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2021 BEST PLACES TO WORK

FOS NEWS - *Our clients come first*

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DON'T WAIT TO ENFORCE ARBITRATION PROVISIONS

By Lauren Maddente

It is not uncommon for businesses to require employees to sign one or more contracts before they begin employment.

Sometimes these contracts contain "arbitration provisions," requiring that disputes regarding the employment relationship be resolved in arbitration, not in court.

By agreeing to arbitration, employees agree to forego their day in court.

Businesses often like arbitration provisions, particularly in the employment context, because arbitration is private, confidential, does not involve a jury, and has limited appeal options.

Employees frequently challenge arbitration provisions on public policy grounds, with limited success.

What happens when an employer waits…and waits, before trying to enforce an arbitration provision? Long after the employee has filed suit?

The employee will likely claim the employer waived its right to arbitrate.

One issue has been whether an employee in such circumstance must show the employee was prejudiced by the employer's delay.

That issue was resolved when, on March 21, 2022, the United States Supreme Court held that arbitration agreements should be treated like any other contract, and the employee need not prove it was prejudiced by the delay. *Morgan v. Sundance, Inc.*

The Court noted that, outside the arbitration context, a federal court assessing waiver appropriately does not generally inquire about the prejudice of either party.

The focus, the Court stated, should be on the employer's conduct or lack of action, and not how any delay in raising an arbitration provision affected the employee.

All companies which enter into contracts with arbitration provisions should be mindful of this decision. So should their employees.

If an employer wants to enforce an arbitration provision, it should timely do so when an employee first makes a claim or commences litigation.

An employer that waits too long could be forced to litigate a dispute in public, under formal litigation procedures.

FOS's attorneys can assist you in understanding and acting on the implications of the *Morgan* decision.

KRISTINA FRKOVIC JOINS FOS

Fox, O'Neill & Shannon, S.C. welcomes **Kristina Frkovic** as an associate attorney with the firm.

Kristina provides legal services primarily within FOS's business, corporate and transactional practices.

Kristina obtained her J.D. from Marquette University Law School.

There, she was Lead Articles Editor for the *Marquette Intellectual Property and Innovation Law Review* and Associate Editor of the *Marquette Sports Law Review.*

Kristina earned a Sports Law Certificate from the National Sports Law Institute.

Before joining FOS, she was a legal intern for the NBA champion Milwaukee Bucks.

FOS SCORES IN "BEST OF" AWARDS

Fox, O'Neill & Shannon, S.C. has been honored in 10 legal practice areas by the *Wisconsin Law Journal's* "Best of" awards.

The firm was recognized in the business law, contract attorney, real estate law, tax law, civil litigation law, estate law, trial lawyer, divorce, family, and DUI/DWI categories. The searchable award digest is at https://www.bestofwlj.com.

These honors reaffirm FOS's commitment to its clients and the firm's longstanding motto: "Our clients come first." Above is FOS's award winning corporate team.

L to R - Fran Hughes, Laurna Kinnel, Lauren Maddente, Kris Frkovic and Mike Koutnik.

MULTIEMPLOYER PENSION PLANS RESCUED

By Jamie Barwin

On July 6, 2022, President Joe Biden highlighted the final rule of the American Rescue Plan's Special Financial Assistance program.

The final rule protects millions of workers participating in over 200 multiemployer pension plans from facing significant cuts to their benefits.

A multiemployer pension plan is established through employer and union relationships within a single or related industry.

Employers and unions feared that the limitations in the interim rule could collapse the country's economic recovery.

The rule allows for these plans to apply for Pension Benefit Guaranty Corporation ("PBGC") protection to remain solvent at least through 2051.

The PBGC provides partial protection of benefits for approximately 10.9 million workers and retirees in about 1,400 multiemployer plans.

Prior to the American Rescue Plan, PBGC's Multiemployer Pension Insurance Program was projected to become insolvent in 2026.

Significant policy changes were made between the interim final rule and final rule of the American Rescue Plan's Special Financial Assistance program to better address the amount of assistance needed to remain solvent.

The final rule allows 33% of special financial assistance to be invested in assets that achieve a higher rate of return, though they are still subject to strict protections.

The other 67% must be invested in investment-grade fixed-income positions.

Eighteen multiemployer plans, that remained solvent but had to choose to restore benefits to previous levels and remain indefinitely insolvent, are currently ensured to remain solvent into 2051.

Approximately two to three million union workers, retirees and their families are now projected to continue receiving their earned benefits.

Pension cuts for over 80,000 workers and retirees have also been reversed, with plans expected to remain solvent long-term.

The PBGC estimated the total projected distributions to troubled plans will be between $74.3 billion and $90.8 billion.

Multiemployer, cont. on pg. 3

WISCONSIN PASSES LAW PROTECTING PRIVATE ACCESS EASEMENTS

By Michael Koutnik

Wisconsin law generally requires easements to be recorded every 40 years to maintain enforceability.

Of course, exceptions exist, such as easements benefiting public utilities, railroads, and government entities.

2021 Wisconsin Act 174, which became effective earlier this year, amended Wisconsin law to add a new exception to the re-recording requirement, this time for access easements.

An access easement is a recorded instrument that allows a person to travel across another's land to reach a location or to accomplish another specified purpose.

They are often found on land used for hunting, fishing or other recreation, as well as properties abutting or near lakes and other bodies of water.

The exception requires one of the following:

1. The easement was recorded on or after January 1, 1960.
2. The easement was recorded before January 1, 1960, and a notice, the instrument or an instrument expressly referring to the easement is recorded on or after January 1, 1960 and before the property is sold or transferred.
3. The easement or express reference to the easement was recorded before January 1, 1960, and it is apparent from or can be proved from physical evidence of its use at such time a person acquired the real estate subject to the easement.

Assuming one of those conditions is met, the easement will run in perpetuity, without needing to be re-recorded, unless the easement itself says otherwise.

The amended law is important for owners of property benefited by an easement, or for parties looking to buy or sell property that involves an access easement.

Involved parties should understand the nature of the easement at issue, its specific terms and requirements, and what is needed to ensure its enforceability after a property transfer.

LIABILITY WAIVERS - WHAT DO YOU ACTUALLY GIVE UP?

By Kristina Frkovic

Before many recreational activities, attendees or participants are given, and often sign, forms releasing the operating company from liability if they are injured.

We often accept or sign these forms without much thought. We're more interested in having fun.

What do they mean, though, if we get hurt? Can we still sue for damages? Well, sometimes, yes. Sometimes, no.

Wisconsin courts construe liability waivers strictly against the issuer, especially when they address conduct below the appropriate standard of care.

To be enforceable, a waiver must clearly, unambiguously, and unmistakably inform the signer of what is being released.

The Wisconsin Court of Appeals recently showed how and why each case's specific facts are critical to a waiver analysis. *Schabelski v. Nova Casualty Company.*

There, the plaintiff fell off a ski-lift after "inelegantly" getting half-on and hanging from it for ten minutes.

She sued the ski resort, alleging that the lift attendant negligently played loud music, shoveled snow, delayed stopping the lift, and engaged in a negligent rescue.

The Court ruled that the waiver did not cover, and so did not apply to, plaintiff's "negligent rescue" claim.

The waiver did not clearly, unambiguously, and unmistakably inform plaintiff that she released the ski lodge from this specific claim.

However, the Court held that the waiver *did* cover plaintiff's claims regarding playing loud music, shoveling snow, and delaying stopping the lift.

The language of the waiver specifically included "the operation of chairlifts, and chairlift loading, riding, and unloading operations."

As a result, the waiver covered the acts which plaintiff alleged caused her injuries.

The Court also held that the waiver did not violate public policy.

The Court relied on the tailored and accurate language, and the waiver's statement that its customer could avoid the waiver entirely by paying $10.

Schabelski shows that companies should monitor their waivers to ensure that they cover the specific risks and claims being released, in the context of the activities actually occurring under them.

Consumers, for their part, should make sure to read exculpatory forms, including their fine print - at least before crumpling them into their pockets.

FOS IN THE NEWS

FOS shareholder **Lauren Maddente** has been appointed to the Board of the Association of Women Lawyers as Director of Special Events.

FOOD FROM THE BAR

FOS will once again participate in the "Food From the Bar" campaign to benefit Feeding America Eastern Wisconsin. "Food From the Bar" is a friendly competition among area law firms and legal departments to support hunger relief efforts.

"Food From the Bar" has been a tremendous success in the past. With every dollar donated, Feeding America has been able to provide enough food for three meals.

Multiemployer, cont. from pg. 2

The White House is touting the relief granted under the American Rescue Plan's Special Financial Assistance program.

It claims that the program will be "the most substantial policy to strengthen the solvency of our nation's multiemployer pensions since the enactment of the Employee Retirement Income Security Act (ERISA) in 1974."

Pensions and the laws governing them are complex.

Your FOS attorney can answer questions you may have regarding the rule.

FOS SUPPORTS WOMEN'S EQUALITY DAY

FOS reaffirmed its longstanding commitment to diversity and equality in recognizing Women's Equality Day on August 26, 2022.

The firm's first female attorney, Shirley Sortor, began her FOS legal career in the 1970s, when women were just beginning to "break into" the legal field.

Five decades later, 41.6% of FOS's attorneys are women, higher than the metropolitan Milwaukee average.* Shown above are FOS's female attorneys and legal support professionals.

And as our clients well know, every FOS member, attorney and staff alike, is a highly qualified individual who provides and supports the provision of top-notch legal services.

*Marquette University Institute for Women's Leadership *Law Firm Equity Initiative 2022 Report.*

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What's THE Big Deal?

By Laurna Kinnel

Anyone who has ever watched an NFL game has likely noticed the emphasis players who attended Ohio State place on the word "THE."

Ohio State's formal legal name is The Ohio State University.

And now, thanks to some fancy footwork, the university can be known simply as "THE®."

That's because Ohio State won trademark rights in the word "THE."

But how?

Common words (with "the" being one of the most common) are not generally eligible for trademark protection.

Ohio State, however, sought to trademark the word "THE" in connection with clothing and baseball hats.

The U.S. Patent and Trademark Office originally concluded that the word "THE" was merely ornamental; simply a decorative feature that does not function as a source identifier.

Eventually, Ohio State argued, successfully, that because it is a university – and not an apparel manufacturer – the word does act as a source identifier, and an indicator of sponsorship.

Even then, Ohio State faced one more battle in its fight for registration – a previously applied-for mark for "THE" by fashion designer Marc Jacobs.

Fortunately for Ohio State, the parties were able to negotiate a deal that allows both to use the mark.

So what's THE takeaway?

Trademarks are an important asset for any business or institution.

Significant meaning and association can attach to even the simplest words, with continued use and emphasis.

Still, because of its unique facts and the negotiated agreement between Ohio State and Jacobs, the "THE" registration appears to be an outlier in the registration system.

The successful registration of a simple and common article/word is likely to be the exception, not the rule.

The best and strongest marks under U.S. trademark law remain fanciful, arbitrary, and uncommonly used marks.

If you have any questions or concerns about your trademark or other intellectual property rights, contact your FOS attorney.