

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.

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.

THE WILAW QUARTERLY NEWSLETTER

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

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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](#).

EMPLOYMENT LAWSCENE ALERT: PREGNANT AND NURSING EMPLOYEES HAVE NEWLY EXPANDED RIGHTS

On December 29, 2022, President Biden signed the Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act) and the Pregnant Workers Fairness Act (PWFA) into law. Both expand the protections for pregnant, postpartum, and nursing employees, who may also have protections under the Pregnancy Discrimination Act, the Americans with Disabilities Act, and the FMLA.

The PUMP Act expands the 2010 amendment to the FLSA that required employers to provide a nursing mother reasonable break time to express breast milk for up to one year after childbirth and to provide a place other than a bathroom for the employee to express breast milk, shielded from view and free from intrusion from coworkers and the public.

Although significant, the 2010 amendment only entitled non-exempt workers to protection because it only covered those workers who were entitled to overtime pay under the FLSA. The PUMP Act expands the protections of break time to nurse and a private place to pump to all exempt and non-exempt employees, which is estimated to cover an additional nearly nine million workers. In addition to expanded coverage, under the PUMP Act, employees have a private right of action to bring suit against employers that do not comply with the Act.

The PUMP Act applies to all employers covered under the FLSA; however, if an employer with fewer than fifty employees can demonstrate that compliance with the break time requirement would impose an undue hardship, the employer may be exempt. Undue hardship is determined by looking at the difficulty or expense of compliance for a specific employer in comparison to the size, financial resources, nature, or structure of the employer's business.

The required break time for pumping under the PUMP Act does not have to be paid unless either (1) the employer provides compensated breaks for other employees during similar break times, (2) the employee is not completely relieved from duty during the break, or (3) the break is otherwise required by law to be paid. However, exempt employees may not have their salaries reduced due to breaks covered by the PUMP Act. The PUMP Act requires the pumping space to not necessarily be permanent but does require that the space be available "each time such employee has a need to express the milk." If an employer does not currently

have any eligible employees, the employer does not have an obligation to provide a space, but employers should consider where they will make space if an employee becomes eligible. It is crucial that the space to express breast milk not be a bathroom.

The PWFA requires employers with fifteen or more employees to engage in an interactive process with pregnant and postpartum applicants and employees and to make reasonable accommodations for any limitations related to pregnancy, childbirth, or related medications, unless such accommodation would pose an undue hardship to the employer. Additionally, employers may not deny employment to, take adverse action against, or retaliate against applicants or employees who request a reasonable accommodation or engage in other protected activity under the PWFA. Much like the ADA, employers and employees must engage in an interactive process to determine what accommodations are necessary for the individual employee; employers cannot unilaterally decide what accommodations are appropriate.

Prior to the end of 2023, the EEOC will issue final regulations related to PWFA. The EEOC has already provided examples of potential accommodations that may be appropriate under the PWFA, including longer and more flexible breaks to eat, drink, and use the restroom; schedule flexibility, including to deal with morning sickness; exemption from strenuous activities; leave for medical appointments and to recover from childbirth; and closer parking. On June 27, 2023, the EEOC began accepting complaints under the PWFA, which also has a private right of action.

In addition to becoming familiar with the new requirements under the PUMP Act and PWFA, employers should review their policies in order to make sure that they comply with the expanded requirements of the laws. 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.

TAX AND WEALTH ADVISOR ALERT-SECTION 1202 STOCK: AN ATTRACTIVE TAX BENEFIT FOR INVESTORS IN SMALL BUSINESSES

Investors in small closely held businesses looking for ways to reduce their tax liability might want to consider taking advantage of Section 1202 stock, also known as Qualified Small Business Stock. Section 1202 of the Internal Revenue Code offers a tax break for individuals who invest in certain qualified small businesses.

So, what exactly is Section 1202 stock? In simple terms, it refers to shares of stock issued by

qualified small businesses that meet specific criteria outlined in the tax code. The main advantage for investors holding these stocks lies in the potential exclusion of a portion of their capital gains from taxation upon the future sale of these stocks.

Under Section 1202, eligible investors can potentially exclude up to 100% of their capital gains from the sale of qualified small business stock held for more than five years. However, it is important to note that the tax benefits provided by Section 1202 are subject to certain limitations and restrictions. For instance, the exclusion of capital gains is limited to the greater of \$10 million (\$5 million for married taxpayers filing separately) or ten times the investor's basis in the stock. Also, the exclusion only applies to investments made after August 10, 1993. Despite these limitations, Section 1202 stock can result in substantial tax savings and provide a significant incentive for individuals looking to invest in startups or small businesses.

To qualify for these tax benefits, the small business must meet certain requirements. First, the company should be a domestic C corporation. Additionally, the business must have total gross assets of \$50 million or less at the time the stock is issued.

Another crucial condition is that the company must be engaged in an active trade or business. The Section 1202 exclusion does not apply to any business primarily providing professional services such as health, law, engineering, architecture, accounting, actuarial science, performing arts, athletics, banking, insurance, financing, leasing, and investing fields, any business operating a hotel, motel, or restaurant, or any business that is primarily holding assets for investment. However, there are exceptions for certain technology-focused businesses that meet specific criteria.

Notwithstanding these limitations, Section 1202 stock remains an attractive tax benefit for investors in small businesses. Investors should plan carefully to determine whether their investment qualifies for the Section 1202 exclusion, and to understand the specific requirements and limitations of this tax benefit. As with any tax-related matter, it is crucial to consult with a qualified tax attorney before making investment decisions. A tax attorney can help navigate the complexities of Section 1202 and ensure compliance with all applicable regulations.

Overall, Section 1202 stock can offer a significant tax break for small business owners and investors. By taking advantage of this provision, investors can potentially reduce their tax liability and support the growth of small businesses.

EX-ATTORNEY CONVICTED OF STEALING MORE THAN \$800,000 FROM ELDERLY VICTIM WITH DEMENTIA

The United States Attorney's Office from the Southern District of Ohio recently issued a press release that highlights how elderly individuals suffering from dementia may be vulnerable to financial abuse. The press release can be found [here](#).

As the release explains, the attorney defrauded his client—an elderly woman in her 80s—over the course of seven years, between 2012 and 2019. The attorney's law license was revoked in 2015. The attorney stole the funds using a myriad of methods, including utilizing his role as the victim's power of attorney and status as a lawyer to transfer money to himself, to force the victim's signature on a revocation of a family member's separate power of attorney, and to cash out the victim's U.S. Treasury Bonds and life insurance policies. The attorney was sentenced to five years in prison and ordered to pay \$882,502 in restitution.

This tragic story underscores the difficulties in flagging and investigating alleged financial abuse when the victim is not capable of protecting his or her own interests. It also rebuts the assumption that some courts and attorneys make in inheritance litigation that one only needs to look back a year or two prior to the victim's death to evaluate whether elder financial abuse of the victim may have occurred. Here, the victim suffered dementia for at least seven years.

If you or a loved one suspects that an elderly person with dementia is being taken advantage of, you should consider reporting elder abuse. There may also be options to pursue an investigation through a civil action. For example, in Wisconsin, there are routes to seek court review of an agent's conduct under a financial power of attorney.

Trevor C. Lippman is a shareholder at the law firm of O'Neil Cannon. Lippman assists clients with all matters related to inheritance disputes, including questions surrounding the creation and administration of trusts and wills. Lippman has assisted hundreds of clients navigate the difficult waters involved in elderly financial abuse allegations and inheritance litigation. To schedule an initial consultation with Lippman, call 414.276.5000 or email him at trevor.lippman@wilaw.com.