HEALTH CARE LAW ADVISOR ALERT: TELEHEALTH IN WISCONSIN (PART 1 OF 2)

O'NEILCANNON
HOLLMAN DEJONG & LAING S.C.

I. Expansion of Telehealth to Meet Clinical Need

Federal and state governments have resolved traditional barriers to telehealth – including complexity of billing, lower reimbursement and privacy and security concerns – to facilitate the safe provision of medical services during the COVID-19 pandemic.[i] The first article in this two-part series highlights basic standards for regulatory compliance in the design of telehealth policies. The second article will address the practitioner's obligation to minimize patient harm (and thus practitioner liability) with attention to the medical standard of care when assessing when and how telehealth is appropriate for each patient.

II. Mechanics of Telehealth Compliance

A. Minimum Standards for Telehealth Practice

A Wisconsin physician planning to provide treatment recommendations (including a prescription) by use of a website-based platform must observe requirements promulgated by the Wisconsin medical examining board to comply with state law and (when applicable) to receive payment from Wisconsin Medicaid.[ii] While the requirement that the physician be licensed to practice medicine in the state has been suspended during the COVID-19 emergency,[iii] the following formalities must still be observed during the pandemic to protect the integrity of the telemedicine encounter:

1. Physician's name and contact information must be made available to the patient;
2. Informed consent must be obtained;[iv]
3. A documented evaluation (including a medical history) must be performed. If needed to satisfy standards of minimally competent medical practice, an examination, evaluation, and/or diagnostic tests are also required.
4. A patient health care record must be prepared and maintained.[v]

Under permanent Wisconsin telemedicine regulations, a physician-patient relationship may be initially established by use of two-way electronic communications, but not by use of audio-only telephone, email messages or text messages.[vi] Conditioning treatment of a patient upon the use of telehealth is expressly prohibited.[vii]

B. Reimbursable Telehealth Services

1. Wisconsin Medicaid & Telehealth

Wisconsin lawmakers began expanding the services and communications that may be provided by telehealth prior to the COVID-19 pandemic. The Wisconsin Department of Health Services ("DHS") continues to broaden the range of medical services covered by the state's medical assistance program when delivered remotely, both during the public health emergency and beyond.[viii] DHS is adding Medicaid coverage for *currently covered services* when provided using a telehealth platform if *functionally equivalent to an in-person visit* (interactive synchronous technology).[ix] DHS's criteria for "face-to-face equivalence" for interactive telehealth services includes the use of "audio, video, or telecommunication technology," but only if there is "no reduction in quality, safety, or effectiveness."[x] Audio-only phone communication that can be delivered with a functional equivalency to face-to-face service will be covered during the COVID-19 pandemic.[xi] DHS emphasizes that documentation must support the service rendered.[xii] For further explanation of these policies, visit ForwardHealth, Telehealth, Telehealth Expansion and Related Resources for Providers.[xiii]

Telehealth coverage expansion applies to all services currently indicated in topic (#510) of the FowardHealth Online Handbook (permanent policy), and additional services temporarily allowed for telehealth are published in ForwardHealth Updates.[xiv] For example, ForwardHealth is expanding coverage to include certain synchronous (real-time) and asynchronous (not real-time) services such as remote patient monitoring and provider-to-provider consultations. DHS also plans to roll out expansion updates particular to specific services areas, such as therapy and behavioral health. DHS will use a phased approach to its expansion of telehealth services, keeping providers informed of expansion of coverage via the ForwardHealth website described above.

In addition to coverage criteria relating to the mode of telehealth services, a provider must be mindful of rules governing the logistics of telehealth visits. Wisconsin Medical Assistance (Medicaid) places no restriction on the location of the provider (permanent policy), which may include physicians, nurse practitioners, Ph.D. psychologists, psychiatrists and others.[xv] Beginning in March 2020, ForwardHealth began allowing coverage irrespective of the location of the patient (permanent policy).[xvi] However, only the following sites are currently eligible for a facility fee: hospitals, including emergency departments, office/clinics, and skilled nursing facilities.[xvii]

2. Federal Medicare & Telehealth

The Centers for Medicare and Medicaid Services ("CMS") greatly expanded access to

Medicare telehealth services based upon the regulatory flexibilities granted under Social Security Act § 1135 waiver authority and the Coronavirus Preparedness and Response Supplemental Appropriations Act. Currently, Medicare will reimburse both synchronous video visits and also brief communication technology-based services ("CTBS") for responses to Medicare Part B beneficiaries by telephone, audio/video, secure text messaging or by use of a patient portal.[xviii] Reimbursement for CTBS is limited to patients with an established (or exiting) relationship with a physician or certain practitioners. The billing codes for CTBS represent ***brief, patient-initiated*** communication services and do not replace full evaluation and treatment services covered under the Medicare benefit and described by existing CPT codes. To meet the criteria for medical necessity, CTBS must require clinical decision-making and not be for administrative or scheduling purposes. The patient must verbally consent to these types of services at least annually.

To be covered by Medicare, the CTBS must not be related to a medical visit within the previous seven (7) days and cannot lead to a medical visit within the next twenty-four (24) hours (or soonest appointment available).[xix] For Medicare reimbursement, providers must confirm that the particular diagnostic benefit falls within the description of CTBS codes. For example, CTBS codes do not include the audiology diagnostic benefit category.[xx] DHS applies similar requirements to billing for "telephone evaluation and management services" covered under Wisconsin Medicare.[xxi]

During the COVID-19 pandemic, Medicare will reimburse telehealth services at the same rate as regular, in-person visits. The level of reimbursement that is approved following the public health emergency will impact the availability of telehealth services.

C. Documentation Requirements

DHS policy (published via ForwardHealth updates available online) is to require that all services provided via telehealth be thoroughly documented in the member's medical record in the same manner as services provided face-to-face.[xxii] Providers must develop and implement their own methods of informed consent to confirm that a member agrees to receive services via telehealth. ForwardHealth considers verbal consent to receiving services via telehealth an acceptable method of informed consent when it is documented in the member's medical record.[xxiii] Documentation for originating sites (patient location) must support the member's presence in order to submit a claim for the originating site facility fee. In addition, if the originating site provides and bills for services and also the originating site facility fee, documentation in the member's medical record should distinguish between the unique services provided.[xxiv]

DHS is temporarily allowing supervision requirements for paraprofessional providers to be met via telehealth. Supervision must be documented according to existing benefit policy.[xxv]

III. Additional Considerations for Telehealth

E-Prescribing – Many states limit the prescribing of controlled substances based solely on telehealth examination. Generally speaking, the U.S. Drug Enforcement Administration ("DEA") requires a telemedicine provider to have an in-person medical evaluation of a patient prior to prescribing a controlled substance for the patient, absent an exception. However, the DEA issued notice in March 2020 that this requirement is waived for the duration of the COVID-19 public health emergency.[xxvi]

Privacy & Security – The Office for Civil Rights announced on March 17, 2020 that they will not impose penalties for noncompliance with the Health Insurance Portability and Accountability Act of 1996 regulatory requirements for remote communications technologies in connection with the good faith provision of telehealth during the national COVID-19 public health emergency. DHS has issued an update clarifying guidance regarding federal enforcement of the Health Insurance Portability and Accountability Act of 1996 regulatory requirements during the COVID-19 pandemic.[xxvii]

***Practicing Telehealth Across State Lines* –** Wisconsin has adopted the Federation of State Medical Boards' Interstate Licensure Compact, which aims to expediate physician licenses for uses like telemedicine in states that adopt the compact. Wisconsin providers serving patients in other states must consult local state laws governing the physician-patient relationship and the use of telemedicine.

When a Wisconsin provider provides telemedicine services to a patient located outside of the state, legal review for choice of law and choice of forum should be undertaken. For example, the laws of the state in which each patient is located should be evaluated for: (1) statute of limitations; (2) standard of care; (3) limitations of liability; and (4) unique provisions governing the establishment or termination of the physician/patient relationship. To manage these challenges in a large telemedicine practice, a provider may need to consider establishing different legal entities for the practice of medicine in different states.

OCHDL will continue to monitor changes in regulations and policy impacting telemedicine. Our next blog post will address medical malpractice risk and telemedicine policies. For more information on these topics, contact Marguerite Hammes at 414-276-5000 or marguerite.hammes@wilaw.com.

[i] SR Health, A Complete Guide to Seeing Patients Virtually and Getting Paid for It, available at https://www.srhealth.com/resources/telemedicine-guide

[ii] *See* WIS. ADMIN. CODE § MED 24.07 (1).

[iii] In the ordinary course, a physician practicing telemedicine in Wisconsin must be licensed to practice medicine and surgery by the medical examining board as required by Wis. Admin. Code § MED 24.04. *See* Wis. Admin. Code § MED 24.07 (1). However, Wis. Admin. Code § MED 24.04 (requiring a physician practicing medicine in Wisconsin to be licensed by the medical examining board) and 24.07(1)(a) (applying licensing requirements to medical practice by telemedicine in the state) have been suspended during the COVID-19 emergency. *See* Governor Tony Evers Emergency Order #16 Related to Certain Health Care Providers and the Department of Safety and Professional Services Credentialing, dated March 27, 2020.

[iv] WIS. ADMIN. CODE § MED 24.07 (1) (citing WIS. STAT. § 448.30 and Ch. MED. 18).

[v] WIS. ADMIN. CODE § MED 24.07(1) (citing ch. MED. 21).

[vi] *See id.* § MED 24.03.

[vii] ForwardHealth Update No. 2020-09, "Changes to ForwardHealth Telehealth Policies for Covered Services, Originating Sites, and Federally Qualified Health Centers" (March 18, 2020).

[viii] *See* WIS. STAT. § 49.45(61)(b); § 49.46(2)(b)(21)-(23). DHS is expanding the permanent definition of telehealth to encompass the "practice of health care delivery, diagnosis, consultation, treatment, or transfer of medically relevant data by means of audio, video, or data communications that are used either during a patient visit or consultation or are used to transfer medically relevant data about a patient." *See* ForwardHealth, Telehealth, Telehealth Expansion and Related Resources for Providers, available at https://www.forwardhealth.wi.gov/WIPortal/content/html/news/telehealth_resources.html.spage *See also* Letter to ForwardHealth Providers from Jim Jones, State Medicaid Director, re: Wisconsin Medicaid Response to the COVID-19 Outbreak; FowardHealth #510.

[ix] *See* ForwardHealth Update 2020-09, *supra* note vii (permanent policy); ForwardHealth Update 2020-12, "Temporary Changes to Telehealth Policy and Clarifications for Behavioral Health and Targeted Case Management Providers" (Revised May 8, 2020); ForwardHealth Update 2020-15, "Additional Services to be Provided Via Telehealth" (Revised May 8, 2020) (temporary expansion policy). *See also* Brooke Anderson, Benefits Policy Section Chief, Telehealth Expansion: Acute and Primary Services, available at https://www.dhs.wisconsin.gov/telehealth/telehealth-expansion-all-provider.pdf

[x] *See* ForwardHealth, Telehealth, Telehealth Expansion and Related Resources for Providers, *supra* note viii. *See also* Brooke Anderson, Benefits Policy Section Chief, Telehealth Expansion: Acute and Primary Services, *supra* note ix.

[xi] ForwardHealth Update 2020-12, *supra* note ix.

[xii] ForwardHealth, Telehealth, Telehealth Expansion and Related Resources for Providers, *supra* note viii.

[xiii] For further explanation of these policies, visit ForwardHealth, Telehealth, Telehealth Expansion and Related Resources for Providers, *supra* note viii. *See also* Brooke Anderson, Benefits Policy Section Chief, Telehealth Expansion: Acute and Primary Services, *supra* note ix.

[xiv] ForwardHealth Update 2020-15, *supra* note ix.

[xv] ForwardHealth Update 2020-12, *supra* note ix (permanent policy with respect to provider location but temporary with respect to other policy changes).

[xvi] ForwardHealth Update 2020-09, *supra* note ix (permanent policy changes).

[xvii] **ForwardHealth, Topic 510, Telehealth, available at https://www.forwardhealth.wi.gov/WIPortal/Subsystem/KW/Print.aspx?ia=1&p=1&sa=1&s=2&c=61&nt=Telehealth**

[xviii] **Centers for Medicare and Medicaid Services, Medicare Telemedicine Health Care Provider Fact Sheet, available at https://www.cms.gov/newsroom/fact-sheets/medicare-telemedicine-health-care-provider-fact-sheet**

[xix] ***See id.***

[xx] **American Speech-Language-Hearing Association, Use of Communication Technology-Based Services During Caronavirus/COVID-19 (June 6, 2020), available at https://www.asha.org/Practice/reimbursement/medicare/Use-of-E-Visit-Codes-for-Medicare-Part-B-Services-During-Coronavirus/**

[xxi] **ForwardHealth Update 2020-09, *supra* note vii.**

[xxii] **ForwardHealth Update 2020-12, *supra* note ix (citing Wis. Admin. Code § DHS 106.02(9); ForwardHealth Online Handbook #201 (Financial Records), #202 (Medical Records); #203 (Preparation and Maintenance of Records); #204 (Records Retention); #1640 (Availability of Records to Authorized Personnel)).**

[xxiii] ***See* ForwardHealth Update 2020-15, *supra* note ix.**

[xxiv] ***See* ForwardHealth Update 2020-12, *supra* note ix.**

[xxv] ***See id.***

[xxvi] **DEA Press Release, DEA's Response to COVID-19 (March 20, 2020), available at https://www.dea.gov/press-releases/2020/03/20/deas-response-covid-19**

[xxvii] ***See* ForwardHealth Update 2020-12, *supra* note ix.**

TAX & WEALTH ADVISOR ALERT: CONSIDERATIONS WHEN APPOINTING A FIDUCIARY

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Various estate planning documents require you to appoint someone to act on your behalf. These appointees are your "fiduciaries" and include your personal representative, guardian for minor children, trustee, attorney-in-fact, and health care agent.

Often times, people name certain individuals for these roles without much consideration, or

they may consider the wrong criteria. Below is a general description of each fiduciary role and a few suggestions on what to consider when deciding who to appoint to those roles. In general, you should carefully consider the skillset each role requires and whether the person you would like to appoint possesses those skills.

Personal Representative

You name your personal representative in your Last Will and Testament. Your personal representative will be responsible for overseeing the administration of your estate during the probate process. Consider naming someone who lives nearby so they can administer your estate and someone who will have the time to file all the necessary paperwork.

Guardian

You name a guardian for your minor children in your Last Will and Testament as well. This person will be responsible for taking care of your minor children. Consider naming someone who lives close by so your children won't have to move (or move very far), has similar values as you and will raise your children similar to how you would, and will have the energy to raise young children or children who require extra care and attention.

Trustee

You appoint your trustee in your trust agreement. Your trustee will administer the trust agreement pursuant to its terms, manage and invest the trust assets, and make distributions to your beneficiaries (sometimes at their own discretion). Consider naming someone who will be able to understand the document and its terms, has a financial background and can manage your assets effectively, and will not be placed in an uncomfortable situation if they decide to refuse a beneficiary's request for a distribution. If you cannot think of someone with the requisite skillset, or if you have complex assets that will need to be managed, consider naming a professional fiduciary.

Attorney-in-Fact

You name your attorney-in-fact in your Financial Power of Attorney. This person will manage your financial affairs in the event you become incapacitated. Consider naming someone who has a financial background, lives nearby and can easily manage your financial affairs, and who is familiar with your financial affairs. If you cannot think of someone with the requisite skillset or someone you completely trust to have these broad powers, consider naming a professional fiduciary.

Health Care Agent

You name your health care agent in your Power of Attorney for Health Care. This person will

make medical decisions for you in the event you become incapacitated. Consider naming someone who has a medical background or who will be capable of understanding your medical situation, will respect your wishes regarding medical treatment, and will be able to carry out your wishes regarding medical treatment even if others disagree.

As you can see, there are several things to consider when selecting a fiduciary. If you would like more information on these fiduciary roles, or if you would like to create or update an estate plan, please contact attorneys Carl D. Holborn, or Kelly M. Spott.

OVERVIEW OF DATA PROTECTION LAWS IN WISCONSIN

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Almost every organization in the world collects personal data from individuals, in one form or another. Indeed, most websites collect consumer information automatically. For this reason, every business must become familiar with relevant data protection laws and understand how to collect, store, use, and share data in compliance with these laws. Organizations that fail to comply with data privacy laws could incur substantial fines and other damaging consequences.

This blog post intends to give Wisconsin organizations a basic overview of consumer data privacy laws, their significance, and how such laws may apply to them.

What is Privacy Law?

"Privacy law" refers to laws governing the regulation, storage, sharing, and use of personally identifiable information, personal healthcare information, financial information, and other types of personal information. While both state and federal governments have various laws governing certain types of information privacy, as of now, no federal law exists to protect consumer data.

Given the absence of federal protection and the number of internet companies collecting—and often misusing—consumer data, several states, including Wisconsin, have developed or are beginning to develop state statutes designed to protect residents from data misuse online. Together with international data protection regulations, these state laws

create an increasingly complex web of obligations for any organization collecting personal data.

What is Personally Identifiable Information?

The key to understanding and properly complying with consumer data privacy laws is understanding the term “Personally Identifiable Information” (PII). In general, PII is any information that may be used to identify an individual. Such information may include not only names, addresses, and government IDs, but also internet protocol (IP) addresses, cookie identifiers, and other automated identifiers.

Despite their many commonalities, international and domestic privacy laws have subtle differences in their categorization of PII. For example, some privacy laws allow pseudonymized or anonymized data to be excluded from PII. Pseudonymization is a reversible process that substitutes the original personal information with an alias or pseudonym such that additional information is required to re-identify the data subject. In contrast, anonymization irreversibly eliminates all ways of identifying the data subject. Similarly, IP addresses may be either static (i.e., specific to a particular computing device) or dynamic (i.e., the IP address changes over time). Static IP addresses are likely to be considered PII whereas dynamic IP addresses may not, depending on the applicable law.

An Overview of Key Data Protection Laws

Modern consumer data protection laws generally articulate both consumers’ rights to data privacy and the responsibilities of entities that collect and process personal data.

Concerning consumers, most consumer data privacy laws establish that consumers have any combination of five fundamental rights, including the right to:

- be informed that data is being collected;
- access collected data;
- rectify incorrect data;
- erase collected data; and
- object to certain uses of that data.

While these diverse privacy regimes have many similarities, they often have substantial differences, including varying definitions, scope, punishment for violations, and jurisdiction. Therefore, it’s critical to determine which laws apply to you and to thoroughly review those laws to understand your organization’s compliance obligations.

a. The European Union–General Data Protection Regulation (GDPR)

The European Union’s (EU) data protection regulation, known as the GDPR, is the world’s first comprehensive data protection law. Having gone into effect in 2018, the GDPR interprets PII

extremely broadly and takes substantial steps to protect such PII. It covers not only IP addresses and cookies but also certain forms of pseudonymized data and metadata. The law is revolutionary in that it applies to all entities possessing or processing the personal data of EU residents, regardless of an entity's nationality. Therefore, U.S. companies who deal with EU citizens as customers, users, or clients are likely to be subject to GDPR rules and regulations.

It is crucial to determine whether your organization is subject to GDPR rules. Should EU regulators determine that a company subject to the GDPR has violated any of the GDPR articles, the company may be subject to fines for as much as €20 million or 4% of the company's global turnover, whichever is higher.

b. The California Consumer Privacy Act (CCPA)

Effective as of January 1, 2020, the CCPA is the first significant consumer data protection act in the United States. Like the GDPR, the CCPA defines PII to include any information that could, directly or indirectly, lead to the identification of any user or household.

Also similar to the GDPR, the CCPA is applied broadly to businesses globally should they do business in California. The CCPA includes specific language defining what businesses are subject to the CCPA. The CCPA applies to any for-profit business that collects, possesses, or otherwise handles the PII of California residents AND that meets any of the following criteria:

1) has annual revenues over $25 million;

2) possesses the personal information of 50,000 or more California consumers, households, or devices in any calendar year; OR

3) earns more than half of its annual revenue from selling consumers' PII.

This statute is intended to be broadly applied to commercial enterprises, regardless of geographical location and whether they explicitly target California residents. Because most businesses operate websites that automatically collect PII, such as cookies or IP addresses, even small non-California businesses risk falling under the CCPA by having a passive online presence.

The California Attorney General may fine companies up to $2,500 per non-willful violation and up to $7,500 per willful violation—amounts that add up quickly if a violation affects thousands (or millions) of users.

c. Other Relevant Consumer Data Protection Laws

Apart from California, 43 other states have made or are in the process of introducing forms of

consumer data privacy bills. Wisconsin introduced three separate bills at the beginning of 2020 that would create rights and obligations concerning consumer data privacy similar to those created by the CCPA and the GDPR.

Currently, Maine and Nevada are the only two other states to have signed consumer data privacy protection bills into laws. The Maine privacy law applies only to internet service providers and not to independent businesses that may possess PII of users. The Nevada law is similar to CCPA in many ways, but it doesn't apply to non-resident companies that do not actively do business in the state.

Additionally, in March 2020 Senator Jerry Moran (R-Kan.), introduced the *Consumer Data Privacy and Security Act*; however, the federal Congress has yet to take action on the proposed bill. If passed, this federal legislation would create a clear federal standard for consumer data protection and create specific rights of consumers to access, correct, and delete personal information. The proposed bill would also create substantial obligations for businesses, including those in Wisconsin, that use, collect, or otherwise possess PII. Finally, the proposed bill would provide the Federal Trade Commission (FTC) with the specific authority to enforce these rights and obligations.

In conclusion, while there are currently no Wisconsin or federal laws directly governing the regulation, storage, sharing, and use of personally identifiable information, Wisconsin businesses could be subject to the requirements of the CCPA or the GDPR. Additionally, it seems likely that in the near future, either Wisconsin or the federal government will pass a law that directly impacts Wisconsin businesses. Moving forward, it will be very important to understand how your company's collection of personal data may be impacted.

O'Neil, Cannon, Hollman, DeJong & Laing remains open and ready to help you.

ATTORNEY JOSEPH GUMINA FEATURED IN MERIT SHOP CONTRACTOR

O'NEILCANNON
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Recently, the *Merit Shop Contractor* magazine featured Attorney Joseph Gumina's article entitled "COVID-19 & Liability." In the article, Attorney Gumina emphasizes methods for

construction employers to prevent and control worksite hazards relating to COVID-19. The article also discusses general safety and health mandates a construction employer should follow in order to help protect themselves from possible COVID-19 litigation. This article is a must read for all construction employers.

Read the full article here.

TAX & WEALTH ADVISOR ALERT: THE IMPORTANCE OF BENEFICIARY DESIGNATIONS

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Some of your most significant assets, like your life insurance and retirement accounts, ask you to make beneficiary designations. If you make valid beneficiary designations on these assets, then upon your death they will pass directly to your named beneficiaries without being subject to the probate process. Click here to view our article on probate and why you might want to avoid it.

Many people overlook the importance of beneficiary designations and neglect to name beneficiaries because they think their other estate planning documents will cover those assets. However, beneficiary designations operate independently from other estate planning documents, like a will or trust agreement. Therefore, you should make beneficiary designations because your other estate planning documents will not control how these assets are to be distributed and to whom they should be distributed. If you neglect to name beneficiaries, then these accounts or policies could become part of your estate and be subject to the probate process.

Just as it is important to make beneficiary designations, it is equally as important to review and, if necessary, update those designations. Major life events, changes in circumstances, or even a change of heart can all warrant an update to beneficiary designations. It is good practice to review your estate plan every three to five years, and each time you do so you should be reviewing your beneficiary designations.

Finally, it is important to consider any unintended consequences to naming someone as a beneficiary. For example, if a special needs person receives assets through a beneficiary

designation, then he or she may no longer be eligible for government benefits. In these circumstances and in others, you should consult with an estate planning attorney to discuss your options.

Beneficiary designations are an important part of your estate plan and require special attention. If you would like more information on beneficiary designations and estate planning in general, please contact attorneys Carl D. Holborn, or Kelly M. Spott.

EMPLOYMENT LAWSCENE ALERT: EMPLOYERS MUST IMMEDIATELY DECIDE WHETHER TO IMPLEMENT SEPTEMBER 1, 2020 PAYROLL TAX DEFERRAL

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On August 8, 2020, President Trump issued an Executive Memorandum directing the Secretary of the Treasury to defer the withholding, deposit, and payment of the employee portion of the Social Security tax (6.2% of wages) for the period beginning on September 1 and ending on December 31, 2020. The deferral applies for employees whose pre-tax bi-weekly wages or compensation is less than $4,000. On an annualized basis, this equates to a salary not exceeding $104,000.

The IRS recently issued limited guidance on the implementation of the deferral. Open issues and takeaways are summarized below.

Additional Detail

In addition to calling for the deferral of the payroll tax, the Memorandum directs the Secretary to explore avenues for eliminating the taxpayers' obligation to repay the deferred taxes in the future. It should be noted that only Congress, not the Secretary, has the authority to waive taxes.

The Memorandum does not provide detail on how the payroll tax deferral will be implemented. In related interviews, the Secretary commented that, while he hoped that many companies would participate, he couldn't force employers to stop collecting and

remitting payroll taxes. In other words, he suggested that the payroll tax deferral would be voluntary—a proposition not included in the Executive Memorandum.

Requests for Clarification

Uncertainty surrounding how to implement the payroll tax deferral resulted in requests from multiple trade groups for clarification, including an August 18 letter signed by 33 trade groups, including the U.S. Chamber of Commerce. The letter, submitted to the Secretary and to the respective leader of the U.S. Senate and of the U.S. House of Representatives, notes that under current law, the Memorandum creates a substantial tax liability for employees at the end of the deferral period.

While the stated purpose of the Memorandum was to provide wage earners with additional available spending money, unless Congress later acts to forgive liability for the deferred payroll tax, the affected earners will owe an increased tax bill next year. As the U.S. Chamber of Commerce letter maintains, the deferral "threatens to impose hardship on employees who will face a tax bill" in an amount of double the usual payroll deduction for Social Security (amounting to 12.4% of employee wages) in the first four months of 2021.

The following chart illustrates the U.S. Chamber of Commerce's assessment of the magnitude of the potential tax bill for employees compared to the immediate benefit of the deferral:

Annual Income	Bi-Weekly Pay	Increase in Take-Home Pay by Pay Period	Tax Bill Due in 2021 (based on 9 pay periods)
$35,000	$1,346.15	$83.46	$751.15
$50,000	$1,923.08	$119.23	$1,073.08
$75,000	$2,884.62	$178.85	$1,609.62
$104,000	$4,000	$248.00	$2,232.00

The U.S. Chamber of Commerce letter further states that many of its employer members would likely decline to implement the deferral, choosing instead to continue to withhold and remit to the government the payroll taxes required by law.

IRS Notice 2020-65

Late in the afternoon on August 28, 2020, the IRS issued Notice 2020-65 to provide guidance regarding the payroll tax deferral. The Notice clarifies that any deferred amounts must be recouped by being collected from employee wages and repaid during the period between January 1, 2021 and April 30, 2021. Interest and penalties begin to accrue May 1, 2021 on any unpaid amounts. While the Notice is silent on the issue, it is presumed, because of the

normal operation of payroll tax law, that employers would be responsible for paying any interest and penalties that accrue, in addition to paying any underlying deferred amounts that cannot be collected from employees.

Some questions about how to implement the deferral remain unanswered by the IRS guidance. Specifically, the guidance addresses neither self-employed individuals nor the method for reporting the deferral of taxes on IRS Forms 941 or W2. The guidance is also silent on how to collect deferred tax for an individual who is no longer employed for all or part of the 2021 repayment period. Staffing agencies, in particular, are concerned about employer exposure to the repayment cost in the event that employees for whom taxes were deferred are no longer employed during the repayment period. It is not clear that deducting the amount owed from an employee's final paycheck would be specifically permitted under either federal or state law, or any applicable bargaining agreements.

Decisions, Decisions

While some employers may welcome the ability to offer the payroll tax deferral to employees as a current relief measure, others may view with some reluctance the prospect of exposure to additional payroll tax costs coupled with the need to re-code payroll software effective September 1, 2020, January 1, 2021, and May 1, 2021. Implementing the current deferral and future double collection would also require careful and accurate communication to employees.

The IRS guidance leaves the door open for employers to avoid, rather than to implement the deferral, and to proceed, instead, to process payroll according the normal procedures. In the language of the guidance, an employer may, "if necessary, . . . make arrangements to otherwise collect the total Applicable Taxes from the employee."

O'Neil, Cannon, Hollman, DeJong & Laing remains open and ready to assist you. To discuss how the Memorandum, IRS guidance, and practical considerations relevant to the payroll tax deferral may apply to your business objectives and circumstances, please speak to your regular OCHDL contact.

JOHN G. GEHRINGER NAMED 2021 BEST LAWYERS® "LAWYER OF THE YEAR"

O'NEILCANNON
HOLLMAN DEJONG & LAING S.C.

John G. Gehringer was recently recognized by Best Lawyers as the 2021 "Lawyer of the Year" for Construction Law.

Only a single lawyer in each practice area and designated metropolitan area is honored as the "Lawyer of the Year," making this accolade particularly significant. Receiving this designation reflects the high level of respect a lawyer has earned among other leading lawyers in the same communities and the same practice areas for their abilities, their professionalism, and their integrity.

In addition to the "Lawyer of the Year" award, John G. Gehringer was also listed in the 2021 Edition of *The Best Lawyers in America* in the following practice areas:

- Commercial Litigation
- Corporate Law
- Real Estate Law

Best Lawyers has published their list for over three decades, earning the respect of the profession, the media, and the public as the most reliable, unbiased source of legal referrals. Since it was first published in 1983, *Best Lawyers* has become universally regarded as the definitive guide to legal excellence.

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20 OCHDL LAWYERS SELECTED AS 2021 BEST LAWYERS®; ANOTHER 5 NAMED BEST LAWYERS: ONES TO WATCH

O'NEILCANNON
HOLLMAN DEJONG & LAING S.C.

We are pleased to announce 20 of our lawyers have been included in the 2021 Edition of *The Best Lawyers in America,* and an additional five have been selected as 2021 *Best Lawyers: Ones to Watch*.

The following are the O'Neil, Cannon, Hollman, DeJong and Laing lawyers named to the 2021 lists:

Best Lawyers in America

- Jean M. Ansay – Commercial Litigation and Tax Law
- Douglas P. Dehler – Litigation – Insurance
- James G. DeJong – Corporate Law, Mergers and Acquisitions Law, and Securities / Capital Markets Law
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EMPLOYMENT LAWSCENE ALERT: ACTION REQUIRED BY AUGUST 31, 2020 FOR CERTAIN RETIREMENT-RELATED CARES ACT RELIEF

O'NEILCANNON
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An August 31, 2020 deadline applies both to individual retirement account participants who want to repay a required minimum distribution received in 2020 and to employer plan sponsors who wish to reduce or suspend certain 401(k) or 403(b) safe harbor employer contributions. Details on each of these special tax relief provisions are summarized below.

Employers and individuals who wish to avail themselves of these special tax relief provisions should take prompt action.

Deadline for Repayment of Certain Waived 2020 Required Minimum Distributions

As we've described previously, tax law generally requires a 401(k), 403(b), or 457(b) retirement plan participant, or IRA owner, to take required minimum distributions (RMDs) annually once the owner reaches age 72 (or 70 ½ under the SECURE Act).

In late March 2020, the CARES Act waived the requirement to take an RMD from a retirement plan or IRA in 2020. For retirement account owners who had already taken 2020 RMDs and did not need them, the CARES Act provided a way to return them. Although RMDs are not usually eligible for rollover treatment, the CARES Act repayment mechanism is to treat the waived RMDs as if they are distributions eligible for rollover. Instead of actually rolling the amount over to a different plan, however, the CARES Act permits a 2020 waived RMD amount to be repaid only to the same account that paid it out. Any repayment, as described in the CARES Act, was required to take place within the standard 60-day window for making a rollover from one tax-favored account into another.

Because the CARES Act was passed in late March, the 60-day repayment period had by then already expired for those who had taken an RMD in early January 2020. The more recent IRS Notice 2020-51 extends the 60-day window period, so that any waived RMDs received on or after January 1, 2020 may now be repaid, provided that such repayment occurs by August 31, 2020.

Employer plan sponsors may also wish to review whether their plan document should be amended by the deadline to accept RMD repayments if their participant population desires to repay previously-distributed 2020 RMDs to the plan.

Employer Deadline to Reduce or Suspend 401(k) or 403(b) Safe Harbor Contributions

In a separate announcement, Notice 2020-52, the IRS has provided special relief to employer plan sponsors of 401(k) and 403(b) retirement plans who wish to make a mid-year reduction or suspension of safe harbor nonelective employer contributions. The ability to take such action expires on August 31, 2020 and should be properly documented as of that date.

Background

More and more employer sponsors of workplace retirement plans, in recent years, have chosen to adopt a "safe harbor" employer contribution feature. The key advantage of safe harbor status for a tax-qualified retirement plan is that the plan is deemed to treat highly and non-highly compensated employees fairly, with respect to one another. It is therefore exempt from the otherwise applicable annual nondiscrimination testing.

In exchange for safe harbor status and the perk of avoiding complex and sometimes costly nondiscrimination testing, a safe harbor plan must meet certain requirements, including committing to provide a minimum employer contribution or formula, immediate vesting of

the contributions, and the provision of an informational notice regarding the contributions before the beginning of the plan year (a safe harbor notice).

The Safe Harbor 12-Month Rule

Typically, once a safe harbor provision is adopted for a retirement plan, it must be in effect for all 12 months of the plan year. This requirement is intended to prevent employers from avoiding nondiscrimination testing if they do not honor the corresponding requirement to contribute to the plan for the benefit of participants.

Generally, there are two exceptions to the 12-month rule that permit a mid-year suspension or reduction of the safe harbor contribution:

1. The first applies if the employer is operating at an economic loss for the plan year.
2. The second applies if the safe harbor notice explicitly reserves to the employer the right to amend, reduce, or suspend the safe harbor contribution during the year.

Under either exception, an additional notice of amendment, reduction, or suspension must be provided to all participants at least 30 days in advance of the effective date of such action. As a result of any mid-year change to a safe harbor contribution, a plan is required to pass nondiscrimination testing in lieu of relying on the safe harbor testing exemption for the year.

Temporary Relief Related to Mid-Year Safe Harbor Nonelective Contribution Changes and Notices

IRS Notice 2020-52 provides special relief under which employers may make a prospective mid-year suspension or reduction of safe harbor nonelective contributions to 401(k) and 403(b) plans after March 13, 2020, for the balance of the year, regardless of whether the employer has satisfied either the requirement of incurring an economic loss or of previously providing a safe harbor notice reserving the right to change contributions.

Additionally, for safe harbor nonelective contribution plans, rather than providing the revised safe harbor notice at least 30 days before the effective date of the suspension or reduction, the notice must be provided by August 31, 2020.

This relief is time-limited, however. To take advantage of these special rules, a plan amendment suspending or reducing the safe harbor contribution must be adopted by August 31, 2020.

Note that the relief provided in IRS Notice 2020-52 does not apply to a mid-year reduction of 401(k) safe harbor *matching* contributions. This is because of the IRS's view that matching contribution levels as communicated to employees directly affect employee decisions regarding elective contributions and should therefore not be changed.

Note also that this article does not address the implications of certain SECURE Act changes to the safe harbor notice requirement, of the impact of IRS Notice 2020-52 thereon.

Conclusion

The temporary relief provided in IRS Notices 2020-51 and 2020-52 will respectively assist individual taxpayers seeking to avoid taking RMDs in 2020, and employer plan sponsors seeking 2020 cost reductions. In either case, action to take advantage of the relief must be taken by August 31, 2020.

The attorneys of the Labor & Employment Group of O'Neil, Cannon, Hollman, DeJong & Laing S.C. are actively monitoring COVID-19 developments and are available to assist employers with related employment law and employee benefit plan compliance matters. Please contact us if you need assistance in amending your employer-sponsored retirement plan to accommodate mid-year safe harbor changes or the return of 2020 RMDs.

JEAN ANSAY NAMED NOTABLE WOMAN IN LAW BY BIZTIMES

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We are pleased to announce that Attorney **Jean Ansay** was one of 27 attorneys in the Milwaukee-area legal community to be honored with a 2020 Notable Women in Law award by the *BizTimes*.

The *BizTimes* Notable Women in Law award honors extraordinary female attorneys who have impacted southeastern Wisconsin in major ways including:

- A track record of setting legal precedents;
- Winning big cases for their clients;
- Mentoring the next generation of women in law; and
- Giving back to their communities.

This recognition honors Jean's professional, civic, and philanthropic achievements.

See the full honor **here**.