

# Law Letter

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## IN THIS ISSUE

### EMPLOYMENT LAW

All You Need Is 12 Months  
Control Creates Employee  
Nothing Wrongful with Workers'  
Comp  
Overtime Pay Gets Blended  
Willful Retaliation Must Pay  
Harsh Layoff Pays High Price

### CORPORATE LAW

LLCs Are Multistate Citizens  
Watch Your Step or Fix It

### CONTRACT LAW

Arb Clauses Can't Jump  
Good Clause Boosts Recovery

### IP LAW

Open Source Violations Infringe  
Copyright

### REAL ESTATE LAW

Homestead Now, Debts Later

## NEWSWORTHY

### EDC Re-Elects Nicolai

**"Patience, persistence and perseverance make an unbeatable combination for success."**

**--Napoleon Hill**

## AVOID BAD ARBITRATION CLAUSES

If an arbitration clause is unclear, invites disagreement about what it means, how it should be applied, or jeopardizes the final enforceability of an award, it is fair to call it bad. Because the purpose of the clause is to help the parties resolve disputes, avoid these pitfalls that can lead to bad arbitration clauses.

Parts of the clause that may create problems are provisions that address:

- **How the tribunal is constituted.** Problems may arise with clauses that refer to arbitrators or nominating institutions that do not exist, or are not available.
- **Arbitrator qualifications.** Some clauses refer to arbitrator qualifications that are impossible to achieve.
- **How proceedings are conducted.** Problems may arise with clauses that refer to multiple sources of law. Other clauses may ambiguously define what is or is not subject to arbitration. Some clauses impose impossibly short deadlines.
- **Enforcement of the award.** Some clauses fail to specify that the award may be enforced in any court with jurisdiction.

A good way to avoid poorly phrased arbitration clauses is to let a few principles guide the initial draft. The best arbitration clauses are the tried and true ones. If there is a need to vary from standard forms, get the advice of experienced counsel.

Never forget that if it can be disputed, it will be disputed. Once a disagreement arises, someone will always have an incentive to find problems with parts of the clause. To avoid this:

- Clearly state the intent to require binding arbitration;
- Verify existence and proper name of the institution designated to administer the arbitration;
- Avoid naming a particular person as arbitrator in the agreement;
- Avoid too much specificity when imposing qualifications for the arbitrators;
- Make sure any institution named to act as appointing authority will do it; and
- Make sure the procedure adopted is clear, workable, and not confused or conflicting.

If an agreement includes a condition prior to arbitration (like negotiation or mediation), clearly state either a deadline for the occurrence, or the condition or means of satisfying the condition.

More information on any of these subjects is available by calling. This material is for information and education purposes only.

It is not legal advice or a legal opinion.

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## Adding Value, Not Overload

Sometimes the blinder I get, the better I see. Maybe it's because so much of what is printed in the newspapers is just a blur to me unless I have my reading glasses on. Maybe it's because I rarely wear my reading glasses unless I really intend to read something. Maybe it's because I've been here before, this being at least the fourth recession in my career, not counting the several I lived through with my parents and grandparents whose lives were formed in the crucible of the Great Depression.

If the information age has done anything, it has destroyed the value of information. There are so many outlets with so many hours or pages to fill that practically everything is news somewhere for a few minutes. Makes it tough to recognize good advice when you hear it.

We still turn down more work than we take on. If our involvement creates more noise than value, we don't insert ourselves. It's adding value that matters to us; it sets us apart. Thankfully, most of our customers operate the same way. While everyone is feeling the effects of this down economy, none of them are *in extremis*.

My experience teaches that the only way through these times is to keep perspective, ignore pundits and keep working at doing the best job. If we can help you identify valuable information from the torrents that wash over us all, I look forward to taking your call.

~ Paul Nicolai, Esq.

They could not be required to arbitrate claims under the stock purchase agreement without an arbitration clause, a New Jersey Appeals court ruled.

### Why This Is Important...

Arbitration clauses cannot jump from agreement to agreement, even if the separate agreements are part of one deal. The intent to arbitrate must be clear in each agreement.

### NOTHING WRONGFUL WITH WORKERS' COMP

A man was killed in the course of employment. His parents filed a wrongful death suit against the employer. Under the Worker's Compensation Act ("Act"), employees grant their employers immunity in exchange for a guaranteed right of recovery for injuries. The injury the employee suffered was compensable under the Act; however, his immediate death with no surviving dependants resulted in no payment available to his estate, ruled the Massachusetts Supreme Court, upholding a lower court decision that the Act's exclusivity provision prohibited a wrongful death action.

### Why This Is Important...

Regardless of whether benefits are actually paid, employers gain immunity from legal action by their employees for compensable injuries under the Act. If you fail to cover your employees with workers' comp insurance, you lose this immunity.

### OVERTIME PAY BLENDED

Employees who work overtime during a workweek that includes both prevailing and non-prevailing wage hours, and an employee who works two or more different types of work in a single workweek for a single employer must have an overtime rate based on the weighted average rate for the work done, ruled the Massachusetts Supreme Court. The prevailing wage statute requires overtime rates to be based on the weighted average rate for actual work, not regular rates.

### Why This Is Important...

Any employee who works more than 40 hours in a workweek receives overtime payment. They must be compensated at the weighted average rate where applicable.

*(Continued on page 3)*

### ALL YOU NEED IS 12 MONTHS

An employee who worked for an employer for five years, left for five years and went out on leave after seven months in his second period of employment did meet the twelve-month requirement for FMLA eligibility, decided the First Circuit. To decide whether an employee qualifies for leave under the federal Family and Medical Leave Act, previous periods of employment with the same employer should be combined.

### Why This Is Important...

The total time an employee has worked for an employer determines their eligibility under FMLA in the First Circuit which includes Maine, New Hampshire, Vermont, Massachusetts and Puerto Rico.

### CONTROL CREATES EMPLOYEE

A Central Massachusetts newspaper carrier was held to be an employee because the defendant newspaper company exercised discretion and control over the plaintiff. The finding was made despite the fact that the plaintiff was a 1099 employee and the defendant had never withheld federal or state taxes.

### Why This is Important...

Under Massachusetts law, an employment relationship exists unless the services at issue are performed (a) free from control or direction of the employer, (b) outside the usual course of business of the employer; and (c) as part of an independently established trade occupation, profession, or business of the worker. This rule is now toughly enforced.

### LLC IS MULTISTATE CITIZEN

A limited liability company is a citizen of all of the states in which its members are citizens for the purposes of diversity jurisdiction, held the Fifth Circuit. This differs from a corporation, which is a citizen of the state in which it is organized.

### Why This Is Important...

This ruling will make it more difficult to remove a suit against a Limited Liability Company to federal court on the basis of diversity jurisdiction.

### ARB CLAUSES CAN'T JUMP

A party signed an employment agreement and a stock purchase agreement on the same day, relating to the same project but with two different parties.

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## OPEN SOURCE VIOLATIONS INFRINGE COPYRIGHT

A violation of a limitation contained in an open source license is enforceable as copyright infringement, and opens the door to an injunction, held the US Court of Appeals for the Federal Circuit. In this landmark case, the standard language of open source licenses is considered a limitation on the license granted, not contractual conditions.

### Why This Is Important...

Developers must be absolutely certain that the terms of any open source license used are met in connection with that use. Any use of open-source software that violates the limitations of the open-source license is subject to injunctive relief and infringement, which could cause the immediate termination of all sales of the non-conforming product and trigger infringement warranty language contained in almost all software licenses.

## WILLFUL RETALIATION MUST PAY

A debtor could not discharge an employment retaliation award against him by a former employee. If the underlying conduct had been reckless or negligent, the debt could have been discharged, but since the underlying conduct was willful and malicious, the debt cannot be discharged, explained the 8th Circuit decision.

### Why This Is Important...

Employment retaliation awards for willful and malicious conduct may not be dischargeable in bankruptcy.

## WATCH YOUR STEP OR FIX IT

A business invitee injured by a dangerous condition on the premises may recover without proof the business had actual or constructive notice of that condition if: (1) the business' chosen mode of operation creates a foreseeable risk that the condition regularly will occur, and (2) the business fails to take reasonable measures to discover and remove it.

Connecticut has become the 23rd state to adopt this "mode of operation rule" for "premises liability."

### Why This Is Important...

Connecticut business owners must take reasonable proactive measures to ensure invitees will not be harmed by the standard conditions of their premises. This rule makes it easier to recover in cases where no safety measures are taken to protect invitees from harm.

## HOMESTEAD NOW, DEBTS LATER

A mortgage issued in association with a promissory note followed the date of the homeowner's homestead declaration. When the date of the promissory note for the debt was before the date of the homestead declaration, a Massachusetts Appeals Court removed the protection of a homestead declaration. The date of the debt, not perfection, determines the homestead rights, the court held.

### Why This Is Important...

A Homestead Declaration is only valid against debts that arise after the date of the homestead.

## GOOD CLAUSE BOOSTS RECOVERY

A valid liquidated damages clause in an agreement relieves the non-breaching party from

proving actual damages or offering evidence that it mitigated damages, ruled a Maryland court, following other jurisdictions.

### Why This Is Important...

In any number of states, a properly drafted, effective liquidated damages clause increases the certainty of recovery by eliminating any need to prove actual damages or that the company tried to lower its damages.

## HARSH LAYOFF PAYS HIGH PRICE

Five female African-American plaintiffs were laid off without notice, supervised while packing their belongings, had their belongings searched, and escorted from the building. A sixth employee was also laid off. A white male, he was given prior notice and allowed to pack his belongings and leave unsupervised. The Massachusetts Supreme Court upheld an award of emotional distress damages and attorney fees for the women.

### Why This Is Important...

It was clear the employer did not discriminate in the decision to lay off the minority employees. The difference in how they were treated after layoff opened the door to damages even without backpay liability.



NEWSWORTHY

## EDC Re-Elects Nicolai

Attorney Paul Nicolai has been re-elected to the Board of Directors for the Economic Development Council of Western Massachusetts, which he first joined in 2004. He has been a member of the EDC's Infrastructure Committee since 2006.

Most recently, he has represented the EDC and the Western Massachusetts business community as a Technical Advisory Committee member for the Knowledge Corridor Passenger Rail Study, undertaken by the Pioneer Valley Planning Commission.

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