The Gavel

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A periodic newsletter on legal issues for clients and friends of **David B. Forest, P.C.**
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The Gavel Is On The Web!

This and ALL back issues of *The Gavel* are now available at our new Webpage. The location is WWW.FORESTLAW.COM *Disclaimer: Nothing in this newsletter is intended to be or is a substitute for legal advice.*

WORKING OVERTIME

With downsizing, the costs of fringe benefits, hiring and training new employees, etc., many employers find it more convenient to simply have their existing workforce work overtime instead of hiring additional employees. **But what is overtime, and what additional pay is an employee entitled for it?**

Both state and federal laws covering overtime define it as work in excess of 40 hours in a workweek. All **"non-exempt"** employees of an employer (i.e. enterprise having two or more employees) must be paid 1½times the regular rate for each hour of overtime. Exempt employees (i.e. employees who do not have to be paid for overtime) are those involved in agriculture, employed by a seasonal amusement or recreational establishment, and those employees in a "bona fide executive, administrative or professional capacity". MCL § 408.384a.

While it sounds simple enough, applying the law can be tricky. For example, what is an "administrative" employee? Under the U.S. Fair Labor Standards Act ("FLSA"), the Department of Labor devotes page after page to defining whether an employee is or is not an "administrative" employee. 29 CFR 541.2 It is an oversimplification to say it just boils down to whether the employee's work is manual or office, blue collar or white collar, line or staff. For example, some foremen may be exempt, but a 'working foreman', such as a group leader, who spends a "substantial" amount of time (defined as 20% or more) doing the same or similar routine, repetitive, recurrent work as his or her subordinates, is deemed to be non-exempt and must be paid for overtime.

Even though a non-exempt employee and his employer have agreed to a fixed salary as fair compensation for the regular and overtime hours worked each week, the FLSA mandates that the employee

must still be paid for overtime hours. In this case, each overtime hour over 40 must be paid at an additional½time, and each week a recalculation is necessary based on the actual hours worked in order to determine the rate to be used. It's all part of the wonderful world of overtime law! *If you have any concerns about compliance with overtime laws, contact your payroll service, accountant, the Wage and Hour Division of the Michigan Department of Labor, or call our office.*

WEBSITE MANIA: BE CAREFUL!

Somewhere out there in cyberspace may be a lawsuit just waiting to happen. The problem for businesses who have a website is: **where** can the business be sued if a claim arises? The answer may be not restricted to where the business is located, but wherever the website can be accessed ... which is **anywhere in the world!**

First, some terminology. The Internet is a telecommunications system that was originally designed for use by research universities and the military. The place on the Internet that users can post and display information is called the **World Wide Web** (www). Anyone who wishes can create and 'upload' a webpage on a topic they chose.

Many businesses have put together websites, at which the businesses can post information about the company, its' services or products, ordering information, interactive links, etc. <u>If</u> the website encourages 'visitors' to avail themselves of the business' goods or services, the business <u>may</u> have opened itself up to jurisdictional problems. Normally, a Court only has **jurisdiction** (power to hear a case and render a verdict affecting the defendant) where the defendant is, or where the cause of action occurred. Thus, if your business is only located in Michigan, a court in New Jersey would not have jurisdiction to hear a case filed against the business. The **due process** clause of the US Constitution protects civil defendants from being hauled into a distant court that has no connection with the defendant or the subject matter of the civil action.

HOWEVER, if the business has purposefully established <u>minimum contacts</u> in another state, then the other state can exercise jurisdiction over that business (called *"long arm jurisdiction*"). How much is enough? Under one definition, when a defendant purposefully directs it marketing (e.g. direct mail and telephone solicitation) towards the residents of other states, and therefore avails itself the privilege of conducting activities in the other state(s), the 'long arm' of the other state's jurisdiction can reach out and grab that defendant

Will this **long arm jurisdiction** reach out and grab a business which has a website? It could if the website solicits sales from other states. The court's view could be that setting up an accessible website is no different that sending direct mail, or telephone sales solicitation. **If the business desires to have the recipient review the sales material, and encourages sales from any and all recipients who review such sales material, then the business may not be able to hide from the long arm of another court.** [*In part because of this, you will note that our law firm's new website is not designed to solicits clients.*]

Non-Competition Agreements

Whether having just bought a business, or operating an existing business, a business owner has an interest in preventing direct competition. **The most common form of protection for the business owner is having a signed non-competition agreement (sometimes called a 'covenant not to compete'**).

In the case of a new business owner, the purpose is to prevent the seller from turning around and setting up shop in competition with the business just sold. For an existing business, the goal is to prevent employees from leaving to directly compete, using the acquired knowledge of products,

pricing, customers, service, etc. in competing against their former employer.

While non-competition agreements are valuable in preventing such competition, they cannot be all encompassing. In Michigan, **it must be narrowly tailored to protect a business' competitive interests.** Thus, the limitations must be reasonable in duration, geographic area and line of business or type of employment.

It would be considered unreasonable to bar a terminated employee from working for a competitor in any capacity whatsoever, as a restrictive covenant must only protect against an employee gaining some unfair advantage in competition with his or her employer.

Interestingly, the geographic restriction component may start to be reexamined in light of today's technology [*Michigan Business Law Journal*]. Because of the use of cellular phones, the Internet, e-mail and e-commerce, for some industries there is no real geographic boundary. Thus, the focus is on the nature of the competitive business interest that needs to be protected.

For the person who breaches a non-competition agreement, the consequences can be **harsh** and **swift.** Many businesses will immediately file a civil action and seek both a **Temporary Restraining Order** and an **Injunction** to prohibit the breaching employee from further competition. If such are granted, the net effect is that the breaching employee is now out of work or out of business. In addition, the breaching employee could be liable for damages, including the value of business lost due to the violation of the non-competition agreement. Finally, there are criminal laws prohibiting the taking of 'trade secrets'.

Bottom line for employers and new businesses: get a non-competition agreement signed up front, and make sure that it is narrowly tailored to the circumstances so that it can be judicially enforced when necessary.

CASE IN POINT:

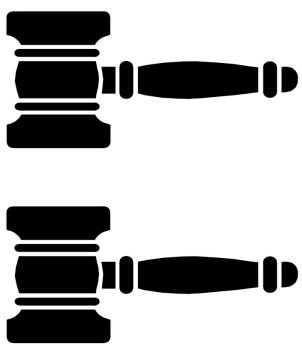
The Confessional must stay secret.

In many religions, a church member has the opportunity, if not the duty, to confess his or her sins to a priest or minister as a spiritual advisor. All involved know that anything said in confession will NEVER be spoken again. **The law reinforces this religious doctrine by protecting the privacy of confessions, deeming such communications to be privileged.**

But what happens when a pastor volunteers the information to his congregation? A plaintiff and his family were member of the Calvary Christian Church. At some point, the plaintiff confessed to the Pastor that he had previously engaged in marital infidelity with prostitutes. Ultimately, the plaintiff and the pastor had a falling out over church doctrine, and the plaintiff was dismissed from the church. One Sunday, the plaintiff picketed a church service, protesting the pastor' scripture interpretation. **The pastor responded by revealing information learned from confession about the Plaintiff's infidelity to the assembled congregation.**

The plaintiff sued the pastor and the church for an intentional tort (essentially breach of confidentiality) for the invasion of privacy and distress caused. The defendants defended by arguing, among other things, that the First Amendment does not allow the court to intervene into a church matter (separation of church and state, and religious freedom). The trial court agreed and dismissed the case on motion. However, on appeal, the Michigan Court of Appeals overturned the trial judge and reinstated the case. The Appeals court reasoned that while there is an initial reluctance of courts to get involved in a religious dispute, this **pastor crossed the line so egregiously that**

a court needed to intervene in order to protect individual rights. *Smith v Pastor, Michigan Court of Appeals.*



➥REFERRALS

If you have been pleased with the **service and professionalism** you have received from our office, it would be greatly appreciated if you passed the good word along. **Referrals are always appreciated and encouraged**, and we look forward to the opportunity to serve your associates and friends. If we cannot immediately service their needs, we will be happy to **refer them to the appropriate attorney specializing** in their specific area of need.

However, if you have not been pleased, contact us directly!

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