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FOS NEWS - *Our Clients Come First*

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Editor: Diane Slomowitz

NONDISCLOSURE/NONDISPARAGEMENT PROVISIONS COULD VIOLATE FEDERAL LABOR LAW

By Lauren Maddente

Employers may be surprised to learn that the National Labor Relations Act ("NLRA"), commonly applied in union settings, also generally applies to private employers which are not unionized.

The Act relates to employees other than those functioning as supervisors.

The NLRA affords employees the rights to gather, to discuss workplace policies, and to collectively bargain, and also prohibits unfair labor practices.

In a departure from prior practice, an important recent National Labor Relations Board ("NLRB"), decision held that nondisparagement and nondisclosure provisions, of the types frequently contained in employee separation agreements, violated § 8. *McLaren Macomb*, 372 NLRB No. 58.

The nondisclosure provision at issue prohibited employees from disclosing a severance agreement's terms "to any third person, other than spouse, or as necessary to professional advisors… unless legally compelled to do so. . . ."

The nondisparagement provision prohibited the "disclos[ure of] information, knowledge or materials of a confidential, privileged or proprietary nature. . ." and the making of statements to other employees or the public that "could disparage or harm the image of the Employer. . . ."

McLaren held that these provisions violated employees' statutory rights to discuss workplace conditions, policies, etc.

The decision further held that the provisions required employees to choose between severance payments and their statutory rights.

The NLRB was also concerned that the provisions contained no time restriction and applied to an employer's parent company.

McLaren emphasized that *the mere offering* of agreements containing unlawful provisions, even if never signed, violates the NLRA.

This was also a departure from prior practice, which required that an agreement entered into be subject to the statutory prohibitions.

One would expect that *McLaren* would apply to agreements entered into on or after the February 21, 2023 decision.

Surprisingly, the NLRB general counsel's March 22, 2023 guidance memo stated that *McLaren* also applies to agreements *executed before*

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MANIAN WINS MARTIN HANSON ADVOCATES PRIZE

FOS shareholder **Jacob Manian** has been awarded the Martin Hanson Advocates Prize from the Wisconsin Association of Criminal Defense Lawyers.

Jake received the award for obtaining an acquittal in a criminal homicide jury trial in October 2022 on behalf of his defendant client.

Each April, the Association honors attorneys who prevailed in criminal homicide cases during the prior year.

The award recognizes the efforts of lawyers who tirelessly work to defend clients during some of the most stressful and vulnerable times in their lives.

MANIAN WINS, cont. on pg. 2

BRUCE O'NEILL MOVIE NIGHT

"A LEAGUE OF THEIR OWN"

The 6th Annual BCO Times Movie Night will be held on Thursday, June 22, 2023.

The featured movie is "A League of Their Own," a favorite of the late FOS shareholder, Bruce O'Neill.

The event will take place at the Times Cinema at 59th & Vliet. Doors open at 6:30 p.m. with the movie starting at 7:30 p.m.

This event continues the O'Neill family tradition of honoring Bruce and raising funds to defeat ALS.

The suggested donation is $25. A raffle with lavish prizes will be featured.

O'NEILL, cont. on pg. 2

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LANDLORD FOUND PERSONALLY LIABLE FOR DEATH OF TENANT

By Michael Koutnik

Limited liability companies, like other corporate entities, are treated as entities separate from their owners.

Generally, this structure protects an LLC's owner from having his or her personal assets at risk to satisfy the debts or liabilities of the business.

However, a recent Milwaukee County Circuit Court decision serves as a reminder that neither an LLC nor any other business structure will necessarily shield business owners if they are negligent in the performance of their business operations.

Further, an LLC or other corporate form can be ignored, and "pierced" through to individual owners, if the business is treated not as a separate entity but as a personal instrument of its owners.

In the Milwaukee County case, an electrical fire at a rental property killed two people.

A lawsuit was later brought against the limited liability companies that own the property and directly against the LLC's owner in his individual capacity.

During the litigation, investigations disclosed that the landlord had a reputation for failing to keep his rental properties up to code.

In addition, numerous code violations existed at the apartment where the fire occurred.

Investigators found no evidence that the owner ever pulled a permit to fix the issues at the building, despite the legal obligation to do so.

The landlord further testified during a deposition that he could not recall if he had made repairs or if he had hired anyone to do so.

The owner also stated that he did not recall the full names of anyone who may have made repairs and that he did not keep any records of repairs being made.

The court entered a $1,000,000 judgment against two of the owner's real estate companies.

The judgment covered negligence, pain and suffering, and the tenants' wrongful death.

The court also entered a $350,000 judgment *personally against the property owner*.

The court did so after finding that the owner/landlord's companies were fictitious and existed primarily for fraudulent purposes.

The court noted that the companies had no corporate documents or business records.

In addition, the companies often made payments directly to family members without records showing any legitimate business purpose.

This case highlights the important requirement that corporate entities, including LLCs, always maintain corporate formalities.

LANDLORD, cont. on pg. 3

O'NEILL, cont. from pg. 1

Bruce passed away due to ALS on September 3, 2016.

ALS remains an incurable, and largely untreatable disease, affecting tens of thousands of people every year. Every dollar raised helps those suffering from ALS and brings us one step closer to a cure.

Bruce notably loved movies about baseball and horse racing.

Past BCO Times titles have included "Field of Dreams," "The Natural," "Secretariat," "42," and "Major League."

MANIAN WINS, cont. from pg. 1

Jake secured a unanimous Not Guilty jury verdict for his client following eight days of trial in Waukesha County.

An acquittal in a homicide case is a rare and difficult feat, requiring skill, hard work, and dedication.

FOS celebrates Jake's skill and commitment to the tenets of our justice system.

Congratulations, Jake!

SMALL CLAIMS COURT: NOT SO SMALL AT ALL

Many wrongly believe that Small Claims Court is limited to disputes involving very small sums.

Small Claims Court actually handles requests for money judgments or earnings garnishments of $10,000 or less.

It also handles tort/personal injury actions for $5,000 or less - not an insubstantial amount.

In addition, all eviction actions, for any amount of rent, must be brought in Small Claims Court as must: (1) non-consumer credit actions for return of personal property of $10,000 or less and (2) consumer credit actions for return of personal property, subject to a lease or credit from a dealer, where the amount financed is $25,000 or less.

Your FOS attorney can guide you through all matters required to be brought in Small Claims Court.

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SAVING FOR COLLEGE? CONSIDER THE 529 PLAN

By Jamie Barwin

The costs of college follow many people through their professional careers.

One way to help defray these costs is through federal "529 plans", which allow account owners to deposit funds into accounts for named beneficiaries, often children or grandchildren.

Account savings grow free from federal and state income tax if used for qualified higher education expenses.

The 2019 SECURE Act broadened education expenses to include costs of qualified apprenticeships and up to $10,000 annually toward K-12 education.

Funds can further be used to repay beneficiary student loans of up to $10,000.

Depending on the sponsoring state and/or institution, contributions may receive a state income tax deduction.

The 2023 Wisconsin income tax deduction for 529 contributions is limited to $3,860 per year per beneficiary, for taxpayers filing as single or as married filing jointly.

A beneficiary includes a child, grandchild, or even yourself.

Wisconsin's two state-sponsored 529 plans are Edvest and Tomorrow's Scholar. Edvest accounts can be opened online by an owner, whereas Tomorrow's Scholar accounts must be opened by a financial professional.

In either plan, account owners can select investment portfolios that meet their risk tolerance and savings objectives.

Account owners direct account distributions, including payments made directly to educational institutions.

Non-owner family members and friends can typically give to a 529 plan for a beneficiary.

Contributions to plans are considered gifts and depending on the amount, should be reviewed by tax counsel, and preparation of a gift tax return should be discussed.

One downside to 529 plans is that if account funds are not used for qualified education expenses, plan income is subject to federal and state income tax and a 10% federal tax penalty.

If several years of tax deferral have passed, withdrawal for non-qualified education expenses *may* be an "acceptable risk."

If not, account owners may transfer accounts between eligible beneficiaries.

Starting in 2024, up to $35,000 (subject to the annual Roth IRA contribution limits) from 529 plans can be used to fund a beneficiary's Roth IRA, without incurring taxes and penalties, subject to certain limitations.

Help your loved ones get a jump start on educational savings.

NONDISCLOSURE, cont. from pg. 1

the decision. The guidance also stated that *McLaren's* holding is *not limited* to separation agreements.

This statement could open a host of other employment-related agreements to potential invalidity, at least as to their non-disparagement and non-disclosure provisions.

The memo did state that, in analyzing an agreement, the NLRB may take into account a savings clause or disclaimer. The memo confirmed, however, that a savings clause or disclaimer will not cure overly broad restrictions.

The memo acknowledged that an employer's financial data, customer lists, and trade secrets can be deemed confidential. It cautioned, however, that restrictions on such information must be limited in time and based on a legitimate business need.

Even so, the payment amount of severance and workplace policies cannot be deemed confidential.

Interestingly, while supervisors are generally exempt from the NLRA, the statute protects them from retaliation for refusing to offer employees unlawfully broad separation agreements.

Employees wrongfully discharged under the NLRA may be ordered reinstated with back pay.

Given *McLaren,* employers should work with counsel to determine the extent to which their nondisclosure and non-disparagement provisions should be narrowed.

Employers should also review previously executed agreements and assess whether it makes sense to attempt to modify them.

Critical thinking is needed about which agreements are used with which employees – e.g., for non-supervisory employees, provisions should be very narrowly tailored.

Employers should work with counsel to determine which employees function as "supervisors" and are generally outside the NLRA.

LANDLORD, cont. from pg. 2

These include creating and adhering to operating agreements or bylaws, keeping records of corporate activities, and holding and recording regular and special meetings regarding corporate business.

They also include making all required governmental filings.

Perhaps most critically, entities should maintain separate financial accounts and records for the companies and their owners' personal financial activities.

QUESTIONS?
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IN THIS ISSUE

IT WASN'T ME!

By Laurna Kinnel

I hear the headlined refrain daily.

No, not from my clients (thankfully) – from my preschooler and toddler.

And I rarely believe them. They usually are conspiring with each other.

I give my clients, on the other hand, the benefit of the doubt.

"I had no idea!" "He never told me!" "I was not involved in any part of this."

These can be common reactions from clients, or anyone, to the surprise of bad or unexpected news.

This is especially true upon learning of previously unknown debts or, even worse, wrongful activity, undertaken by those you trust the most – your spouse, your trusted friend, or your business partner.

If you didn't have anything to do with causing the problem, you can't be responsible for it, right?

Wrong, according to the U.S. Supreme Court.

Earlier this year, the U.S. Supreme Court ruled that individuals cannot use bankruptcy to wipe out debts fraudulently incurred by a partner, even if the other partner was not involved in the fraud.

The Court reached its decision by focusing on how the debt was fraudulently incurred, not who incurred it.

"That's not fair!" (Again, a common refrain in my house.)

True, it may not be fair to the innocent partner.

His or her only recourse, if any, may be to try to recover his or her losses from the fraudster, though the chance of recovery may be slim to none.

Nonetheless, it is likely the fairest outcome for the innocent victim of fraud.

We all want to trust our personal and business partners.

It's less work, after all, to sit back and let someone else handle the deal or project.

Less work now, however, can mean more liability later.

To protect yourself, be aware of your spouse's or business partner's conduct.

Ask questions. Stay on top of financial issues. Don't ignore red flags.

Don't sign a document without knowing all material facts about its origin and its ramifications.

And if you need help, contact your FOS attorney.