policies addressing confidential information, trade secrets, and customer relations.

Employers should ensure that their non-compete and non-solicitation agreements are narrowly tailored to protect the employer's specific and legitimate business interests.

Employers should also consider additional and/or alternative ways to protect their business interests.

Contact your FOS attorney with questions or concerns.

FOS "Best Lawyers"

Four FOS shareholders were recognized as "Best Lawyers" in the 2022 edition of *Best Lawyers in America*.

Laurna Kinnel was recognized for corporate and family law, **Michael Koutnik** for corporate and land use/zoning law, **Jacob Manian** for criminal defense, general practice, and **Matthew O'Neill** for appellate practice, arbitration, and commercial litigation.

Congratulations to all.

EIN UPDATES

The IRS urges entities to update their employer identification ("EIN") information upon a change in the responsible party or contact person.

The IRS already requires this to occur within 60 days of any change, but many entities have not complied.

Accurate information is critical, including for the IRS to be able to contact the right person as to issues of identity theft or suspicious filings.

EMPLOYEE'S INDIFFERENCE TO OFFERED POSITION MAY PROVE FATAL TO REFUSAL TO HIRE CLAIM

By Jamie Barwin

An employer may be liable for its unreasonable refusal to rehire an employee injured on the job.

This liability can extend to lost wages and other benefits during the period of a refusal to rehire under Wis. Stat. § 102.35(3).

An employer has reasonable cause to decline rehiring an employee under certain circumstances. For example, an employer has reasonable cause where

1. its own business necessity requires it to fill the employee's position; and/or
2. a suitable alternate position is unavailable, including where the injured employee's medical limitations prevent him or her from performing a required action for that position.

If suitable, an employer may offer the employee another available position that fits his or her modified skillset.

But what if the employee expresses no interest in that position or in continuing employment?

Under a recent Court of Appeals decision, *Anderson v. LIRC*, the employee may be out of luck if he or she makes an unreasonable refusal to rehire.

In *Anderson*, the employer filled the injured employee's position, which the Court found was justified because the position was integral to the employer's business.

The employer recommended an available and allegedly suitable sales position, with less physical strain, to the employee.

The employee, however, neither made any effort to pursue the recommended sales role, nor sought any other position with the company. Instead, the employee filed a claim against the employer for refusal to rehire.

After holding that the employer met its burden, the court concluded that the employee "failed to express an interest…in other work," and so failed to meet his burden and prove his claim. As always, an employer must have reasonable cause to refuse to rehire an injured employee.

If available, the employer should recommend one or more suitable alternate positions to the employee.

But the employee has employment obligations too.

The employee cannot simply dismiss an employer's recommendations for suitable and available alternate positions. An employee may be viewed as dismissing such recommendations through silence as well as through words.

If an employee demonstrates an unwillingness to consider, much less accept, any alternate suitable position, they are not likely to prevail in a refusal to rehire claim.

Illinois Amendments, cont. from pg. 1

Compensation

Non-compete provisions are prohibited for employees with actual or expected annualized earning rates under $75,000, increased in $5,000 increments every 5 years through January 1, 2037.

Non-solicitation provisions are prohibited for employees with such actual or expected earnings rates under $45,000, increased in $2,500 increments every 5 years through January 1, 2037.

Notice

Employees must be advised in writing to consult with an attorney before entering into a non-compete or non-solicitation covenant.

The employee must have a copy of the covenant at least 14 days before employment begins or the covenant is signed.

COVID

Employers may not enter into non-compete or non-solicitation covenants with employees terminated, laid off or furloughed as a result of COVID-19 or similar pandemics, unless consideration for their enforcement includes compensation base-level salaries, reduced by the employees' subsequently earned compensation.

Enforceability

Non-competes and non-solicitation provisions must (1) be accompanied by adequate consideration; (2) be ancillary to a valid employment relationship; (3) be no greater than required to protect the employers' legitimate business interests; (4) not impose undue hardship on the employee; and (5) not hurt the public.

Blue-Pencil

Courts may "blue-pencil" a prohibited covenant—modify it to be enforceable — or void it totally.

Enforcement

Potential remedies for the state's enforcement include damages (paid to Illinois), restitution (paid to employees), and civil penalties up to $5,000 per initial violation ($10,000 per repeat violation within five years).

A prevailing employee, including in a civil action or arbitration, can recover costs and reasonable attorney's fees.

The Illinois legislation contains additional provisions which should be reviewed by employers with Illinois offices and/or employees.

An open question is whether the law will apply to renewals or amendments of agreements existing on January 1, 2022.

Contact your FOS attorney to discuss the full legislation.

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IN THIS ISSUE

MARIJUANA: (STILL) ILLEGAL IN WISCONSIN

By Jacob Manian

Puff the Magic Dragon could not have anticipated the legal state of marijuana in 2021.

Recreational marijuana is now legal in 18 states and the District of Columbia.

Medical marijuana is legal in 37 states.

Despite two of our neighboring states having recently legalized recreational marijuana, the Wisconsin legislature has not legalized recreational or medical marijuana.

Possession of marijuana is a crime in Wisconsin, punishable by up to 6 months in jail and a $1,000 fine.

A possession conviction as a second or subsequent offense is a Class I felony, punishable by up to 3-1/2 years in jail and fines up to $10,000.

Meanwhile, Illinois residents can legally possess 30 grams (about an ounce) and Michiganders 2.5 ounces (70 grams).

Illinois reports non-Illinois residents spent over $81 million on marijuana in Illinois in just the first 3 months of 2021.

To be sure, a large portion of those sales came from Wisconsin residents.

Marijuana possession, however, remains illegal in Wisconsin, even if the marijuana was purchased legally in another state.

Marijuana is also illegal under federal law, which Congress has shown little interest in changing.

If Wisconsin law enforcement performs a traffic stop and detects the odor of marijuana emanating from a vehicle, it generally is allowed to search the vehicle for evidence of marijuana.

If marijuana is discovered in the vehicle, it will not matter that it was legally purchased in a neighboring state. Possession is still a crime.

And any statements made to law enforcement in that situation can be used in court as evidence of guilt.

Remember, if your vehicle is stopped by law enforcement, you are still protected by the Fourth Amendment against unreasonable searches and seizures.

This means that you may decline an officer's request to search your vehicle.

Even if you do, do not physically interfere with or refuse a lawful order to comply.

Instead, contact your FOS attorney right away.