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.

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.

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.”

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 11th 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.

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.

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.

<u>Action Items for Advisors</u>

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.

<u>Advisor Transition-Period</u>

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.

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.

THE RUFFED GROUSE SOCIETY MOVES FORWARD

Attorney Seth Dizard was mentioned in the Milwaukee Journal Sentinel for his involvement with the Ruffed Grouse Society and its recent developments to continue moving the organization forward. The society signed a memorandum of understanding with the U.S. Forest Service, and the Society hired its first habitat biologist, a Hales Corners native named Dan Dessecker.

Seth was elected earlier this year to serve on the organization's national board of directors.

Click here to read the full story.

EEOC WELLNESS LAWSUIT AGAINST WISCONSIN EMPLOYER ENDS IN $100,000 SETTLEMENT

A Wisconsin employer's settlement last month with the EEOC ended the final round of litigation initiated against it by the EEOC over its workplace wellness plan.

In 2009, Manitowoc-based Orion Energy Systems (Orion) implemented a wellness program that included a health assessment. The health assessment consisted of a personal health questionnaire, a biometric screening, and a blood draw. An Orion employee refused to participate and, as a result, was required to pay her full health premium costs of more than $400 per month. (Meanwhile, for employees who participated in the health assessment, the employer paid 100% of the premium cost). The employee openly questioned the purpose of the health assessment, the confidentiality of its results, and the CEO's response to her questions. Approximately three weeks after declining to participate in the health assessment, her employment was terminated. She then filed a complaint with the EEOC, which in turn sued Orion in August 2014, alleging that the company's wellness program violated the ADA as "involuntary" and that the company had retaliated against her in violation of the ADA.

The ADA generally prohibits employers with 15 or more employees from requiring medical examinations or making disability-related inquiries of an employee, unless the examination or inquiry is job-related and consistent with business necessity. The law includes an exception for "voluntary" wellness programs, but the EEOC had not finalized its definition of a "voluntary" wellness program until May 2016, nearly seven years after the events at issue in this case.

In a mixed September 2016 decision, the court for the Eastern District of Wisconsin ruled against the EEOC by finding that the wellness plan was voluntary. The court determined that the health assessment incentive (the premium cost) was permitted within the framework of a "voluntary" plan, and therefore was *not* prohibited under the general ADA medical examination and inquiry rules. While shifting even 100% of the premium cost to the employee was a strong incentive, it was still not an involuntary "compulsion," the court reasoned, because employees could still choose between completing the health assessment or paying the full premium.

While the court's ruling essentially approved the design of the wellness plan, it declined to dismiss the employee's ADA retaliation and interference claims. In other words, it was only the termination (allegedly in response to the employee's refusal to participate in the wellness plan) that the court found troubling.

To resolve these remaining issues, Orion agreed to pay the former employee $100,000. Orion also agreed:

- Not to maintain any wellness program in the future with disability-related inquiries or medical examinations that do not meet the criteria for "voluntary" wellness plans as defined under the May 2016 final EEOC regulations;
- Not to engage in any form of retaliation, including interference or threats, against any employee for raising objections or concerns as to whether the wellness program complies with the ADA;
- To tell its employees that any concerns about its wellness program should be sent to its

human resources department;
- To train its management and employees on the law against retaliation and interference under the ADA; and
- To conduct an additional training meeting with its chief executive officer, its chief operating officer, its chief financial officer, its HR director, and all employees responsible for negotiating or obtaining health coverage or selecting a wellness program. This training is to include an explanation of the settlement terms and the ADA's requirements regarding wellness programs.

While Orion, in the consent decree, "continues to deny the EEOC allegations," the settlement serves as a reminder to employers not to base any employment decisions on participation or non-participation in a workplace benefit program. Wellness programs must comply not only with multiple provisions of the ADA, but also with HIPAA, the Genetic Information Nondiscrimination Act (GINA), the Affordable Care Act, and other laws. As these rules, and relevant case law, continue to evolve, it is important that employers maintaining, implementing, or considering updating a wellness plan proceed with an awareness of the potential costs of noncompliance.

OCHD&L'S CLAUDE KRAWCZYK JOINS THE PROFESSIONAL RECOGNITION SOCIETY

Attorney Claude Krawczyk has been named to the Greater Milwaukee Foundation's Herbert J. Mueller Society.
The recognition society acknowledges the efforts of professional advisers who are committed to their clients, philanthropy and the community. Krawczyk is one of 12 new members this year to the society, which now includes more than 300 professional advisers.

The society is named in memory of Herbert Mueller, a local estate planning attorney who, through his quiet efforts, helped shape the Foundation into the strong, stable and successful organization it is today. By the time of his death in 2001 at age 91, Mueller had worked with his clients to start more than a dozen Foundation funds with gifts totaling nearly $50 million.

For more than a century, the Greater Milwaukee Foundation has helped individuals, families and organizations realize their philanthropic goals and make a difference in the community, during their lifetimes and for future generations. The Foundation consists of more than 1,200 individual charitable funds, each created by donors to serve the charitable causes of their choice. The Foundation deploys both human and financial resources to address the most critical needs of the community and ensure the vitality of the region. Established in 1915, the Foundation was one of the first community foundations in the world and is now among the largest.