THE WILAW QUARTERLY NEWSLETTER

Newsletter Article Highlights:

- A Must-Read Book for Family Business Owners
- Trends in Arbitration in the United States
- Sales Tax Collection in Wisconsin Starts October 1st–Are You Ready?
- Supreme Court Decides Class-Action Waivers Are Enforceable for Employees

Pleased to Announce:

- State Bar of Wisconsin Taxation Law Section Board Adds New Director, Attorney Samantha M. Amore
- O'Neil, Cannon, Hollman, DeJong and Laing S.C. is Proud to Celebrate 45 Years!

Click the image below to read more.

EMPLOYMENT LAWSCENE ALERT: SHOULD I USE E-VERIFY OR NOT?

E-Verify is an internet-based system that is operated by the Department of Homeland Security (DHS) in conjunction with the Social Security Administration (SSA). In theory, the program simplifies the process of ensuring new employees have the appropriate work authorization. After registration, employers enter sections 1 and 2 of the new employee's I-9 Employment Eligibility Verification Form into the system, allowing the system to cross-reference the employee's information with information stored by the SSA. After entering the information, employers would receive either an initial confirmation or a "tentative non confirmation" in seconds. The program sounds like an easy way to navigate the dark waters of unintentional unauthorized employment; however, the program, with many advantages and disadvantages is not for everyone.

The question then becomes—should I use E-Verify or not?

In some cases, the answer is simple. All federal contractors are required to use the program. Similarly, Arizona and Mississippi have passed laws requiring all employers to use the program while South Carolina "encourages" but does not mandate its use. Colorado, Georgia, Missouri, Nebraska, Rhode Island, and Utah have passed legislation that required the use of

E-Verify for all public contractors and state agencies while Idaho, Minnesota, and North Carolina require state agencies to use the program.

If your company falls into one of these categories, you must use the program, regardless of the well-documented downfalls. If, however, you live in any other state or are not otherwise required to use E-Verify, each employer must balance the pros and cons of the program before deciding whether to enroll.

Benefits of E-Verify

Simply put, E-Verify is a quick way of receiving an initial determination of a new employee's authorization to work. By entering information from the employee's I-9, the employer receives an automatic reference which provides the employer protection against inadvertently hiring an individual without work authorization. Although the program does not provide complete immunity, it does create a rebuttable presumption that the employer has not violated INA section 274A(a)(1)(A) ("Unlawful Employment of Aliens").

Moreover, if an employer hires a foreign national who recently received a degree in science, technology, engineering, or mathematics (i.e., the STEM fields), voluntary usage of the E-Verify program may make those new employees eligible to work an additional 17 months before the employer is required to file an H1-B petition on their behalf.

Finally, there have been efforts on the federal level to make E-Verify mandatory nationwide. Should these proposed bills turn into law, those employers who have already been using E-Verify will already be familiar with the program. If E-Verify becomes mandated nationally, the program would likely experience technical issues and the error-rate would likely expand. Being familiar with the program would thus be an advantage.

Downfalls of E-Verify

DHS claims that E-Verify is free to use; however, there are some built in costs to consider. First, E-Verify is an "all-or-nothing" program. In other words, employers may not use the program intermittently. Rather, signing up for E-Verify represents an organizational shift that may require extra time, money, and effort to train and supervise staff on how to properly use the system. Depending on the size of the company, this shift may involve significant costs.

Importantly, e-Verify is far from perfect. There have been many reports of e-Verify providing tentative or final non confirmation notices to employees who have proper work authorization—even to U.S. Citizens. Moreover, the issuance of a tentative non confirmation notice requires the employer to provide adequate notice to the new employee, allowing them the opportunity to challenge the determination. Failure to provide adequate and timely notice may open the employer up to legal action by the new employee. Additionally, the system can

be cumbersome and difficult to manage, particularly for smaller businesses. For example, with E-Verify, employers may only accept an I-9 List B document if it bears a photograph and employees must possess a social security number. Neither of these requirements is needed to prepare an I-9 outside of the E-Verify program.

Moreover, the government is able to use E-Verify to ensure that employers are timely filing I-9s on behalf of new employees and to correct any errors in a timely fashion. E-Verify provides the government with a swath of information about employers and employees and allows the government to mine this information for employer violations. Voluntarily entering information into this database, in other words, increases the risk that the employer may be investigated and fined for intentional or unintentional violations.

Finally, many immigration reform advocates criticize the program as a means of shifting the burden of immigration enforcement from the government to private employers. Immigration enforcement has always been the responsibility of the federal government. As with the debate behind the implementation of 287(g) agreements by some local law enforcement agencies, critics of the program argue that E-Verify shifts one aspect of enforcement from the government onto private businesses.

In conclusion, employers should weigh the benefits and disadvantages of enrolling in E-Verify before doing so. What may seem like an easy way to ensure the proper work authorization of employees may actually create significant human and financial costs.

For more information on the E-Verify program and to discuss whether enrollment is right for your business, please contact us.

GRANT KILLORAN RE-ELECTED TO THE AMERICAN BAR ASSOCIATION HOUSE OF DELEGATES

The law firm of O'Neil, Cannon, Hollman, DeJong and Laing S.C. is pleased to announce that Attorney Grant C. Killoran recently was re-elected by the State Bar of Wisconsin Board of Governors to serve another two-year term as one of the State Bar of Wisconsin's five Delegates to the American Bar Association House of Delegates.

The House of Delegates is the policy-making body of the ABA. Control and administration of the ABA is vested in the House of Delegates. Established in 1936, the House of Delegates has over 500 members and its actions become the official policy of the ABA, the nation's largest

lawyer association.

Mr. Killoran previously has served as a Delegate to the ABA House of Delegates from 1997-1999, 2003-2009 and 2014 to present.

Mr. Killoran is a shareholder with and the Chair of O'Neil, Cannon, Hollman, DeJong and Laing's Litigation Practice Group. He has diverse trial experience, focusing on complex business and healthcare disputes.

A MUST-READ BOOK FOR FAMILY BUSINESS OWNERS

Recognizing that family-owned business owners throughout Wisconsin have ongoing questions when it comes to selling and transferring ownership of their companies, the law firm of O'Neil Cannon Hollman DeJong and Laing has written *The Art, Science and Law of Business Succession Planning*.

"Our goal is to help owners understand the importance of succession planning and give them a good starting point for implementing it in their own businesses."

Available in paperback on Amazon for $19.95 and as a Kindle ebook for $9.95, the law firm's book explains that whether the plan is to sell the business to fund the owner's own retirement or pass the business on to descendants or other key employees, there are questions that need to be answered sooner rather than later:

• Am I prepared to consider transferring ownership or control of my business during my lifetime?
• Have I made sure that the transition will be orderly?
• Will my key employees stay with the business rather than seek other employment?
• Is my estate sufficiently diversified so that children who are not active in the business may be treated fairly alongside those receiving an interest in the business?

The law firm's corporate and tax attorneys incorporated the latest changes to federal tax law into the inaugural edition of the book.

Book chapters include:

Chapter 1: The Need for Succession Planning
Chapter 2: The Five Objectives of Good Succession Planning

Chapter 3: Objective 1-Maximizing the Value of the Business
Chapter 4: Objective 2-Minimize Taxes
Chapter 5: Objective 3-Provide for the Continuity and Survival of the Business
Chapter 6: Objective 4-Treating Your Children Equitably
Chapter 7: Objective 5-Preserving Family Harmony
Chapter 8: Seven Pitfalls that Work Against a Successful Transition
Chapter 9: What a Good Succession Planner Will Do
Chapter 10: Structuring Buy-Sell Agreements
Chapter 11: The Key Employee Agreement

“If a business fails due to improper planning, children’s futures are affected, and so are the futures of every employee who works for the company,” Holborn said. “By following the steps necessary to take a company into the next generation, owners are not only potentially benefitting every member of their business team, but also their families and their descendants after them.”

STATE BAR OF WISCONSIN TAXATION LAW SECTION BOARD ADDS NEW DIRECTOR AND VICE CHAIRPERSON

On July 1, 2018 Attorney Samantha M. Amore began a three-year term as a Director of the Board of the State Bar of Wisconsin Taxation Law Section. The Taxation Law Section has more than 500 members. The Board’s mission is to provide its members with a forum to discuss issues pertaining to federal and state taxation, as well as to recommend legislation and to provide opportunities for professional education and networking.

Samantha is a member of the firm’s Business Law and Tax/Succession Practice Groups where she focuses on tax planning. Samantha offers planning strategies on entity selection and formation; prepares and negotiates organizational documents such as operating and shareholders agreements; and structures mergers, acquisitions and reorganizations. Additionally, she assists clients with various federal and state tax matters, including equity rollovers, like-kind exchanges, and obtaining and maintaining tax-exempt status. Samantha also counsels individuals on estate and business succession planning matters.

Samantha is very pleased to be elected and look forward to being involved with the Board in their new roles.

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Newsletter Article Highlights:

- Protecting the Elderly from Fraud by Caregivers
- Debt Collection Safe Harbor May Not Be So Safe
- Mental Capacity Issues in Estate Planning Litigation
- Employers Should Review Their Employee Non-Solicitation Agreements
- What Should Businesses Know About the Tax Plan?

Pleased to Announce:

- Steve Slawinski Elected to the ABC of Wisconsin Board of Directors
- Gregory Mager Moderates for the AAML

Click the image below to read more.

GREGORY MAGER MODERATES FOR THE AAML

Attorney Gregory S. Mager recently moderated the Family Court Commissioners' Panel at the 36th Annual Midwinter Seminar for the Wisconsin Chapter of the American Academy of Matrimonial Lawyers.

The American Academy of Matrimonial Lawyers (AAML) was founded to provide leadership that promotes the highest degree of professionalism and excellence in the practice of family law, including divorce and child custody decisions.

The AAML focuses on generating assistance, support, and growth for education, mediation, and arbitration in matrimonial law. The organization makes resources available to its members, including news, publications and other information on important sociological and psychological research concerning marriage breakdown, with particular attention on the consequences for the children of separated and divorced parents.

Greg has been a fellow in the AAML since 2012. He is recognized by judges and peers as one of Wisconsin's premier family law attorneys. He uses his extensive skill, training, and experience to help his clients achieve successful resolutions of their divorce, paternity,

custody, placement, and support matters. Greg is uniquely positioned to successfully represent clients in their family law matters, including those involving complex business, financial, and child related issues.

For additional information, please contact Greg at Gregory.Mager@wilaw.com or 414-276-5000.

EMPLOYMENT LAWSCENE ALERT: RECENT LEGISLATION IMPACTS QUALIFIED RETIREMENT PLAN HARDSHIP WITHDRAWAL AND PLAN ROLLOVER RULES

The two-year budget agreement passed by Congress on Friday, February 9th, and signed by President Trump later that day, includes tax policy changes that affect qualified retirement plans. Specifically, qualified retirement plan hardship withdrawal operations will be impacted by the Bipartisan Budget Act of 2018 (the Budget Act) as follows:

- **Removal of the six-month prohibition on deferrals following a hardship withdrawal.** Section 41113 of the Budget Act directs the IRS to issue updated guidance to permit 401(k) and 403(b) plan participants who have taken a hardship distribution from a retirement plan to continue contributing to the plan, even immediately following the hardship distribution. Under current rules, once a participant elects to take a hardship distribution, no elective deferrals are permitted to be made until six months have passed from the date of the distribution. The revised rule will take effect on January 1, 2019 for plans that have a calendar-year plan year.
- **Inclusion of QNECs, QMACs, and profit-sharing contributions in hardship withdrawals.** Under current regulations, a plan sponsor may specify the sources of a participant's plan assets eligible for a hardship withdrawal, but such assets may in no event include certain employer contributions. Beginning on January 1, 2019 (for calendar-year plans), the Budget Act rules will permit a participant's 401(k) or 403(b) plan assets deriving from employer profit-sharing contributions, as well as from employer corrective contributions known as Qualified Nonelective Employer Contributions (QNECs) and Qualified Matching Contributions (QMACs), to be included in sources from which a hardship withdrawal may be taken. The earnings on such contributions will also be included among the assets available for withdrawal. Section 41114 of the Budget Act not only expands the potential sources of a hardship withdrawal, but also eliminates the requirement (previously elected by some employers) that a participant must have taken a plan loan before qualifying to take a hardship withdrawal.

The Tax Cuts and Jobs Act of 2017 (the Tax Act), signed into law by President Trump on December 22, 2017, affects certain plan loan distributions. Specifically, for all tax-qualified retirement plans that offer loans, including 401(k), 401(a), 403(b), and governmental 457(b) plans, the Tax Act provides for an:

- **Extended Deadline for Rolling Over Certain Plan Loan Offsets.**
  - Background and prior law: A plan loan "offset" occurs when an individual owes an outstanding loan to a qualified retirement plan, but then experiences a distribution event that is either (1) a termination of employment; or (2) the termination of the plan. If the plan, in such situation, permits a participant's account balance to be paid out in full, minus the loan amount, then a plan loan offset occurs. A Form 1099-R is issued, indicating that the offset amount is an actual distribution. If a participant receiving a loan offset takes no action, the offset loan amount is considered or "deemed" to be a distribution, and is subject to taxation. Under these facts, taxation of the offset amount can be avoided if: (1) the distribution is otherwise eligible to be rolled over; and (2) the participant rolls the full amount of the distribution, including the amount of the offset, into an IRA. To include the offset amount in the rollover, the participant will need to contribute personal (or borrowed) funds to the rollover amount. Previously, offset loans could only avoid taxation if such a rollover occurred within the 60-day period beginning on the date offset distribution.
  - New law, effective for plan years beginning on and after January 1, 2018: The Tax Act expressly extends the time period for avoid taxation by rolling over an offset loan until the participant's deadline for filing a federal income tax return (taking any extensions into account). This change means that in many cases, a participant will have more time in which to effect a tax-free rollover of a loan offset occurring following termination of employment.

Caution: No Change to Basic Tax Rules

Although recent legislation is trending toward easing the rules relating to hardship withdrawals and plan loans, it is important to remember that nothing about the fundamental tax treatment of these distributions have changed.

A common misconception (especially among participants) is that if a participant qualifies for a hardship distribution, then the distribution from the plan is tax-free.
A hardship distribution is subject to the same taxation rules as other plan distributions. Satisfying the standards for a hardship distribution simply entitles the participant to receive an in-service distribution of elective deferrals (and other contributions) from the plan, but the hardship distribution is subject to income taxes applicable to plan distributions. A hardship distribution is also generally subject to a 10% early distribution penalty, unless the participant has reached age 59-1/2. A hardship distribution is never eligible to be rolled over into an IRA.

Similarly, once a plan loan has been deemed distributed (either due to a plan loan repayment

default, because a plan does not provide for an offset option upon distribution, or because an offset is not timely rolled into an IRA), the deemed distribution of a plan loan is taxed in the same manner as a regular plan distribution for purposes of determining the tax, including any early distribution penalty. A deemed distribution may never be rolled over into an IRA.

Plan Sponsor Action Items

With respect to plan hardship distributions, employer sponsors of 401(k) and 403(b) plans should prepare for the 2019 plan year by:

- Considering whether it is desirable to add a hardship distribution option to the plan (if not already permitted). If hardship distributions will be added, amend the plan and communicate the availability of the option to participants by preparation and distribution of a Summary of Material Modification (SMM) (or other appropriate form of communication in the event of a non-ERISA plan).
- Plan documents that already provide for hardship distributions should be amended, effective for the first day of the 2019 plan year, to eliminate the 6-month restriction on elective deferrals following a hardship distribution and to expand the permitted accounts from which hardship distributions may be taken. These details should be communicated to participants in the form of an SMM.

With respect to plan loans, plan sponsors of plans that permit loans should:

- Review the plan loan policy and plan loan provisions to determine if either should be updated to reflect this rule, or consider whether to modify the loan policy to take advantage of this rule. For example, if the plan currently permits continued loan repayments following termination of employment consider whether this option should be continued or eliminated. Consider also whether a loan note should be allowed to be rolled over to a successor plan upon plan termination or if the new extended rollover period provides sufficient flexibility to participants absent a rolled over loan note.
- Consider whether plan participant communications should be revised to alert participants to the greater flexibility now allowable for rollover of loan offset amounts.
- As applicable, confer with any third-party administrator for the plan to avoid inadvertently deeming a participant’s loan a deemed (taxable) distribution.

ATTORNEY CLAUDE J. KRAWCZYK INVOLVED IN RESTORING MARQUETTE CAMPUS STATUE

The George Washington statue has returned to Wisconsin Avenue near the campus of Marquette University. The 133 year-old monument had been removed for restoration, which involved removing layers of black corrosion and the repair of splitting bronze. Attorney

Claude Krawczyk currently serves as the president of The Westown Association, which raised funds for the restoration effort. In total, the restoration project cost more than $100,000 to complete. Attorney Krawczyk had a special interest in the project, explaining “I can remember seeing [the statue] when I was a kid, it’s been there all my life. I think it’s an important memory for Milwaukee … an important symbol.” Read full story here.

THE WILAW QUARTERLY NEWSLETTER

Newsletter Article Highlights:

- What Should You Do If You are Named Trustee?
- Do Your Due Diligence
- A Deeper Dive Into the Arbitration Process and a Look at the Advantages and Disadvantages of Arbitration
- ACA Employer Payment Notices Arriving Soon
- What Should Individuals Know About the Tax Plan?

Pleased to Announce:

- OCHDL Welcomes New Attorney Kelly M. Spott
- Scoby and Gagan Elected Shareholders
- Congratulations to Our 2017 Super Lawyers

Click the image below to read more.