THE WILAW QUARTERLY NEWSLETTER

Newsletter Article Highlights:

- An Introduction to Earnouts for the Seller of a Registered Investment Advisor
- Understanding the “Step-Up in Tax Basis”: A Summary of IRC Section 1014 and Double Stepped-Up Basis for Marital Property in Wisconsin
- Dust Off Those Handbooks–The NLRB Has Changed Its Rules (Again)
- Ex-Attorney Convicted of Stealing More Than $800,000 from Elderly Victim with Dementia

Firm News:

- 19 O’Neil Cannon Lawyers Selected as 2024 Best Lawyers; Another 4 Named Best Lawyers: Ones to Watch
- Christa Wittenberg Featured on State Bar Podcast

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IRS PREPARING FOR POTENTIAL GOVERNMENT SHUTDOWN: WHAT YOU NEED TO KNOW

As we approach the end of September, the possibility of a government shutdown looms large, and the Internal Revenue Service is making preparations for the potential impact on its operations. Below is a summary of the IRS’s contingency plans and what taxpayers can expect in the event of a government shutdown.

Government Shutdown: A Looming Threat

If Congress fails to reach a short-term agreement to fund the government by the end of September, a government shutdown is likely to occur. The IRS, like other federal agencies, is not immune to the consequences of such an event.

IRS Contingency Plans

To mitigate the potential disruption caused by a government shutdown, the IRS has been developing contingency plans. While it was initially believed that the agency could continue its operations thanks to funds allocated through the Inflation Reduction Act, recent reports

indicate a change in strategy.

The National Treasury Employees Union, which represents IRS employees, has suggested that the IRS is working on a new contingency plan that includes furloughing some of its workforce. While the full scope of this plan is yet to be disclosed, it raises questions about how IRS services will be affected.

Impact on Taxpayers

So, what does this mean for taxpayers? In the event of a government shutdown, several key IRS functions may be affected:

1. Delayed Refunds: Taxpayers who file paper returns will likely experience delays in receiving their refunds. Even electronic filers may encounter delays if their returns require further processing.
2. Backlog Increase: The IRS has been grappling with a backlog of tax returns, with 2.6 million returns pending at the end of the 2023 filing season. A shutdown could exacerbate this backlog, further delaying tax processing.
3. Filing Deadlines: It's essential to note that filing deadlines for certain entities remain unchanged. Calendar-year individuals and C corporations with filing extensions must still file their 2022 returns by October 16, and tax-exempt organizations with extensions must file by November 15. Employers must also meet their Q3 employment tax deadlines by October 31, 2023.

Uncertain Future

As the deadline for a government shutdown approaches, the situation remains uncertain. While federal agencies have backup plans in place to maintain essential services, there will undoubtedly be impacts on federal employees and the American public. In the coming weeks, taxpayers should stay informed about developments in the IRS's contingency plans and be prepared for potential disruptions to IRS services. O'Neil Cannon will continue to monitor the situation and provide updates as more information becomes available.

For questions or further information relating to the potential government shutdown's impact on the IRS, please contact Britany E. Morrison.

CHRISTA WITTENBERG FEATURED ON STATE BAR PODCAST

Christa Wittenberg, a shareholder and board member at O'Neil Cannon, was recently a guest

on *Bottom Up*, a podcast through the State Bar of Wisconsin focused on the challenges, interests, and opportunities available to lawyers. The podcast is intended to be a resource for attorneys establishing their practice in Wisconsin and beyond. In the podcast episode, Wittenberg discusses her career path, her new role as a director at the firm, the positive work environment and culture at O'Neil Cannon, and her involvement in the community. Listen and enjoy the full podcast here.

EMPLOYMENT LAWSCENE ALERT: DUST OFF THOSE HANDBOOKS–THE NLRB HAS CHANGED ITS RULES (AGAIN)

Because the incumbent President appoints members of the National Labor Relations Board (NLRB), the NLRB's decisions often reflect the policy choices of that President's political party. Generally, when a Democrat holds office, the NLRB's decisions are more employee and union-friendly, and when a Republican holds office, the NLRB's decisions are more management-friendly. An issue that the NLRB has consistently gone back and forth on, depending on the incumbent President, is the standard for evaluating employee handbooks and establishing what rules and policies are acceptable under Section 7 of the National Labor Relations Act (NLRA). Under Section 7 of the NLRA, employees have rights of organization and collective bargaining, including the right to discuss wages, hours, and other terms and conditions of employment.

From 2004 to 2017, under the *Lutheran Heritage* standard, the NLRB took the position that, if an employee could reasonably construe a rule or policy to prohibit activities protected by Section 7, that the rule or policy violated Section 7. This guidance emphasized that employer's rules and policies needed to be narrowly tailored to avoid violating Section 7. Then, in 2017, the NLRB decided *Boeing*, which held that a facially neutral work policy was lawful when the potential adverse impact on an employee's exercise of protected rights was outweighed by justifications associated with the policy.

Now, the NLRB has changed the standard back to something that "builds on and revises" the *Lutheran Heritage* standard. On August 2, the NLRB set an employee and union-friendly standard for rules and policies in its *Stericycle Inc.* ruling. Under the new standard, a workplace rule or policy is presumptively unlawful if an employee would reasonably interpret the rule "to chill employees from exercising their Section 7 rights." These rights include discussing wages and terms of employment with coworkers, appealing to the public about working conditions, organizing to improve working conditions, and supporting or forming a

union. That presumption of unlawfulness may be rebutted by the employer "by proving that the rule advances a legitimate and substantial business interest and that the employer is unable to advance that interest with a more narrowly tailored rule." However, this is likely to be a high burden for employers to meet.

Rules and policies most at risk of being interpreted as chilling an employee's ability to exercise his or her Section 7 rights include those regarding the following issues: social media, audio and video recording, cell phone use, personal conduct, conflicts of interest, and confidentiality of harassment complaints and investigations. It is important to note that facially neutral rules may be found unlawful and that the employer's intent in creating the rule is immaterial; all rules are viewed through the employees' lens and what they could reasonably interpret.

Another important aspect of the new standard is that the NLRB decided that it is to be applied retroactively, meaning it not only applies to workplace policies going forward but also workplace policies already in existence. Therefore, it is crucial that employers reevaluate their current employee handbooks and other workplace rules and policies to ensure that they do not violate the standard set forth in *Stericycle*. Because the NLRA applies to non-union companies, all employers should be aware of the new standard and ensure that their handbooks and policies comply with the *Stericycle* decision. As always, O'Neil Cannon is here for you. We encourage you to reach out with any questions, concerns, or legal issues you may have.

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19 O'NEIL CANNON LAWYERS SELECTED AS 2024 BEST LAWYERS; ANOTHER 4 NAMED BEST LAWYERS: ONES TO WATCH

We are pleased to announce 19 of our lawyers have been included in the 2024 Edition of *The Best Lawyers in America*, and an additional four have been selected as 2024 *Best Lawyers: Ones to Watch*.

The following are the O'Neil Cannon lawyers named to the 2024 lists:

Best Lawyers in America

- Douglas P. Dehler – Litigation – Insurance
- James G. DeJong – Corporate Law, Mergers and Acquisitions Law, and Securities / Capital Markets Law

- Seth E. Dizard – Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law and Litigation – Bankruptcy
- Peter J. Faust – Corporate Law and Mergers and Acquisitions Law
- John G. Gehringer – Commercial Litigation, Construction Law, Corporate Law, and Real Estate Law
- Joseph E. Gumina – Employment Law – Management and Litigation – Labor and Employment
- Dennis W. Hollman – Corporate Law and Trusts and Estates
- Grant C. Killoran – Commercial Litigation and Litigation – Health Care
- JB Koenings – Corporate Law
- Dean P. Laing – Commercial Litigation, Personal Injury Litigation – Plaintiffs, and Product Liability Litigation – Defendants
- Gregory W. Lyons – Commercial Litigation and Litigation – Insurance
- Patrick G. McBride – Commercial Litigation
- Joseph D. Newbold – Commercial Litigation
- Chad J. Richter – Business Organizations (including LLCs and Partnerships) and Corporate Law
- John R. Schreiber – Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law and Litigation – Bankruptcy
- Jason R. Scoby – Corporate Law
- Steven J. Slawinski – Construction Law

Best Lawyers: Ones to Watch

- Trevor C. Lippman – Litigation – Trusts and Estates
- Erica N. Reib – Labor and Employment Law – Management and Litigation – Labor and Employment
- Kelly M. Spott – Trusts and Estates
- Christa D. Wittenberg – Commercial Litigation

About Best Lawyers

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.

Best Lawyers: Ones to Watch recognizes associates and other lawyers who are earlier in their

careers for their outstanding professional excellence in private practice in the United States.

Lawyers on *The Best Lawyers in America* and *Best Lawyers: Ones to Watch* lists are divided by geographic region and practice areas. They are reviewed by their peers on the basis of professional expertise, and they undergo an authentication process to make sure they are in current practice and in good standing.

TAX AND WEALTH ADVISOR ALERT–UNDERSTANDING THE "STEP-UP IN TAX BASIS": A SUMMARY OF IRC SECTION 1014 AND DOUBLE STEPPED-UP BASIS FOR MARITAL PROPERTY IN WISCONSIN

When a loved one passes away, the emotional toll can be overwhelming, and dealing with the complexities of tax implications may not be a priority. However, understanding the concept of "step-up in tax basis" can significantly impact the tax burden on inherited assets. In this blog post, we'll explore the basics of the step-up in tax basis, focusing on IRC Section 1014, and how Wisconsin's marital property laws can provide a double stepped-up basis for inherited assets.

What is a "Step-Up in Tax Basis"?

Under normal circumstances, when you sell an asset that has appreciated in value since you acquired it, you are subject to capital gains tax on the difference between the purchase price (cost basis) and the selling price. However, when an individual passes away and bequeaths assets to their heirs, these assets receive a "step-up in tax basis." This step-up means that the tax basis of the inherited assets is adjusted to their fair market value on the date of the decedent's death. As a result, any unrealized capital gains up to that point are effectively wiped out, reducing or eliminating the capital gains tax burden for the heirs.

IRC Section 1014: Understanding the Legal Basis for Step-Up

The Internal Revenue Code provides the legal framework for the step-up in tax basis. Specifically, IRC Section 1014 outlines the rules governing the determination of the basis of property acquired from a decedent. According to this section, the basis of inherited property is generally its fair market value at the date of the decedent's death. There are certain exceptions and adjustments depending on the nature of the asset and the circumstances of

the transfer, but the general principle remains the same: assets inherited after someone's passing receive a new, stepped-up tax basis.

It is important to note that certain types of assets such as 401(k)s, annuities, or IRAs do not receive the step-up in basis as these assets contain what is known as "Income in Respect of Decedent." These assets are subject to income tax when inherited by the heirs.

Double Stepped-Up Basis for Marital Property in Wisconsin

Wisconsin is one of the nine states in the United States that follows a community property system. Under this system, certain assets acquired during a marriage are considered marital property, jointly owned by both spouses. When one spouse dies and leaves their share of the marital property to the surviving spouse, the tax basis of the deceased spouse's share is stepped-up to its fair market value on the date of their death, as per IRC Section 1014.

Now, here's where Wisconsin's marital property law provides an added benefit. When the surviving spouse inherits the deceased spouse's share of the marital property, the tax basis receives another step-up to its fair market value on the date of the surviving spouse's death. This is known as a "double stepped-up basis."

The double stepped-up basis can be highly advantageous for the surviving spouse and their heirs. It allows the appreciation of a certain asset owned during the marriage to be shielded from capital gains taxes entirely if the asset is later sold by the surviving spouse's heirs. This significant tax benefit can help preserve more of the family's wealth and provide more financial flexibility for future generations.

Conclusion

The step-up in tax basis is a critical concept to understand when dealing with inherited assets. Under IRC Section 1014, inherited assets generally receive a new tax basis equal to their fair market value on the date of the decedent's death, eliminating or reducing the capital gains tax burden. In Wisconsin, the marital property laws add an extra layer of advantage by providing a double stepped-up basis for assets acquired during a marriage. This double step-up can have a substantial positive impact on the overall tax liability for the surviving spouse and their heirs, offering a valuable tool for preserving family wealth and passing it on to future generations.

AN INTRODUCTION TO EARNOUTS FOR THE SELLER OF A REGISTERED INVESTMENT ADVISOR

The sale of a Registered Investment Advisor (RIA) involves various critical considerations, with the purchase price being one of the most significant. In connection with the purchase price, the seller of an RIA will often encounter the concept of a contingent purchase price, commonly called an “earnout.” In a business acquisition, an earnout is a payment arrangement where (i) a portion of the consideration paid by the buyer to the seller is not delivered until after the closing and (ii) the amount of such post-closing consideration is dependent on events that occur after the closing.

The payment structure of an earnout contrasts with the traditional payment structure of a business acquisition in which the total consideration (whether in cash, stock, or debt) is delivered by the buyer to the seller *at closing* in *a fixed amount*. In such a payment structure, delivery of the cash is typically executed by a wire transfer of immediately available funds, and delivery of stock or debt is completed by the exchange of signed documents at closing. Once the funds reach the seller’s bank account, the transaction is considered complete. The seller’s business is transferred to the buyer.

In the case of an earnout, the transfer of the seller’s business to the buyer is still complete at closing. The crucial difference is that payment of a portion of the purchase price depends on the performance of the acquired business during a specified period following the closing. The earnout payments are typically spread out over several years. In the case of an acquired RIA, the performance metrics that determine the amount of those payments commonly include Assets Under Management growth, revenue growth, profitability, client retention, and client acquisition.

In certain situations, the use of an earnout in the sale an RIA can be a strategic and beneficial arrangement for the seller. An earnout can benefit the seller by providing a higher total consideration received, a smoother transition for clients and employees, more flexibility in exit timing for the seller, and, in the event of valuation disparities between buyer and seller, the opportunity for the seller to realize the full enterprise value of the RIA. Careful planning is essential to achieving the desired outcomes of an earnout and protecting the interests of the seller.

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Newsletter Article Highlights:

- The Pitfalls of Payable on Death Accounts
- Section 1202 Stock: An Attractive Tax Benefit for Investors in Small Businesses
- Pregnant and Nursing Employees Have Newly Expanded Rights
- A Michigan Jury R-E-S-P-E-C-Ts Aretha Franklin's Wishes

Firm News:

- O'Neil Cannon Welcomes Attorneys Eric Peterson and Kyle Kasper
- Chambers and Partners Recognizes Faust and O'Neil Cannon for M&A Excellence
- Attorney Seth Dizard to Receive 2023 Judge Dale E. Ihlenfeldt Bankruptcy Award
- O'Neil Cannon Serves as Legal Advisor to i3 Product Development in Its Sale to Helios Technologies

Click the image below to read more.

A MICHIGAN JURY R-E-S-P-E-C-TS ARETHA FRANKLIN'S WISHES

In 2018, the "Queen of Soul" Aretha Franklin passed away, leaving behind four sons and a multimillion-dollar estate. Since this time, Franklin's sons have been engaged in a fierce legal battle regarding the application of contradictory handwritten wills and the proper division of her assets. Recently, a jury in the probate court in Pontiac, Michigan decided that Franklin's handwritten will drafted in 2014 revoked a previous handwritten will and will set forth how Franklin's assets will be divided amongst her children.

Initially, it was believed that Franklin died without a valid will and her estate assets would be distributed in accordance with Michigan's intestacy law. Under Michigan law, because Franklin was not married at the time of her death, her entire estate was to be distributed equally to her four children. However, months after Franklin's death, two conflicting handwritten wills were found in Franklin's home. The first document was discovered in a locked cabinet and was dated 2010. This document was approximately twelve pages long and was signed by Franklin on each page. The second document was dated 2014 and was found inside a spiral notebook tucked under a couch cushion. The 2014 document was

significantly shorter than the 2010 document and was only signed “Franklin” with a smiley face nearby. The two handwritten wills were each drafted by Franklin herself and did not list any parties as witnesses. The legal battle revolved around which of the two handwritten wills would apply as they had conflicting terms for the division of Franklin’s assets.

Two of Franklin’s sons argued that the 2014 document revoked the 2010 document and met the legal standard for a “holographic will” under Michigan law. Typically, a will is only valid under Michigan law if it meets three requirements: (1) it is in writing; (2) it is signed by the testator or, while the testator is present, by another at the testator’s direction; and (3) it is signed by at least two witnesses in a reasonable time after seeing the testator sign or after the testator acknowledges the signature. However, unlike Wisconsin, Michigan recognizes handwritten or “holographic” wills if the document is signed, dated, is in the testator’s handwriting, and demonstrates by clear and convincing evidence that the testator intended the document to be their will. After less than an hour of deliberations, the jury determined that the 2014 handwritten document revoked the 2010 document and shall serve as Franklin’s will.

Had Franklin been a Wisconsin resident at the time she drafted the conflicting handwritten wills, the legal battle between her children likely never would have occurred. In Wisconsin, for a will to be valid it must meet certain requirements: (1) it is in writing; (2) it is signed by the testator or signed in the presence of the testator at their direction; and (3) it is signed by at least two witnesses (who are unrelated and disinterested) within a reasonable time after witnessing the signing of the will, after the testator’s acknowledgment of their signature on the will, *or* after the testator’s acknowledgement of the will. Wisconsin does not recognize holographic wills, and neither Franklin’s 2010 nor 2014 holographic wills would have been upheld as valid regardless of a showing of Franklin’s intent. Instead, Franklin’s estate would be distributed in accordance with Wisconsin’s default probate laws.

Estate planning can be a complex and stressful process for families, that too often ends in disputes between loved ones. The estate planning team at O’Neil Cannon is dedicated to assisting its clients navigate the estate planning process and creating a personalized plan that meets their goals and wishes for distributing their assets. In the event that disputes arise, O’Neil Cannon’s inheritance litigation team is also prepared to assist its clients in all matters related to disputed estate planning documents. To schedule a consultation with a member of O’Neil Cannon’s estate planning or inheritance litigation teams, please call (414) 276-5000.

ATTORNEY KYLE KASPER HAS JOINED O'NEIL CANNON

Attorney Kyle Kasper, a *magna cum laude* graduate of Marquette University Law School, has joined O'Neil Cannon. Kyle is a member of the firm's Litigation Practice Group. While in law school, Kyle was actively involved in numerous organizations, including the Moot Court Association, Marquette Law Review, and Marquette Sports Law Review. Additionally, Kyle was selected as an Academic Success Program leader where he assisted law students with their legal writing and research. We are very pleased to welcome Kyle to O'Neil Cannon.

O'Neil Cannon, founded in Milwaukee in 1973, is a full-service law firm that focuses on meeting the many needs of businesses and their owners. Our experienced attorneys work with businesses and their owners at all stages of the business life cycle, helping them start, grow, and transition their businesses. We also assist business owners with their personal legal needs, including tax and estate planning and family law. For more information about the services we provide, please visit our website.