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FOS NEWS - *Our Clients Come First*

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Editor: Diane Slomowitz

EMPLOYERS - POTENTIAL LIABILITY FOR HACKERS DISCLOSING EMPLOYEE INFORMATION?

By Kristina Frkovic

Cyberfraud has become a potentially devastating occupational hazard for many businesses.

Money is not the only asset that can be stolen in a cyberfraud attack.

Personal information, including Social Security numbers, bank accounts, dates of birth, and home addresses, can also be targeted.

For example, an employer's computer system may be hacked and employees' personal information may be stolen.

The consequences can be financially and reputationally devastating for employers and employees.

A recent Wisconsin Court of Appeals decision specifically addressed employers' potential liability to hacked employees.

After addressing employers' potential liability under traditional negligence and contract theories, the court in *Reetz v. Aurora Health* limited employers' potential liability for invasion of privacy claims.

In *Reetz,* a former Aurora employee's bank account information was leaked in a company data breach.

The employee sued Aurora for negligence, breach of contract, and statutory invasion of privacy.

The Court of Appeals upheld the continuation of the employee's traditional negligence claim, which alleged Aurora had breached its duty to safeguard an employees' personal information, causing her damage from fraudulent transactions and overdraft fees.

The Court upheld the dismissal of Reetz's traditional breach of contract claim, which alleged that Aurora breached an agreement to prevent the disclosure of personal information.

It held that Aurora did not agree to protect the employee's personal information in any employment documents.

Finally, the Court discussed the employee's statutory invasion of privacy claim. The Court addressed for the first time the issue of an employer's intent where a plaintiff alleges the public disclosure of private facts.

Here, the claim involved a third party's hack of an employer's system, which released employees' confidential information.

The Court held that, to be liable, the defendant must act intentionally.

Because Aurora did not intend for its system to be hacked, much less for its employees' private information to be made public, it did not have the required intent.

The Court explained that while Aurora may have

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FOS WINS BIG AT BEST OF MILWAUKEE AWARDS

Fox, O'Neill & Shannon, S.C. earned first place awards for Best Law Firm in the business and estate planning categories in the *Shepherd Express's* Best of Milwaukee awards.

In addition, FOS Shareholder Jacob Manian was a finalist in the competition's criminal defense category.

The firm was also a finalist in the full-service law firm category.

The winners were announced at a January 3, 2023, reception at the Marcus Performing Arts Center in Milwaukee.

FOS is humbled by these honors and grateful for our clients' continued support.

As always, our clients come first.

BARWIN ELECTED FOS SHAREHOLDER

FOS congratulates Attorney and CPA, Jamie Barwin, on being unanimously elected a shareholder of the firm.

Jamie, a Wisconsin native, began her career at FOS in 2021, returning to Milwaukee after working as an attorney in Michigan and Illinois.

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

In addition to her legal experience, Jamie has over ten years of accounting experience working with high-net-worth individuals and closely held businesses within "Big Four" accounting firms and as Controller in the family office of a prominent Chicago family.

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EASY DOES IT - LLC CONSIDERATIONS BEFORE MAKING AN S ELECTION

By Jamie Barwin

Wisconsin limited liability company ("LLC") organization is simpler than corporation organization.

The default tax classification for a multi-member LLC is a partnership.

For a single member LLC, the entity is disregarded in favor of the member.

Too often, LLC owners are encouraged to make an S election, agreeing to follow S corporation taxation rules, to minimize payroll tax.

Payroll taxes like FICA and Medicare are imposed on the *reasonable* salary of an S corporation shareholder, not on the member's net LLC earnings.

An LLC's S election is easy to make on IRS Form 2553, Election by a Small Business Corporation.

Even so, unintended consequences of the S election may be impossible to unravel.

Consider these compliance tips *before* making an S election for your LLC:

Conform the LLC Operating Agreement to S Corporation Rules.

Confirm that your organization's operating agreement conforms to S corporation rules.

The operating agreement must provide for only one membership interest or the election is invalidated.

An electing S corporation must also function as if there is one class of such interests.

All outstanding interests must confer identical rights to distribution and liquidation proceeds.

An electing S corporation must further allocate income and deductions in proportion to the membership interests.

Ensure That All LLC Owners Are Allowable S Corporation Owners.

There may be no more than 100 members.

Only individuals and certain types of trusts and estates may be owners.

Partnerships, corporations, and non-resident aliens are disallowed shareholders.

These rules apply to present and future members.

Be Willing to Forgo an Inside Basis Step-up at a Member's Death.

Subchapter S corporations' shareholders are not allowed a step-up in tax basis at death.

This is different than partnerships.

Consider whether this loss of step-up in basis is desirable to heirs or beneficiaries of S corporation owners.

Consider the Appeal of S Corporation Status to New Members.

New members receiving a membership interest in exchange for property may have their contribution recognized as a taxable gain and treated as if it was sold to the S corporation.

Except for different voting

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failed to prevent the cyberfraud, that failure (which here was sufficient to allege negligence) was different than the intentional disclosure of private information.

This holding is important because it limits an employer's liability for invasion of privacy to situations where the employer takes an affirmative role in releasing employee information.

Because cyberfraud is ever-changing, it is impossible to totally protect against every fraudulent scheme. Even so, employers can take steps to limit their potential liability to employees and others.

Employers should obtain and maintain appropriate insurance coverage for cyberfraud.

Employers should also safeguard and limit access to confidential information; conduct employee security training; regularly update software; develop, maintain and enforce cyberfraud response plans; and disclaim in employee contracts and documents liability for third-party breaches.

FOS can guide you through preventative actions.

REAL ID REQUIREMENTS POSTPONED - AGAIN

As far back as the winter of 2019, this newsletter described the then-upcoming implementation of the REAL ID program.

Under REAL ID, driver's licenses or identification cards would have to comply with various ID certification requirements to be used to board an airplane or enter a federal agency.

https://foslaw.com/wp-content/uploads/2020/06/Revised-Winter-2019-Newsletter-11.22.2019.pdf

As this newsletter subsequently updated our clients, when the COVID-19 pandemic arrived in early 2020, the REAL ID enforcement date was delayed from October 1, 2020 to October 1, 2021, and then to May 3, 2023.

As the May 2023 date came closer, air travelers and those needing in-person federal agency assistance may have started to worry about complying.

Well, we all can once again breathe a sigh of relief.

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"Did We Win?" TM?

By Laurna Kinnel

The whole country, it seems, monitored with great concern Buffalo Bills safety Damar Hamlin's health and recovery after his harrowing on-field injury.

On January 2, 2023, during a Monday Night Football game against the Cincinnati Bengals, Hamlin (#3), suffered cardiac arrest after making a tackle.

Thankfully, and in part due to the quick actions of medical personnel on the field, Hamlin survived. While initially sedated and on a ventilator, Hamlin was eventually removed from those devices.

The first thing that he asked his medical care team and those gathered in his room was, "Did we win?"

Hamlin's first words speak to his incredible dedication to his team and the sport. "Did we win?" became an instant classic.

It also, unfortunately, became something that others quickly tried to capitalize upon.

As he recovered, Hamlin had the idea to sell t-shirts with "Did we win?" emblazoned upon them, with the proceeds given to support first responders and the University of Cincinnati trauma center.

Others, however, in the wake of reporting on Hamlin's story, began selling similar items for their own profit.

Upon learning of this crass profiteering, while Hamlin continued his recovery with his medical team, Hamlin's *other* team was also hard at work – filing a January 6, 2023, trademark application with the U.S. Patent and Trademark Office for "Did we win?" and "Three is back."

The applications cover various products and services, including posters, mugs, clothing, pins, and educational, entertainment, and health care services.

As Hamlin's case shows, just as in sports, it is important to play offense *and* defense when protecting your intellectual property rights. That includes filing trademark applications as soon as practicable (though hopefully not when you are in the hospital).

It also means sending cease and desist letters to those who are looking to capitalize on your intellectual property.

It remains to be seen whether the US Patent and Trademark Office will approve registration of Hamlin's applications.

But his drive and determination – on and off the field – are examples to us all to act quickly to protect yourself and your rights.

If you have any questions or concerns regarding your trademarks or other intellectual property rights, call your FOS attorney.

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rights, S corporations are limited to one class of membership interest.

These factors may be unattractive to potential investors with disparate investment needs.

Evaluate the Exit Strategy.

An electing S corporation may not fit with an owner's exit strategy.

It also may be different than the desires of potential acquirers.

Depending on the transferee's structure, pre-acquisition restructuring may be required.

This is because corporations and partnerships cannot own an electing S corporation.

These complex issues require consideration of more than ease of election and potential payroll tax savings.

They involve other tax and operational considerations and also require consideration of the needs and preferences of current and potential future investors.

Your FOS attorney can guide you through the potential implications of S elections on your present and future business structures.

QUESTIONS?
CALL US
414-273-3939

OR EMAIL US
info@foslaw.com

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REAL ID's enforcement date has once again been postponed, this time to May 7, 2025.

This means that, for the next two years, traditional driver's licenses or identification cards will be acceptable identification for access to at least domestic flights and federal agency buildings.

The postponement gives individuals additional time to obtain licenses or identification cards which will comply with REAL ID requirements.

These requirements were issued to provide enhanced security protections against, among other things, terrorist attacks.

Even with these postponements, it is unlikely that the requirements will be withdrawn.

At some point the rules will be enforced, and unwitting individuals will be caught unaware.

To obtain a compliant license or ID, most people must provide the DMV with an original or certified copy of their birth certificate or a valid, unexpired U.S. passport.

You can do this by renewing or getting a new license or ID card.

A complete list of acceptable documents is at wisconsindot.gov/pages/dmv/license-drvs/how-to-apply/realid.aspx .

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CORPORATE TRANSPARENCY ACT RULES PROVIDE SOME RELIEF FOR ORGANIZERS

By Lauren Maddente

This newsletter has previously detailed the beneficial ownership reporting requirements which entities must follow under the Corporate Transparency Act (the "Act"). https://foslaw.com/wp-content/uploads/2023/01/Winter-2022-Client-Newsletter.pdf; https://foslaw.com/corporate-transparency-act-battles-entity-owners-secrecy-2/

Most entities, beneficial owners (generally those exercising substantial control and those owning or controlling 25% or more), and applicants (generally incorporators/organizers) must report to FinCen their names and other identifying information.

Two issues have arisen under the Act. First, it appeared that entities existing when the law becomes effective would have to provide identifying information on their applicants.

For entities created years ago, this could be an arduous, time-consuming, and potentially impossible task.

Existing companies can now breathe easier. The final rules clarify that entities existing on January 1, 2024 need not provide such information. Entities created on or after that date, however, must report such information.

Second, the new rules clarify the Act's definition of "beneficial owner."

A "beneficial owner" is any individual who (1) exercises substantial control over the entity OR (2) owns 25% or more of the entity.

An individual exercises substantial control if they:

i. are a senior officer such as a President, Chief Financial Officer, Chief Executive Officer, or Chief Operating Officer, or hold a similar position. General counsel are included, but not treasurers/secretaries;

ii. can appoint or remove senior officers;

iii. are a board member *and* have either control of or substantial influence on the board; or

iv. have at least substantial influence over important matters affecting the entity.

The 25% ownership interest requirement applies to an individual owning at least 25% equity in the company. Equity includes capital or profits interest, convertible debt, options, and "any other manner" of obtaining that 25% ownership interest.

Companies existing prior to January 1, 2024 have until January 1, 2025 to report beneficial ownership information. Companies created on or after January 1, 2024 have 30 days to report.

The Act has strict penalties. Your FOS attorney can guide you through its requirements.