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CELEBRATING 60 YEARS

2021 BEST PLACES TO WORK

FOS NEWS - *Our clients come first*

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Editor: Diane Slomowitz

CHEERS TO 2023's NEW NORMAL

By Francis Hughes

2022 was a busy year for FOS and our clients.

Thanks to medical advances, our relationship to the COVID-19 virus moved from the battlefield to a workable coexistence.

Despite facing worker shortages, higher prices, and supply chain delays, the country reopened for business.

FOS, which never closed during the pandemic, went into overdrive during 2022 to address clients' pent-up needs and desires.

We guided clients through business acquisitions and sales, succession planning and implementation, commercial and residential real estate transactions, and operational issues and expansions. Our litigation team secured critical victories for clients.

Some measures initially implemented to prevent COVID-19's spread, such as Zoom meetings and electronic closings, may be here to stay due to their efficiencies. Even so, the personal benefits of in-person communications cannot be overestimated.

FOS continues to issue Client Alerts regarding important legal issues. A complete collection of Client Alerts and other timely and informative articles is at foslaw.com/news-views.

Whatever the methods, FOS will continue to successfully represent you as it has done for the past 60 years. In 2022 alone, FOS:

- Shepherded clients through significant business acquisitions, encompassing over $200 million in enterprise value;
- Won a major election law victory before the Wisconsin Supreme Court, on behalf of the Racine School District's Board of Canvassers, which preserved over $1 billion in local school district expenditures over the next 30 years;
- Completed the administration of a multimillion dollar trust established by a long-held client; and
- Obtained a not guilty verdict on a substantial criminal charge, after an eight-day trial, despite very substantial resources invested by the Waukesha County District Attorney's office.

While these successes may be headline worthy, they are no more memorable to FOS than the hundreds of other

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RISING YOUNG LAWYER - LAUREN MADDENTE

FOS congratulates shareholder **Lauren Maddente** for being named a 2022 Rising Young Lawyer by the *Wisconsin Law Journal,* in conjunction with its first-ever Legal All-Stars awards.

These awards celebrate "outstanding legal minds from across the state" according to the *Wisconsin Law Journal*.

Lauren will receive her award at a December 8, 2022 evening reception at the Grain Exchange building in Milwaukee.

2022 has been a big year for Lauren, who maintains an active business and litigation practice.

Lauren was unanimously elected FOS shareholder earlier this year.

Lauren's legal knowledge, practical acumen, and enthusiastic demeanor set her apart from other lawyers and are emblematic of FOS's motto - "Our clients come first."

FOS LAWYERS ARE SUPER!

FOS congratulates FOS shareholders **Matt O'Neill** and **Jake Manian**, and FOS of-counsel **Ken Barczak,** for being named to the list of 2022 Super Lawyers.

Matt received special recognition as part of the Super Lawyers Wisconsin "Top 50" and Milwaukee "Top 25."

FOS also congratulates shareholders **Laurna Kinnel, Mike Koutnik** and **Lauren Maddente,** and associate **Jamie Barwin,** for being named to the list of 2022 Super Lawyer Rising Stars.

All seven are formally recognized in the December 2022 *Super Lawyer* edition of *Milwaukee Magazine* as 2022 top Wisconsin attorneys.

This is the 17th year in which Matt and Ken have achieved this honor.

It is the sixth year for Laurna and Mike, the third for Jake, and the first for Lauren and Jamie.

CAREFUL DRAFTING OF EMPLOYMENT RESTRICTIVE COVENANTS IS CRITICAL

By Kristina Frkovic

Restrictive covenants - temporarily prohibiting employees from competing with their employers after leaving employment - and confidentiality agreements - precluding employees from disclosing confidential information - are important tools protecting employers' interests in their customers and businesses.

A July, 2022 published Wisconsin Court of Appeals decision, *Diamond Assets LLC v. Godina*, highlights the importance of careful drafting to these agreements' enforceability.

Wis. Stat. Sec. 103.465 requires that employment covenants be reasonable as to time and territory and necessary to protect the employer.

Usually, challenges to a restrictive covenant's enforcement are not decided until after facts are disclosed through depositions and written discovery, after which a summary judgment motion is filed.

Diamond Assets, whose salesman had a restrictive covenant and confidentiality agreement, is notable because the court invalidated the confidentiality agreement on a motion to dismiss, based solely on the complaint's allegations and the covenant's language.

The court ruled that the definition of "confidential information," which included information related to "the manner and methods of conducting the Employer's business," was much broader than needed to protect the employer's interest. The provision, for example, could be interpreted to include "even the most mundane minutiae" such as "the kind of pens purchased for office use."

Diamond Assets is also notable because the parties agreed in their confidentiality agreement that a court which rules the agreement is unreasonable could modify it into a reasonable one.

The court, however, refused to apply this provision, because under Wis. Stat. Sec. 103.465, if any part of a covenant is unenforceable, the entire covenant is void.

The case is further notable because the court ruled, in contrast to prior practice, that a restrictive covenant under certain circumstances might apply to prospective customers, not just existing ones.

This would depend on facts such as how developed the "relationship" is and the number of actual versus potential customers at issue.

So unlike the agreement's confidentiality provisions which the court held as overbroad on its face, the restrictive covenant survived the motion to dismiss.

The court held its reasonableness as to actual and potential customers could not be determined without factual development and consideration of the totality of the circumstances.

While *Diamond Assets* was not appealed to the Wisconsin Supreme Court, it remains an important tool for employers' toolkits.

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matters undertaken for clients during 2022, including contract reviews, real estate transactions, trademark maintenance, employment issues, and estate planning.

As our motto states, "Our clients come first." All clients, and all matters, big and small.

In another 2022 achievement, and in recognition of her exceptional contributions to the firm, FOS unanimously elected attorney **Lauren Maddente** to shareholder.

Maddente was also honored as a "Rising Young Lawyer" in the *Wisconsin Law Journal's* "Legal All-Stars" awards.

FOS's successes and client dedication continued to be recognized in 2022.

Shareholders **Matt O'Neill** and **Jake Manian** and of-counsel **Ken Barczak** were named to the list of 2022 Super Lawyers. Shareholders **Laurna Kinnel, Mike Koutnik** and **Maddente**, as well as associate **Jamie Barwin**, were named to the list of 2022 Super Lawyers Rising Stars.

FOS was also honored in 11 gold or silver legal categories of *Shepherd Express'* "Best Of" competition.

While many law firms continued to downsize, in June FOS welcomed Attorney **Kristina Frkovic** to its business group. As expected, Kris hit the ground running, providing critical support in several complex commercial transactions.

In September, **Jason Koehler** joined FOS's business management team. Jason, who has extensive financial, administrative and HR experience, has already added to FOS's organizational efficiencies and client services.

And FOS is proud of the client relations **Valeria Paredes,** our new receptionist and legal assistant, has already established since she joined the firm in August.

We end 2022 grateful for your trust in FOS, our attorneys and staff. We look forward to continuing our partnership with you in 2023.

Call, Zoom, email, or text us. We're here for you!

EXPECTING ACCOMMODATIONS FOR PREGNANT EMPLOYEES?

By Laurna Kinnel

It's no secret that pregnancy can be physically taxing. What happens when a pregnancy interferes with an employee's ability to perform their job functions?

Under the Americans with Disabilities Act ("ADA"), employers must provide reasonable accommodations for employees suffering from a disability, unless that would create an undue hardship for the employer.

Pregnant employees are protected from discrimination by both the ADA and the Pregnancy Discrimination Act.

While pregnancy itself is not a disability under the ADA, a pregnant person could develop a condition qualifying as an ADA disability requiring an accommodation. This could include restricting the amount of weight that can be lifted, or limiting the amount of time a pregnant employee is on their feet.

For those employed in physically demanding positions, these restrictions can require a significant deviation from their normal job duties.

So, must employers always provide affected pregnant employees with lighter duty work? In August, the Seventh Circuit Court of Appeals answered no.

The court ruled that a Walmart distribution center's policy of offering light-duty work to employees injured on the job, but not to pregnant employees, did not violate the Pregnancy Discrimination Act.

The court held Walmart had shown a "legitimate, nondiscriminatory justification" for its policy.

The Equal Employment Opportunity Commission ("EEOC"), which brought the claim, argued that accommodating employees injured on the job by providing light-duty positions, but refusing similar positions to pregnant employees, constituted sex discrimination.

Walmart countered that it had a legitimate business reason - reducing its exposure under Wisconsin's worker's compensation statute - to only accommodate employees *injured* on the job. The Seventh Circuit agreed, concluding that the substance and details of Walmart's policy were legitimate and nondiscriminatory, such that no discrimination occurred against pregnant employees.

Even though the court ruled for the employer in this case, employers should tread very carefully, to avoid discriminating against employees in developing and implementing any policy regarding accommodations for employees who may become temporarily disabled.

It is critical that any policy limiting the realm of available employee accommodations be developed for a clearly articulated, nondiscriminatory business purpose.

NEW REPORTING REQUIREMENTS FOR U.S. BUSINESS ENTITIES

By Lauren Maddente

U.S. businesses should start to get ready for the new Treasury Department Rule ("Rule") requiring the reporting of beneficial ownership information regarding the businesses.

Any domestic corporation, LLC, or similar entity, and any foreign corporation, LLC, or similar entity registered to do business in the U.S. must file reports.

Reporting companies must report their: (1) legal name and trade name; (2) current address; (3) state of formation; and (4) the IRS identification number.

"Beneficial owners" and filers must report their: (1) legal name; (2) date of birth; and (3) identifying number from government-issued photo identification document or foreign-issued passport.

Beneficial owners include individuals with substantial control over a reporting company or owning at least 25% of the entity. "Substantial control" includes:

- President, chief financial officer, general counsel, chief executive officer, chief operating officer, or similar position;
- One with authority to appoint/remove senior officer(s) or a majority of directors;
- One who directs, determines or has substantial influence over important decisions regarding the business's nature, scope, and attributes; reorganization, dissolution, or merger; major expenditures/investments; selection/termination of business lines; compensation schemes; or significant contracts.

Among those exempt are "large operating companies," which must have: (1) more than 20 full-time employees; (2) the previous year's filed federal income tax return showing over $5,000,000 in U.S. gross receipts or sales; and (3) a U.S. physical operating presence.

Companies created before January 1, 2024 have until January 1, 2025 to file their reports.

Companies created on or after January 1, 2024, and companies that were exempt but become nonexempt, must file 30 days thereafter.

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IN THIS ISSUE

REQUIRED MINIMUM DISTRIBUTION RELIEF

By Jamie Barwin

The SECURE Act of 2019 (the "Act") changed the beneficiary payout provisions for many classes of beneficiaries, known as *Designated Beneficiaries*, from a life-expectancy payout to a payout over 10 years (the "10-year Rule") for plan owners dying after December 31, 2019.

Life-expectancy is still awarded for certain *Eligible Designated Beneficiaries*, including spouses, minor children, and disabled individuals, among a few other classes.

Practitioners understood the 10-year Rule to mean that *Designated Beneficiary* distributions could be taken at any point within a 10-year period, beginning the year following the plan owner's death, with no obligation to take any distribution in years one through nine.

In February of 2022, when the IRS first issued Act Proposed Regulations, it became clear that the 10-year Rule was applied differently depending on whether a plan owner died before or after attaining age 72.

In the case of a plan owner dying on or after age 72, an annual required minimum distribution ("RMD") "must continue, with a full distribution required by the end of the 10th calendar year following the calendar year of the employee's death."

In this situation, the RMD amount would be based on the Designated Beneficiary's life expectancy.

Due to the length of time between the SECURE Act's effective date and the issuance of Proposed Regulations, many beneficiaries failed to take an RMD in 2021 and 2022.

This is significant because the IRS assesses an excise tax of 50% for a missed RMD!

In response to taxpayer and practitioner commentary, in October, 2022, the IRS issued Notice 2022-53 (the "Notice"), announcing that it would not impose any penalty on such undistributed 2021 and 2022 RMDs (labelled, "specified RMDs").

It also stated that the provisions in the Proposed Regulations would apply no earlier than 2023.

The IRS is encouraging any taxpayers who may have paid the excise tax to request an excise tax refund.

Be aware, though, that beneficiaries may still have to take the RMDs that they did not take in 2021 and 2022. This has yet to be clarified.