

# EMPLOYMENT LAWSCENE ALERT: IRS ANNOUNCES 2018 FSA, TRANSPORTATION, AND EMPLOYEE BENEFIT PLAN LIMITS

The Internal Revenue Service has released the cost-of-living adjustments to the dollar limits under various employer-sponsored benefit plans for 2018. Several key limits (indicated in bold, below) have been increased for 2018.

Employer-sponsors of benefit plans should update payroll and plan administration systems for the 2018 limits and ensure that any new limits are incorporated into relevant participant communications, enrollment materials and summary plan descriptions, as applicable.

## Health FSA Employee Contribution and Transportation Plan Limits

- For 2018, the maximum dollar limit on employee contribution to health flexible spending arrangements (FSAs) will increase to **\$2,650** from the prior limit of \$2,600. An Employer is not required to adopt the new Health Care FSA increase, but may do so as long as the Health FSA Plan document is expressly amended for this purpose.
- The maximum pre-tax value of a qualified transportation plan for employee parking or transit passes will increase by \$5 to **\$260** per employee, per month in 2018.

## 2018 Qualified Retirement Plan Limits

For retirement plans beginning on and after January 1, 2018, the following dollar limitations apply for tax-qualified retirement plans:

- The elective deferral limit under Section 402(g) or the Internal Revenue Code (Code) will increase from \$18,000 to **\$18,500** for employees who participate in:
  - Code Section 401(k) plans;
  - Code Section 403(b) plans; and
  - Most Code Section 457 plans.
- The catch-up contribution limit for those age 50 and over under will remain unchanged at \$6,000 for all plans other than SIMPLE 401(k) and SIMPLE IRAs. (For these SIMPLE plans, the catch-up contribution limit for those age 50 and over under will remain unchanged at \$3,000).
- The limitation on the annual benefit for a defined benefit plan will increase from \$215,000 to **\$220,000**.
- The limitation on annual additions (meaning total employee plus employer contributions) to a participant's defined contribution plan will increase from \$54,000 to **\$55,000**.
- The limit on the amount of annual compensation taken into account under a tax-qualified retirement plan will increase from \$270,000 to **\$275,000**.
- The limitation used in the definition of a highly compensated employee (HCE) under

Code Section 414(q) will remain unchanged at \$120,000.

- The limitation used in the definition of a key employee in a top-heavy plan under Code Section 416 will remain unchanged at \$175,000.
- The dollar amount under Code Section 409(o) for determining the maximum account balance in an employee stock ownership plan (ESOP) subject to a five-year distribution period will increase from \$1,080,000 to **\$1,105,000**.
- The dollar amount used to determine the lengthening of the five-year distribution period will increase from \$215,000 to **\$220,000**.

## Prior Guidance on Additional 2018 Limits

### Social Security Taxable Wage Base

As announced in mid-October (and adjusted in November), the Social Security Administration announced that the Social Security wage base for 2018 will increase slightly (from \$127,000) to **\$128,400**. This is the maximum wage base subject to the FICA tax and is also the maximum “integration level” for retirement plans using “permitted disparity.” (The 2018 increase is about 1% higher than the 2017 wage base. In contrast, the 2017 wage base increase was more than 7% higher than the 2016 amount).

### 2018 Health Savings Account Limits

In May of this year, the IRS announced that combined annual contributions to a Health Savings Account (HSA) in 2018 must not exceed the maximum annual deductible HSA contribution, which will be **\$3,450** for single coverage and **\$6,900** for family coverage. These limits reflect a \$50 and \$150 increase over the 2017 maximums, respectively. The catch-up contribution for eligible individuals who will attain age 55 or older by year end remains at \$1,000.

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## OCHDL PROUDLY SPONSORS 10TH ANNUAL CHARITABLE EVENT FOR CRS

For the second consecutive year, OCHDL proudly sponsored the Catholic Relief Services (CRS) reception at the Wisconsin Club. This was a very special year, as the humanitarian group celebrated its 10th year here in Milwaukee. As always, a very well received event and powerful message was presented.

The Milwaukee chapter of CRS, which includes OCHDL Shareholder Carl Holborn, brought about a great deal of awareness this year-reaching out to radio stations, publications, and

even appeared on TMJ4's *The Morning Blend* to help spread the word about CRS and their charitable mission. The Milwaukee committee is grateful for all the support the Milwaukee community has shown to them over the years and are very proud to be celebrating this ten-year milestone.

CRS is one of the largest international aid organizations in the world. They are also one of the most efficient and effective: Ninety-seven percent of their expenditures go directly to programs that benefit individuals overseas. As part of the universal mission of the Catholic Church, they work with local, national and international Catholic institutions and structures, and other organizations, to assist people on the basis of need, without regard to race, religion or nationality. They alleviate suffering and provide assistance to more than 100 million people in need who live in some of the most impoverished places in over 100 countries.

O'Neil Cannon is honored to have been a part of such a meaningful event.

[Read more about CRS >>](#)

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## **EMPLOYMENT LAWSCENE ALERT: IT'S TIME TO AMEND 403(B) RETIREMENT PLAN DOCUMENTS!**

If your organization is a public school or university, a tax-exempt charter school or hospital, a church, church-affiliated entity, or other tax-exempt organization, it is eligible to sponsor a 403(b) retirement plan.

For any eligible sponsor of a 403(b) plan, it is critical, to ensure the ongoing tax-compliance of the plan, to conform your document to the form of an IRS pre-approved 403(b) document (available for use since March 2017) no later than March 31, 2020. This date is the IRS-announced end of the "special remedial amendment period" that permits correction of plan language defects retroactive to January 1, 2010, provided that plans are operated in the meantime according to the regulatory requirements.

This means that if your last 403(b) plan amendment and restatement pre-dates March 2017, or is not otherwise in the form of a 2017 IRS-approved document, an amendment and restatement must occur by the deadline to ensure proper compliance. The IRS will not honor, or issue, any letters as to the qualified status of an individual 403(b) plan. This is why all 403(b) plan sponsors must adopt a 2017 pre-approved document. Pre-approved documents are available through a number of plan service providers, third-party administrators, and employee benefits attorneys.

Any employer who, for whatever reason, *never* complied with the final 403(b) regulations (and ERISA, if applicable), and operated 403(b) program subsequent to December 31, 2009 *without* adopting a written 403(b) plan document, may make use of an IRS correction program. Under the IRS's Employee Plan Compliance Resolution System, a properly documented correction and application, together with a fee, can be submitted to obtain administrative relief for the failure to previously document the plan. It is likely that the ability to correct a failure to have a plan document will become significantly more restricted (and expensive) if not addressed prior to March 31, 2020.

In our experience, the IRS has been active, in recent years, in auditing the operations of 403(b) plans of Wisconsin entities and organizations. It should be anticipated that 403(b) plan audits on and after April 1, 2020 will review not only operational, but also documentational, compliance with the 403(b) plan rules.

While the March 31, 2020 deadline is still two and a half years away, it can take some time for 403(b) plan changes to be fully considered and approved by the required bodies (retirement plan committees, and or boards of education or boards of directors) that are common within the organizations of eligible employers.

The existence of the deadline also presents an opportunity for 403(b) plan sponsors to revisit the extent to which current plan design features are functioning to support human resources objectives (on both a recruitment, retention, and costs basis), and whether any design amendments should be considered in conjunction with the required amendment and restatement.

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## **OCHDL IS PLEASED TO ANNOUNCE THAT ATTORNEY NICHOLAS G. CHMURSKI HAS JOINED THE FIRM**

Attorney Nicholas G. Chmurski, a graduate of Marquette University, has recently joined the Milwaukee law firm O'Neil Cannon Nick is a member of the Business Law and Real Estate and Construction Groups. His business background and clerkship experience make Nick a valuable resource, as he is able to contribute across practice groups to help solve a wide range of legal issues.

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.

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## **AVOIDING PITFALLS WHEN ADDING SWEAT EQUITY MEMBERS IN AN LLC**

Many owners and businesses desire to reward employees with ownership interests for services rendered. This can be a valuable incentive that recognizes past accomplishments and improves employee engagement and retention by allowing them to share in the success of the business without requiring a capital investment. While bonuses, raises, or phantom equity can often accomplish similar goals with fewer structural considerations, the allure of being a true owner is sometimes hard to match. More likely than not, the flexibility and reduced formality of an LLC were factors in making it the entity of choice. However, because LLC ownership is unique, there are several key issues to consider when adding this sweat equity member to make sure all parties understand the consequences.

First, how is the LLC managed? If it is a member-managed LLC (default in Wisconsin), the new employee-member could have full agency power and could enter into contracts or agreements on behalf of the LLC. While the employee might already have significant authority according to his or her job title or responsibilities, this member agency authority extends to issues outside of the ordinary course of business, such as taking out a loan or purchasing real estate. On the other hand, a member of a manager-managed LLC is viewed more akin to a passive, limited partner, with no actual agency power. Therefore, before adding the employee as a member, the current members should review the ownership structure and possibly amend the LLC's articles of organization to align their goals.

Second, does the LLC have an operating agreement? Outside of being an essential tool to structure and manage the business, an operating agreement can modify default provisions of the Wisconsin statutes that govern LLCs (Wisconsin Statutes Chapter 183). For example, unless modified in an operating agreement, Wisconsin law provides that voting in member-managed LLCs is based on members' capital contributions, and not on members' ownership interests. An employee receiving a member's interest for services will have voting rights based on the value of his or her services as recognized on the LLC's capital account, regardless of the actual member's interest received. To remedy this situation, the LLC should document all members' capital contributions (including the value for services) and draft (or amend) an operating agreement that clearly defines voting rights for all members. There are many ways to accomplish this goal (unitizing the members' interest, etc.), but it is

important to make sure all parties understand their respective rights and roles in the LLC.

Lastly, what are the tax consequences? If the LLC is taxed as a partnership (default), the employee receives a regular capital interest in the LLC, that member's interest would be considered compensation in exchange for services that will likely be taxed as ordinary income. Depending on the value of those services, the employee could have a significant tax burden in the year he or she receives the capital interest without any guarantee of receiving cash distributions from the LLC to help cover that tax. Think winning a car on *The Price is Right*, only to discover a several thousand dollar tax bill waiting off-stage. The LLC can address this by offering the employee an interest consisting of the future profits/losses of the business. A profits interest still allows the employee to have similar rights as a member in the LLC, but because there is no initial value assigned to the profits interest (and thus no liquidation value), the employee has no immediate tax obligation. The employee-member would then owe tax only on his or her allocation of future company profits. While taxes are inevitable, proper planning can avoid surprises and headaches for the employee and company, alike.

In conclusion, while LLCs provide flexibility for adding sweat equity members, careful design and implementation is required to avoid any potential surprises.

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## **BEST LAWYERS® HONORS 18 ATTORNEYS IN 2018**

O'Neil, Cannon, Hollman, DeJong and Laing S.C. is pleased to announce that 18 lawyers have been named to the 2018 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.

O'Neil, Cannon, Hollman, DeJong and Laing S.C. would like to congratulate the following attorneys named to the 2018 *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
- Robert R. Gagan – Municipal 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
- Gregory S. Mager – Family Law
- Patrick G. McBride – Commercial Litigation
- Thomas A. Merkle – Family Law
- 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.”

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## **401(K) PLAN ERRORS COST SELLERS OF COMPANY NEARLY \$200,000**

A recent Court of Appeals decision provides a tangible example of the costs of ignoring employee benefit compliance requirements. In *Tatum v. SFN Group, Inc.* (No. 16-11966, 6/23/17), the 11<sup>th</sup> Circuit affirmed that the purchase price paid for a CFO-outsourcing firm was

properly reduced in light of compliance errors in the operation of the company's 401(k) Plan.

In February 2010, Tatum, LLC (Seller) and staffing company SFN Group (Buyer), entered into a merger agreement (Agreement) under which the Buyer agreed to acquire Seller's company for payment of several million dollars, which included payments in cash and stock, as well as the assumption of debt and liabilities. The Seller's 401(k) plan was assumed by the Buyer. Under the terms of the Agreement, part of the purchase price was held back for eighteen months after the closing in the form of an indemnification holdback fund. The purpose of the holdback fund was to compensate the Buyer in the event it incurred certain defined damages, including damages resulting from the Seller's breach of any representation or warranty contained in the Agreement.

After the closing, but just before the end of the eighteen-month holdback period, the Buyer notified the Seller of its discovery that the Agreement had misrepresented the Seller's 401(k) plan. Specifically, the Seller had represented and warranted in the Agreement that its 401(k) plan was operated in compliance with applicable law. The Buyer had learned, however, that the 401(k) plan was not in compliance, and was therefore subject to potential tax-disqualification by the IRS.

The 401(k) plan's significant compliance errors were ultimately resolved through the IRS's Voluntary Correction Program (VCP), under which a 401(k) plan sponsor may self-report a compliance issue to the IRS and receive approval for its proposed solution, thereby avoiding tax-disqualification. By the time the compliance errors were rectified, the total 401(k)-related legal expenses and VCP fees incurred by the Buyer totaled \$192,000. As a result, the indemnification holdback fund, minus the \$192,000 amount, was disbursed to the Seller.

While the Seller asserted claims including breach of contract and conversion in an attempt to recover the withheld funds, the Court found that the Seller had breached its duties to the Buyer under the Agreement and that the Buyer was entitled to withhold the amount at issue.

Had the 401(k) plan errors been previously resolved by the Seller, or discovered by the Buyer before the transaction closing, the costs to the Seller (and burdensome correction process by the Buyer) may have been reduced or avoided. The ruling serves as a reminder of the importance of adherence to compliance with benefits requirements, as well as the need for performing careful due diligence and strategically drafting the purchase agreement in merger and acquisition transactions.

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# THE WILAW QUARTERLY NEWSLETTER

## Newsletter Article Highlights:

- Don't Sell Yourself Short: Early Tax Planning to Maximize the Sale of Your Business
- Are You Ready to Comply with the Final Fiduciary Rule?
- Creating a Successful Succession Plan

## Pleased to Announce:

- OCHDL included in the prestigious Chambers USA Directory
- Annual Charity Event raised over \$14,000 for Milwaukee community

Click the image below to read more.



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## IT'S (ALMOST) JUNE 9! ARE YOU READY TO COMPLY WITH THE FINAL FIDUCIARY RULE?

At 11:59 p.m. on Friday, June 9, 2017 (the Effective Date), the ERISA definition of a fiduciary will expand to include, for the first time, many financial firms and advisors that provide investment advice to certain employer-sponsored retirement plans and individual retirement accounts (IRAs). This is because part of the final Department of Labor (DOL) Fiduciary Rule (described in our [prior post](#)) takes effect at this time, and will apply to anyone receiving a fee for providing a “recommendation” regarding covered investment transactions.

“Recommendation” is broadly defined to include communications that are likely to be considered a suggestion to take, or to refrain from taking, a particular course of action.

After the Effective Date, ERISA fiduciary duties will also extend to the provision of a recommendation regarding whether or not to take a rollover or distribution from an ERISA retirement plan or an IRA, even if the rollover or distribution recommendation is not accompanied by investment advice.

While the Fiduciary Rule most directly impacts investment advice providers, employer sponsors of ERISA retirement plans should also be aware of the new rules and of the ways in which plan service provider arrangements and internal human resources practices may be impacted by them.

Key requirements and recommendations for both investment advisors and employer retirement plan sponsors are briefly summarized, below.

### Action Items for Advisors

Unless an exception or exemption applies, financial advisors who give investment advice to participants of covered plans and IRAs must now observe impartial conduct standards, and some portions of the DOL Best Interest Contract (BIC) exemption or Principal Transaction exemption (if applicable). This means that advisors must, as of the Effective Date:

- provide advice in participants' best interests;
- receive no more than reasonable compensation; and
- avoid misleading statements.

By January 1, 2018, the remainder of the BIC and Principal Transaction exemption rules apply and affected advisors must:

- maintain (and adhere to) written anti-conflict policies and procedures;
- make required disclosures to advice recipients; and
- enter into enforceable written contracts relating to the provision of investment advice services relating to covered employer retirement plans and IRAs.

### Advisor Transition-Period

Under a temporary non-enforcement policy issued by the DOL on May 22, 2017, neither the DOL nor the IRS will enforce potential violations of the prohibited transaction rules, provided that the advisors are working diligently and in good faith to comply with the new rules. This temporary non-enforcement policy will end on January 1, 2018, which is also when the remaining parts of the Fiduciary Rule (and exemption) requirements take effect.

### Taxes and Penalties for Violation

After January 1, 2018, an advice fiduciary that fails to comply with the new rules, and thereby engages in a prohibited transaction, may be required to refund all fees earned from the transaction and to pay an annual excise tax of 15% on such fees until repayment occurs. To the extent that such a prohibited transaction relates to an ERISA-subject retirement plan, a violation of the rules could potentially also result in legal claims by retirement plan sponsors or IRA investors, civil penalties, and personal liability for losses or improper profits.

### Certain Assets Unaffected

The new rules do *not* affect any health, disability, term life, or other health-related

arrangements or assets that do not contain an investment component. Personal brokerage accounts (not involving an employer-sponsored retirement plan or any IRA) are also unaffected by the changes.

### Action Items for Employer Plan Sponsors

Employer retirement plan sponsors should consider taking the following steps:

- Review existing educational materials provided to participants to determine whether they remain non-fiduciary “investment education,” or whether they now constitute fiduciary “investment advice.”
- Review practices relating to rollovers into and out of the plan to determine whether they trigger fiduciary advice-related obligations.
- Confirm that in-house employees who provide advice to participants (if any) are not being separately compensated for such advice.
- Review contractual arrangements with advisers to determine which advisers are fiduciaries under the new rules. For those service provider serving as a fiduciary for the first time under the Fiduciary Rule, expect that agreements will be amended or replaced before January 1, 2018. Any resulting fee changes must be clearly disclosed.
- Expect to receive additional disclosures beginning in 2018 from investment advice fiduciaries that will rely on the BIC exemption to continue receiving certain types of compensation. Among other things, these disclosures must describe any of the advice fiduciary’s conflicts of interest, and the types of compensation paid in connection with plan investment recommendations.
- Carefully review all fee disclosures you receive to ensure that you understand what fees are being charged for plan services. Confirm that the fee structure and amounts of compensation received by advisers are reasonable, in light of the services performed.

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## **CHAMBERS USA DIRECTORY INCLUDES RECOGNITION OF O’NEIL, CANNON, HOLLMAN, DEJONG AND LAING S.C.**

The prestigious Chambers USA Directory has included O’Neil, Cannon, Hollman, DeJong and Laing S.C. as one of the notable firms in the category of Corporate/M&A. Additionally, Chambers has included Jim DeJong and Pete Faust among their Recognised Practitioners.

The Chambers directories, published by London-based Chambers and Partners, rank attorneys and law firms based on a year-long objective research process. The process includes interviews with outside attorneys and feedback from clients. Learn more at [www.chambersandpartners.com](http://www.chambersandpartners.com).