DEAN P. LAING NAMED “LAWYER OF THE YEAR”

On July 16, 2019 Dean P. Laing was named “Lawyer of the Year” by the Milwaukee Bar Association at a reception attended by more than 300 attorneys. Dean was recognized for winning two cases at the Wisconsin Supreme Court for defendants and settling several million dollar plus cases on behalf of plaintiffs during the past year. In presenting Dean with the award, the President of the Milwaukee Bar Association stated that Dean is recognized as “one of Wisconsin’s top trial attorneys.”

Dean can be reached at 414-276-5000 or dean.laing@wilaw.com.

FIRM WINS TRIFECTA

O’Neil Cannon was victorious in three cases before the Wisconsin Supreme Court this year, all involving issues of first impression in Wisconsin.

In the first case, decided on January 29, 2019, the Supreme Court held that bad faith under the Uniform Fiduciaries Act (“UFA”) requires proof by a bank customer of bank dishonesty whereby the bank willfully failed to investigate compelling and obvious known facts suggesting fiduciary misconduct because of a deliberate desire to evade knowledge of fiduciary misconduct.

In *Koss v. Park Bank*, 2019 WI 7, 385 Wis. 2d 261, 922 N.W.2d 20, an employee of Koss Corporation embezzled $34 million from the Company over a 10-year period. A significant portion of the embezzled funds came from cashier’s checks obtained by the employee from the employer’s bank accounts at Park Bank, which the employee used for her personal benefit. After the embezzlement was discovered, Koss Corporation sued Park Bank, alleging that Park Bank should have discovered the embezzlement earlier and reported it to Koss Corporation, and its failure to do so was bad faith under the UFA, which precludes claims of negligence against banks. After five years of litigation, the trial court dismissed the case on summary judgment, finding that Koss Corporation failed to meet the high standard for establishing bad faith under the UFA. The Court of Appeals affirmed the dismissal, and the Supreme Court did so as well.

In a 2-3-2 decision, the Supreme Court held that the following “foundational principles” are applicable in analyzing a bank’s conduct when bad faith is asserted under the UFA: (1) bad faith is an intentional tort requiring that a bank employee suspected fiduciary misconduct but purposefully failed to investigate out of a fear of discovering the misconduct; (2) bad faith is reviewed on a transaction by transaction basis, such that the facts known by each individual bank employee are not aggregated to form collective knowledge of the bank; (3) whether a bank acted in bad faith is determined at the time of the breach of fiduciary duty, not by looking back at transactions that occurred many months earlier; and (4) considerations of bad faith require analyses of a bank's actions to determine its subjective intent.

In applying these bank-friendly standards and principles, the Supreme Court held that "none of Koss Corporation's factual allegations asserted, or even implied, that Park Bank acted dishonestly such as being motivated by self-interest with regard to the transactions [the customer's employee] initiated," and "none of Koss Corporation's allegations assert that Park Bank suspected that [the customer's employee] was acting improperly." Concluding, the Supreme Court held that, while "[t]here is much here from which a claim of negligence could be made," negligence is not sufficient to establish bad faith under the UFA.

In the second case, decided on March 14, 2019, the Supreme Court held that a business purpose is not required in order for land to be classified as "agricultural land" for property tax purposes. In *State ex rel. Ogden Family Tr. v. Bd. of Review*, 2019 WI 23, 385 Wis. 2d 676, 923 N.W.2d 837, the Ogdens owned property in the Town of Delafield that was originally classified as "agricultural land," thereby resulting in a low assessed value for property tax purposes. In 2016 the Town reclassified the property as "residential" on the grounds that the property was not being used for a business purpose, which resulted in a 50-times increase in the assessed value of the property. The Ogdens challenged the reclassification, arguing that the property is used primarily to harvest apples and hay for food and fiber, and to grow Christmas trees, which are agricultural uses. The Town failed to budge, determining that a business purpose is required for land to be classified as "agricultural land" for property tax purposes. The Ogdens filed a petition for certiorari review, which the trial court rejected, siding with the Town.

The Ogdens appealed, and the Court of Appeals reversed, concluding that a business purpose is not necessary for land to be classified as "agricultural land" for property tax purposes. The Supreme Court affirmed, in a unanimous decision, holding that section 70.32(2)(c)1g., Wis. Stats., merely requires the "growing" of crops, not the marketing, selling, or profiting from them, for land to be classified as "agricultural." As a result, the Supreme Court held that "[a] business purpose is not required in order for land to be classified as 'agricultural' for property tax purposes."

In the third case, decided on May 23, 2019, the Supreme Court held that constructive trust is a remedy, not a cause of action. In *Tikalsky v. Friedman*, 2019 WI 56, 386 Wis. 2d 757, 928 N.W.2d 502, Tikalsky's parents disinherited him from their estates, leaving their entire estates to their other three children, equally. Following his parents' deaths, Tikalsky sued his siblings, alleging that two of them intentionally interfered with his expected inheritance. As to his third sibling, Tikalsky sued her for constructive trust arguing that, even though she was innocent of any wrongdoing, she is in possession of a portion of his expected inheritance and, if he prevails on his claims against his other two siblings, his innocent sibling should be required to disgorge the excess portion she received from her inheritance.

The trial court dismissed the innocent sibling from the lawsuit on the grounds that no cause of action for liability was asserted against her and, without a finding of liability against a party, no remedy can be ordered against that party. The Court of Appeals reversed, holding that constructive trust is available against an innocent beneficiary if wrongful conduct is found against any party and it would be inequitable for the innocent beneficiary to hold onto the property received as a result of the wrongdoing.

In a 4-3 decision, the Supreme Court reversed the Court of Appeals' decision and held that "constructive trust is a remedy, not a cause of action." The Supreme Court further held that, while "a constructive trust may be imposed on property in the possession of one who is wholly innocent of any" wrongdoing, that remedy is only available where the innocent beneficiary "came into possession of property that was already burdened with a constructive trust," *i.e.*, the owner of the property must have conveyed the property to an innocent beneficiary in violation of a duty to transfer it to the plaintiff (such as by a court order in a divorce proceeding). Concluding, the Supreme Court held that Tikalsky's parents "violated no duty to [Tikalsky] when they caused their estate planning documents to transfer part of their estate to [Tikalsky's innocent sibling]" and, as a result, "where there is no violated duty . . . there can be no constructive trust."

Dean Laing represented the bank in *Koss* and the innocent beneficiary in *Tikalsky*. He can be reached at 414-276-5000.

ATTORNEY GRANT KILLORAN APPOINTED CO-CHAIR OF THE WISCONSIN FELLOWS OF THE AMERICAN BAR FOUNDATION

Grant Killoran recently was appointed to a three year term as Co-Chair of the Wisconsin Fellows of the American Bar Foundation, beginning September 1, 2019.

The Fellows of the American Bar Foundation is a global honorary society of attorneys, judges, law faculty, and legal scholars whose public and private careers have demonstrated outstanding dedication to the highest principles of the legal profession and the welfare of their communities. Established in 1955, the Fellows support the research of the American Bar Foundation and currently has a membership totaling over 14,000 individuals across the globe. Membership in the Fellows is limited to one percent of lawyers licensed to practice in each jurisdiction.

The American Bar Foundation is among the world's leading research institutes for the empirical and interdisciplinary study of law. An independent, nonprofit organization for more than 65 years, it seeks to advance the understanding and improvement of law through research projects on the most pressing issues facing the legal system in the United States and around the world today. It seeks to expand knowledge and advance justice through innovative, interdisciplinary, and rigorous empirical research on law, legal processes, and legal institutions. Its research findings are published in a wide range of forums, including leading academic journals, law reviews, and academic and commercial presses.

For more information on the Fellows of the American Bar Foundation and the American Bar Foundation, visit www.americanbarfoundation.org.

Grant Killoran is a shareholder with the law firm of O'Neil Cannon 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 and health care disputes.

Grant Killoran can be reached at grant.killoran@wilaw.com or 414-276-5000.

ATTORNEY CHRISTA WITTENBERG WINS 2019 JUDGE TERENCE T. EVANS HUMOR AND CREATIVITY IN LAW COMPETITION

Christa Wittenberg was recently announced the winner of the 2019 Judge Terence T. Evans Humor and Creativity in Law Competition, sponsored by the Eastern District of Wisconsin Bar Association. The award is given to one attorney each year whose original creative law-related writing piece is selected by the review committee. The competition honors the memory of the Honorable Terence T. Evans, former judge of the U.S. District Court, Eastern District of Wisconsin, and U.S. Court of Appeals for the Seventh Circuit, who was known for his wit and creativity throughout his life and his work. At the EDWBA Annual Meeting in April, Attorney Wittenberg happily accepted the award of a traveling trophy. Her winning article is below:

Boot Camp for Litigators: An Unconventional, Immersive CLE

By: Christa D. Wittenberg

Are you a litigator looking to improve your skills? Stuck in a career rut? Wishing you could practice the essential soft skills that make lawyers effective in and out of the courtroom? Try our 12-week intensive crash course: Parental Leave, also known as Boot Camp for Litigators. A brand new baby is required for this course; you will need to supply your own.

This innovative CLE emphasizes the skills that separate good lawyers from great lawyers, which are the same skills new babies force upon their parents: tenacity, flexibility, heightened awareness, creativity, and the ability to sift through crap. Our boot camp will give you the skills necessary to make you the litigator you've always dreamed of becoming. It's guaranteed to give you the confidence to tell your opponents you can beat them while using just one arm. Literally.

The course focuses on the following areas:

Sleep deprivation resistance training: You will simulate the long days and sleepless nights of trial. Boasting 3-4 hours of interrupted sleep nightly, our boot camp will teach you to be impervious to the side effects of exhaustion in the highest stakes environment: your child's life depends on it.

Thinking quickly on your feet: Improvising and adapting to challenging circumstances are crucial skills for litigators. Test your mental and emotional dexterity with countless tear-your-hair-out moments, like diaper blowouts, incessant screaming for no apparent reason, fending off well-meaning strangers trying to touch your child, politely nodding at your relatives' terrible baby advice, and wrestling clothing onto your flailing infant. Like with any good improvisation class, instead of saying "no, please, no," you'll learn to say "yes, and . . . ." You'll roll with the punches and make it work, because there's really no alternative. After completing this boot camp, the next time you combat a challenging witness or argue your point to a frowning judge, your experienced brain will be hardwired to assess the situation and react deftly.

Reading a jury: Knowing whether a juror's grimace is disbelief, sympathy, or merely the burrito he had for lunch is an important skill that allows you to adjust your trial strategy on the fly and win the case. After spending 12 weeks trying to guess the reasons for your baby's many, many cries, you will find reading a fully-formed adult as easy as reading a book.

Public speaking: There's simultaneously no tougher and no easier audience than a crying baby who could not care less what you are saying. If you can soothe an infant with a spontaneous, animated speech about the jungle animals swinging from his mobile, handling an opening statement will be a breeze.

Perseverance through tedium: We all know the exciting and glamorous parts of litigation—trials, depositions, oral arguments—don't come along every day, and that it's the preparation and background work that make up the bulk of our work as litigators. Sifting through thousands of documents for the needle in the haystack, poring over mountains of raw data to build a case, researching all variants of every possible legal theory to support your claims—such work cannot be done without the ability to persist in the face of extreme boredom. At our boot camp, you will face colossal tedium. For 12 weeks, around the clock, your life will follow a dismally predictable cycle: Feed. Change diaper. Soothe. Sleep. Repeat. After you complete this mind-numbing routine for that long, reading every Seventh Circuit decision on diversity jurisdiction since 1950 will sound like some welcome fun.

Dealing with demanding clients: You'll rarely meet a client more irrational than an infant, and you don't often have a client who screams at you more than your unsmiling newborn incapable of any other form of communication. Let your little one reinforce your talent for service with a smile.

Prioritizing: Parenting, like lawyering, is all about prioritizing. Imagine you have a brief due at midnight, a deposition tomorrow, and a demanding client calling every ten minutes. Now imagine you're in the nursery, there's spit-up on your shirt, poop everywhere else, and a hungry screaming infant lying on the changing table. In both scenarios, the key to success is efficiently tackling the problems in order of priority. Our boot camp will allow you to practice your triage skills in the relative comfort of your own home. For example, you might currently think showering every day or eating your meals while they're hot are important, but you'll soon learn otherwise. The same goes when you're up against competing deadlines and demands—except you'll probably still want to shower when handling your workplace challenges if you don't want to offend your colleagues.

Gaining perspective: A healthy dose of perspective can help lawyers keep a clear head, even under great stress. Yes, we all want to do good work, win our cases, and strive for justice. But no single project or case will define you unless you let it. Caring for your child—for 12 weeks and beyond—will force you to slow down and see the forest instead of the trees.

Participants are admitted to Boot Camp for Litigators on a rolling basis. Sign up early, as there is typically a 9-month wait list for this life-changing course. This 12-week intensive course is pre-approved for 2,016 hours of CLE credits. Boot Camp for Litigators can be repeated as many times as you wish; the difficulty level increases each time.

Are you ready to see if our Boot Camp for Litigators can make you a better lawyer? Make the commitment today—if you dare!

EMPLOYMENT LAWSCENE ALERT: NEW RULE WILL PERMIT EMPLOYER REIMBURSEMENT OF EMPLOYEES’ INDIVIDUAL ACA COVERAGE PREMIUMS

Beginning January 1, 2020, employers will have the option to reimburse employees’ individual ACA Exchange (or Marketplace) health insurance premiums under an employer-sponsored Health Reimbursement Arrangement (HRA).

This is a significant change from current rules, which generally permit an HRA to reimburse only group (not individual) health insurance coverage, and which prohibit employer reimbursement of any health insurance coverage provided through the ACA Exchange.

<u>HRA Overview</u>
An HRA is a type of account-based plan that an employer may use to provide pre-tax reimbursement, up to employer-determined annual limits, of certain employee medical care expenses. Under applicable law, an HRA is a self-funded health care plan, which may be funded only by employer (not employee) dollars. An HRA is subject to ERISA, HIPAA, and certain IRS rules, including the nondiscrimination requirements that prohibit discrimination in favor of highly compensated employees.

<u>What’s Old is New Again</u>
Under final regulations issued jointly, last week, by the United States Departments of Treasury, Labor, and Health and Human Services (the Departments), Employers can once again reimburse certain individual employee health insurance expenses on a pre-tax basis. This practice was broadly permitted under IRS rules in effect from 1961 through January of 2014, when the IRS put a sudden halt to the practice on the grounds that it violated the Affordable Care Act.

<u>With Some Twists</u>
Prior to 2014, employers could directly reimburse an employee for the cost of that employee’s individual insurance coverage premiums. No additional benefit plan or plan document was required. Under the new rules, employer reimbursements of individual insurance premiums may not be made directly, but must instead flow through a documented HRA program. The HRA must conform in form and operation with applicable Department rules.
Under the law in effect over the last few years, an HRA could reimburse group health plan insurance premiums only if it were “integrated with” an ACA-compliant employer-sponsored group health plan. Under the rules that will take effect January 1, 2020, HRA “integration”

with ACA-compliant individual coverage will be available for the first time.

Why are the HRA Rules Changing?

The final regulations issued jointly by the three Departments last week ultimately result from an October 2017 Presidential Executive Order intended to expand "healthcare choice" and flexibility. HRAs were one of three priorities identified in President Trump's Executive Order 13813, which directed the Departments to consider proposing regulations or revising guidance as needed "to expand employers' ability to offer HRAs to their employees, and to allow HRAs to be used in conjunction with non-group coverage."

Key Requirements

The final regulations exceed 200 pages and provide extensive detail on the requirements applicable to the new individual coverage HRAs (ICHRAs). Among these are the following six key conditions, which must be satisfied in order to successfully integrate an HRA with individual health insurance coverage:

- All individuals covered by an ICHRA must be enrolled in individual coverage through the Exchange.
- The employer may not offer an ICHRA to the same class of employees to whom it offers group health plan coverage. This means that an employee in a particular classification may not be given a choice between a traditional group health plan and an ICHRA. Under a related rule, employers are prohibited from steering participants with adverse health factors into individual, rather than into group, coverage.
- An ICHRA must be offered in both the same amount and under the same terms and conditions to all employees. The HRA may not be more generous or less generous to some individuals based on an adverse health factor.
- The ICHRA must offer an opt-out provision so that an employee may choose to waive ICHRA HRA coverage. This condition is intended to preserve an individual's eligibility for a premium tax credit for coverage obtained on the Exchange under certain circumstances, such as when the ICHRA offered is either unaffordable or does not provide minimum value in accordance with ACA standards.
- Claims for reimbursement under an ICHRA must be substantiated and confirmed to relate to the cost of individual Exchange health insurance premiums. An employer may rely on an employee's attestation to this effect, and model attestation forms have been provided by the Departments. If an ICHRA sponsor learns of an incorrect or false attestation, future reimbursements relating to the relevant period may be denied.
- Participants potentially eligible to participate in an ICHRA must be provided with a written notice at least 90 days before the beginning of each plan year (with some exceptions for a shorter notice period in for an initial year of eligibility). The final regulations specify the content that must be provided in the notice.

Limited Time to Prepare

In order for employers to reimburse employees' purchase of individual ACA-regulated health insurance by January 1, 2020, there is much work to do in relatively little time. Before the November 1 start date of the open enrollment period for 2020 ACA coverage:

- Employers must adopt (or amend existing) HRA Plan documents to comply with the new requirements;
- Employers, as well as Exchanges will need to work to communicate the changes to eligible individuals; and
- All separate State-facilitated Exchanges, as well as the Federal Exchanges must implement any required website coding and enrollment procedures.

The State-facilitated Exchanges have been concerned about a possible 2020 rollout since that date was initially mentioned in proposed rules issued late last year. This April, the administrators of all 12 State Exchanges asked the Departments to postpone the effective date. In response, the Departments have promised to provide technical assistance to the Exchanges to facilitate timely implementation of the new rules. Nonetheless, the final regulations are extremely detailed and complex. Whether, and to what extent, employers (and Exchanges) are able to embrace ICHRA reimbursement of individual health insurance premiums remains to be seen.
The attorneys of the Employment Law team of O'Neil, Cannon, Hollman, DeJong and Laing are closely following these new developments and are prepared to discuss how the change in HRA rules may impact your strategy regarding employee benefits offerings, ACA compliance, or how to amend an existing HRA or MERP (medical expense reimbursement plan) or to adopt a new HRA document to prepare for the reimbursement of individual coverage.

EMPLOYMENT LAWSCENE ALERT: CREATION OF NEW TASK FORCE SIGNALS INCREASED STATE SCRUTINY OF WISCONSIN WORKER CLASSIFICATION

April 15, 2019 marked not only the end of the 2018 personal income tax season, but also the beginning of a new era of enforcement of Wisconsin employment practices. On that date, Governor Tony Evers issued an Executive Order creating a Joint Task Force on Payroll Fraud and Worker Misclassification (the "Task Force"). This Task Force will focus on workers who should be classified as employees but are misclassified as independent contractors.

The Task Force will be chaired by the Secretary of the Department of Workforce Development ("DWD") and will be staffed by representatives from the DWD, including its Worker's Compensation and Unemployment Insurance divisions, the Department of Revenue, and the offices of the Attorney General and the Commissioner of Insurance.

<u>Background</u>

Similar task forces have been implemented in recent years in Connecticut and Massachusetts (2008), New York (2016), Colorado, New Jersey, Tennessee, and Virginia (2018), and Michigan (2019).

One of the catalysts for the Wisconsin Task Force creation was the finding, under DWD audits from January 2016 through April 2019, of 5,841 misclassified employees and the related under-reporting of nearly $70 million in gross wages and $1.8 million in unemployment insurance taxes. Misclassification of employees also results in the underpayment of Social Security and Medicare-related employment law taxes.

Another impetus for the new interagency coordination is the concern that employers who misclassify workers as independent contractors gain an unlawful competitive advantage that allows them to under-bid or out-compete law-abiding employers.

Prior reviews of employer practices reported by the National Employment Law Project posit that audits of Wisconsin employers have typically revealed worker misclassification in 44% of investigated cases.

Task Force Mandates

The new Task Force is required to report annually to the Governor by March to describe its accomplishments and recommendation for the prior year. Specifically, the Task Force report must include the amount of wages, premiums, taxes, and other payments or penalties collected as a result of coordinated agency activities, as well as the number of employers cited for misclassification and the approximate number of affected workers. The Task Force must also identify administrative or legal barriers impeding more effective agency coordination. After consultation with representatives of business, organized labor, members of the legislature, and other agencies, the Task Force will also propose changes to administrative practices, laws, or regulations appropriate to:

- reduce agency coordination barriers;
- prevent worker misclassification from occurring;
- investigate potential violations of laws governing worker classifications;
- improve enforcement where such violations are found to have occurred; and
- identify successful mechanisms for preventing worker misclassification.

Key Take-Away

The Wisconsin Task Force is being implemented at a time when recent federal decisions by the National Labor Relations Board and the United States Supreme Court appear to be permitting some gig economy companies to more easily classify workers as independent contractors, rather than as employees.

As a result of the creation of the Task Force, however, Wisconsin employers should expect increased scrutiny from the DWD and Department of Revenue regarding independent contractor relationships.

The Employment Law team of O'Neil, Cannon, Hollman, DeJong and Laing recently presented client seminars in Pewaukee and Green Bay on the many aspects of worker classification and are well-positioned to assist Wisconsin employers in reviewing current arrangements or discussing how the law applies under various circumstances.

OCHDL IS PLEASED TO ANNOUNCE THAT ATTORNEY BRITANY E. MORRISON HAS JOINED THE FIRM

Attorney Britany E. Morrison, a graduate of Marquette University Law School, recently joined the Milwaukee law firm O'Neil Cannon Prior to joining the firm, Britany worked at a "Big Four" public accounting firm utilizing her certified public accounting license to help clients manage regulatory compliance risks and enhance returns. Britany is a member of the firm's Business Law and Tax/Succession Practice Groups, and her practice will focus on tax planning.

O'Neil Cannon, founded in Milwaukee in 1973, is a full-service legal practice that primarily focuses on providing business law and civil litigation services to closely-held businesses and their owners. The firm represents corporations, institutions, and partnerships at all stages of the business life cycle, helping them start, grow and transition from one generation to the next. We also assist business owners with their personal legal needs including tax and estate planning, family law and litigation—including personal injury litigation.

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

In our last article we discussed why a well-constructed succession plan is necessary. In this article, we review the five essential objectives the plan needs to address. The five objectives are:

1. Maximize the value of the business;
2. Minimize taxes;
3. Provide for the continuity and survival of the business;

4. Treat your children fairly; and
5. Preserve family harmony.

As you can imagine, meeting all five of these goals is a balancing act. For instance, you may entertain several strategies for maximizing value and ensuring the business's survival, but not all of these will preserve family harmony. You'll have to weigh some decisions against others (possibly over and over again), before arriving at a strategy that meets all five objectives.

Objective 1: Maximize the Value of the Business.
Since this probably has been the goal of your business all along, succession planning simply shifts this strategy to the context of continued growth and value once you're no longer at the helm.

Objective 2: Minimize Taxes.
Without proper planning, income and estate taxes can take a huge bite out of your business. Your advisor can present options, structures, and strategies to reduce this burden significantly.

Objective 3: Provide for the Continuity and Survival of the Business.
You'll need to balance a number of dynamic factors here, including the current direction of the economy and key staff and family members involved with the business. Additionally, if you want to transfer the business to one or more of your children before you pass on, you need to consider your own financial security and standard of living, based on your company's profitability. You may also want to include a component that provides for your own continued compensation.

Objective 4: Treat Your Children Fairly.
Typically, business owners want all of their children to receive a fair share from their business or estate, regardless of the children's ownership stake or level of involvement in the company. It is important to distinguish fairness from equality. For some families, fair is not always equal and equal is not always fair.

Objective 5: Preserve Family Harmony.
Questions of succession and inheritance always carry the potential to evoke conflict between family members. Some may feel entitled to particular parts of your estate, while others may feel slighted by your decision to give control to someone else. This objective can sometimes be the most difficult to meet, but careful planning and open discussion make it possible.

Consider the Needs and Goals of All Affected Parties.
Bear in mind that everyone with “skin in the game” brings needs and goals to the table, and you'll need to take these into account in your plan. These affected parties include:

1. You (the owner) and your spouse;
2. Children who are active in the business;
3. Children who are not active in the business; and
4. Key management staff who are not family.

With this reality in mind, we encourage honest discussion with all affected parties throughout the process, from planning to the actual transfer. These conversations may be challenging at times, but open conversation is almost always preferable to keeping people in the dark and then surprising them.

Your People Come First.
Tax considerations and other financial factors are a necessary part of all business planning, but remember the best interests of your family and key people always outweigh tax considerations. Tax savings alone should never be the deciding factor for a specific plan.

Finally, as you strive to meet and balance these five objectives, remember that you may have more alternatives than you see at first, which is where your attorney’s advice comes in handy. Don’t get discouraged as you work through the issues. As long as you keep these objectives in mind, your options are limited only by the imagination, current laws, and your commitment to the plan being carried out.

THE WILAW QUARTERLY NEWSLETTER

Newsletter Article Highlights:

- Can I Really Be Sued There?
- Give a Guarantor Some Credit!
- IRS Issues a Second Set of April 2019 Changes to Retirement Plan Correction Program

Firm News:

- Jim DeJong Awarded Carroll University Distinguished Alumnus Award
- WI Supreme Court Rules in Favor of Firm’s Client
- WI Supreme Court Rules Unanimously in Property Tax Case

Click the image below to read more.

EMPLOYMENT LAWSCENE ALERT: IRS ISSUES A SECOND SET OF APRIL 2019 CHANGES TO RETIREMENT PLAN CORRECTION PROGRAM

The IRS Employee Plans division on Friday, April 19, released an updated version of its comprehensive retirement plan correction protocol. Although touted as a "limited update" to the Employee Plan Compliance Resolution System, or EPCRS, the changes contained in this new Revenue Procedure 2019-19 nonetheless offer substantial savings opportunities for certain employer sponsors of 401(k), 403(b), and profit-sharing plans, and employee stock ownership plans (ESOPs).

The update is effective immediately, and is notable for being the second change in the EPCRS rules to take effect in April 2019. Under a previously-issued update to the program, a new online-only submission requirement took effect on April 1, 2019. As of that date, plan sponsors are no longer permitted to submit EPCRS correction applications or payments by mail.

Bottom Line

The effect of the April 19 update is to expand the circumstances under which a plan sponsor is permitted to correct a self-identified error under the self-correction program (SCP), rather than having to submit a formal application, and accompanying fee, to the IRS.

This expansion of the opportunities for self-correction is a welcome opportunity for plan sponsors who become aware of certain plan compliance failures involving the language of the plan document as well as particular types of errors in the operation of participant loan programs. Correction of the specified errors may now be made on a less formal basis. Provided that the proper correction protocol is followed and documented, a correction can now be completed without having to pay the usual IRS submission fee, which ranges from $1,500 to $3,500.

EPCRS Background

The purpose of the IRS EPCRS program, generally, is to provide a system of correction programs and procedures for sponsors of tax-qualified retirement plans that have fallen outside of the qualification requirements either because of errors in the language of the plan document or because of mistakes in how the plan is operated. The EPCRS correction program permits plan sponsors to correct these errors and thereby to continue to offer retirement benefits to their employees on a tax-favored basis.

Depending on the nature and severity of a retirement plan compliance error, three different

EPCRS programs exist, each with slightly different rules:

- SCP. For the least significant errors, the Self Correction Program (SCP) permits a plan sponsor to self-correct the error without paying any fee or sanction and without submitting any documentation to the IRS. Even though no documents are submitted to the IRS under the SCP program, it is important that the proper self-correction protocols described by the IRS are followed. An improper or undocumented self-correction provides no future IRS audit protection. A proper retirement plan self-correction, however, will protect a plan sponsor from future fees or penalties related to the properly-corrected error.

- VCP. For more significant compliance failures, or for failures not corrected within a specified time period, the only way to receive approval of a correction is to participate in the Voluntary Compliance Program (VCP). This program requires that a description of the error, and of its correction, be submitted to the IRS for formal approval. To use this program, a plan sponsor must pay a fee to the IRS. Under the recently-amended fee structure, the amount of the fee depends solely on the amount of plan assets and ranges from $1,500 (for plans with less than $500,000 in assets) to $3,500 (for plans with more than $10,000,000 in assets).

- Audit CAP. If it is the IRS, rather than the plan sponsor, who identifies a compliance error, then the only permitted correction program is the more expensive Audit CAP program. Errors can be corrected under Audit CAP if the IRS identifies an error during an audit. Under Audit CAP, the penalties imposed in order to retain the retirement plan's tax-qualification will be larger than under the VCP program, and will vary, based upon the nature and extent of the compliance error, the severity of the error.

Potential Opportunity to Make Key Corrections at a Lower Cost

The Treasury Department and IRS expect to continue to update the EPCRS program, in whole or in part, from time to time. Given the ever-changing and highly fact-specific nature of the IRS correction program, the severely adverse threat of plan tax-disqualification, and the need to determine the most effective correction strategy, plan sponsors who suspect or know that a retirement plan has a compliance error are advised to work confidentially with legal counsel specifically experienced in this area of practice. Because an error cannot be corrected under either the SCP or VCP programs after an IRS audit has begun, it is always best to respond to a compliance error quickly and proactively.

Now that the opportunities for self-correction have been expanded, there is no time like the present for plan sponsors to review their tax-qualified plan documentation and operations. Because more types of compliance errors can now be self-corrected, the cost of bringing an employer-sponsored retirement plan back into good standing may now be reduced.