

# EMPLOYMENT LAWSCENE ALERT: REVIEW YOUR COMPANY'S "TOP-HAT FILING" STATUS NOW TO AVOID INCREASED FORM 5500 PENALTIES

Companies that have entered into arrangements (1) to pay deferred compensation to key employees (including owners), or (2) to provide employee benefits specifically for apprentices or trainees should immediately determine whether a "top-hat filing" is required, and, if so, whether it has been properly filed with the Department of Labor. Two very recent legal developments—increased penalties and a new filing search tool—indicate that enforcement activity on top-hat filing compliance is increasing. Penalties for not filing can be extremely costly, and the penalties have been increased, effective January 15, 2020. Fortunately, a low-cost correction option is available for corrections made prior to a DOL assessment of penalties.

## Top-Hat Overview

A top-hat filing is a short informational submission to the DOL that describes the company's contact information and the nature of the sponsored plan. It is legally required to be submitted with respect to any compensation arrangement for key management and owner employees (or employee benefit plans provided only to apprentices or trainees) that constitutes a top-hat plan. So named in apparent reference to gentility as evoked by Lincoln-era fashion standards, a top-hat plan is an agreement or plan maintained by an employer primarily for the purpose of providing deferred compensation to a select group of key employees, apprentices, or trainees.

The term "select group of management or highly compensated employees" is not clearly defined, but must, instead, be determined in the context of the particular facts and circumstances that apply to the employer. Neither the IRS definition of "highly-compensated employee" or of "key employee" applies in determining whether a compensation arrangement is a top-hat plan. Instead, relevant factors include the duties and responsibilities of the employee and the level of the employee's compensation as compared to the compensation of the employer's work force, in general.

## Top-Hat Filing – Required within 120 Days of Plan Effective Date

In general, all employer-provided benefits are subject to ERISA's requirements, unless an exception applies. In the case of top-hat payment arrangements, DOL guidance has expressed that "certain individuals, by virtue of their position or compensation level, have the ability to affect or substantially influence, through negotiation or otherwise, the design and operation of their deferred compensation plan, taking into consideration any risks

attendant thereto, and therefore would not need [all of] the substantive rights and protections of” ERISA. The DOL also permits this lower-protection status for arrangements that provide employee benefits (including health benefits) only to apprentices or trainees, or both.

In light of the reduced need for ERISA protections for these plans, the DOL authorizes an exemption from the otherwise-applicable ERISA mandates regarding participation, vesting, funding, and fiduciary rules. Importantly, an additional exemption from ERISA’s reporting and disclosure rules is also available, but *only if* a “top-hat filing” is submitted to the DOL within 120 days of the initial effective date of such plan.

Because ERISA’s reporting and disclosure rules include the requirement to file an annual Form 5500 to the DOL, this annual Form 5500 filing requirement continues to apply to a top-hat plan unless a top-hat filing has been timely submitted. Alternately, an initial failure to submit a top-hat filing can generally be corrected, retroactively, for a relatively small compliance fee.

### Form 5500 Penalties at an All-Time High

An employer that fails to timely file a Form 5500 may be subject to a DOL penalty of \$2,233 per day (as adjusted annually for inflation). This new penalty amount of \$2,233 per day is effective January 15, 2020. (For the prior year, the penalty amount had been \$2,194 per day). This is not a typographical error. The law applies these penalty amounts *per day* for each day past the required filing date(s). The penalties are cumulative and become exponentially large for failures stretching over multiple years. While an aggregate penalty assessment could likely be negotiated downward by experienced ERISA legal counsel, an assessed DOL penalty for a late Form 5500 is guaranteed to be large.

The IRS imposes separate penalties for the failure to timely file a Form 5500, unless a showing of reasonable cause is made. Until recently, the IRS penalty was \$25 for each day of the failure up to a maximum penalty of \$15,000 per year. Under the Setting Every Community Up for Retirement Enhancement (SECURE Act) enacted on December 20, 2019, however, the IRS penalties for a late Form 5500 have increased tenfold to \$250 per day, up to an annual maximum of \$150,000. These increased IRS penalties apply for any Form 5500 due to be filed on and after January 1, 2020.

### New DOL Top-Hat Filing Search Tool

Earlier this week, the DOL published a new online search tool to enable the public to search for top-hat filings. The search tool is available [here](#). Results can be printed or downloaded to Excel.

Prior to the DOL making the search tool available, generally only benefits professionals and practitioners ever searched for top-hat filings, and then only via a website maintained by a private company that regularly obtained the information from the DOL through Freedom of Information Act Requests.

The issuance of the public DOL search tool is a positive development that will assist employers in confirming their top-hat filing compliance status. Of course, this increased access likely also signals increased DOL interest in enforcing late Form 5500 penalties for those employers that have not timely filed a top-hat statement. In light of the ease of searching, it will now be harder for employers to reasonably contend that they were unaware that a top-hat filing had not been submitted. Similarly, it is conceivable that plaintiffs' attorneys or disgruntled employees could use the tool themselves to determine whether a company is likely out of compliance with the top-hat filing, and therefore, the Form 5500 filing, rules. If this knowledge were used to inform the DOL, which, in turn, could trigger a penalty assessment, the penalty amounts could be devastating.

## Correction Option

If you determine or suspect that your company has inadvertently failed to submit a top-hat filing for a covered top-hat plan, take steps right away to amend this oversight by submitting a delinquent filer voluntary compliance application. If you catch the error before the DOL has assessed a penalty, then you can retroactively correct the issue for a fee of only \$750 for a single year (or a maximum of \$1,500 for multiple years). The IRS generally accepts this same correction method as sufficient to avoid the separate IRS Form 5500 penalties, as well. Indeed, this DOL correction method often works to abate the IRS penalties after these have already been assessed.

## Conclusion

It is common for companies that implement deferred compensation arrangements to consider the tax implications of such arrangement, including, for example, the application of Internal Revenue Code Section 409A. Equally important, however, is consideration of the other federal law that may govern such arrangements—ERISA. It is simply not true that all compensation agreements for key employees are exempt from ERISA's requirements. Failure to anticipate this reality—and to submit a top-hat filing when required—exposes the employer to significant Form 5500 penalties.

To avoid these penalties, check on your company's top-hat filing compliance now. The attorneys of the OCDHL Employment Law Team can assist you with assessing whether your company's key employee compensation agreements constitute top-hat plans within the meaning of ERISA, or whether an exemption may apply. If you maintain a top-hat plan for which no top-hat filing was ever submitted, we can assist in correcting the inadvertently

missed prior filings, thereby potentially eliminating the existing exposure to thousands of dollars.

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## **ATTORNEYS GRANT KILLORAN, CHRISTA WITTENBERG, AND CHRIS KEELER SPEAK AT STATE BAR OF WISCONSIN'S ANNUAL CONSTITUTIONAL LAW SYMPOSIUM**

Grant Killoran, Christa Wittenberg, and Chris Keeler of O'Neil, Cannon, Hollman, DeJong and Laing's Litigation Practice Group recently presented at the State Bar of Wisconsin/Pinnacle's "Annual Constitutional Law Symposium 2019" in Pewaukee, Wisconsin.

Attorney Killoran was the Chair of the symposium and presented on Third Amendment issues. Attorney Wittenberg moderated and presented as part of a panel discussion on due process issues related to public health actions to prevent the spread of contagious diseases. Attorney Keeler co-presented on constitutional issues relating to the incarceration of juveniles.

Attorneys Killoran, Wittenberg, and Keeler were joined at the symposium by speakers from around Wisconsin and the country to discuss various constitutional topics and issues.

Attorney Killoran is a shareholder with the law firm and is the Chair of its Litigation Practice Group. He has significant and diverse trial experience representing clients in Wisconsin State and Federal Courts, and courts around the country, focusing on complex business, health care and employment law disputes.

Attorney Wittenberg is a member of the Litigation Practice Group. She assists businesses and individuals with prosecuting and defending a variety of civil litigation matters, including complex contract disputes, trademark and copyright claims, inheritance disputes, class actions, personal injury cases, and fraud and conspiracy claims. As a former federal district court law clerk, Attorney Wittenberg is intimately familiar with litigation and procedures in federal court. She has also litigated matters in state court, as well as resolved cases through mediation prior to litigation.

Attorney Keeler is a member of the Litigation Practice Group. He concentrates his practice on general business law and complex business litigation by assisting clients with a variety of business and development needs. Additionally, Attorney Keeler devotes a portion of his practice to immigration law, with an emphasis on employment visas and humanitarian

matters.

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## **ATTORNEY JOSEPH GUMINA FEATURED IN MERIT SHOP CONTRACTOR**

Recently, the *Merit Shop Contractor* magazine featured Attorney Joseph Gumina's safety article on construction contractor compliance with OSHA's fall protection standard (29 C.F.R. § 1926.501). In his article, Attorney Gumina discusses the general requirements of OSHA's construction industry fall protection standard. Despite the simple requirements of the standard, OSHA's fall protection standard continues to be the most frequently cited OSHA standard in the construction industry. Attorney Gumina discusses methods to eliminate, prevent, and control fall hazards on the worksite with a special emphasis on fall protection training so that employees can avoid fall hazards and contractors can achieve effective safety compliance.

Read the full article [here](#).

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## **O'NEIL CANNON RANKED IN 2020 "BEST LAW FIRMS"**

O'Neil Cannon has been ranked in the *2020 U.S. News - Best Lawyers*® "Best Law Firms" list in 17 practice areas:

- Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law
- Bet-the-Company Litigation
- Commercial Litigation
- Construction Law
- Corporate Law
- Family Law
- Litigation - Bankruptcy
- Litigation - Insurance
- Litigation - Labor and Employment
- Mergers and Acquisitions Law
- Municipal Law
- Personal Injury Litigation - Plaintiffs
- Product Liability Litigation - Defendants

- Real Estate Law
- Securities / Capital Markets Law
- Tax Law
- Trusts and Estates Law

Firms included in the 2020 “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.

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## **ATTORNEYS CHRISTA WITTENBERG AND GRANT KILLORAN FEATURED IN WISCONSIN LAWYER**

Recently Attorneys Christa Wittenberg and Grant Killoran were featured in the State Bar of Wisconsin publication *Wisconsin Lawyer*. In the article, they discuss the hot topic of measles and the due process implications of public health responses.

Read the full article [here](#).

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## **ATTORNEYS CARL HOLBORN AND BRITANY MORRISON PUBLISHED IN THOMSON REUTERS JOURNAL**

Attorneys Carl D. Holborn and Britany E. Morrison were recently published in the *Taxation of Exempts*, a Thomson Reuters journal.

There is a big unresolved public policy issue in the philanthropic world—private foundations and their use of donor-advised funds (DAF). Specifically, the issue is whether distributions made by private foundations to donor-advised funds should be treated as “qualifying distributions” for purposes of the 5% annual payout rule.

While the issue was sparsely debated before, the IRS really stirred the debate in the charitable world with the issuance of Notice 2017-73. The Notice specifically requests comments on whether a contribution to a DAF by a private foundation should be considered a distribution that counts as a “qualifying distribution” for the purposes of the annual 5%

payout rule. [1] Comments in response to the Notice poured in and opinions were deeply divided between those in favor of reform to disallow or limit “qualifying distributions” to DAFs and those in full defense of the IRS maintaining the status quo.

Two years have passed since the Notice issuance and the IRS has yet to issue any regulations or proposed regulations. This article highlights some of the major arguments for reform, limits, and the status quo regarding private foundations distributions to DAFs “counting” as qualified distributions.

Read full article [here](#).

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[1]See Notice 2017-73, 2017-51 IRB 562 available at <https://www.irs.gov/pub/irs-drop/n-17-73.pdf>.

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## THE WILAW QUARTERLY NEWSLETTER

### Newsletter Article Highlights:

- IRS Unveils Significant Virtual Currency Taxation Enforcement Initiative
- Aretha Franklin’s Estate: Are Handwritten Documents Valid Wills?
- Time to Act on Act 368: Wisconsin Pass-Through Entity-Level Tax Election
- Breaking News: DOL Sets Overtime Salary Exemption Threshold at \$35,568
- The Objectives of Good Succession Planning

### Firm News:

- Congratulations to Our Attorneys Listed in The Best Lawyers in America® 2020 Edition
- Attorney Erica Reib Reelected to the Board of the State Bar’s Labor and Employment Section

Click the image below to read more.



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## O’NEIL, CANNON, HOLLMAN, DEJONG AND

# LAING ELECTS JB KOENINGS AND ERICA REIB AS SHAREHOLDERS

O'Neil, Cannon, Hollman, DeJong and Laing is pleased to announce that Attorney JB Koenings and Attorney Erica Reib were recently elected as shareholders of the firm.

JB has been with the firm since 2010, first as a law clerk and then as an attorney in 2011. He works with and advises clients on a wide range of business law matters, including form of entity selection and initial capitalization, raising funds through private equity offerings, securities compliance and broker/dealer matters, mergers and acquisitions, contract preparation and negotiation, and software, technology, and IP matters.

Learn more about JB Koenings by visiting his full [profile](#).

Erica has been with the firm since 2014 and is a member of the Employment Law Practice Group. She assists clients with employment discrimination litigation, non-competition and trade secret litigation, wage and hour issues, NLRB and unfair labor practice matters, employment policy and agreement drafting and review, unemployment compensation, investigations and proper employment practices to avoid litigation.

Learn more about Erica Reib by visiting her full [profile](#).

We are pleased to add both JB and Erica as shareholders.

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## IN MEMORIAM: WILLIAM RYAN DREW

We are saddened to announce the passing of William Ryan Drew, who served of counsel at O'Neil Cannon for more than thirty years.

Bill was a tireless public servant for the citizens of Milwaukee as an elected and appointed official serving in many capacities over the decades, including: Director of Administration for Milwaukee County, Commissioner of City Development for the City of Milwaukee, Treasurer of the Southeastern Wisconsin Regional Planning Commission, President of the Milwaukee Common Council, and Fourth District Milwaukee Alderman. In addition, he served as President of the Board of Directors for the City of Milwaukee Retiree's Association, Board of Directors for the National Center for Housing Management, and was on the Board of Visitors for the Les Aspin Center for Government at Marquette University.

His counsel will be missed dearly by our firm. Our prayers and thoughts are with his family.

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## **ATTORNEY MCBRIDE NAMED FELLOW OF THE WISCONSIN LAW FOUNDATION**

Patrick G. McBride, shareholder in O'Neil, Cannon, Hollman, DeJong and Laing's Litigation Practice Group, was recently elected Fellows of the Wisconsin Law Foundation.

The Fellows organization was created in 1999 as a special means to honor members of the State Bar of Wisconsin who have achieved significant accomplishments in their career and have contributed leadership and service to their communities. Membership in the Fellows is limited to 2.5% of the State Bar of Wisconsin's total members.

The Fellows aims to energize its members to continue their efforts in the promotion of justice, advancement of the legal profession, and improvement of legal education. For more information on the Fellows click [here](#).