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Moss & Barnett Advocate

To Arbitrate or Litigate?

By Jeffrey A. Wieland



Demand For Commercial Office Space Is Changing But Offices Are Not Obsolete

By Chelsy M. Jantsch



Are Employer-Mandated COVID-19 Vaccinations Worth a Shot?

By Megan J. Renslow



ALSO IN THIS ISSUE:

- 3 Alerts
- 4 Brian T. Grogan and James J. Vedder Re-elected to Moss & Barnett Board of Directors
Moss & Barnett Named a "Best Law Firm" by *U.S. News – Best Lawyers*® for 2021
- 5 Moss & Barnett Announces New Shareholders
Moss & Barnett's COVID-19 Resource Page
- 8 Three New Attorneys Have Joined Our Team: Brianna J. Blazek, Elise R. Radaj, Brittany D. Yelle
- 9 Fifteen Moss & Barnett Lawyers Named to 2021 *Best Lawyers*® List



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To Arbitrate or Litigate?

Clients frequently ask whether they should specify arbitration or litigation as the dispute resolution method in their contracts. Of course, the answer is one of the most hated of lawyerly answers — it depends. There are advantages and disadvantages to both methods of dispute resolution.

Monetary Considerations

The conventional wisdom is that arbitration is the better choice because it is less expensive. But this is not necessarily true. Arbitrations administered by agencies like the American Arbitration Association have filing fees that can be in the thousands of dollars, while court filing fees are usually only hundreds of dollars. In arbitration, the parties pay the arbitrator's fees. In complex matters, arbitrations are often decided by a panel of three arbitrators, each of whom bills by the hour. In contrast, judges in court are paid by the taxpayers. Courtrooms are also provided by the taxpayers, while arbitrations often occur in conference rooms that are rented by the parties. Administration of arbitrations is unquestionably more expensive for the parties than court-based litigation.

Arbitration's reputation as a cheaper alternative to litigation stems from its less formal nature. Court proceedings are governed by strict rules of procedure and evidence. Arbitrations have rules too, but those rules are generally more relaxed. The result is that there are fewer disputes over procedural technicalities in arbitration, allowing the parties to concentrate more on substance than form. Arbitrations usually move faster than court proceedings, which also saves the parties money on attorneys' fees.

Limitations on discovery are the biggest driver for cost savings in arbitration. The courts have rules that permit wide-ranging discovery of evidence through several means, including written interrogatories, subpoenas, requests for production of documents, and depositions. All too often, the cost to respond to discovery can equal or even exceed the amount in controversy. The amount of discovery permitted in arbitration varies widely depending on the applicable arbitration rules and the arbitrator. The AAA's Fast Track Rules, for example, do not permit any discovery. That being said, there is a trend in arbitration to generally allow for more discovery, which reduces or even eliminates the cost advantage of arbitration.

Non-Monetary Factors

In addition to the above cost considerations, there are three non-monetary factors parties should consider when negotiating a method of dispute resolution:

1. Control. In court proceedings, the parties' fates are controlled by the judge assigned to the case by the court. That judge will probably be fair, smart, and hard-working, but the judge may not have a background in the area of dispute. Many judges rotate between assignments, including criminal and family law matters. As a result, the judge may not be in the best position to handle a complex commercial dispute.

In contrast, the parties to an arbitration have input on who will decide their dispute. Arbitrators do not have to be lawyers. The parties can choose someone with knowledge of their industry to decide the dispute.

2. Finality. Court proceedings have mechanisms for appeal. Judges and juries make mistakes, and appeals allow for correction of those errors. But that takes time and money. Arbitrations do not typically have appeals. Overturning a bad arbitration award is very difficult, so if you have a bad day at arbitration, you may well be stuck with the result. There is a fundamental trade-off between the ability to potentially overturn a bad result and the time and expense to reach a final resolution.

3. Speed. The last non-monetary consideration is speed. Most of the time, court proceedings are slower than arbitrations as the pace is dictated by the court's calendar. Because arbitrations are controlled by the parties, they can be tailored by the parties to move as quickly as the parties want.

Conclusion

This is a very brief overview of complex issues that can affect you and your company. Before signing any contract with a dispute resolution clause, you should talk with your Moss & Barnett attorney about what dispute resolution method is right for your situation and how contract language can be crafted to achieve your goals.



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Jeffrey A. Wieland practices in our construction law and litigation groups. He has a B.S. in Engineering Physics and a Master's degree in Mechanical Engineering. He spent 15 years working as an engineer and project manager before becoming a lawyer. He is licensed in the state and federal courts in Minnesota and North Dakota where he typically represents contractors, subcontractors, suppliers, and owners.

Alerts

1 Tax Update – When Are Taxes Due?

IRS Individual Income Tax Return and Estimated Tax Due Dates

Unlike last year, the Internal Revenue Service (“IRS”) has not extended the filing deadline for your 2020 individual income tax return. Your return is due April 15, 2021.

If you cannot file by April 15, 2021, to avoid penalties you must file an extension by submitting Form 4868 to the IRS by April 15, 2021. This extension extends your return filing due date to October 15, 2021. Be aware that this extension does not extend the time to pay your IRS tax liability, but merely extends your return filing due date. To avoid late payment penalties, you may need to make a payment to the IRS by April 15, 2021.

Likewise, the IRS has not extended the deadlines for making estimated tax payments in 2021. If you are required to make estimated tax payments, individuals must submit payments by the following dates:

FOR THE PERIOD:	PAY BY:
Jan. 1 – March 31	April 15, 2021
April 1 – May 31	June 15, 2021
June 1 – Aug. 31	Sept. 15, 2021
Sept. 1 – Dec. 31	Jan. 17, 2022*

* You do not have to make this estimated payment if you file your income tax return and pay the entire amount by January 31, 2022.

Minnesota Tax Return Due Dates

Similarly, Minnesota has not extended the filing deadline for your 2020 individual income tax return.

Minnesota requires taxpayers to file their 2020 individual income tax returns by April 15, 2021. Minnesota does allow an extension to file returns until October 15, 2021. No special form is needed to file for this extension. It is an automatic grace period provided to taxpayers. However, to avoid a late payment penalty, you must pay your Minnesota tax liability by April 15, 2021.

Minnesota has not extended any estimated tax payments due in 2021. The due dates for making Minnesota estimated tax payments are the same as for federal estimated tax payments, which are outlined above.

Although Minnesota has not extended the various due dates, it is abating penalties due to reasonable cause, which may include being negatively affected by the COVID-19 pandemic. Please reach out to a Moss & Barnett attorney to help evaluate whether your circumstances constitute reasonable cause or if you have questions regarding the tax filing deadlines.

2 Company Expenses Paid with Forgiven PPP Loan Proceeds Are Tax Deductible

The Consolidated Appropriations Act, 2021 (the “Act”) clarifies the treatment of business expenses paid with Paycheck Protection Program (“PPP”) loan proceeds that were subsequently forgiven. Prior to the Act, the Internal Revenue Service (“IRS”) issued guidance that businesses could NOT claim a tax deduction for business expenses that were paid with forgiven PPP loan proceeds. The IRS position was that businesses would recognize a “double benefit” since the forgiven PPP loan proceeds were excluded from taxable income. The Act reverses the IRS position and provides that such expenses are tax deductible. Please note that some states have taken a position that expenses paid with forgiven PPP loan proceeds are NOT tax deductible for state income tax purposes.

If you would like assistance assuring best practices in these areas, please contact your attorney at Moss & Barnett.

Team News

Brian T. Grogan and James J. Vedder Re-elected to Moss & Barnett Board of Directors

Brian T. Grogan and James J. Vedder were re-elected to three-year terms as members of Moss & Barnett's Board of Directors, effective January 1, 2021.

Brian T. Grogan serves as the firm's President and Chief Executive Officer and is a member of the firm's business law and communications practice groups. He represents local units of government and municipal entities throughout the country on communications law issues including contract negotiations and regulatory proceedings. Brian also advises and represents broadband service providers, content providers, and enhanced service providers in contract negotiations, sales and marketing disputes, and cybersecurity compliance.



James J. Vedder

James J. Vedder serves as a Director of the firm and is a member of the firm's family law team. He has significant trial and settlement experience in complex marital dissolution matters, including the division of marital and nonmarital assets, the division of closely held businesses, spousal maintenance, child support, and custody issues. Jim brings a compassionate approach to difficult family law cases in both alternative dispute resolution forums and litigation.

Brian and Jim will each continue practicing law on a full-time basis in addition to handling their management responsibilities. They are joined on the board by co-directors, **John P. Boyle**, **Kevin M. Busch**, **Jana Aune Deach**, and **Timothy L. Gustin**.

Moss & Barnett Named a "Best Law Firm" by U.S. News – Best Lawyers® for 2021



Moss & Barnett is pleased to announce that, for the 11th consecutive year, the firm has been named a "Best Law Firm" by *U.S. News – Best Lawyers®* for 2021.

Firms included in the 2021 "Best Law Firms" list are recognized for professional excellence with persistently impressive ratings from clients and peers. Achieving a tiered ranking signals a unique combination of quality law practice and breadth of legal expertise. Ranked firms, presented

in tiers, are listed on a national and regional-based scale. Receiving a tier designation reflects the high level of respect a firm has earned among other leading lawyers and clients in the same communities and the same practice areas for their abilities, their professionalism, and their integrity. Moss & Barnett is nationally ranked in three practice areas and regionally ranked in 17 practice areas.

"The ranking of Moss & Barnett as a 'Best Law Firm' by *U.S. News – Best Lawyers®* for 2021 is a tribute to all of our professionals and dedicated staff," says Moss & Barnett President and Chief Executive Officer, **Brian T. Grogan**.

Team News

Moss & Barnett Announces New Shareholders



Kathy Y. Allen



Kelly C. Engebretson



Brittney M. Miller



John M. Schmid



Alex R. Schoephoerster

Moss & Barnett is pleased to announce that Kathy Y. Allen, Kelly C. Engebretson, Brittney M. Miller, John M. Schmid, and Alex R. Schoephoerster have become shareholders in the firm.

Kathy Y. Allen represents lenders, borrowers, and servicers in connection with complex real estate and other commercial transactions, focusing on the areas of multifamily housing, finance development, and servicing. She primarily represents lenders who originate loans that are later sold to Freddie Mac, for multifamily housing projects around the country.

Kelly C. Engebretson assists businesses and individuals with their litigation needs, including commercial and business disputes, construction disputes, shareholder disputes, professional liability

claims, personal torts, and a variety of other areas. She also provides regulatory and compliance counsel for public utilities and represents those clients before state regulatory bodies in litigation matters.

Brittney M. Miller assists clients in all family-related matters, including parenting, support, division of assets, stepparent and same-sex adoptions, antenuptial agreements, and many other issues confronting modern families. She has extensive experience with cases involving complex social and financial issues at both the trial and appellate court levels.

John M. Schmid primarily represents lenders that originate and sell multifamily mortgage loans to Freddie Mac and Fannie Mae. In all aspects of his practice, he examines and resolves title issues affecting

real estate. He works with clients to help close their deals in diverse markets all over the country, many with complex features such as targeted affordable housing, ground lease transactions, and joint ventures.

Alex R. Schoephoerster provides strategic advice to clients in the areas of contract law, entity formation, fundraising, commercial transactions, estate planning and succession planning, real estate, mergers and acquisitions, buy-sell agreements, and general business practices. He is also well-known for advising emerging companies and entrepreneurs on a suite of startup and growth matters.

Congratulations to these new firm leaders.

Moss & Barnett's COVID-19 Resource Page



The COVID-19 virus is having significant and rapidly changing legal implications for both businesses and individuals. Moss & Barnett has created a resource page to provide information that may be helpful in your decision-making. We know that this is a difficult and stressful time for everyone, and new challenges will emerge as this situation continues to evolve. Together, we are well-equipped to navigate these challenges and overcome these trying times.

Visit [LawMoss.com/news-moss-and-barnett-covid-19-resource-page](https://www.lawmoss.com/news-moss-and-barnett-covid-19-resource-page) to learn more.

Demand For Commercial Office Space Is Changing But Offices Are Not Obsolete

Nearly one year ago, the COVID-19 pandemic caused many employers to shutter their offices indefinitely. The abrupt shift to remote work changed the atmosphere and economic reality of downtown and metro areas. But with the rollout of multiple COVID-19 vaccines, there is reason to be optimistic about a comeback for these business districts, including in the Twin Cities.

Remote Work & Socially Distant Office Spaces

The shift to remote work has led many companies to reevaluate their office space needs, especially if remote work did not result in a reduction in productivity. At the same time, there are many employees who are expressing a preference for remote work or some hybrid-model. For these reasons, remote work is unlikely to end even after the pandemic does. Consider these statistics:

- According to a recent Gartner CFO Survey, 74% of chief financial officers and other finance executives expect they will move at least 5% of their onsite workforce to remote work after the pandemic.
- In the United States, the number of employees working from home is estimated to increase from 5%-6% of employees working from home prior to the pandemic to between 10%-11% after.

However, an increase in remote work does not necessarily mean a decrease in demand for commercial office space. Cushman and Wakefield, one of the world's largest real estate service firms, recently conducted a study about the future of the office real estate market. One of the findings from the study is that there may be a reversal of the pre-pandemic trend to designate less office space to each employee. This trend was the product of the open office concept — a design aesthetic focused on large common areas and eliminating individual offices. But in a post-pandemic world, more space will be needed per employee to adequately socially distance, which could actually result in an increased demand for commercial office space.

A Promising Prediction

According to the Cushman and Wakefield study referenced above, the office real estate market will recover, albeit gradually. The firm predicted that global office vacancies will likely return to pre-COVID levels by the year 2025. This prediction is supported by the fact that large companies like Facebook and Amazon have continued to acquire and grow their office space during the pandemic.

A Local Perspective

The Twin Cities office real estate market was certainly not immune to the effects of the pandemic. The vacancy rate for the Minneapolis-St. Paul Market for 2020 was 14% for all properties, which is a four-year high. While asking rates from landlords generally held steady in the Twin Cities area in 2020, more tenant-friendly concession packages were also offered.

Yet, there are signs the market will bounce back. The fact that a number of development projects in downtown Minneapolis moved forward despite the pandemic suggests continued business confidence in the downtown area. One such project is the construction of what will be one of the tallest buildings in downtown Minneapolis, which will offer commercial office space and be home to a five-star luxury hotel.

In the past few months, there has been a noticeable increase in foot traffic in the downtown Minneapolis skyways as well as more people frequenting coffee shops and lunch spots — signaling that many offices are reopening and employees are heading back to the office for work. If COVID-19 cases continue to trend downward in Minnesota as they have during the beginning of 2021, it is likely downtown and metro areas will continue to see a resurgence in economic activity.

Conclusion

While the full impact of COVID-19 on the commercial office real estate market and downtown economies will be unknown for some time, the data and anecdotal evidence available provide hope for an eventual return to pre-pandemic life.

Moss and Barnett offices remain open in Minneapolis and St. Cloud to meet client needs and provide high quality legal services.



Chelsy M. Jantsch

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Chelsy M. Jantsch is a member of our multifamily and commercial real estate finance group. She has extensive experience representing Freddie Mac, Fannie Mae, and life insurance lenders in the financing of multifamily and commercial projects around the country.

Are Employer-Mandated COVID-19 Vaccinations Worth a Shot?



When Minnesota's first stay-at-home order took effect, many employers believed office closures would be short-term. But as the pandemic progressed, it became apparent that remote work would continue for an extended period of time. Now, with multiple COVID-19 vaccines becoming available, employers may be tempted to mandate vaccinations for their employees to accelerate returning to the office. Before doing so, employers should pause to consider the legal implications as well as possible alternatives to a mandated vaccination policy.

Federal Guidance

On December 16, 2020, the Equal Employment Opportunity Commission ("EEOC") issued revised guidance on whether employer-mandated COVID-19 vaccinations are allowed under federal law. While federal law generally permits employers to develop policies that mandate the COVID-19 vaccine, employers must still comply with pertinent anti-discrimination laws.

Americans with Disabilities Act

The Americans with Disabilities Act ("ADA") allows employers to create safety-based qualification standards for employees. A COVID-19 vaccination requirement may be considered a safety-based qualification standard, but legal issues may arise if a disability prevents an employee from receiving the COVID-19 vaccine. In that situation, the employer must engage in an individualized analysis:

- **Determine if the unvaccinated employee poses a direct threat to the worksite.**
- **If a direct threat exists, consider available reasonable accommodations to eliminate or reduce the threat (e.g., mask wearing, social distancing, schedule changes, and isolation to a particular work area). Only if there is no way for the employer to provide reasonable accommodations can the unvaccinated employee be excluded from the workplace.**

Under the ADA, employers must also be mindful when requesting proof of vaccination. Although the vaccine itself is not a medical examination and asking for proof of the vaccination is not a disability-related inquiry, subsequent questions regarding why

the employee did not receive a vaccination may elicit information about a disability. The ADA requires that disability-related inquiries be job related and consistent with a business necessity.

Title VII of the Civil Rights Act

COVID-19 vaccination policies may also implicate Title VII of the Civil Rights Act, which prohibits discrimination on the basis of religion. If an employee opts out of the COVID-19 vaccine due to a sincerely held religious belief, the employer should be prepared to provide reasonable accommodations.

The EEOC recommends that employers assume an employee's request for religious accommodation is based on a sincerely held belief. However, additional supporting information may be necessary in some situations.

Alternatives to a Vaccination Mandate

For some employers, a COVID-19 vaccination mandate may prove difficult to establish or enforce. There are numerous alternatives to a mandate, including incentivizing employees to obtain the vaccine. For example, employers may wish to consider offering paid leave to obtain the vaccine or providing a small bonus or other benefit upon vaccination.

Conclusion

This is an emerging area of law, and new issues may arise as employers implement COVID-19 vaccination policies. To better understand the options available to your workplace, please contact your attorney at Moss & Barnett.



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Megan J. Renslow is a member of our litigation team. She assists business and individuals with commercial litigation disputes.

Three New Attorneys Have Joined Our Team

Brianna has wide-ranging business law experience representing privately held businesses on entity formation, corporate governance, operating agreements, website policies, trademarks, and employment law. In addition, she has guided clients through merger and acquisition transactions structured as share sales, asset sales, and corporate reorganizations. She also advises commercial real estate clients with corporate matters regarding commercial development projects. Combining a background in business and prior in-house experience, Brianna excels at translating complex themes for her clients while finding pragmatic and creative solutions to difficult problems. She received her J.D. from the University of Minnesota Law School and her B.A. from the University of Minnesota-Twin Cities.

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Elise focuses her practice on construction and commercial litigation. She enjoys working with clients to understand the specific issue or dispute at hand and formulating a plan to best address each client's individual goals. Elise has experience advocating for and advising owners, general contractors, and subcontractors on a variety of matters, including payment, construction defect, and termination disputes. She received her J.D., *summa cum laude*, from William Mitchell College of Law and her B.S., *summa cum laude*, from Iowa State University. Elise served as editor for the *William Mitchell Law Review* and secretary of the William Mitchell Minnesota Justice Foundation and was a member of the American Association of Justice Mock Trial Team and Warren E. Burger Inn of Court.

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Brittany advises individuals, businesses, and lenders in real estate, corporate, and lending transactions. This includes lenders that originate and sell multifamily mortgage loans to Freddie Mac and Fannie Mae. Her goals with every transaction are to ease her client's concerns and to make sure her clients are as protected as they can be with the documents they sign. Brittany has a diverse professional background that gives her a unique perspective as an attorney. She has worked for a Fortune 500 utility company where most of her time was spent analyzing real estate documents, including easements, deeds, and leases, and she has also clerked for a Hennepin County judge and managed a caseload of 200 criminal cases. Brittany received her J.D. from the University of St. Thomas School of Law and her B.A. from the College of Saint Benedict.

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Fifteen Moss & Barnett Lawyers Named to 2021 *Best Lawyers*® List

Moss & Barnett is pleased to announce that 12 lawyers have been included in the 2021 edition of *The Best Lawyers in America*. Additionally, three lawyers from the firm are recognized in the inaugural edition of *Best Lawyers: Ones to Watch*.

Recognition by *Best Lawyers* is based entirely on peer review. Lawyers are reviewed on the basis of professional expertise, and undergo an authentication process to make sure they are in current practice and in good standing. *Best Lawyers: Ones to Watch*, the newest award initiative from *Best Lawyers*, recognizes attorneys who are earlier in their careers for outstanding professional excellence in private practice in the United States.

Moss & Barnett would like to congratulate the following lawyers named to 2021 *Best Lawyers* publications:

The Best Lawyers in America



Cindy J. Ackerman
Trusts and Estates



Yuri B. Berndt
Tax, Tax Law, and
Trusts and Estates



Kevin M. Busch
Banking and Finance Law, Financial Services
Regulation Law, Banking & Financing Litigation,
and Securitization and Structured Finance Law



Jana Aune Deach
Family Law



Richard J. Johnson
Administrative / Regulatory Law
and Energy Law



Charles E. Jones
Professional Malpractice
Law-Defendants



Richard J. Kelber
Corporate Law and
Mergers and Acquisitions Law



Susan C. Rhode
Family Law and
Family Law Mediation



Dave F. Senger
Trusts and Estates



Thomas J. Shroyer
Commercial Litigation, Intellectual Property
Litigation, Securities Litigation, and
Professional Malpractice Law-Defendants

Best Lawyers: Ones to Watch



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Corporate Law



James J. Vedder
Family Law



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Trusts and Estates



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