

SUMMER 2022

EXECUTIVE REPORT

Summer greetings to all of our clients and friends!

Welcome to the latest edition of the Petrie + Pettit newsletter. Now that warm weather is here, we hope that you are taking advantage of it and enjoying time outside. As I write this, it is 84 degrees with lots of sun and blue skies. Summer always rejuvenates me and I hope that it does the same for our clients and friends.

Petrie + Pettit has attorneys with expertise in many areas of the law, as shown by the diversity of articles included in this edition of the newsletter. If you have any legal needs please reach out to us for assistance. If for some reason if we are unable to assist you, rest assured we are happy to make a referral to someone who can.

Stay safe and enjoy the weather.



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Father, Mentor, Friend

It's hard to believe that 6+ months have passed since we lost my dad Jim Petrie to Covid at 92 years young. Both our firm and our family have been experiencing many "firsts" without him. As I write this note, Father's Day has just come and gone – there was a big hole at our family's table this year.

At the firm, we miss Jim presiding as Chair at our monthly Board of Directors meetings. We also miss his deep historical knowledge of firm clients and attorneys reaching back multiple generations. We even miss him bragging about "how well my pencil and paper still work" every time we experience internet or computer server issues. We know we were extremely lucky to have had his guiding presence at the firm for 60+ years. Remarkably, he was still engaged and contributing to the firm up until the very end.

I am profoundly grateful for the almost 30 years we had to work together on both client and firm administration matters, and I'd like to take this opportunity to thank everyone who took the time to reach out with memories of and tributes to my dad. They meant a tremendous amount to me, my mom Sharon, and our entire extended family. I'd hoped to be able to respond to each of you personally, but the pace of work life this year has frankly been relentless. The Covid pandemic put an unprecedented spotlight on the areas of estate planning, probate and trust administration starting in 2020, and the work to be done on these matters for our clients has shown no signs of abating - even as the latest Covid surge seems to be receding.

Here are just a few snippets from the many heartfelt tributes we received from longtime clients and colleagues:

"I am sorry for your loss of your wonderful father. I treasure the relationship I had with him. It was like having a wise counselor and friend at the same time."

"What a magnificent man – Jim Petrie. I learned from Jim how to be humble and "street" smart – but strong with conviction when necessary ... may his memory last an eternity."

My dad knew the value of good partnerships, both business and personal. He and my mom Sharon made a fantastic team for over 60 years and together they were intrepid travelers and lifelong learners. My dad had a knack for finding unique ways to combine business and pleasure, including American Bar Association (ABA) sponsored continuing legal education trips to such far-flung places as Moscow and the Amazon. In that spirit, after giving it much thought these past 6 months, our family has decided not to hold a public memorial service for Jim. Instead, we are planning a private memorial tribute that will take place during our family's upcoming 3-generation trip to Iceland - 1 of the few places on Jim's bucket list that he and Sharon didn't get to visit and explore together.

Thank you again for your trust and confidence in us through the years, and more recently for your extra care and support as the firm and our family adapt to Jim's loss.

Laura J. Petrie

LANDLORD-TENANT TEAM ANNOUNCEMENT

Recently, Attorneys **TRISTAN PETTIT** and **GARY KOCH** spoke at the Apartment Association of Southeastern Wisconsin (AASEW)'s monthly meeting. They led a panel discussion and question-and-answer session regarding recent trends in the eviction process, with specific focus on the Milwaukee County Eviction Court procedures and pitfalls. Since the pandemic began in 2020, evictions have seen a whirlwind of change, bringing significant challenges due to moratoriums, new regulations, additional funding for tenant advocacy groups, as well as a fluid court philosophy – all designed to find a balance between public health and private rights. Petrie + Pettit's landlord-tenant team has been successfully navigating all these changes for our clients, which is one of the many reasons why our team's attorneys are frequently asked to present. Feel free to reach out to any member of our team to put that success and experience to work for you!



TRISTAN PETTIT

JENNIFER HAYDEN

GARY KOCH

JESSE SHEFCHIK

SAMANTHA LIEDTKE

“DISCOURAGING” AN EMPLOYEE’S LEAVE REQUEST MAY VIOLATE THE FMLA

In a recent case titled *Ziccarelli v. Dart*, the Seventh Circuit Court of Appeals, which controls the decisions of the federal district courts in Wisconsin, Illinois and Indiana, held that an employer may be guilty of violating the Family and Medical Leave Act (“FMLA”) by “discouraging” an employee from taking FMLA leave, even if the employer does not deny a specific leave request. The plaintiff, Salvatore Ziccarelli, worked for the Cook County Sheriff's office. He had regularly used FMLA leave for a variety of issues from 2007 – 2015.

In 2016 Ziccarelli used most of his 480 hours of FMLA leave for PTSD treatments. He alleged that when he contacted his employer's benefits manager to discuss taking some of his remaining FMLA leave for additional PTSD treatments, the benefits manager discouraged him from taking any more leave, and said he would “be disciplined” if he did so. Concerned that he would be terminated if he took more FMLA leave, Ziccarelli retired from his position.

After retiring, Ziccarelli filed suit alleging, among other things, that his rights under the FMLA were violated when his employer “discouraged him” from taking leave. The District Court granted the Sheriff's Department's motion for summary judgment, concluding that Ziccarelli's FMLA interference claim failed because he did not show an actual “denial” of FMLA benefits.

On appeal, the Seventh Circuit reversed. The court held that a violation of the FMLA does not require actual denial of FMLA benefits and that a reasonable jury could find that the employer “interfered with” Ziccarelli's remaining FMLA leave hours by threatening to discipline him for using them. The court explained that the text of the FMLA undermines any requirement that an actual “denial” of leave must occur by explicitly prohibiting an employer from “interfering with, restraining, or

denying” an employee's rights under the FMLA. Thus, the court held that an employer can be found to unlawfully interfere with an employee's FMLA rights by either denying leave or discouraging the employee from taking it.

The benefits manager in question denied threatening that Ziccarelli would be disciplined if he took more FMLA leave, and the case was remanded to the district court for trial to resolve this factual dispute. However, the *Ziccarelli* case demonstrates the importance of training supervisors and other employees responsible for handling leave requests to be careful in their communications with employees requesting FMLA leave. Employees receiving such requests must understand that they should not say or do anything that could be interpreted as interference with an employee's right to take FMLA leave, including “discouraging” the employee from submitting a leave request. Similarly, employer's FMLA policies should be reviewed to ensure they do not use language that might be viewed as discouraging the use of protected leave.

Please let us know if you have questions about how this recent case may apply to your organization.

David A. McClurg



BIG CHANGES

ARE COMING TO WISCONSIN'S LLC STATUTE

In April of 2022, Wisconsin passed 2021 Wis. Act. 258 (the “Act”) into law. The Act makes a number of significant changes to Wisconsin’s business entity statutes. These changes include repealing and restating Chapter 183 of the Wisconsin Statutes, which governs limited liability companies (“LLCs”). Below is an overview of some of the important revisions the Act has made to Wisconsin’s LLC statute.

THE ACT’S EFFECTIVE DATE. The Act applies to any LLC formed on or after January 1, 2023, unless an LLC files an election stating that it wishes to be governed by the Act prior to this date. Starting on January 1, 2023, it will also apply to any LLC formed before this date unless the LLC files an election stating that it wishes to continue to be governed by the current version of Chapter 183.

LLC FORMATION. An LLC is formed by an “organizer” filing articles of organization with the Wisconsin Department of Financial Institutions (“DFI”). Under the Act, the articles no longer need to specify whether the LLC is member-managed or manager-managed. The LLC will be member-managed by default unless its operating agreement contains provisions providing that it is a manager-managed company.

OPERATING AGREEMENT. Unlike the former LLC statute, an operating agreement is no longer optional and does not need to be made in writing. Under the Act, an LLC cannot exist without an operating agreement, which can be oral or written, express or implied, or any combination thereof. Any matters that are not contained in an LLC’s operating agreement are governed by the Act.

AUTHORITY OF MEMBERS. The Act generally eliminates the concept of “apparent authority” with respect to members of member-managed LLCs. In other words, a member of an LLC is no longer the LLC’s agent merely because they are a member. An LLC may file a “statement of authority” with the DFI specifying the authority (and any limits on such authority) of those persons holding certain positions with the LLC.

DUTIES OF MEMBERS AND MANAGERS. Another change under the Act is that an LLC’s members and managers owe the LLC and its members fiduciary duties of loyalty and care, and they must discharge these duties (whether they are statutorily imposed or found in the LLC’s operating agreement) consistently with the contractual duty of good faith and fair dealing. The Act includes various examples of actions that would constitute a breach of these duties and obligations.

ANNUAL REPORTS. LLCs are required to file annual reports with the DFI each year. One change under the Act is that these annual reports must now contain the name of at least one member if the LLC is member-managed, or the name of at least one manager if the LLC is manager-managed.

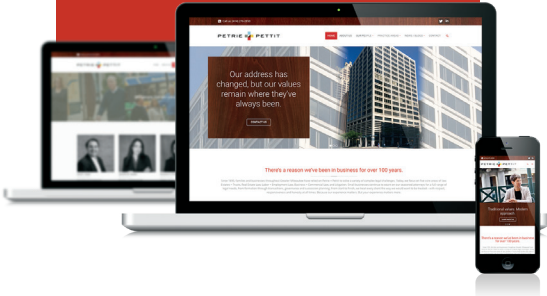
CHARGING ORDERS. The Act provides judgment creditors of an LLC’s members with a number of additional rights. Most significantly, the Act provides that a judgment creditor of an LLC’s members can make a showing that distributions it is entitled to receive pursuant to a charging order will not pay its judgment debt within a “reasonable time,” and the creditor may then foreclose on the member’s interest in the LLC. While for multi-member LLCs this would not enable the purchaser of the foreclosed interest to participate in the management or business activities of the company, for a single-member LLC the purchaser of the member’s foreclosed interest would become the company’s sole member for all purposes, and the former member would be dissociated from the company.

DISSOLUTION AND WINDING UP. Dissolution under the Act automatically occurs upon the passage of 90 consecutive days where an LLC has no members. Additionally, the DFI may now administratively dissolve an LLC that (a) does not file an annual report within 1 year of its due date; (b) does not pay a required fee or penalty within 1 year of its due date; (c) is without a registered agent for at least 1 year; (d) fails to notify the DFI of changes to its registered agent or registered office within 1 year of such change taking effect; or (e) commits certain crimes involving human trafficking.

If you have questions or concerns about how the Act may affect your Wisconsin LLC interests, please contact us.

David J. Espin

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BACK TO BASICS:

SERVICE OF THE NOTICE TERMINATING TENANCY

Unfortunately, landlords sometimes find themselves in the situation where they have to terminate the tenancy of a residential tenant. There are a variety of notices that can be used to do so, and that is a topic for another day. This post is on **how** to serve a notice terminating tenancy.

Wisconsin Statute §704.21 delineates the methods by which a landlord can serve a notice on a tenant. Among the options are personal service, substitute service, posting and mailing after diligent attempts at personal or substitute

service, sending certified or registered mail, or by any other method authorized by Wis. Stat. §801.11 for service of a summons. For most landlords, the most effective means of service of the notice is via certified or registered mail.

Wis. Stat. §704.21(1)(d) authorizes service of the notice terminating tenancy by “mailing a copy of the notice by registered or certified mail to the tenant’s last-known address.” There is no requirement that the tenant actually receive the notice, simply that the landlord mail the notice via certified or registered mail to the tenant’s last-known address. Most landlords opt to wait the extra two days (see Wis. Stat. §704.19(7)) required for the certified / registered mail service because “I never received the notice” is not a defense to service under this section. The notice need only to have been sent via certified or registered mail to the tenant’s last-known address.

Furthermore, with the 2017 amendments to the eviction statutes (via 2017 Wisconsin Act 317), the Wisconsin Legislature created Wis. Stat. § 799.40(1)(g), which provides that if a landlord serves a notice terminating tenancy via certified or registered mail, that “proof of certified mailing from the United States post office shall be sufficient to establish that proper notice has been provided for the purpose of filing a complaint or otherwise demonstrating that proper notice has been given in an eviction action, and an affidavit

of service may not be requested to establish that proper notice has been provided.” It is clear the Wisconsin Legislature supports (arguably even encourages) service of notices terminating tenancy via certified or registered mail.

With all of this said, if a tenant does not actually receive the notice, though, the action specified in the notice is unlikely to occur. For example, if a tenant owes rent but never receives the notice sent via certified mail, the tenant is less likely to pay the outstanding rent owed than if the tenant actually received the notice. Because landlords want the tenant to get the notice and perform accordingly, many landlords also send a copy of the notice via First Class U.S. Mail, as well. **THIS IS NOT A REQUIREMENT OF THE STATUTES FOR PROPER SERVICE**, but rather helps foster communication between landlords and tenants. It is often much less burdensome for all if the tenant actually receives the notice and performs accordingly, rather than having to move forward with an eviction.

If you have an instance where you are required to serve notice, it is important to do it properly. Petrie + Pettit can certainly help ensure compliance. Feel free to reach out to us!

Gary D. Koch