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.

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.

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.

TAX AND WEALTH ADVISOR ALERT: THE OBJECTIVES OF GOOD SUCCESSION PLANNING

This the 4th of 11 articles based on our firm's book *The Art, Science and Law of Business Succession Planning*.
In the last article we discussed the five essential objectives a good succession plan needs to address. In this article we will discuss the first objective in more detail–maximizing the value of the business.

Number 1: Maximize and Protect the Value of the Business

Every business– no matter how large, small, or financially sound– becomes vulnerable to losing value during a change of leadership. Thus, your first goal with succession planning should be to enact a strategy that enables the company to preserve its value and continue to grow after the transfer is complete.

For our discussion, we will assume you've already built a profitable family business that remains on a growth trajectory. The guiding principles that have built your success won't change; the primary variable is the transfer itself. Thus, your best strategy for maximizing company value is to protect its value during the transition. For that reason, this article focuses mainly on protection strategies.

Developing and Retaining a Trusted Management Team

Your best defense against losing company value is to assemble a strong management team well in advance. This team may consist of family members or key associates or managers you trust.

For any key management people who are non-family, it is wise to incentivize them by giving them some financial stake in the company's operation. Consider the following examples.

Minority Stock Ownership

One of the more common methods of sharing a financial stake with key management personnel is to grant them a minority interest in the company through stock ownership. Though if you do so, bear in mind that, by taking this action, you're giving these managers more than just a vested interest–you're also granting them specified rights and legal access to the company as minority stockholders. Let's address some of these in turn.

Right of Inspection

At any time, stockholders have the right to inspect and make copies of some corporate documents, including the list of stockholders, the stock ledger and some financial records. To view or copy these documents, the stockholder must make a written demand stating a "proper purpose" for doing so. In Wisconsin, state law defines "proper purpose" as "a purpose reasonably related to such person's interest as a stockholder."

In plain English, the law requires you to make these records available to minority stockholders if the stockholder provides a specific reason why it's pertinent to their investment. This does not mean you have to automatically open all of your books for every request. If a stockholder requests to see the corporation's books and records, the burden of proof is on the stockholder to demonstrate why this information is needed.

On the other hand, stock ledgers and stockholder lists are more in the stockholder's domain, and the burden of proof would be on you to show why that member does not have a "proper purpose."

Right to Bring a Derivative Suit

If a minority stockholder believes it necessary, he may have the legal right to file a “derivative lawsuit”—that is, to sue a third party on behalf of the institution in which he owns stock. These suits don’t happen often, but you need to know they can happen.

Derivative suits are intended to let a stockholder to protect his investment in the corporation in the event that the firm’s leadership fails to do so.

Thus a third party defendant may be any entity who poses a perceived threat to the company’s well-being. That includes its executive officers and directors. In an extreme application, if you make a key employee a stockholder while you remain in an executive position, that employee could subsequently sue you on behalf of the company, if he believes you breached your duties in some way (such as by using corporate property for personal gain).

In most cases, the stockholder can only bring a derivative claim if the following conditions are met:

• The stockholder must meet the minimum standing requirements as a stockholder, based on applicable laws. (For example, he must own a specified number of shares or be a stockholder at the time of the alleged offense.)
• The stockholder must have already made a written demand to the board of directors to take action, and the board either refused or failed to act.

Because the derivative claim is filed on company’s behalf (rather than the individual stockholder’s), if he wins the case, any financial award goes to the corporation, and not directly to the stockholder.

Right to Protection Against Shareholder Oppression

This provision protects minority stockholders against financially oppressive or harmful actions by stockholders with a controlling share in the corporation. Examples include:
• Controlling shareholders buy more shares below fair market value
• Forcing minority shareholders to sell their shares below market value
• Taking actions that cause minority shares to drop in value significantly

If a minority stockholder believes controlling stockholders are committing shareholder oppression, he may file a direct suit against the corporation itself, as opposed to a derivative suit.

When you maintain good relations with key employees, and when your company conducts business in an upright manner (even in your absence), chances of a minority stockholder invoking these rights are greatly reduced. But because you grant these rights to anyone who has stock ownership, choose your stockholders wisely.

Deferred Compensation/Bonuses

If you don't want to face the complexities involved with minority stock ownership, deferred compensation can also be an excellent way to give a financial stake to non-family members of your management team.

Deferred compensation is additional income paid out over time, based on profits or other identifiable goals. This gives your key employees a great incentive to stay with your company post-succession. You can implement deferred compensation in a variety of ways; we generally review four of the most common types below.

Deferred Bonus Plans

Bonus plans provide excellent incentives to work hard and grow the company, because the workers receive a share of the additional profits. When bonuses are deferred, they can incentivize staff to remain with the company as long as possible. For example, if you calculate bonuses annually, an employee could receive 50 percent up front, 25 percent in year two and 25 percent in year three, with additional annual bonuses adding to the amount each year. With this in place, employees know they will forfeit a portion of their bonus if they leave the organization.

Non-Qualified Retirement Plans

Unlike the standard plans defined by the Employee Retirement Income Security Act (ERISA), a non-qualified retirement plan is a tax-deferred instrument designed for the specific retirement needs of key employees.

Under this structure, an institution agrees to pay specified additional compensation to the employee upon retirement, and this amount is calculated according to a vesting schedule. Thus, the longer the employee stays with your company, the larger this retirement bonus will be, up to a fixed amount.

Stock Appreciation Rights (SARs)

With stock appreciation rights (SARs), your key employees receive additional deferred compensation tied directly to firm growth. As your business increases in value, your employee's financial stake grows proportionately in the form of ownership shares, based also upon the employee's tenure with the company. These shares are given to the employee upon one or more "triggering events," such as when the employee retires, or if the business is sold.

Phantom Stock Plans

Phantom stocks are similar in nature to SARs, with the main exception that they aren't actual stock, but instead stock "units" that parallel the value of real stocks. Upon a triggering event as described above, the non-family employee receives a dividend or cash bonus for her phantom stocks, proportionate to the increased value of the actual stock.

Non-Compete Agreements

When a key employee leaves, your company's value may become vulnerable. This is especially true if that employee has knowledge of your client base or trade secrets. To preserve your business interests, you'd be wise to have these employees sign a non-compete agreement of some sort. These agreements occur in two basic forms:
• *Non-compete Clause (or, Restrictive Covenant)*: Under this agreement, the employee promises that if she leaves the organization, she will not perform similar work that might compete with your business within a defined geographic range, for a set period of time.
• *Nonsolicitation Agreemen*t: This agreement specifies that an employee leaving the company will not attempt to solicit your clientele away from you.

Non-compete agreements are validated by some sort of valuable consideration— that is, an added value to the employee as an incentive to sign. For an employee just coming on board, the valuable consideration may be the job offer in itself; however, if you ask existing key personnel to sign a non-compete, you'll need to include additional incentives, such as a bonus, a raise or increased benefits.

It is important to note that in Wisconsin, the validity of non-compete agreements is determined on a case-by-case basis, so it's critical to consult with an employment lawyer regarding the specifics of these contracts.

As the owner of your business, you've already developed habits that encourage company growth. By utilizing tools such as those we've described here, you're building a trusted, motivated management team and laying important groundwork for continued growth of your business after you leave it.

EMPLOYMENT LAWSCENE ALERT: EIGHTH CIRCUIT HOLDS THAT AN SPD CAN FUNCTION AS A PLAN DOCUMENT

A federal appellate court has ruled, in *MBI Energy Services v. Hoch*, decided in July 2019, that a single document may serve as both the summary plan description (SPD) and the formal

plan document for an ERISA welfare benefit plan.

In this case, the plan sponsor of a self-insured group health plan paid benefits on behalf of a participant for medical injuries sustained in an accident. Subsequently, the participant settled a tort claim with a third party who allegedly caused the accident. The settlement amount exceeded the amount of the plan-paid medical expenses and the plan sponsor sought reimbursement.

ERISA Requires a Plan Document

Under ERISA, the requirement that "every employee benefit shall be established and maintained pursuant to a written instrument" is understood to mean that the terms of each benefit program must be memorialized in a written plan document. ERISA further requires the plan sponsor to provide to each plan participant an SPD that briefly and clearly summarizes the terms of the plan document.

In some cases, plan sponsors do not offer two separate documents (a plan document and an SPD), but rely, instead, on a single combined document that purports to function both as the plan document and as the SPD.

Several courts have argued that a combined Plan document and SPD is unacceptable on the grounds that it is not possible for a document to summarize itself. Nonetheless, in the self-insured medical plan context (where coverage exclusions and limitations are difficult to summarize), it is common to have a single document that serves as both the plan document and the SPD.

Where's the Plan?

While the employer in the *MBI Energy Services* case could point to no document clearly identified as the "plan," there was an administrative services agreement (ASA) between the employer and the plan's claims administrator indicating that the plan benefits, terms, and conditions were set forth in an attached exhibited – the SPD. Along with the benefit provisions and ERISA-mandated language, the SPD contained sections addressing the rights of subrogation, reimbursement, and assignment. The SPD stated, in part, that if a participant "makes any recovery from a third party . . . whether by judgment, settlement or otherwise," the participant must reimburse the plan sponsor "to the full extent of any benefits paid" by the plan.

The Arguments

The participant argued that the SPD was not a valid plan document and that the employer therefore had no right to reimbursement. Instead, the participant asserted that the SPD was only a summary of, and in conflict with the terms of, the ASA, which the participant contended was the controlling plan document. The participant's argument was rooted in the

Supreme Court's reasoning, in its 2011 *CIGNA v. Amara* ruling, that "'summary documents, important as they are, provide communication with beneficiaries *about* the plan, but that their statements do not themselves constitute the *terms* of the plan."

The plan sponsor, on the other hand, argued that the SPD functioned as both the SPD and the plan document and that the SPD's reimbursement language gave the plan an equitable lien on the participant's recovery proceeds.

The Ruling

The Eighth Circuit disagreed with the participant's contention that the SPD was unenforceable because it conflicted with the ASA, pointing out that the ASA was silent as to reimbursement and expressly incorporated the terms and conditions of the SPD. The court thereby joined other circuits in distinguishing *CIGNA v. Amara* (a retirement plan matter in which both a plan document *and* an SPD were present) and concluding that, absent a formal plan document, the SPD may function as the plan document.

Specifically, the court rejected as "nonsensical" any interpretation that renders no plan document at all under the terms of ERISA and concluded that the label of SPD is not dispositive. Where no other source of benefits exists, the SPD *is* the formal plan document.

The court also pointed out that it would be inequitable to allow the participant to receive benefits according to the SPD but not hold him to the reimbursement responsibilities set forth in that same document. It concluded that, since the SPD was the plan's written instrument, the participant was bound by its terms and obligated to reimburse the plan.

As a result, the participant was required to reimburse the self-funded employee benefit plan for $45,474 in medical benefits the plan had paid.

Implications

Since the U.S. Supreme Court's *CIGNA v. Amara* ruling, plan sponsors of self-insured plans have wondered whether the common practice of using a single document as both the plan and the SPD may permissibly continue. The Eighth Circuit's *MBI Energy Services* ruling adds to a growing list of cases finding that an SPD can function as an enforceable ERISA welfare plan document in the absence of a separate additional document.

Plan sponsors should take note that identifying the controlling language relevant to a given employee benefit plan is not always clear cut. In some cases (as here), the plans terms may be contained within a single document. In other instances, the terms of an ERISA plan may be inferred from a series of documents, none of which is clearly labeled as a plan.

Do your Plan's Documents Protect You?

All plan sponsors are advised to review whether their documents for ERISA welfare plans (such as group health, dental, vision, disability, and life plans) not only comply with ERISA,

but also whether they reflect the employer-specific disclosure requirements and employer-protective statements, which are typically *not* included in documents prepared by insurers or third-party administrators.

In many cases, it is advisable to streamline multiple separate ERISA benefits into a single so-called Wrap Plan document, which 'wraps around' and supplements the other documents to become the SPD. A Wrap Plan can help employers to minimize the risk of financial penalties and lawsuits and streamlines certain reporting and amendment requirements.

The attorneys of the Employment Law Group of O'Neil, Cannon, Hollman, DeJong and Laing can assist in reviewing and providing counsel relating to the documentation and operation of all employer-sponsored employee benefit and compensation plans.

EIGHTEEN OCHDL ATTORNEYS NAMED 2020 BEST LAWYERS IN AMERICA®

O'Neil Cannon is pleased to announce that eighteen lawyers have been named to the 2020 Edition of *Best Lawyers*, the oldest and most respected peer-review publication in the legal profession.
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. Its first international list was published in 2006 and since then has grown to provide lists in over 75 countries.

"For more than a third of the century," says CEO Steven Naifeh, "Best Lawyers has been the gold standard of excellence in the legal profession." President Phil Greer adds, "We are extremely proud of that record and equally proud to acknowledge the accomplishments of these exceptional legal professionals."

Lawyers on *The Best Lawyers in America* list are divided by geographic region and practice areas. They are reviewed by their peers on the basis of professional expertise, and undergo an authentication process to make sure they are in current practice and in good standing.

We would like to congratulate the following attorneys named to the 2020 *Best Lawyers in America* list:

- Douglas P. Dehler – Litigation – Insurance
- James G. DeJong – Corporate Law, Mergers and Acquisitions Law, Securities / Capital Markets Law

- Seth E. Dizard – Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law, Litigation Bankruptcy
- Peter J. Faust – Corporate Law, Mergers and Acquisitions Law
- John G. Gehringer – Commercial Litigation, Construction Law, Corporate Law, Real Estate Law
- Joseph E. Gumina – Litigation – Labor and Employment
- Dennis W. Hollman – Corporate Law, Trusts and Estates
- Grant C. Killoran – Litigation – Health Care
- Dean P. Laing – Commercial Litigation, Personal Injury Litigation – Plaintiffs, Product Liability Litigation – Defendants
- Gregory W. Lyons – Commercial Litigation, Litigation – Insurance
- Patrick G. McBride – Commercial Litigation
- Thomas A. Merkle – Family Law
- Chad J. Richter – Business Organizations (including LLCs and Partnerships)
- John Schreiber – Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law, Litigation – Bankruptcy
- Steven J. Slawinski – Construction Law

Since it was first published in 1983, *Best Lawyers* has become universally regarded as the definitive guide to legal excellence. *Best Lawyers* is based on an exhaustive peer-review survey. Over 54,000 leading attorneys cast more than 7.3 million votes on the legal abilities of other lawyers in their practice areas. Lawyers are not required or allowed to pay a fee to be listed; therefore inclusion in *Best Lawyers* is considered a singular honor. *Corporate Counsel* magazine has called *Best Lawyers* “the most respected referral list of attorneys in practice.”

IRS DECLARES SALES OF PROPERTY FROM ONE SPOUSE’S GRANTOR TRUST TO THE OTHER SPOUSE’S GRANTOR TRUST TO BE TAX FREE TRANSACTIONS

In a recent Private Letter Ruling the IRS declared that sales of property between spouses and the spouses’ grantor trusts do not trigger income taxation. This ruling validates a planning technique using special trusts called Spousal Lifetime Access Trusts (SLATS) and transactions between the spouses and these trusts. This type of planning is used to minimize or avoid estate tax and to protect assets from creditors and divorce. Please see PLR 201927003, Rev Rul 85-13, 1985-1 CB 184, and Code Sec. 1041(a).

EMPLOYMENT LAWSCENE ALERT: IRS EXPANDS LIST OF HSA-COMPATIBLE PREVENTIVE CARE SERVICES

The IRS recently issued guidance expanding the types of preventive care services that can be provided by a high-deductible health plan (HDHP), before the deductible is met, without eliminating a covered individual's eligibility to participate in a Health Savings Account (HSA). The new guidance was published on July 17, 2019 and took legal effect on that same day.

Employers who sponsor HDHPs should now consider whether any plan documentation or communication changes are required to implement the expanded preventive care coverage rules. Alternately, employers who have not previously adopted a HDHP should assess whether the new rules may now make the HDHP/HSA model a more attractive way to control health care costs.

Background

An HSA is a tax-favored account that may receive contributions from an employee, an employer, or both. HSAs are subject to various rules that govern the individual account holder's eligibility to make and receive contributions and whether or not withdrawals are taxable.

To be eligible for HSA contributions, an individual must be covered under a HDHP and may generally not have any health coverage other than HDHP coverage. Certain preventive care services, however, are not considered to constitute health coverage so as to disqualify an individual from HSA eligibility.

Previously, preventive care (within the meaning of the HSA and HDHP rules) has not included any service or benefit intended to treat an *existing* illness, injury, or condition.

The IRS is aware, however, that cost barriers for care have resulted in the failure by some individuals who are diagnosed with certain chronic health conditions to seek or to use effective and necessary care that would prevent exacerbation of such conditions. Accordingly, and in consultation with the U.S. Department of Health and Human Services (HHS), the IRS determined that certain medical care services received and items purchased, including prescription drugs, should now be classified as preventive care for someone with the corresponding chronic condition.

Newly Established HSA-Compatible Preventive Care

To address the stated concerns, the expanded list of HSA-Compatible preventive care

expenses includes fourteen cost-effective items and services that are likely to prevent the worsening of eleven specified chronic conditions, as follows:

Preventive Care for Specified Conditions	**For Individuals Diagnosed with**
Angiotensin Converting Enzyme (ACE) inhibitors	Congestive heart failure, diabetes, or coronary artery disease
Anti-resorptive therapy	Osteoporosis or osteopenia
Blood pressure monitor	Congestive heart failure or coronary artery disease
Inhaled corticosteroids	Asthma
Insulin and other glucose-lowering agents	Diabetes
Retinopathy screening	Diabetes
Peak flow meter	Asthma
Glucometer	Diabetes
Hemoglobin A1c testing	Diabetes
International Normalized Ratio (INR) testing	Liver disease or bleeding disorders
Low-density Lipoprotein (LDL) testing	Heart disease
Selective Serotonin Reuptake Inhibitors (SSRIs)	Depression
Statins	Heart disease and diabetes

The IRS and HHS will together review the list approximately every five to ten years to determine whether any items or services should be removed or added.

Changes Arose from Executive Order and Policy Advocacy
The immediate impetus of the change is Section 6 of Executive Order 13877, “Improving Price and Quality Transparently in American Healthcare to Put Patients First,” which was signed by President Trump on June 24, 2019, and which mandated the issuance of guidance permitting HSAs to cover low-cost preventive care to help “maintain health status for individuals with chronic conditions.”

The change also reflects the efforts of various health-policy advisors and advocates, who have long called for allowing first-dollar HDHP coverage for targeted, evidence-based, preventive services that prevent chronic disease progression and related complications.

Key HDHP Sponsor Issues and Next Steps

- In preparation for the 2020 open enrollment season, employer-sponsors of HDHPs should work to educate employees and dependents to assist them in understanding and

benefitting from the new pre-deductible preventive care services.
- Sponsors of HDHPs should review whether or not existing plan documentation should be amended to encompass the expanded categories of covered care (or whether the current definitions remain legally sufficient).
- Because the out-of-pocket costs for some types of chronic care will now shift to the employer, sponsors of HDHPs should analyze whether the current deductible and premium levels are sufficient to meet the increased benefit expenses, or whether adjustments are warranted.
- Employers who offer both HDHPs/HSAs and on-site health clinics may provide only preventive care services in the on-site clinic in order to avoid jeopardizing employee HSA eligibility. Affected employers may now reconsider and expand the types of pre-deductible services to be provided to employees in the on-site clinic.
- Increased coverage of chronic condition expenses may increase the attractiveness of HDHP coverage to participants who are managing chronic conditions. The new rules may provide an opportunity to either increase future employee participation in, or to newly adopt, HDHP/HSA coverage.

THE WILAW QUARTERLY NEWSLETTER

Newsletter Article Highlights:

- Objecting to an Opposing Party’s Request for Attorney Fees Can Have Ramifications
- United States Supreme Court Clarifies Standard on Sanctions for Violating Bankruptcy Discharge
- Not Feeling so SECURE: Proposed Law Could be Costly for Non-Spouse IRA Beneficiaries
- Creation of New Task Force Signals Increased State Scrutiny of Wisconsin Worker Classification
- The Five Objectives of Good Succession Planning

Firm News:

- The Firm Welcomes Britany E. Morrison
- Firm Wins Trifecta
- Attorney Dean Laing Named “Lawyer of the Year”
- Attorney Christa Wittenberg Wins 2019 Judge Terence T. Evans Humor and Creativity in Law Competition
- Attorney Grant Killoran Appointed Co-Chair of the Wisconsin Fellows of the American Bar Foundation

Click the image below to read more.

ERICA REIB REELECTED TO THE BOARD OF THE STATE BAR'S LABOR AND EMPLOYMENT SECTION

Attorney Erica N. Reib was recently reelected to the Board of the Labor and Employment Section of the State Bar. The State Bar of Wisconsin provides opportunities for lawyers to work on issues that matter to them and the public they serve. The Labor and Employment Section includes new and experienced attorneys who practice labor and employment law. The section keeps members up-to-date on recent developments in the law. The section also allows members to exchange information and opinions on various labor topics and legal issues in the workplace.

Erica is a member of O'Neil Cannon's Employment Law Practice Group. She assists clients with employment discrimination litigation, non-competition and trade secret litigation, OSHA matters, 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. She volunteers her time at Marquette Volunteer Legal Clinic and Milwaukee Justice Center, and is a board member and legal committee chair at the Audio and Braille Literacy Enhancement, Inc.

If you would like to contact Erica, she can be reached at 414-276-5000 or erica.reib@wilaw.com.

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