

NAMWOLF: YESTERDAY, TODAY & TOMORROW

By: Margaret Lockhart

Inside this issue:

- **Message from the Chairman**
Page 2
- **Spotlight: Member Firm**
Page 3
- **Law Firm News & Successes**
Page 6

Articles:

- **The Reasonable Accommodation Process: A 10-Point Checklist**
—Page 10
- **Delaware LLC Agreements—Application of the Statute of Frauds**
—Page 12



NAMWOLF member firms and corporate partners gathered in Chicago March 11-13, 2009 for the annual business meeting. Participants, including NAMWOLF's founders and its newest members and corporate partners, enjoyed dine-arounds at some of Chicago's liveliest eateries, followed by two days of valuable planning, communication, and networking sessions.

The opening session featured a reflective view of NAMWOLF's genesis and development, followed by a lively and productive discussion of NAMWOLF's growth and outlook for the future. NAMWOLF was founded in 2001 with the goal of promoting true diversity in the legal profession by fostering relationships between pre-eminent minority and women-owned law firms and private and public entities. NAMWOLF's growth was slow but steady in its early years. By year end 2002, NAMWOLF had 7 member firms. When NAMWOLF held its first annual meeting in Chicago in 2005, it had grown to 26 member firms. By 2007, membership had grown to 48 firms and attendance at the annual meeting increased from 151 to 278. Today, NAMWOLF has 60 member firms, a 28 member advisory council, more than 140 corporate partners, and 3 practice area initiatives.



NAMWOLF's growth and success were not accidental. Gonzalez, Saggio and Harlan both housed and shouldered the bulk of NAMWOLF's administrative work as it grew. NAMWOLF's longstanding corporate partners, including diversity achievement award winners Accenture, DuPont, and KeyCorp, facilitated introductions and invited their in house colleagues and counterparts to get involved. Fellow professional organizations, including DRI, MCCA and ACCA have and continue to share their resources to promote NAMWOLF's mission.

After thanking those who established and nurtured NAMWOLF, including Yolanda Coly and her staff, the session focused on where NAMWOLF is going. Karen Giffen shared the Board's 3-5 year strategic plan, developed at the 2008 annual meeting. Recognizing that with growth comes a need for structure, the Board established five standing committees- Finance, Corporate Outreach & Sponsorship, Governance, Admissions and Law Firm Criteria and Membership Outreach- and established 2009 goals for each. Each committee and initiative chair invited and encouraged members to get involved.



(Continued on page 2)

NAMWOLF: YESTERDAY, TODAY & TOMORROW

(Continued from page 1)

The session concluded with a discussion of parameters for NAMWOLF's future growth. The group had a frank discussion regarding the thorny issue of limiting, by geography or practice area, future member firm admissions. Representatives from the advisory council weighed in, indicating that on balance, they did not believe restrictions were necessary. In the end, the group reached a consensus that limitations based on perceived market saturation were not consistent with NAMWOLF's mission and goals. We can look forward, therefore, to welcoming many new firms in 2009 and beyond.

Margaret Lockhart is an attorney with Cooper & Walinski LPA. She can be reached at lockhart@cooperwalinski.com.

Message from the Chairman



Emery K. Harlan
Chairman

Thank you to everyone who attended the March Business Meeting in Chicago. Tremendous progress was made toward NAMWOLF's Fifth Annual Meeting & Law Firm Expo, with the goal of enhancing our CLE offerings to increase participation. Save the date for this year's Annual Meeting, which will be held October 5, 6, and 7 in Chicago.

I am pleased to welcome Tiffany Weber as our new Communications Specialist. Tiffany has extensive experience in marketing, public relations, and event planning. Most recently, Tiffany executed multiple large events while working at Bucyrus International, Inc. NAMWOLF is also pleased to announce the addition of Rachael Nork as a temporary employee. Rachael is assisting NAMWOLF with the management and coordination of various projects.

Given the current economic conditions, we need everyone to pitch in to make the Fifth Annual Meeting a successful event. Accordingly, I am asking each member law firm to consider having one of its attorneys join the Annual Meeting Sponsorship Subcommittee. Members of this Subcommittee will actively "recruit" financial sponsors for the Annual Meeting. If you are able to designate an attorney from your firm to serve on the Sponsorship Subcommittee, please have that attorney contact Tiffany Weber by telephone at 414-277-1139 ext. 1106 or via email at tiffany_weber@namwolf.org. Thank you in advance for your assistance.

WELCOME NEW NAMWOLF MEMBERS



Yolanda Coly
Managing Director

The following entities have joined NAMWOLF's Corporate and Public Entity Partnering Program:

Public Entity: New York Power Authority

Corporate Entity: GlaxoSmithKline, Karasma Media, Nationwide Insurance, American Airlines

NAMWOLF thanks Microsoft Corporation for their renewed Gold Sponsorship.

NAMWOLF is also pleased to announce AT&T as a Silver Financial Contributor and Kraft Foods as a Bronze Financial Contributor.

Spotlight—Member Firm:

Lebow, Malecki & Tasch LLC

At a time when the most prestigious business institutions face uncertainty instead of stability and prosperity, corporate America looks to its trusted business relationships more than ever before. Lebow, Malecki & Tasch LLC, a long-time law firm member and supporter of NAMWOLF, has built a reputation for its commitment to developing relationships with clients based on shared values of trust, respect and exceptional service. Coupled with a proven record of success emanating from its team of expert, well-seasoned attorneys, the firm is highly regarded for its skill at finding solutions and employing every available resource to serve clients' interests.

Lebow, Malecki & Tasch, LLC is a firm with a unique identity. Defining their success as "winning in a way that ensures the successful performance of a client's enterprise" is the firm's core philosophy. Joan Lebow, member and a founder, explains, "We are business partners as well as legal counselors and we know that the only valuable legal solutions are business solutions." With attorneys who are grounded in decades of experience as general counsel and senior executives for significant businesses, the firm understands that legal service must incorporate both the technical legal solution and an understanding of the competitive business environments in which clients operate.

With a downtown Chicago location and two additional offices in the west and northwest suburbs, Lebow, Malecki & Tasch LLC is poised to incorporate the latest technology, streamline its services and enhance its accessibility and availability to clients. Corporations, regardless of size, seek the firm for its critical insight, depth of knowledge and technical experience in its core practice areas. The firm routinely turns away work its members believe is not within this group of skills.

"We are investing time and our problem solving skills in addressing the challenges presented by the end of the billable hour as a metric for measuring the worth of a firm's services," says Lebow, "I have been waiting for the past decade to see this change start and now it's accelerating. I expect that firms with a traditional pyramid will be especially challenged. Our firm is structured in the opposite fashion from traditional firms and has three junior attorneys and nine senior attorneys. As former general counsel, we look forward to the end of the billable hour and are in the process of proposing other fee arrangements to our corporate clients."

Now entering their fifth year as a legal team, Joan Lebow, Melinda Malecki and Martin Tasch continue to forge a distinctive path. As a member of NAMWOLF, the Chicago-based firm represents the very essence of the NAMWOLF philosophy—excellence is not defined by color, race or gender. The firm has made community outreach part of its agenda, with a focus on contributions to worthwhile endeavors, such as mentoring, professional initiatives and community service. Recognizing that its success comes from the success of others, the firm plans to grow strategically, develop and enhance its services, give opportunity and training to young lawyers, while also giving back to the greater community it serves.



Termination of Employment – The Employee Benefits Side of the World

By M. Rogan Morton

I was asked to do a “short” article on employee benefit issues that tend to pop-up when an employee is terminated. Because most employee benefit plans contain specific provisions and employee terminations raise numerous and complex issues, I thought a better plan of attack would be to list out the problems I see occurring again, again, and again... I will call this my list of repeat offenders.

Termination Documentation Must be Consistent with Benefit Communications, Documentation & Records.

My partner Ginger has already explained the New York State Labor Law Section 195 notice (“195 Notice”) that must be provided within five (5) business days of an individual’s termination of employment. From the benefits perspective, make sure that the dates provided in the 195 Notice are not only accurate, but also consistent with plan communications, records and documentation.



Here is one example to illustrate some of the issues involved: The 195 Notice must generally provide the date of termination of employment and the last day of plan coverage. Ok, that sounds easy enough. However, now you have to look at the loss of health plan coverage from the perspective of the benefit plans. One requirement is that the termination of employment is generally going to be a qualifying event that will allow the ex-employee to continue certain health coverage(s) under both Federal and New York State rules. For instance, the continuation coverage requirements under the Consolidated Omnibus Budget Reconciliation Act (“COBRA”) generally requires health plans to provide former employees with the right to temporarily continue health coverage at group rates. COBRA also provides that the ex-employee (and family members) must receive a notice of continuation coverage rights which may contain information concerning the employee’s termination of employment and when health coverage ends. Care should be taken to ensure that the dates used on the 195 Notice are consistent with any health plan communication informing participants of continuation coverage rights, as well as other communications, internal plan records and documentation. Any discrepancy will likely be held against the employer.

Determine if New York Requirements Apply

Even if COBRA does not apply to your business (because you are a small employer) you may still be required to offer your employees continuation coverage as required by New York State Insurance Law Section 3221(m) (“NYS CC”). NYS CC generally provides that certain insured health coverage is subject to continuation coverage requirements similar to COBRA (although not exactly the same).

Provide an Individual Benefit Statement (IBS)

An IBS shows the total plan benefits earned by a participant and information on his/her vested benefits. The IBS must be provided upon written request, but must also be provided automatically to certain participants who have terminated service with the employer.

Know Your Plan Loan Documents

If the individual being terminated has an outstanding plan loan from a retirement plan and requests a complete distribution of plan assets, the plan loan documents may cause the individual to default on his/her plan loan. In contrast, the loan documents may provide that a loan is accelerated at termination of employment and the individual may be given a reasonable period of time to repay the loan before a default is triggered by the failure to repay.

Provide Accurate Certificates of Creditable Coverage (“CCC”)

A CCC is a written document indicating the period of health coverage under a plan or program. Group health plans and health insurance issuers must generally provide a CCC when an individual loses coverage under a plan, when an individual becomes covered under COBRA and when COBRA coverage ceases. If all of your plan benefits are insured, the insurance carrier may provide a CCC to the participant; however, do not rely on the

(Continued on page 5)

Termination of Employment – The Employee Benefits Side of the World

(Continued from page 4)

insurance carrier to meet this requirement. First, if there are any self-insured benefits under your plan or if you have changed insurance companies, the CCC provided by the insurance company may not contain all required creditable coverage information for that participant. You should ensure that a CCC is being provided and that the CCC contains accurate and complete information for the participant and time period at issue.

Administer Changes in Status

A termination of employment is usually a change in status event under most pre-tax cafeteria plans (if benefit eligibility under the plan is affected as a result of the event). Make sure to follow plan terms and procedures for employees who terminate employment.

Inconsistent Benefit Descriptions in Handbooks and Summary Plan Descriptions (SPD)

Many employers provide summaries of benefit programs in employee handbooks. However, if the handbook is not updated for all plan changes, the employer may be providing employees with outdated benefit descriptions. Inconsistencies between handbooks and SPDs usually come to light when an employee is terminated and she/he decides to use the handbook to determine how benefits will be handled upon termination of employment. If there is any inconsistency between the handbook and the SPD, it is a safe bet that the ex-employee will claim that the employer must provide the more generous benefit package or terms. One tactic to avoid this inconsistency is for the employer to include only basic employee benefit information in the employee handbook and cross-referencing the SPD for details of the benefit program.

Numerous other issues exist – such as properly administering retirement plan distributions/rollovers, offering conversion options for certain health and welfare benefits, meeting applicable recordkeeping requirements, etc. There are far too many issues that may arise to mention all of them. Be sure to check your benefit plan documents and procedures for compliance related issues.

M. Rogan Morton is a partner with Schröder, Joseph & Associates, LLP. She can be reached at rmorton@sjalegal.com.



The National Association of
namwolf
Minority & Women Owned Law Firms
"Legal excellence knows no color or gender"

2009 ANNUAL MEETING SPONSORSHIP OPPORTUNITY

Dedicated to Diversity Through Lasting Partnerships
NAMWOLF 2009 Annual Meeting & Law Firm Expo
Sheraton Chicago Hotel & Towers – Chicago, Illinois
October 5-7, 2009

For more information on becoming a sponsor and the many benefits included, please contact:
Tiffany Weber, Communications Specialist 414.277.1139

Law Firm News—Successes and Awards

NAMWOLF FIRM WINS TRIAL FOR NAMWOLF SPONSOR



WILSON PETTY KOSMO & TURNER LLP



Claudette Wilson

Claudette Wilson and Meryl Maneker of Wilson Petty Kosmo & Turner LLP, a NAMWOLF founding firm, recently successfully defended GlaxoSmithKline (GSK), an avid supporter of NAMWOLF, in an age discrimination and retaliation case in federal court in Orange County, California. Mark Rome, a former Senior Executive Sales Representative for GSK, was terminated on August 14, 2003 because he had violated an important company policy regarding grants. Rome was 49 at the time of his termination and claimed his age, and a complaint he made after his supervisor raised the policy violation with him, was the basis for his termination. Wilson Petty removed the case to federal court on diversity grounds, and jury was waived by both parties. The trial lasted five court days before Judge James V. Selna of the Central District of California.

The case had a long history. It was originally filed in October 2003, and Wilson Petty obtained summary judgment in March 2005. The summary judgment was partially reversed by the U.S. Court of Appeals for the Ninth Circuit in May 2007 and the case was remanded for trial, which finally went forward on August 12, 2008, five years from the date of Rome's termination.

Anyone who has tried a five-year old case knows the difficulties of finding witnesses, documents and refreshing long dormant recollections. Despite these challenges, the trial was as enjoyable as a trial can be. "A lot of the credit for this has to go to GSK, and more specifically to Rick Richardson, VP and Associate General Counsel, for his dedication to making sure that the trial team had all the tools at their disposal to effectively defend the claim," said Claudette Wilson. "The witnesses were made aware of the importance of the litigation and the need to devote the necessary time to refreshing recollection and preparing for trial. And we were allowed both the time and resources necessary to work effectively with the witnesses."

As a result of this commitment, the case was organized, the lawyers prepared and the witnesses ready. The trial went extremely smoothly, despite a surprise witness who had refused to speak to GSK or Wilson Petty and an independent third party witness favorable to GSK, who the judge described as "evasive" and "combative" and "one of the poorer witnesses to appear before me in almost 10 years on the bench." Rick Richardson, who attended the trial, commented "I have seldom seen a trial team that worked so well together or seemed to enjoy trial so much!" The cross-examination of plaintiff was the highlight of the case. Claudette Wilson was able to completely undermine Plaintiff's claim of discrimination and retaliation and, due to meticulous and painstaking preparation by the trial team, demonstrated that Plaintiff had made significant misrepresentations on his resume, a fact that drew a series of follow-up questions by the Judge. After Claudette Wilson's cross examination of the plaintiff was complete, the unanimous view of the trial team, including Rick, was that she had totally destroyed him. Plaintiff's counsel apparently did not have the same impression and in closing, asked for compensatory damages of \$3.6M, and punitive damages of \$15M, for a total of \$18.6M. At the end of the trial, Judge Selna gave an extensive ruling from the bench finding that GSK had a legitimate business reason for the termination, and there was no evidence of age discrimination or retaliation. The case is now again on appeal to the 9th Circuit, where GSK and Wilson Petty intend to vigorously defend the allegations one more time!



Meryl Maneker

Law Firm News—Successes and Awards


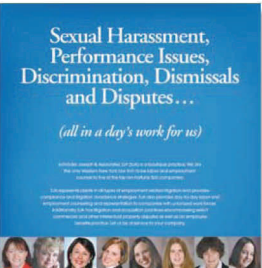


Member firm, **Schröder, Joseph & Associates, LLP**, received the “Your Honor Award” by the Legal Marketing Association with first place honors for their advertising campaign. The award was presented at LMA’s Annual Conference on April 2, 2009 in Maryland.

ADVERTISING: CAMPAIGN

FIRST PLACE

Schröder, Joseph & Associates, LLP

Stereotypes Working Well

Schröder, Joseph & Associates, LLP, a woman-owned business enterprise (WBE) law firm, launched an ad campaign in the Buffalo area that poked fun at sexual stereotypes to create awareness about the firm's unique capabilities and achievements. The YHA judges applauded, giving it a first place award in this year's competition.

The 18-month campaign, developed in cooperation with the leading Western New York paper *Business First*, used one layout with changing headlines and slightly altered copy to gain notice and create buzz.

The designers chose to bleed a wash of dark blue ink over two-thirds of the full-page space and include individual shots of the firm's handful of attorneys – a means of reinforcing with design the consistent and serious nature of the lawyers and their work. Body copy also reinforced the firm's accomplishments, referencing in each ad Schröder's position as “the only Western New York law

firm to be labor and employment counsel to five of the top 10 Fortune 500 companies.”

The changing headlines played off blatant stereotypes – “Ever Argue With a Woman?” “Size Doesn't Matter,” “Labor Pains?” – using humor (and some shock value) to convey the unique strengths of the firm.

Daring and strategic placement of the ads in media added impact. For example, the “Labor Pains” ad was placed opposite the Top 25 List of Labor Unions. Considering the firm represents only management side in union negotiations, this was a gutsy move.

OUTCOMES: Campaign was awarded “Best Campaign Series” by the American City Business Journals’ Pinnacle Awards program; It garnered national and international press – including *The Buffalo News*, which ran a cover story on the campaign and the firm – and blogging attention from the ABA and other influential groups. At least two new clients materialized as a result of the awareness brought by the campaign.

18



Brown Law Group is proud to announce that associate **Farzeen Essa** has been chosen to serve as an American Bar Association Young Lawyers Division 2009-2011 District Representative, and a member of the YLD Council. Congratulations Farzeen!

Janice Brown of Brown Law Group has been appointed to Senator Boxer's judicial advisory committee. The advisory committee is responsible for making recommendations to the Senators for positions of U.S. District Court Judge, U.S. Attorney, and U.S. Marshal. Janice is honored and excited to participate.



Jose I. Rojas of the Rojas Law Firm was invited to speak at the “Commercial and Intellectual Property Litigation Symposium—Litigating the Financial Meltdown and Protecting Your Intellectual Property,” held in Chicago in April 2009. Attorney Rojas’ presentation was entitled “The Effective Use of Financial Experts in Business Litigation.” The three-day Symposium focused on business litigation and credit crisis issues; included discussions and presentations addressing issues and techniques of importance to counsel representing businesses in a wide array of disputes; and cutting-edge intellectual property issues, including patent and trademark litigation, plus a special program for young lawyers.



Law Firm News—Successes and Awards

NAMWOLF Member Announces Defense Win



Linda G. Burwell

NAMWOLF member Linda G. Burwell, a partner with Detroit employment law firm Nemeth Burwell, P.C., announces an award of costs in defending Nemeth Burwell clients, United American Payroll 17, Inc. and Ryan Sherman following a grant of summary judgment on December 18, 2008.

The case involved a short-term employee who was hired as the second bookkeeper in a two-person accounting department. The employee was terminated after making several potentially costly mistakes at her job. The employee claimed that she had a condition where she completely shuts down and is unable to work in a stressful, competitive or "nitpicky" environment which she attributed to the fact that her supervisor pointed out her numerous mistakes. She claimed that she was terminated because she was disabled and because her employer perceived her as disabled. The court denied the employee's claims and concluded that the employee's dismissal was indeed performance-based.

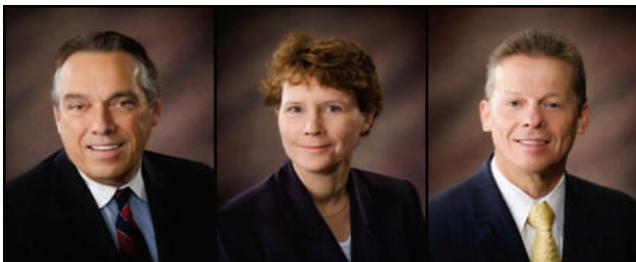
With the court's grant of summary judgment, the employer sought to recover its costs incurred in defending against the employee's claims. The employee objected that recovery of costs was not justified because the court did not determine the claims were frivolous, because she accepted a case evaluation award that the employer rejected and because the employee suffered financial hardship as a result of her separation from her employment and inability to secure a permanent job. The court denied the employee's objection on the basis that the relevancy of the employee's claims is not a factor in the court's discretion to award costs. The court also stated that it could not conclude that the employer's rejection of the case evaluation award unnecessarily prolonged the matter, particularly because the court ultimately concluded that the employee could not prevail on her claims. Finally, the court decided that an award of costs was appropriate because the employee failed to substantiate with documentary evidence that she is unable to pay an award of costs and that "financial hardship" is not a sufficient basis to deny recovery of costs.

In addition to Ms. Burwell, senior attorney Monica M. Moore of Nemeth Burwell also represented the defendants in this case.

Nemeth Burwell, P.C. is pleased to announce

Frederick E. (Rick) Champnella II has joined the firm as a partner
Susan D. Koval and Louis Eble have joined the firm as senior attorneys

With the addition of these attorneys, Nemeth Burwell P.C. now has sixteen attorneys. Nemeth Burwell, P.C. is the largest certified women owned law firm in Michigan representing employers exclusively in the prevention, resolution, and litigation of labor and employment disputes.



**NEMETH
BURWELL** P.C.
Attorneys & Counselors

2009 Annual Business Meeting | Chicago, IL | March 11-13, 2009



The Reasonable Accommodation Process: A 10-Point Checklist

By Michelle Ballard Miller



The Americans with Disabilities Act (ADA), recently amended by the ADA Amendments Act, requires employers to engage in a good-faith interactive process with a disabled employee to determine an effective reasonable accommodation. Some state disability bias laws impose similar duties. Whether an employer has fulfilled the reasonable accommodation obligation continues to be a hotly contested issue in disability discrimination litigation. The following checklist will help employers properly handle accommodation requests.

Develop a consistent policy.

Train managers and supervisors on what to do when they receive an accommodation request. Standardize documentation and procedures for consistency in handling such requests.

Enable employees to request accommodations.

An employer's obligation to engage in the interactive process is triggered whenever an employer becomes aware that an employee has a disability and requests an accommodation. There may also be an obligation if the employer knows (or should know) that an employee has a disability that is causing problems with work. Notify employees that the company provides reasonable accommodation to employees with disabilities and who to contact. Make it clear that it is the employee's responsibility to request an accommodation.

Analyze essential job functions.

Having detailed job descriptions identifying the essential job functions will allow you to determine whether a reasonable accommodation would enable the employee to perform them.

Consult with the employee.

The first step in the interactive process is to meet with the employee to discuss his or her specific limitations and needs. Solicit suggestions directly from the employee about what type of accommodation will be most effective. Consider having the employee obtain suggestions from his or her health care provider. Remember, however, that employees are not required to identify an effective accommodation so long as they can describe the work-related problems posed by the disability.

Get expert advice.

Once you identify the employee's specific limitations, the next step is to determine what would constitute a reasonable accommodation. Reasonable accommodation might include providing special equipment, restructuring the job, providing a leave of absence, modifying the work schedule, or reassigning the employee. If a reasonable accommodation is not readily apparent, you may need to seek outside advice.

Respond promptly.

Don't let too much time pass once the employee makes an accommodation request. You should act promptly to begin the interactive process and provide a reasonable accommodation, if appropriate. Failing to act promptly in response to an accommodation request can constitute a violation of the ADA and expose you to liability.

Keep the employee informed.

If there is an unavoidable delay in implementing the accommodation – for example, special equipment will take time to arrive – inform the employee of your efforts and the anticipated timetable and determine if temporary interim measures are appropriate.



(Continued on page 11)

The Reasonable Accommodation Process: A 10-Point Checklist

(Continued from page 10)

Choose among effective options.

Employers need to assess the effectiveness of various accommodation options. If there are several options, and one is less expensive, you can choose that option so long as it effectively removes the workplace barrier. You have the ultimate discretion to choose an effective accommodation, but the disabled employee's preferences should be considered. While you can't require an employee to accept an accommodation, an employee who refuses to accept a genuinely effective accommodation may not be qualified to remain in the job.

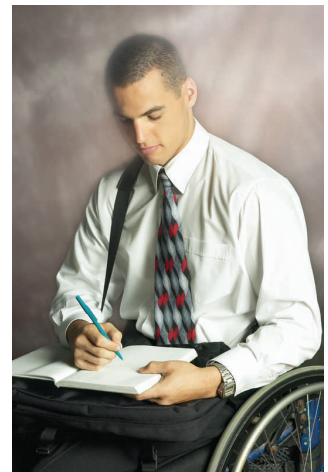
Keep your door open.

Providing a reasonable accommodation does not end your interactive obligations. Continue to monitor the situation to ensure the accommodation is enabling the employee to perform the essential job functions. If the accommodation is not effective in eliminating workplace barriers, resume the interactive process and continue efforts to find an effective accommodation.

Document scrupulously.

Always document your consultations with the employee and the efforts you make to identify and provide a reasonable accommodation. Written confirmation of every accommodation considered and offered should be sent to the employee, so that he or she cannot later deny that a particular accommodation was offered or considered.

The ADA's reasonable accommodation process can be extremely complex. Adopting a consistent policy for dealing with accommodation issues and meticulously documenting the employer's efforts, in consultation with knowledgeable employment law counsel, will go a long way towards minimizing potential liability.



Michele Ballard Miller is a shareholder in Miller Law Group, a women-owned employment law firm specializing in the representation of management in all facets of employment litigation and counseling. Michele can be reached at (415) 464-4300 or mbm@millerlawgroup.com.



Interested in submitting an article for future editions of the NAMWOLF newsletter?

Contact:

Stacy Fode, Editor
fode@brownlawgroup.com

LAW GROUP
brown

Delaware LLC Agreements – Application of the Statute of Frauds

By Ellisa Opstbaum Habbart



The Delaware Court of Chancery recently addressed an issue of first impression before the Delaware courts, or apparently before a court in any other United States jurisdiction - whether the statute of frauds applies to limited liability company ("LLC") operating agreements.¹ The Court held that the statute of frauds² was applicable to LLC operating agreements governing LLCs formed under the Delaware Limited Liability Company Act (the "LLC Act"). This ruling, however surprising to Delaware practitioners, provides useful lessons for those that utilize LLCs in the operation of their business or in their practice.

The parties in *Olson* were hedge fund founders, who subsequently disagreed about a provision in an unsigned LLC operating agreement after one of the founders (the plaintiff) was removed from his position in the LLC by the remaining founders (the defendants). The unsigned agreement contained a provision which provided any founder, who voluntarily or involuntarily retired from their position, a multi-year earnout of their interest in the company based on a percentage of the remaining founders' income over the following six years. In addition to the payment obligation, the provision at issue included several obligations which the remaining founders had to comply with, including maintaining the retiring member's economic interest, preventing action which would reduce that interest, and preventing one specific founder from withdrawing a certain percentage of his funds unless he relinquished his veto rights. The Court found that the statute of frauds rendered this provision unenforceable, holding that because the LLC operating agreement which contained the provision had not been signed and the oral agreement to the terms of the provision could not be performed within one year, the provision at issue could not be enforced as against the parties.

The Court noted that the LLC Act expressly allows for oral operating agreements, but further noted that the LLC Act does not expressly address the applicability of the statute of frauds to such agreements. The Court further noted the view of some commentators that in the absence of an express, specific intent to override the statute of frauds, it should apply. Conversely, it was noted that others contend that the Delaware legislature's expressed intent to give maximum effect to the enforceability of LLC operating agreements should trump the applicability of the statute of frauds.

In the end, the Court relied on the policy for enactment of the statute of frauds -- to protect against unfounded or fraudulent claims that require performance over an extended period of time. While the Court noted that few oral LLC operating agreements are likely to contain provisions that cannot be performed in one year, if that is the case, then those provisions will be unenforceable.³

What does this decision mean for those utilizing the LLC form -- LLC operating agreements (and likely any other agreement governing alternative entities) should always be reduced to writing and executed. By executing operating agreements, the contracting parties ensure their intent is confirmed and that the provisions therein will not be subject to a claim of unenforceability by application of the statute of frauds.

¹*Olson v. Halvorsen, et al.*, 2008 Del. Ch. LEXIS 156 (October 22, 2008).

² The Delaware statute of frauds provides, in relevant part, "that an agreement 'that is not to be performed within the space of one year from the making thereof' must be reduced to writing and signed by the party against which the agreement is to be enforced". *Olson* at *11 (quoting 6 Del. C. §2714(a)).

³It is important to note that the Court suggests that if only payment were required after a one year period, and all other obligations could be satisfied within one year, such an oral agreement would not be subject to the statute of frauds. *Olson* at *10-12.

NAMWOLF ANNOUNCEMENTS

We are also pleased to announce our latest hire, Tiffany A. Weber. Tiffany will be facilitating communication and event planning needs within our organization. She has over eight years of marketing and event planning experience. Her previous clients have included businesses such as Tetra Pak, Johnson Controls, Harley Davidson, Kohl's Corporation and Bucyrus International Inc.

NAMWOLF would like to thank all of the following members who have joined the Annual Meeting Sub Committee for Sponsorship:

Chairs: Joe West, Wal-Mart Stores, Inc. and Carlos Rincon, Rincon Law Group
Brune & Richard: Laurie Edelstein | Buford: Delores Robinson | Callier & Garza: Bernie Garza
Chan Law Group: Tom Chan | Chaves Resendez & Rivero: Rene Obregon
Cooper & Walinski: Patti Wise | Cuyler Burk: Jo Ann Burk | Fields & Brown: Carla Fields
Gannon & Garcia: Paul Garcia | Gonzalez Saggio & Harlan: Vincent Vigil, Emery Harlan
Lafayette & Kumagai: Rebecca Kimura | Pruetz Law Group: Adrian Pruetz | Rojas Law Firm: Gail Sosby
Schroder Joseph & Associates: Linda Joseph | Smith Fisher Maas & Howard: Kim Howard
The O'Riordan Bethel Law Firm: Pamela Bethel
Weldon-Linne & Vogt: Madeleine Weldon-Linne & Drew Balac
Wilson Petty Kosmo & Turner: Robin Wofford
Wong Fleming: Greg Johnson & Dan Fleming | Wood Rafalsky & Wood: Kristie Mayer

Advisory Council:

Joe West, Associate General Counsel/Outside Counsel Management for Wal-Mart Stores, Inc., joined the NAMWOLF Advisory Council in April 2009.

Barbara Stevens, Corporate Counsel, Vice President of Contracting for Prudential Financial joined the Advisory Council in May 2009.

Save-The-Date:

October 5-7, 2009 is NAMWOLF's Annual Meeting. This year it will be held at the Sheraton Chicago Hotel & Towers in Downtown Chicago, Illinois. If you are not receiving information on the event, please contact Tiffany Weber at tiffany_weber@namwolf.org



NAMWOLF Headquarters
207 East Michigan Street | Suite 510
Milwaukee, Wisconsin 53202
Tel: 414.277.1139 | Fax: 414.831.2285
www.namwolf.org

Yolanda Coly
Managing Director
ycoly@namwolf.org
414.277.1139 ext. 1158

Tiffany Weber
Communications Specialist
tiffany_weber@namwolf.org
414.277.1139 ext. 1106