

COVID-19 RAISES PRIVACY ISSUES FOR MAJOR-LEAGUE BASEBALL

After months of delay trying to address COVID-19 issues, the 2020 Major League Baseball (“MLB”) season finally opened Thursday night with the New York Yankees defeating the Washington Nationals, 4-1, and the Los Angeles Dodgers pulling away from the San Francisco Giants for an 8-1 victory. Because of the COVID-19 pandemic, this season – assuming it is not called off because of COVID-19 outbreaks – will be unlike any prior MLB season. The regular season has been reduced from 162 games to 60 games, the number of playoff teams was expanded from 10 to 16 teams, games are being played in empty stadiums, and players, coaches, and other staff are subject to extensive COVID-19 testing and daily monitoring.

As of July 17, 80 players have tested positive for COVID-19, 17 of which tested positive after teams began their workouts on July 1. Of those 80 players, the general public knows the identity of only 56 of them. Why only 56, especially since MLB clubs traditionally have disclosed details of a player’s injury? For example, when New York Mets pitcher Noah Syndergaard tore the ulnar collateral ligament in his pitching elbow in March, the Mets announced that Syndergaard had suffered the injury and would undergo Tommy John surgery. The Mets later announced that the surgery had been successful, and that Syndergaard was expected to pitch again at some point during the 2021 season.

MLB clubs are more tight-lipped about COVID-19 issues. MLB has effectively created a COVID-19 Related Injured List for players who have tested positive, have been exposed, or have shown symptoms of the COVID-19. The list does not differentiate between players who have tested positive and players who have been exposed to someone who has tested positive for COVID-19, and is not being published as a stand-alone list. Instead, players with positive COVID-19 testing or exposure status will be acknowledged on the normal injury report just like any other injured player. Their injury, however, will be described as an undisclosed injury, an illness, or a non-baseball injury. While naming a player to the injury list with a designation of “undisclosed” does open the door for public speculation regarding a player’s health status, the various designations on the list do not function to definitively confirm that a particular player has tested positive for or been exposed to the virus that causes COVID-19.

Why do MLB clubs disclose less about the status of a player who is missing games because of COVID-19 than a player one who is out for the season with a torn elbow ligament?

The simple answer is that the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) and the Americans with Disabilities Act (“ADA”) provide broad health privacy and confidentiality protections for players. Specifically, HIPAA and the ADA each restrict the clubs’ ability to publicize information about employee illness without permission.

How do HIPAA and the ADA Apply?

HIPAA applies to an MLB club in its role as a health-care provider to the players. HIPAA is a federal law that was created to protect sensitive patient health information and prevents disclosure of individual health information without such individual's consent. This privacy rule generally applies only to specified types of covered entities and their associates. Covered entities include healthcare providers and group health insurance plans. Certain business associates and vendors of a covered entity can also be required to observe HIPAA's requirements. Where an entity is either not regulated by HIPAA, or is subject to HIPAA, but has obtained individual consent, the federal privacy law does not prevent the disclosure of personal medical information. Because professional sports teams provide healthcare to their players via team doctors, they are healthcare providers under HIPAA. The terms and conditions of professional athletes' employment, as documented in the applicable collective bargaining agreement, generally requires player consent to disclose individual medical information relevant to team status.

The ADA applies to an MLB club in its role as an employer. The ADA functions to prohibit employers from discrimination against employees on the basis of a disability and to require employers to treat all information about employee illness as a confidential medical record. While federal guidance indicates that COVID-19 status is unlikely to constitute a disability, the Equal Employment Opportunity Commission ("EEOC") has made clear that employers must treat employee COVID-19 status as confidential.

Why is There Different Treatment?

An elbow injury and a positive COVID-19 test are treated differently because of HIPAA, the ADA, and MLB's collective bargaining agreement and standard player contract. MLB players and clubs must operate in accordance with the health information disclosure rules as currently codified under Article XIII.G.(1) of the collective bargaining agreement known as the 2017-2021 Basic Agreement (the "CBA") and by Paragraph 6(b)(1) of each standard player contract, known as the Uniform Player's Contract ("UPC"). Under these agreements, each player is required to execute a HIPAA-compliant authorization for the use and disclosure of health information about the player. By signing the UPC, the player authorizes disclosure of employment-related injuries. The UPC incorporates the relevant health information disclosure provisions of Article XIII.G. of the CBA, Section 4, which provide that:

[for] public relations purposes, a Club may disclose the following general information about employment-related injuries: (a) the nature of a Player's injury, (b) the prognosis and the anticipated length of recovery from the injury, and (c) the treatment and surgical procedures undertaken or anticipated in regard to the injury.

If a medical condition, other than an employment-related injury, prevents a player from

playing and the player has not provided the club with specific written authorization to disclose information about the medical condition, the club may disclose only that a medical condition is preventing the player from playing and the anticipated absence of the player from the club. COVID-19 status, therefore, is not deemed to be an employment-related injury that would allow an MLB club to disclose details regarding prognosis and treatment. Although a player may authorize a team to disclose his COVID-19 status, such authority is not automatic under either HIPAA or the documents governing the employment relationship. The ADA does not explicitly address employee authorization of an employer to disclose medical information, but does permit limited disclosure as necessary to respond to a request for reasonable accommodation.

In practical terms, this compliance with the HIPAA privacy and ADA confidentiality rules with respect to COVID-19 means that even if a player tests positive, the club or its staff may not disclose that to the public unless granted permission to do so by the player. Any unauthorized disclosure could constitute a HIPAA violation, for which significant federal civil monetary penalties may apply if the U.S. Department of Health and Human Services investigates a complaint or performs a compliance audit. Additionally, a player might be able to bring a collective bargaining grievance, or to allege a breach of the employment contract.

Lessons for the Rest of Us

Of course, most businesses are not professional sports franchises with collective bargaining agreements providing HIPAA disclosure consent. The caution displayed by the MLB in avoiding the disclosure of player COVID-19 status, however, is a reminder to all employers with access to employee health information and records to carefully assess which health-related information disclosures may or may not be permitted under applicable law.

HIPAA

HIPAA is a complex health privacy law with multiple exceptions and with sometimes conflicting state law counterparts. Health care providers, employer sponsors of self-insured group health plans and their business associates are subject to its requirements and should take care to ensure that affirmative compliance actions are taken and maintained. Violations of these rules, as well as the inability to demonstrate operational and documented (written) compliance, can subject the health care providers, health plan sponsors, or their associates, to large civil, or even criminal, penalties.

The ADA, FMLA, and GINA

For employers who, unlike MLB clubs, are not directly subject to HIPAA, it is important to remember that other laws provide separate protections for employee health information. Any information known to an employer regarding an employee's disability or gathered as a result

of an employer-provided medical examination (which can include taking a temperature) should remain confidential. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA and EEOC guidance. Similarly, employers subject to the Family and Medical Leave Act (“FMLA”) or the Emergency Family Medical Leave (“EMFL”) provisions of the CARES Act must confidentially maintain any records and documents relating to employee (and family) medical certifications and medical histories and created for FMLA or EMFL purposes. The Genetic Information Nondisclosure Act (“GINA”) also requires employers to keep all genetic information, including information about an individual’s genetic tests, the genetic tests of a family member, family medical history, regarding employees confidential. The ADA, FMLA, EFML, and GINA all require that such records be stored separately from the usual personnel files.

If you have questions related to your business’s obligations under the ADA, FMLA, CARES Act, or GINA, or HIPAA, or seek attorney-client privileged review of your current compliance program, including as to HIPAA policies and procedures, please contact your regular OCHDL attorney or Pete Faust.

ATTORNEY STEVE SLAWINSKI FEATURED IN MERIT SHOP CONTRACTOR

Recently, the *Merit Shop Contractor* magazine featured an article by Attorney Steve Slawinski entitled “Dispute Resolution: Mediation and Arbitration in Today’s Construction World.” In this article, Attorney Slawinski describes and explains mediation and arbitration, detailing the differences between the two and ultimately how they work.

Read the full article [here](#).

STEVE SLAWINSKI PUBLISHED IN STATE BAR’S CONSTRUCTION BLOG

With the ongoing economic impact of the COVID-19 pandemic, construction lien rights have become more vital than ever to businesses in the construction industry. To help navigate

through this topic, Attorney Steve Slawinski recently authored an article entitled “101: Wisconsin’s Construction Lien Law,” which appeared in the *State Bar of Wisconsin Construction Blog*. In the article he provides a refresher course on the basics of construction liens on privately owned construction projects in Wisconsin.

Read the full article [here](#).

For more information on this topic contact [Steve Slawinski](#) at 414-276-5000 or steve.slawinski@wilaw.com.

ATTORNEY BRITANY MORRISON GIVES INFORMATIONAL PPP WEBINAR

Recognizing the need to help clarify some of the potential questions posed from the new law, Attorney [Britany Morrison](#) recently presented an informational webinar entitled, “PPP Rules Under the New Flexibility Act and Loan Forgiveness FAQs.” In the webinar they discuss the new rules under the Paycheck Protection Program Flexibility Act of 2020, loan forgiveness frequently asked questions, and the “unknowns” of loan forgiveness.

O’Neil, Cannon, Hollman, DeJong and Laing remains open and will continue to monitor Paycheck Protection Program changes. For questions or further information relating to the Paycheck Protection Program, please contact Attorney [Britany Morrison](#).

ATTORNEYS ERICA REIB, JOE NEWBOLD, AND GRANT KILLORAN FEATURED IN WISCONSIN LAWYER

An article by Attorneys [Grant Killoran](#), [Joe Newbold](#), and [Erica Reib](#) entitled “The New Wave of Litigation: An Early Report on COVID-19 Claims” is featured as the cover story in the June edition of the State Bar of Wisconsin publication *Wisconsin Lawyer*. In their article they analyze the claims being filed relating to the ongoing COVID-19 pandemic in the United States.

Read the full article [here](#).

TAX AND WEALTH ADVISOR ALERT: THE IMPORTANCE OF A DURABLE FINANCIAL POWER OF ATTORNEY

A proper estate plan covers not only what should happen upon your death, but also what should happen if you lose your decision-making skills. While planning for incapacity may be as unpleasant as planning for death, it is an important step in the estate planning process. Planning for incapacity ensures that someone you specifically choose and trust can act on your behalf while you are unable to do so for yourself. One key document to help you plan for incapacity is the Durable Financial Power of Attorney.

A Durable Financial Power of Attorney allows you to appoint someone, your “agent” or “attorney-in-fact,” to manage your financial affairs in the event you are unable to do so for yourself. The word “durable” simply means that the power of attorney remains in effect after you become incapacitated or incompetent. These documents are fairly flexible, allowing you to give your agent broad or limited power. Further, you can choose to either give your agent immediate power or to make your agent’s power effective only once you’ve been determined to be incapacitated.

Some examples of tasks your agent can perform include paying your bills, managing your assets, filing an insurance claim, and even hiring a lawyer. It is easy to believe that a Durable Financial Power of Attorney is unnecessary if you don’t own many assets or if you own assets jointly with someone else. However, some of these actions require your agent to have specific legal authority to act on your behalf, and the Durable Financial Power of Attorney would provide your agent with that authority.

If you do not get a power of attorney and you were to become incapacitated or incompetent, then your family would need to ask the court to appoint someone to act on your behalf. Not only could the court appoint a stranger to manage your financial affairs, but also this process can be expensive, public, and time consuming. Having a proper estate plan that covers what should happen if you become incapacitated or incompetent will save you and your loved ones time and money.

Keep in mind, though, that a Durable Financial Power of Attorney would not allow your agent to continue managing your financial affairs after your death. For this reason, these documents are often drafted as part of a larger estate plan.

The attorneys at O’Neil Cannon have experience in drafting various estate plans, both simple

and complex, and would be happy to discuss the estate planning process with you. If you are interested in learning more about estate planning, please contact attorney [Kelly M. Spott](#).

GRANT KILLORAN PARTICIPATE IN 14TH ANNUAL STATE BAR OF TEXAS BILL OF RIGHTS CONFERENCE

Attorney Grant Killoran, a shareholder in O’Neil, Cannon, Hollman, DeJong and Laing’s Litigation Practice Group, recently co-presented a speech entitled “The Tenth Amendment: The Sword and the Shield of the States” at the 14th Annual State Bar of Texas Bill of Rights: Cutting Edge Controversies in Constitutional Law Conference. Grant also co-presented another speech at the seminar entitled “The Free Exercise and Establishment Clauses: Is Anything We Learned in Law School Still the Law.”

The State Bar of Texas Annual Bill of Rights Conference brings together attorneys and law professors from around the country each year to speak on emerging issues in constitutional law.

ATTORNEY JIM DEJONG FEATURED ON WISN AM 1130

Attorney Jim DeJong will be featured on *Money Sense* presented by Ellenbecker Investment Group on **WISN AM 1130**. On the show, Jim provides an overview of the implications of the COVID-19 pandemic on the M&A market. He discusses what a business owner planning to sell a business should be doing now to prepare the business to attract qualified buyers and to obtain the best price. Jim also discusses the importance of business succession planning.

Tune in to hear the show in its entirety on **Saturday, June 6th at 2:00 pm**.

The recording can be accessed [here](#).

TAX AND WEALTH ADVISOR ALERT: HOW A TRUST CAN PROVIDE ASSET PROTECTION FOR YOUR CHILDREN

Do you want to leave your children with an inheritance, but are worried about creditors taking part of that inheritance? If so, you are not alone. Fortunately, a properly established protective trust can help safeguard the money you leave behind for your children from their creditors, including in a divorce.

Creditors can more easily reach your children's inheritances if it is given to them directly, outside of a trust. However, creditors would have more hurdles to jump through to reach your children's inheritance if it is held in a protective trust. Therefore, many parents add extra protections for their children by directing their children's inheritances to be held in a protective trust.

The trust, acting as its own separate entity, would own the assets on behalf of your children, the beneficiaries of the trust. This way, your children would not technically own the assets which makes it much more difficult for creditors to reach their inheritances. Importantly, your children would still have access to the trust assets and benefit from them. A protective trust would allow your children to be the beneficiaries and receive distributions for their health, support, and maintenance. Also, in some circumstances your children could be the Trustee of their own trust, meaning they could manage the trust assets on their own.

Not only would a protective trust safeguard your children's inheritances from obvious creditors, it would also safeguard their inheritances if they were to get a divorce. If you were to give your children their inheritances directly, they would need to take extra steps and precautions to ensure their inheritance is not comingled with marital property to prevent the inheritance from transmuting into a marital property asset. However, if the inheritance is protected in a trust, then the trust assets would remain classified as individual property under Wisconsin marital property law.

With a proper estate plan in place, you can have peace of mind knowing the money you leave behind for your children will be protected from the many threats your children may come across. If you would like to learn more about asset protection and discuss your estate planning options, please contact attorney [Kelly M. Spott](#).

ATTORNEY JOSEPH GUMINA RECENTLY FEATURED IN SUPER LAWYERS

Attorney [Joseph Gumina](#), chair of O'Neil Cannon's labor and employment law group, was recently featured in the *Super Lawyers* article "Can I Lay Off My Furloughed Employees?". In the article, Gumina shares advice regarding legal considerations employers need to be aware of when considering laying off furloughed employees during these unprecedented times. Read full article [here](#).

O'Neil Cannon remains open for its clients and we are here to help. We encourage you to reach out with any questions, concerns, or legal issues you may have, including those related to coronavirus.