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FOS NEWS - *Our Clients Come First*

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Editor: Diane Slomowitz

RELIGIOUS FREEDOM PROTECTIONS POSE NEW QUESTIONS FOR EMPLOYERS

By Laurna Kinnel

While Americans readied Fourth of July barbecues and fireworks to celebrate our rights to "life, liberty and the pursuit of happiness," the Supreme Court was busy issuing decisions, including one strengthening employee protections for religious freedom.

The right to religious freedom originated in the First Amendment to the U.S. Constitution, guaranteeing that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…." Congress strengthened this fundamental right in Title VII of the Civil Rights Act, which prohibits employers from discriminating against employees/applicants on the basis of religion. State and local laws further bolster these protections.

This year, as July 4th approached, the Supreme Court, in *Groff v. DeJoy*, heightened the standard employers must meet when denying a worker's request for religious accommodations.

Previously, employers only had to demonstrate a "de minimis (operational) cost" to deny a request for a religious accommodation. Now, employers "must show that the burden of granting an accommodation" has "*substantial increased costs* in relation to the conduct of its particular business."

This means employers now bear a higher burden to prove injury to avoid religious accommodation.

In *Groff*, a former postal worker claimed that he was not allowed to be off work to observe the Sabbath on Sundays in accordance with his religious beliefs. He further claimed he was punished when he took off work on Sundays to do so.

The postal service relied on its significant accommodations to Groff, at great cost to other employees, including excusing him from Sunday shifts until staffing shortages prevented that accommodation, and having the local postmaster and other employees cover his shifts.

The Supreme Court did not decide which side was "right," instead remanding to the lower court for a fact-specific inquiry under the new, heightened burden.

While employers should take all accommodation requests seriously, employers must now clearly demonstrate substantial business costs when denying a religious accommodation request.

Slight increases in cost or

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KELLY GORMAN JOINS FOS

Fox, O'Neill & Shannon, S.C. welcomes attorney **Kelly Gorman** as the firm's newest associate.

Kelly will provide services within the firm's business and transactional groups.

After earning her Bachelor's degree (top 5%) from the UW-Madison, Kelly graduated with honors from the UW-Law School.

Kelly served as Articles and Managing Editor for the *Wisconsin Law Review* and editor of the *Harvard Journal of Law and Public Policy.*

Kelly was student representative to the State Bar of Wisconsin Business Law Section, for which she will continue as Board Member.

We are excited for Kelly to begin her career with FOS!

FOS PLANTS ITS FLAG ON MOUNT KILIMANJARO!

FOS congratulates shareholder **Michael Koutnik** for successfully summiting the world's highest freestanding mountain, Mount Kilimanjaro, also known as "The Roof of Africa."

Upon reaching the summit in early June, Mike and fellow participant and FOS alum Daniel Hughes proudly planted FOS's flag for the world to see.

Smiling with pride and relief in the above picture are Daniel, left, and Mike.

Great job, Mike and Daniel! Time for the next adventure!

UNCERTAINTIES REGARDING NON-COMPETES CONTINUE

By Lauren Maddente

On January 5, 2023, the Federal Trade Commission ("FTC") issued a Notice of Proposed Rulemaking that would effectively ban non-compete agreements in employee contracts.

This newsletter previously addressed this issue here. https://foslaw.com/ftc-issues-proposed-rule-to-ban-most-non-competes/

The Proposed Rule would be draconian in its retroactivity, requiring employers to notify current and former employees holding active non-compete agreements of their rescission.

Many assumed the FTC would issue its final rule when the comment period ended on April 19, 2023. However, the FTC still has not done so, perhaps due to the tens of thousands of comments on the proposal. The Proposed Rule, after all, would drastically change many existing laws.

There are indications that the FTC intends to issue a final rule at a formal meeting in April 2024. Any final rule will be effective 60 days following publication in the Federal Register.

In the meantime, many states have begun to follow the FTC's lead, restricting and even outlawing non-competes.

A new Minnesota law, effective July 1, 2023, bans all non-compete agreements, including for independent contractors.

California, North Dakota, Washington, D.C., and Oklahoma have also banned non-competes, with a few exceptions.

And on June 20, 2023, the New York State Assembly prohibited most new non-competes involving broadly defined "covered individuals."

Wisconsin employers remain in limbo, not knowing whether, when, or to what extent their existing or future non-competes could be banned.

What should they do when facing the unknown?

First, employers should review their standard non-compete agreements, confirm they are no broader than necessary, and consider whether they can be narrowed.

Employers should similarly review their non-solicitation, confidentiality, and non-disclosure provisions or agreements to ensure they are reasonably tailored to protect the employer's legitimate interests.

In addition, employers should identify their trade secrets and develop proper policies and procedures to protect them, outside of non-competes.

This could be important because the FTC cited the availability of trade secret protections as one factor mitigating potential business harm from a retroactive final rule.

Employers should also develop procedures to identify any non-competes with former employees that are still in effect.

This will become crucial if the Proposed Rule takes effect, as employers will have an affirmative obligation to contact former employees and provide notice.

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decreases in efficiency may no longer justify denying such a request.

And requests can vary from time off on holy days to wearing religious garments, specific prayer time breaks, or even religion-based vaccine refusals.

Employers should evaluate all requests and document their analytical process regarding an accommodation's feasibility.

FOS SUPPORTS FEEDING AMERICA

FOS will be conducting a food drive during the month of September to benefit Feeding America Eastern Wisconsin.

The firm has participated in such campaigns since 2016 and has had tremendous success raising funds and collecting food for the organization.

With every dollar and non-perishable food item donated, Feeding America has been able to provide enough food for four meals for our community.

To donate or contribute please visit: https://feedingamericawi.org/fos/.

O'NEILL: TOP 10 COMMERCIAL LITIGATOR

FOS shareholder **Matthew O'Neill** has been named one of the "Top 10 Influential Commercial Litigation Lawyers to Watch in Wisconsin" by *Business Today*.

Matt has over 30 years of experience litigating complex commercial disputes.

He also provides legal services in appellate litigation, election law, and campaign finance matters.

The award commended the recipients' "exemplary services" in commercial litigation.

Congratulations to Matt on this well-deserved honor!

BE CAREFUL WHEN USING AI TO STREAMLINE HIRING

By Kristina Frkovic

Artificial Intelligence ("AI"), the "intelligence of machines/ software instead of people," is increasingly used in the workplace.

AI can streamline certain employment tasks, including the hiring process. Employers, however, should be aware of AI's potential legal risks.

For example, the use of AI in hiring can result in potential exposure to discrimination claims.

AI tools in the hiring process include resume scanners, video interviewing technology, and software that tests and rates applicants according to test results.

These AI programs could unintentionally produce discriminatory results, opening employers to potential charges of employment discrimination under either Title VII of the Civil Rights Act or the Americans with Disabilities Act ("ADA").

Title VII discrimination can occur unintentionally if an employer uses hiring selection procedures that disproportionately exclude people based on certain classifications for reasons unrelated to the position, without a business necessity.

Discrimination, for example, could be found if an AI tool develops an algorithm that incorrectly identifies a correlation between an applicant's specific trait and job success.

This happened to Amazon when it used an AI hiring tool that excluded female job applicants from a technical position because their resumes did not match those of the predominantly male technical employees actively employed at the time.

The ADA prohibits discrimination on the basis of disability and requires employers to provide reasonable accommodations to applicants/ employees with disabilities unless doing so would cause undue hardship.

The U.S. Equal Employment Opportunity Commission ("EEOC") has issued guidance for employers using AI.

It recommends employers conduct ongoing self-analyses of their employment practices and periodically test AI tools for discriminatory results.

Employers should also ask prospective vendors using AI about their steps to protect against discriminatory results.

In addition to the above steps, employers should train staff to process reasonable disability accommodation requests, including alternative non-AI testing.

Employers should also ensure that any AI tool that is used only measures abilities or qualifications necessary for the specific position at issue.

Employers should further confirm with potential AI vendors that no algorithm invokes disability-related questions that could violate the ADA.

CRYPTOCURRENCY BACK IN THE NEWS

By Jamie Barwin

Cryptocurrency is a virtual currency that uses cryptography to secure transactions recorded on a *digital ledger*. Units of cryptocurrency are known as coins or tokens. FOS's estate planning newsletter has described the role of cryptocurrency in estate planning. https://foslaw.com/wp-content/uploads/2021/10/Fall-2021-EP-Newsletter.pdf

With market declines, cryptocurrency seemed to fall out of favor with many investors.

The IRS, however, treats the receipt of cryptocurrency as taxable income for federal tax purposes and has recently formalized its position on what qualifies as cryptocurrency-related income.

In recent Revenue Ruling 2023-14, the IRS clarified that if a taxpayer "stakes" cryptocurrency and receives additional cryptocurrency units as a result, the receipt of the additional cryptocurrency is taxable income.

The Revenue Ruling's impact is best described through a primer on how cryptocurrency is created.

A blockchain, synonymous with a *digital ledger*, records cryptocurrency transactions.

These records, which are stored in multiple network locations ("nodes"), *validate* the blockchain's integrity and ensure new record entries are authentic, which then create a new "block" on the chain.

Cryptocurrency holders can qualify themselves to participate in the *validation* process by "staking" their holdings. Multiple validators are digitally selected to perform the validation.

Holders may earn rewards — additional cryptocurrency units — when a validation occurs and may be penalized if a validation is unsuccessful.

According to the IRS, if a validator stakes cryptocurrency, the taxpayer gains dominion and control over the earned cryptocurrency reward when the validation occurs.

Revenue Ruling 2023-14 concludes that the fair market value of the reward at validation is gross income.

While cryptocurrency values may remain depressed for some time, holders and validators should stay abreast on the IRS's position on the taxability of income associated with it to avoid future penalties and interest for failure to report income.

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DOES YOUR CONTRACT ACTUALLY GOVERN YOUR RELATIONSHIP WITH YOUR SALES REP?

By Michael Koutnik

An independent sales representative ("sales rep") is an independent contractor who markets, solicits, and secures orders for the wholesale purchase of goods on behalf of a business entity ("principal").

Once a sales rep secures an account, the rep earns commissions from the principal.

Businesses using sales reps should consider that many states, including Wisconsin, Illinois, and Minnesota have enacted statutory or other protections for sales reps.

While each state's protection varies, statutes generally regulate the payment of commissions during and after the termination of the contract and impact the terms a principal may include in its contracts.

These laws often come into play when determining the commissions payable to a sales rep upon termination of a contract.

Importantly, state laws often govern *any sales* that occur in that state.

This is true regardless of the principal's or sales rep's location or what the contract with the sales rep says.

Further, some states allow double or even triple damages, plus attorney's fees and court costs, for violations of their laws.

For example, Wisconsin and New York provide for double damages, while California, Texas, and Illinois allow triple damages.

Lastly, as alluded to above, many of these laws cannot be waived by contract.

Illinois, Texas, and California, for example, have enacted anti-waiver provisions.

Wisconsin's statute does not currently prohibit contractual waivers.

Principals often try to use choice-of-law provisions to allow a state's more favorable law to apply if disputes arise. But the inability to waive these statutory protections can void choice-of-law provisions.

Businesses that use independent sales reps to grow sales should be sure to understand the terms of their agreements with their sales reps and the laws of any state included in the sales rep's territory.

This analysis is particularly important when a business is considering terminating a sales rep.

A careful review of the contract and local laws can help your business avoid inadvertently violating another state's laws and facing double or triple damages.