ATTORNEY GRANT KILLORAN PUBLISHED IN THE WISCONSIN LAWYER

Grant Killoran authored an article in the June, 2021 edition of the *Wisconsin Lawyer* magazine, entitled “The Legal Treatment of Vaccine Injury Claim.” Their article analyzes how claims for vaccine injury, including claims related to the newly-developed COVID-19 vaccines, are handled under existing law, including the statutory processes applicable to such claims.

Read the full article here.

EMPLOYMENT LAWSCENE ALERT: WHAT DOES THE CDC’S NEW MASK GUIDANCE MEAN FOR EMPLOYERS?

On May 13, 2021, the CDC announced that it had updated its guidance for individuals who have been fully vaccinated against the COVID-19 virus (i.e., individuals who received their final shot more than two weeks ago). The updated guidance states that individuals who have been fully vaccinated against COVID-19 are not required to wear masks or follow social distancing guidelines in most settings. Masks are still required for those who have not reached full vaccination. Masks are also still required for all individuals in certain places, including on public transportation, in transportation hubs, and at high-risk workplaces, such as healthcare, correctional facilities, and homeless shelters. Although this guidance was issued for individuals, the CDC has promised updated guidance for businesses and employers shortly, and some companies have already lifted their mask mandates for customers.

So, while this means that employers may soon be able to relax their mask rules for employees, there are a number of important considerations for employers.

Can an employer ask its employees if they have been vaccinated?

Yes. According to the EEOC, requesting proof of COVID-19 vaccination is not likely to elicit information about a disability, and therefore is not a disability-related inquiry under the ADA, which would otherwise need to be job-related and consistent with business necessity, and does not elicit genetic information protected by the Genetic Information Nondiscrimination Act. Additionally, HIPAA does not apply to employee health information collected or maintained by an employer in its role as an employee’s employer. However, medical

information regarding employees should be kept confidential and separate from an employee's general personnel file.

Does my company still have to comply with local mask ordinances?

Yes. The CDC guidance specifically says that individuals are still required to wear masks when required by federal, state, local, tribal, or territorial laws, rules, and regulations, including local business and workplace guidance. Therefore, companies located in areas where there are currently mask ordinances in place must continue to follow such local or state laws.

What about OSHA and other safety concerns?

On January 29, 2021, OSHA published guidance that required all individuals to wear masks when in public and around other people and provided that employers should not distinguish between workers who are vaccinated and those who are not. However, OSHA has now stated that it is reviewing the CDC guidance, will update its guidance in the near future, and to "refer to the CDC guidance for information on measures appropriate to protect fully vaccinated workers." Therefore, employers should be able to rely on the CDC guidance related to mask mandates and social distancing for fully vaccinated employees. However, employers must remember that, consistent with the obligations under the OSH Act's general duty clause, they will need to continue to provide a safe workplace. Therefore, an employer that abandons all COVID-related safety protocols or permits all employees, regardless of vaccination status, to stop wearing masks may still be at risk of an OSHA complaint.

In summary, employers must continue to comply with local mask ordinances and should monitor OSHA and other guidelines to make sure that they are ensuring the safety of their employees. If an employer decides to allow fully vaccinated individuals to stop wearing masks, it should clearly communicate its policy, including how it will verify vaccination status, to its employees. As always, O'Neil Cannon is here for you. We encourage you to reach out to our labor and employment law team with any questions, concerns, or legal issues you may have, including those regarding COVID-19 and related issues.

EMPLOYMENT LAWSCENE ALERT: AMERICAN RESCUE PLAN EXTENDS TAX CREDITS FOR COVID-RELATED LEAVE

On March 11, 2021, President Biden signed the American Rescue Plan into law. Among a wide

variety of other aims, the $1.9 trillion bill extended tax incentives for certain employers that chose to provide their employees with qualifying paid leave related to the COVID-19 pandemic.

In March 2020, the Families First Coronavirus Response Act ("FFCRA") was signed into law. The FFCRA contained two leave components: the Emergency Paid Sick Leave Act ("EPSLA") and the Emergency and Family and Medical Leave Act ("EFMLA"). Under the EPSLA, employers with fewer than 500 employees were required to provide employees with up two weeks of leave sick leave for six COVID-related reasons; and under the EFMLA, employers with fewer than 500 employees were required to provide employees with up to 12 weeks of leave if their children's school or child care facilities were closed due to COVID. Those employers could then offset the expense of such paid leave through tax credits. Mandated leave under the FFCRA ended on December 31, 2020, but in December 2020, the tax credits were extended through March 31, 2021 for employers with fewer than 500 employees that opted to continue to provide qualifying EPSLA and EFMLA leave.

The American Rescue Plan similarly gives employers with fewer than 500 employees the option, but not the obligation, to continue to provide EFMLA and EPSLA to employees through September 30, 2021 and provide employers with a 100% tax credit to offset the cost of such leave. The American Rescue Plan has also expanded the list of qualifying reasons for EPSLA leave to include time off to receive the COVID-19 vaccination and time off to recover from side effects of receiving the vaccination. Employers should be mindful to update their existing FFCRA leave forms to reflect these additional uses for leave. Finally, on April 1, 2021, for employers who opt to provide continued leave pursuant to EPSLA and EFMLA, employees are entitled to a renewed two-week bank of EPSLA leave, and if an employee's bank of FMLA has not otherwise renewed pursuant to the employer's FMLA policy, the 12-week EFMLA leave bank would also be replenished.

Therefore, while the American Rescue Plan does not add any new obligations for employers, it does continue to provide incentives in the event that employers with fewer than 500 employees choose to provide COVID-related paid time off. As always, O'Neil Cannon is here for you. We encourage you to reach out to our labor and employment law team with any questions, concerns, or legal issues you may have, including those regarding COVID and related issues.

$7.5 MILLION DEBT LIMITATION FOR SMALL

BUSINESS DEBTORS EXTENDED

On Saturday, President Biden signed into law the COVID-19 Bankruptcy Relief Extension Act of 2021. This act extends the $7.5 million debt limitation under the Small Business Reorganization Act of 2019 (SBRA) for another year, until March 27, 2022.

Last year, Congress passed the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) to provide emergency assistance for individuals and businesses affected by the COVID-19 pandemic. The CARES Act temporarily increased the debt limitation under the SBRA from $2,725,625 to $7.5 million. The SBRA, which took effect on February 19, 2020, created Subchapter V of the Bankruptcy Code to provide a more streamlined and cost-effective reorganization option for small businesses. The $7.5 million debt limitation increase under the CARES Act was set to expire on March 27, 2021.

The COVID-19 Bankruptcy Relief Extension Act of 2021 extends the bankruptcy relief provisions of the CARES Act, which most notably includes the $7.5 million debt limitation under the SBRA, until March 27, 2022. As a result, small businesses with debts between $2,725,625 and $7.5 million will continue to be eligible for Subchapter V for another year.

For further information regarding the COVID-19 Bankruptcy Relief Extension Act of 2021 or insolvency concerns relating to bankruptcy or receivership, please contact attorney Jessica K. Haskell.

FEMA LAUNCHES COVID-19 FUNERAL ASSISTANCE PROGRAM

Under the Coronavirus Response and Relief Supplemental Appropriations Act of 2021 and the American Rescue Plan Act of 2021, the Federal Emergency Management Agency (FEMA) will provide financial assistance for COVID-19-related funeral expenses incurred after January 20, 2020.

FEMA estimates that qualifying families can expect reimbursements of $3,000 to $7,000 out of the program's total budget of $2 billion.

To be eligible for funeral assistance, you must meet the following conditions:

- The death must have occurred in the United States;
- The death certificate must indicate the death was attributed to COVID-19; and

- The applicant must be a U.S. citizen, non-citizen national, or qualified alien who incurred funeral expenses after January 20, 2020.

There is no requirement for the deceased person to have been a U.S. citizen, noncitizen national, or qualified alien.

FEMA will begin accepting applications for funeral assistance in April 2021. FEMA is still working out the details of this program, but encourages prospective applicants to start gathering the following documentation for the application:

- An official death certificate that attributes the death directly or indirectly to COVID-19 and shows that the death occurred in the United States;
- Funeral expense documents (receipts, funeral home contract, etc.) that include the applicant's name, the deceased person's name, the amount of funeral expenses, and the dates the funeral expenses happened; and
- Proof of funds received from other sources specifically for use toward funeral costs. FEMA will not duplicate benefits received from burial or funeral insurance, or financial assistance received from voluntary agencies, government agencies, or other sources.

If you have lost a loved one due to COVID-19 and have questions about the administration of your loved one's affairs, please contact Kelly M. Spott.

ATTORNEY GUMINA'S ARTICLE ON EMPLOYER COVID-19 VACCINATION POLICIES WAS FEATURED BY ABC OF WISCONSIN

Recently, Associated Builders and Contractors of Wisconsin (ABC of Wisconsin) featured Attorney Joseph Gumina's article entitled "Encouraging Rather Than Mandating COVID-19 Vaccinations May Be An Employer's Best Option". In this article, Attorney Gumina discusses some of the challenges employers may face with a mandatory COVID-19 vaccination policy and suggests alternative options for employers to consider. Attorney Gumina plans to provide updates to this ongoing issue in the upcoming workforce focused magazine—*Wisconsin Merit Shop Contractor*.

Attorney Gumina's article is a must read for any employer contemplating whether to require its employees to become vaccinated. Read the full article here.

ATTORNEYS MARGUERITE HAMMES AND GRANT KILLORAN PUBLISHED IN THE WISCONSIN LAWYER

Attorneys Marguerite Hammes and Grant Killoran authored an article in the February, 2021 edition of the *Wisconsin Lawyer* magazine, entitled "COVID-19 Vaccination: Legal Landscape and Challenges." Their article analyzes the authority of Wisconsin public health officials regarding mass vaccination for COVID-19 and the circumstances under which individuals can object to vaccination requirements.

Read the full article here.

EMPLOYMENT LAWSCENE ALERT: WORKPLACE SAFETY IS A TOP PRIORITY FOR THE BIDEN ADMINISTRATION

In our series discussing the new workplace initiatives under the Biden Administration, we will first look at the Biden Administration's efforts on protecting worker health and safety.

Simply, under the Biden Administration, employers should expect to see a more robust Occupational Safety and Health Administration (OSHA), meaning ramped-up OSHA enforcement efforts, including more workplace inspections, more whistleblower protection, and the likely issuance of an emergency temporary standard to address the hazards of COVID-19 in the workplace. In light of the Biden Administration's concerted focus on workplace safety, it behooves all employers to take notice of OSHA's new enforcement policies now, and to review and update, if necessary, all health and safety programs before OSHA knocks on your door.

New DOL Secretary and Deputy Assistant Secretary of Labor for OSHA

To lead the Biden Administration's charge in making workplace safety a top priority, President Biden has nominated Marty Walsh to be the new Secretary of Labor. Walsh is the former mayor of Boston and the former union leader of Boston's Building and Construction Trade Council, an umbrella group of 20 local construction unions. Many believe that Secretary

nominee Walsh will be a strong and ardent advocate for worker safety given his background in the construction industry and his former roles as mayor and union leader where he was a strong vocal proponent for more stringent safety regulations for workers.

During his Senate confirmation hearing, Walsh committed to improving workplace safety by increasing the number of OSHA compliance officers and making sure that OSHA has the tools in place to protect workers during the COVID-19 crisis — Walsh's comments would seem to indicate that employers should expect an emergency temporary standard on mitigating and eliminating COVID-19 hazards in the workplace, a national emphasis program on COVID-19, and increased inspections in workplaces where workers work in close proximity with other workers or customers.

To manage OSHA's new policies and expected emphasis programs, President Biden has chosen James Frederick, the former Assistant Director of the United Steelworkers' Health, Safety and Environment Department to lead OSHA to be the Deputy Assistant Secretary of Labor for OSHA. Fredrick has already commented that OSHA's new guidance on preventing COVID-19 in the workplace is OSHA's "first step" to make it clear "that OSHA is advocating for workers."

President's Executive Order and OSHA's New Guidance on COVID-19 in the Workplace

On January 21, 2021, the day following the Presidential inauguration, President Biden issued an Executive Order outlining his administration's policy on protecting the health and safety of workers from COVID-19. President Biden's Executive Order established a five-step plan to combat COVID-19 in the workplace by requiring the Secretary of Labor, acting through the Deputy Assistant Secretary of Labor for OSHA, to:

1. Issue within two weeks revised OSHA guidance on workplace safety during the COVD-19 pandemic;
2. Consider, by March 15, 2021, whether any emergency temporary standards on COVID-19, including the use of masks in the workplace, are necessary;
3. Review the enforcement efforts of OSHA related to COVID-19 and to identify any changes that can be made to better protect workers and ensure equity in enforcement;
4. Launch a national program to focus OSHA enforcement efforts related to COVID-19 on violations that put the largest number of workers at serious risks or are contrary to anti-retaliation principles; and
5. Coordinate with the Department of Labor's Office of Public Affairs and Office of Public Engagement and all regional OSHA offices to conduct a multilingual outreach campaign to inform workers and their representatives of their rights under applicable law.

On January 29, 2021, consistent with President Biden's Executive Order, OSHA issued a detailed guidance entitled "Protecting Workers: Guidance on Mitigation and Preventing the Spread of COVID-19 in the Workplace." While not legally binding, OSHA, through this

guidance, instructs employers on the appropriate control measures that should be implemented in the workplace to help mitigate and prevent the spread of COVID-19. Such measures include: conducting a hazard assessment; identifying a combination of measures that limit the spread of COVID-19 in the workplace (e.g., wearing face masks and social distancing), adopting measures to ensure that workers who are infected or potentially infected are separated and sent home from the workplace; and implementing protections from retaliation for workers who raise COVID-19 related concerns. Employers should consider this guidance as the stepping stone for OSHA to issue an emergency temporary standard on mitigating and eliminating COVID-19 in the workplace — a directive that President Biden's Executive Order has mandated to be achieved by March 15, 2021.

A COVID-19 National Emphasis Program is Possible

If OSHA issues an emergency temporary standard on mitigating and eliminating COVID-19, employers should also expect that a COVID-19 national emphasis program will come along with it. A COVID-19 national emphasis program will permit OSHA to ramp up inspections and target workplaces where OSHA believes, based on industry and Centers for Disease Control and Prevention ("CDC") data, that workers are most at risk for COVID-19. Presumably, OSHA will target those places of employment where workers work in close proximity to other workers or are forward-facing with customers and the general public. This can include meatpacking plants, warehouses, fulfillment centers, grocery stores, and other retail stores where workers have close contact with customers. If a COVID-19 national emphasis program is established, employers will be chosen randomly by OSHA for inspection based on program criteria rather than based on complaints or reports of accidents. Most employers believe that if they can prevent workplace accidents and avoid having employees complain to OSHA, they can avoid an OSHA inspection, but employers who fall within a national emphasis program's criterion must always be mindful that an OSHA inspection can occur at any time. The question for these employers is will they be ready for an OSHA inspection when OSHA comes knocking.

COVID-19 and a Robust OSHA Requires Employers to Be Proactive

Employers should expect that OSHA will take a stronger and more enforcement-oriented approach to addressing COVID-19 in the workplace through new directives, emergency temporary standards, and policy guidelines mandated by the new Biden Administration. This will require employers to formalize, in writing, their COVID-19 response plan in the same manner that other safety programs are written and to also conduct regular training for all its workers to educate them on what actions they can take to help prevent the spread of COVID-19 in the workplace. Such training should include the obvious health and safety controls that can be put in place such as the requirement that all workers wear face masks, maintain social distancing, and that workers who are ill or exhibiting signs or symptoms of COVID-19 are sent home until they are cleared to return to work based on CDC guidelines.

Finally, employers should also note that as the COVID-19 vaccine becomes more widely available, employers should encourage all their workers to become vaccinated. OSHA recommends, however, that the same safety measures that are in place now to combat COVID-19 should remain in place even after workers are vaccinated. That is, both vaccinated and unvaccinated workers should follow the same safety measures, such as wearing masks and maintaining social distancing, because the CDC has not yet determined whether a vaccinated individual can transmit the COVID-19 virus even though they may have immunity based on having received the vaccination. As a result, assuming that an emergency temporary standard on COVID-19 will be issued by OSHA, employers should take note that having a vaccinated workforce may not immune their workplace from OSHA citations if COVID-19 safety measures are not being followed and enforced.

As always, O'Neil Cannon is here for you. We encourage you to reach out to our labor and employment law team with any questions, concerns, or legal issues you may have regarding OSHA's new policies and directives under the Biden Administration.

TAX AND WEALTH ADVISOR ALERT: WISCONSIN DEPARTMENT OF REVENUE SAYS EXPENSES PAID WITH FIRST ROUND FORGIVEN PPP LOANS ARE NOT DEDUCTIBLE

A little less than a month ago, the IRS reversed its original position, and stated that businesses can deduct expenses paid for with the proceeds of a forgiven Paycheck Protection Program (PPP) loan, as further detailed here. However, in guidance issued on Friday, the Wisconsin Department of Revenue clarified that expenses that are paid with the forgivable PPP funds (in the first round) are not deductible for Wisconsin income/franchise tax purposes and must be added back to Wisconsin income in the year incurred or paid. Therefore, unless the legislature acts, businesses that have received PPP loans may find themselves saddled with unexpected Wisconsin tax liabilities as a result of the Wisconsin Department of Revenue's recent guidance.

The guidance clarifies that both federal and Wisconsin law provide an exclusion from income for forgiveness of debt on the first round of PPP loans and signals Wisconsin's plan to deny the expense deduction. Additionally, second-round PPP loans (those issued in 2021) are also set to be taxed by the state, albeit in the opposite manner: expenses will be deductible, but the loans are set to be treated as taxable income.

As we previously wrote about here, Wisconsin is a static conformity state, meaning that unlike a "rolling" conformity state where the state's tax code automatically conforms to the changes in federal tax law, a static state conforms to the federal tax code as it existed on a certain date. Wisconsin conforms to the Internal Revenue Code (IRC) as it existed on December 31, 2017, and although the Wisconsin Legislature adopted omnibus legislation on April 15, 2020, A.B. 1038, to address the coronavirus pandemic, the bill did not update Wisconsin's conformity date. Rather, the bill included express language that brings the state's tax code into conformity with several federal tax law changes under the CARES Act, including the CARES Act exception that permits loan forgiveness on a tax-free basis under the PPP from February 15, 2020 through June 30, 2020.

Therefore, absent legislative action, Wisconsin remains set to treat PPP loans and expenses in a complex and confusing manner given the way in which Wisconsin's tax code currently stands in relation to the federal tax code. PPP loans from the first round will not be taxable income, but associated expenses are non-deductible. On the other hand, second-round PPP loans are taxable income, but associated expenses can be deducted. That means small businesses, many of which are struggling from the COVID-19 economic downturn, could have to pay state taxes on their PPP loans unless the state legislature and Governor Tony Evers intervene.

O'Neil, Cannon, Hollman, DeJong and Laing remains open and will continue to monitor federal and state law tax changes. For questions or further information relating to taxation under the CARES Act and the new relief bill, please contact Attorney Britany E. Morrison.

BRITANY MORRISON PUBLISHED IN STATE BAR'S INSIDETRACK

Attorney Britany Morrison authored an article entitled "Telecommuting: Tax Implications for Employers and Employees," which appeared in the State Bar of Wisconsin's newsletter**,** *InsideTrack*.

In the article**,** Morrison addresses a few important tax considerations for employers and employees working remotely. You can read the full article here.

For more information on this topic**,** contact Britany Morrison at 414-276-5000 or Britany.Morrison@wilaw.com.