ATTORNEYS CHRISTA WITTENBERG AND GRANT KILLORAN FEATURED IN WISCONSIN LAWYER

An article by Attorneys Christa Wittenberg and Grant Killoran on constitutional law issues relating to the current COVID-19 pandemic is featured as the cover story in the April edition of the State Bar of Wisconsin publication *Wisconsin Lawyer*. In their article, they take an informative and deep dive look into regulations and due process concerns relating to the current public health emergency.

Read the full article here.

OCHDL SUPPORTS LOCAL TEENAGER IN FIGHT AGAINST THE PANDEMIC

We are incredibly proud to financially support local Port Washington hero, 16-year-old William "Billy" Schowalter, as he works diligently to create plastic face shields for medical professionals, local police, and other service providers that work with the public. Billy, a son of an OCHDL employee, is using his 3D printer to make personal protective equipment and headpieces to help those on the front lines in the fight against COVID-19. Click here to read more about Billy's story and to be reminded that we are all in this together.

EMPLOYMENT LAWSCENE ALERT: ROADMAP EMERGES FOR CLAIMING THREE TYPES OF EMPLOYER TAX CREDITS ALLOWED UNDER COVID-19 STIMULUS LAWS

Under a flurry of recent legislation, Congress has created several tax credits to reimburse employers for paying certain types of wages during the COVID-19 outbreak in 2020. Until now, the precise mechanism for claiming these tax credits has been unclear. With the March 30 IRS issuance of guidance and a draft version of Form 7200, however, the process by which employers may realize the tax relief is coming into view.

With respect to tax credits for the cost of: (1) emergency paid sick leave; (2) expanded family medical leave; and (3) employee retention payments, we now know that eligible employers can reduce the amount of employer payroll taxes otherwise required to be deposited with the IRS. Specified payroll taxes can be reduced dollar-for-dollar by the amount of credit-eligible wages paid. The reduction in employer payroll taxes will be reflected on the employer's quarterly payroll tax returns, using the appropriate form from the 941 series. To the extent that the amount of the available tax credit exceeds the total amount of payroll tax deposits, however, an employer may use Form 7200, entitled "Advance Payment of Employer Credits Due to COVID-19," to request expedited payment of the excess credit amount.

Emergency Paid Sick Leave and Expanded FMLA Leave

We have previously described the emergency paid sick leave and expanded family medical leave required to be provided to qualifying employees between April 1, 2020 and December 31, 2020. These expanded types of leave were implemented by the Families First Coronavirus Response Act (FFCRA), which also provided for employer tax credits to reimburse employers for 100% of the cost of corresponding wages paid.

Employee Retention Credit

The newer employee retention credit (described in more detail here) is available to eligible employers under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) and is designed to encourage businesses to keep employees on their payrolls.

The amount of the refundable employee retention tax credit is 50% of up to $10,000 in wages paid, per employee, between March 12, 2020 and December 31, 2020 by an eligible employer whose business has been financially impacted by COVID-19. Some limits based upon employer size apply to the number of employees for whom the credit may be claimed. The class of employers eligible for the credit *excludes* state and local government employers, as well as employers who take small business loans under the Paycheck Protection Program.

For purposes of the employee retention credit, an eligible employer of any size (including a tax-exempt organization) will be deemed to have been financially impacted by COVID-19 if:

1. the employer's business has been fully or partially suspended by government order due to COVID-19 during a 2020 calendar quarter; and
2. the employer's gross receipts are below 50% of the comparable quarter in 2019. Once the employer's gross receipts exceed 80% of a comparable quarter in 2019, then eligibility for the credit is extinguished as of the immediately following quarter.

Note that while an employer is permitted to receive tax credits for emergency paid sick leave and expanded family medical leave under the FFCRA, as well as for the CARES Act employee retention payments, these tax credits cannot be applied to the same wages.

STATE AND FEDERAL FUNDING OPPORTUNITIES FOR SMALL BUSINESSES AFFECTED BY THE CORONAVIRUS PANDEMIC

SBA to Provide Disaster Assistance Loans for Small Businesses Impacted by the Coronavirus

As part of the Trump administration's efforts to combat the coronavirus outbreak and minimize economic disruption to the nation's 30,000,000 small businesses, the U.S. Small Business Administration (SBA) is offering designated states and territories low-interest federal disaster loans for working capital to small businesses suffering substantial economic injury as a result of the coronavirus. Upon a request received from a state's or territory's governor, the SBA may issue, as provided by the Coronavirus Preparedness and Response Supplemental Appropriations Act that was recently signed by the President, an Economic Injury Disaster Loan declaration.

On March 17, 2020, the SBA issued revised criteria for states and territories seeking an Economic Injury Disaster Loan declaration related to the coronavirus. The relaxed criteria will have two immediate impacts:

- **Faster, Easier Qualification Process for States and Territories Seeking SBA Disaster Assistance.** Historically, the SBA has required that any state or territory affected by disaster provide documentation certifying that at least five small businesses have suffered substantial economic injury as a result of a disaster, with at least one business located in each declared county or parish. Under the just-released, revised criteria, states or territories are only required to certify that at least five small businesses within the state or territory have suffered substantial economic injury, regardless of where those businesses are located.
- **Expanded, Statewide Access to SBA Disaster Assistance Loans for Small Businesses.** SBA disaster assistance loans are typically available only to small businesses within counties identified as disaster areas by a governor. Under the revised criteria issued today, disaster assistance loans will be available statewide after an economic injury declaration. This will apply to current and future disaster assistance declarations related to the coronavirus.

Any Economic Injury Disaster Loan declaration issued by the SBA makes loans available **statewide** to small businesses and private, non-profit organizations to help alleviate economic injury caused by the coronavirus. Once a declaration is made, the information on the application process for Economic Injury Disaster Loans will be made available to affected small businesses within the state. These loans must be used to pay fixed debts, payroll,

accounts payable and other bills that can't otherwise be paid because of the disaster's impact. The interest rate is 3.75% for small businesses without credit available elsewhere; businesses with credit available elsewhere are not eligible. The interest rate for non-profit organizations is 2.75%. The SBA offers loans with long-term repayment periods in order to keep payments affordable, up to a maximum term of 30 years. Terms are determined on a case-by-case basis, based upon each borrower's ability to repay.

Governor Evers Seeks an Economic Injury Disaster Loan Declaration from the SBA for Small Businesses Affected by the Coronavirus

On March 18, 2020, Governor Evers submitted a request to the SBA to declare the coronavirus a disaster for the State of Wisconsin. If the SBA declares Wisconsin a disaster area, the SBA will allow Wisconsin small businesses across the state to apply for SBA Economic Injury Disaster Loans, which would offer up to $2,000,000 in assistance for each affected small business. Governor Evers's request to the SBA can be found here.

As of the date of this article, the SBA has declared the following disaster areas: Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Idaho, Maine, Maryland, Massachusetts, Montana, Nevada, New Hampshire, New Mexico, New York, North Dakota, Oregon, Rhode Island, Texas, Utah, Virginia, Washington, and Wyoming. The list continues to grow and the areas eligible for SBA Economic Injury Disaster Loans are continuously updated here.

If Wisconsin is declared a coronavirus disaster area or if your small business is located in one of the declared disaster areas, you can apply for an Economic Injury Disaster Loan through the SBA here.

Wisconsin's Small Business 20/20 Program

On March 17, 2020, the Wisconsin Economic Development Corporation arranged for the deployment of $5,000,000 in emergency funds to create the Small Business 20/20 Program in order to help mitigate the impact of the coronavirus pandemic on small businesses in Wisconsin. The purpose of the program is to ease the' short-term cash flow challenges of these small businesses, and to protect jobs and public health in Wisconsin. The Small Business 20/20 Program provides funds to eligible Wisconsin-based Community Development Financial Institutions (CDFIs) that can make grants available to existing loan clients in order to mitigate the effects of the coronavirus pandemic. Eligible applicants for the Small Business 20/20 Program funds are Wisconsin CDFIs that have a minimum organizational loan portfolio of at least $4,000,000, or a collaborative of CDFIs with a combined organizational loan portfolio of at least $4,000,000. A list of Wisconsin's 24 CDFIs can be found here.

Approved CDFIs and collaboratives will make program grants available to for-profit

businesses that are loan recipients in good standing as of March 1, 2020 with the approved CDFI or its collaborating CDFIs. These businesses must have 20 or fewer full-time or part-time employees and greater than $0 but less than $2,000,000 in annual revenues. Preference for these program grants will be given to service and retail businesses.

Businesses may be granted two months of payroll and rent expenses, up to a maximum of $20,000. These funds must be used for rent and payroll expenses, including covering paid leave (e.g., sick, family, and other leave related to the coronavirus) during the duration of the funding period.

If you have questions relating to the SBA's Economic Injury Disaster Loans or the Wisconsin Small Business 20/20 Program, please contact O'Neil Cannon

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EMPLOYMENT LAWSCENE ALERT: IRS SAYS REDUCED-COST OR FREE COVID-19 TESTING OR TREATMENT WON'T PREVENT INDIVIDUALS FROM MAKING OR RECEIVING HSA CONTRIBUTIONS

In recent guidance, the IRS noted the "unprecedented public health emergency posed by COVID-19" (the disease that results from the 2019 Novel Coronavirus), and the need to remove potential administrative and financial barriers to COVID-19 testing and treatment under the health savings account (HSA) rules.

Issued on March 11, 2020, IRS Notice 2020-15 responds to employer uncertainty as to whether a health plan providing for reduced-cost COVID-19 testing—for individuals who have not yet met their annual deductibles—remains an HSA-compatible high-deductible health plan (HDHP).

That uncertainty arose from the recent wave of insurer and state announcements of the waiver of out-of-pocket costs for COVID-19 testing (and, in some cases, for treatment). Cost-sharing waivers apply, as of this writing, in at least 32 states, including for most, but not all, insurers in Wisconsin. Insurers have agreed to waive cost sharing due, variously, to voluntary agreements by major insurers, state mandates, or state-insurer agreements.

No-cost COVID-19 testing will be required by all private health plans now that President Trump has signed the Families First Coronavirus Response Act.

HSA-Compatible Coverage, Generally

As we described in a prior post, an HSA is a tax-favored account established to receive contributions from an employee, an employer, or both.

To be eligible to make (or receive) HSA contributions, an individual must be covered only under the HDHP and my not have any other coverage (including reduced-cost services), unless such other coverage is expressly permitted by the IRS.

Certain "preventive care" services are specifically permitted and are not considered to constitute "other" health coverage that would disqualify an individual from HSA eligibility. In July of 2019, the IRS expanded the list of "preventive care" to include fourteen additional items and services intended to prevent the worsening of certain chronic medical conditions.

HSA-Compatible Coverage Now Includes Coronavirus-related Services

The result of the newly-issued IRS Notice 2020-15 is that an individual who is covered by an HDHP will not lose eligibility to make (or receive) tax-favored HSA contributions merely because the HDHP permits pre-deductible COVID-19 testing and treatment with reduced (or no) employee cost-sharing. HSA-eligible individuals may continue to contribute to an HSA regardless of whether the HDHP offers, or the individual receives, a reduced-cost or no-cost COVID-19 test or treatment.

Be Aware That:

- As in the past, any vaccination costs continue to count as preventive care and can paid for by the plan at any time during the year, without regard to whether the deductible has been met.
- As recently confirmed by the Centers for Medicare and Medicaid, the costs of certain COVID-19 treatments and services, including testing, isolation, quarantine, and vaccination, are generally covered as essential healthcare benefits under Affordable Care Act rules for individual and small group health plans.
- Self-funded group health plans are not required to waive COVID-19 cost-sharing under the state mandates or insurer agreements (but are impacted under the federal Families First Coronavirus Response Act).

The text of the IRS Notice is available here.

The attorneys of the Labor and Employment Group of O'Neil, Cannon, Hollman, DeJong and Laing are actively monitoring COVID-19 developments and are available to assist employers with related employment law and employee benefit plan compliance matters.

18 OCHDL ATTORNEYS RECOGNIZED BY SUPER LAWYERS

Each year, *Super Lawyers* surveys the State of Wisconsin's 25,000 attorneys and judges, seeking the State's top attorneys. *Super Lawyers* then selects the Top 10 Attorneys in Wisconsin, Top 50 Attorneys in Wisconsin, Top 25 Attorneys in Milwaukee, and Super Lawyers (consisting of the top 5% of attorneys in Wisconsin).

The 2019 lists were published by *Super Lawyers* in December 2019, and include the following attorneys from O'Neil Cannon:

- Dean P. Laing:
  - Top 10 Attorneys in Wisconsin (Ranked #2)
  - Top 50 Attorneys in Wisconsin
  - Top 25 Attorneys in Milwaukee
  - Super Lawyer
- Seth E. Dizard:
  - Top 50 Attorneys in Wisconsin
  - Top 25 Attorneys in Milwaukee
  - Super Lawyer
- Douglas P. Dehler: Super Lawyer
- James G. DeJong: Super Lawyer
- Peter J. Faust: Super Lawyer
- John G. Gehringer: Super Lawyer
- Joseph E. Gumina: Super Lawyer
- Gregory W. Lyons: Super Lawyer
- Patrick G. McBride: Super Lawyer
- Joseph D. Newbold: Super Lawyer
- Chad J. Richter: Super Lawyer
- John R. Schreiber: Super Lawyer
- Jason R. Scoby: Super Lawyer
- Steven J. Slawinski: Super Lawyer

In addition, Erica N. Reib was selected by *Super Lawyers* as Rising Stars (a Rising Star must be 40 years old or younger or in practice for 10 years or less).

In total, 18 attorneys of O'Neil, Cannon, Hollman, DeJong and Laing were recognized by *Super Lawyers*, which has called the firm "the Milwaukee mid-sized powerhouse."

Super Lawyers is a national rating service that rates attorneys in all 50 states. The selection process utilized by *Super Lawyers* is multi-phased and includes independent research, peer nominations, and peer evaluations.

TAX AND WEALTH ADVISOR ALERT: PRESIDENT TRUMP'S BUDGET PROPOSAL EXTENDS THE TCJA TAX CUTS

President Trump unveiled a budget proposal for the 2021 fiscal year. Of note, the income tax and estate tax cuts provided in the Tax Cut and Jobs Act of 2017 which are scheduled to expire on January 1, 2026, are being extended in this proposal to 2035. This includes the increased estate tax exemption of $11 million per person, plus annual cost of living increases. It remains to be seen how Congress will respond to this proposal.

O'NEIL, CANNON, HOLLMAN, DEJONG AND LAING ELECTS CHRISTA WITTENBERG AS SHAREHOLDER

O'Neil, Cannon, Hollman, DeJong and Laing is pleased to announce that Attorney Christa Wittenberg was recently elected as a shareholder of the firm.

Christa has been with the firm since 2014 as a member of the Litigation Practice Group. She assists businesses and individuals with prosecuting and defending a variety of civil litigation matters. Her practice includes complex contract disputes, trademark and copyright claims, shareholder disputes, inheritance disputes, class actions, personal injury cases, and fraud and conspiracy claims. Before joining the firm, she was a federal district court law clerk.

Christa will be a tremendous addition to the shareholder group, and we are proud to have her on our team.

THE WILAW QUARTERLY NEWSLETTER

Newsletter Article Highlights:

- Attorneys Christa D. Wittenberg and Grant C. Killoran Featured in Wisconsin Lawyer

- The Potential Impact of Post-Valuation Date Events on Gift Tax Valuations
- New Year – New Labor and Employment Law Developments Every Employer Should Know

Firm News:

- Attorneys JB Koenings and Erica N. Reib Elected as Shareholders
- Congratulations to Our Attorneys Listed in the 2019 Edition of Super Lawyers

Click the image below to read more.

NO-CONTEST CLAUSES

When Denver Broncos owner Pat Bowlen died in June 2019, he left behind a professional football franchise valued at more than $2.5 billion. The validity of his trust, wherein he named one of his seven children as chief executive after he passed, is being fought over in court by his children.

After Bowlen's death, his two oldest daughters, Amie Bowlen Klemmer and Beth Bowlen Wallace, filed a lawsuit challenging the validity of the trust. They argue that Bowlen was subject to undue influence when he executed the trust in 2009 and that he lacked the requisite mental capacity to create the trust. Bowlen lived with Alzheimer's Disease for several years before his death, and the trustees of his trust have run the NFL team since 2014 when Bowlen stepped down for health reasons.

Amie's and Beth's challenge is not without risk because of what is known as a "no-contest clause" contained within the terms of the trust document. The "no-contest clause" could cause them to receive nothing from their father's trust.

Simply put, a “no-contest clause” – also known as an “*in terrorem* clause” – in a will or trust seeks to punish a beneficiary who challenges the decedent’s estate plan. Generally, the “punishment” for the beneficiary who challenges the will or trust is disinheritance. The threat of losing out on all or part of an inheritance is often enough to keep a beneficiary from challenging a will or trust with a “no-contest clause” in it.

Laws concerning “no-contest clauses” vary by state. Wisconsin has a statute that addresses the use of “no-contest clauses,” explicitly permitting them but limiting their enforcement “if the court determines that the interested person had probable cause of instituting the proceedings.” That is, in Wisconsin, the court may decide not to enforce the provision if the court finds that the contestant had sufficient facts to justify why he or she made the contest, even if the contestant’s challenge was ultimately unsuccessful. Of course, this means that a court could enforce a “no-contest clause” if the court finds that the challenger had no “probable cause” for bringing the challenge in the first place if the court upholds the will or trust as valid. Accordingly, under Wisconsin law, there is considerable risk involved in bringing a challenge to an estate planning document with a “no-contest clause” in it.

Bowlen’s case is in Colorado, which explicitly allows “no-contest clauses” in wills but has no corresponding provision in statutes concerning trusts. Case law on the issue is also sparse, so in this situation, if Amie and Beth are found to be in violation of the “no-contest clause” and the trust is held to be valid, it is quite possible that they would forfeit their shares of the trust. On the other hand, if a court finds they had probable cause to challenge the trust, it’s also possible that a court would decline to enforce the “no-contest clause.”