THE WILAW QUARTERLY NEWSLETTER

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EMPLOYMENT LAWSCENE ALERT: RELIGIOUS ACCOMMODATION IN EMPLOYMENT WILL HAVE ITS DAY AT THE HIGH COURT

In recent years, the U.S. Supreme Court has made major employment law headlines with its *Bostock* decision (holding sexual orientation and gender identity are protected classes under Title VII) and *Epic Systems* decision (holding class-action waivers are enforceable against employees), among others. It looks like 2023 will be no different. In addition to taking up the rights of employers to sue unions for damages incurred during strikes and asking the Solicitor General to weigh in on what actions can be the basis for a discrimination suit under Title VII,

the Supreme Court is also poised to reshape the landscape of religious accommodations.

Under Title VII, employers are prohibited from discriminating against individuals because of their religion in hiring, firing, and other terms and conditions of employment. In addition, employers must reasonably accommodate the religious practices of an employee or a potential employee, unless doing so would pose an "undue hardship" to the employer. Such accommodations may include flexible scheduling, voluntary substitutes or swaps, job reassignments, lateral transfers, changes to dress and grooming codes, and protection of workplace religious expression. Currently, under the 1977 Supreme Court decision *Trans World Airlines, Inv. v. Hardison*, an "undue burden" is defined as "more than *de minimis* cost" or a minor burden. This definition stands in fairly stark contrast to the Americans with Disability Act definition of "undue burden," which is "significant difficulty or expense."

Because employers have had fairly significant leeway when it comes to religious accommodation, this area of law has not seen significant litigation, as religious discrimination claims account for only 3.4% of all EEOC charges in fiscal year 2021. However, the tides may be turning, particularly if *Hardison* is overruled. In January, the Supreme Court agreed to hear oral arguments in a case that could be poised to change the "undue burden standard" for religious accommodation. In *Groff v. DeJoy*, a Christian letter carrier objected to delivering packages for Amazon on Sundays and asked for an accommodation that he never be required to work on Sundays due to his religious beliefs. The U.S. Postal Service rejected this request, stating that granting it would be an undue burden because it would cause tension among other employees who would be required to work on Sundays. The U.S. Postal Service did offer to let the employee switch shifts with other employees, if any of them were willing to do so. The District Court and the Court of Appeals for the Third Circuit ruled in favor of the U.S. Postal Service, citing *Hardison* and the minimal burden the employer needed to show to reject the request for accommodation. Although conventional wisdom would typically indicate that the conservative super-majority on the high court is likely to rule in favor of the corporation, given this Supreme Court's openness to arguments of religious discrimination in other contexts and both Justice Alito's and Justice Gorsuch's prior criticism of *Hardison*, the current definition of what is a "de minimis" burden in religious accommodation cases is likely to change in favor of the employee. Whether that change brings the religious accommodation definition of "undue burden" closer to the ADA's definition or creates some newly defined test remains to be seen.

Employers should stay tuned for the outcome of *Groff* and should, in the meantime, carefully consider any requests for religious accommodation with an eye toward a potentially increased burden on the employer to show that the requested accommodation creates an undue burden. 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: IRS POSTPONES $600 PAYMENT PROCESSOR 1099-K REPORTING REQUIREMENT

In a year-end gift of sorts to tax professionals, payment processing companies, and individuals pursuing eBay and other small-transaction side hustles, the IRS has delayed a new transaction reporting requirement that some believed would cause confusion among taxpayers and tax preparers alike.

Many More Payments Were to Be Reported to the IRS

The new reporting requirement would have required companies such as Venmo, PayPal, eBay, and Etsy that process business-related payments to provide each individual who received more than a total of $600 in reportable transaction payments from the company in 2022 with a form 1099-K and to report those payments to the IRS. Formerly the 1099-K reporting requirement was not triggered unless an individual received more than $20,000 in reportable payments in more than 200 transactions in a calendar or tax year.

So, for example, if an eBay seller earned more than $600 from eBay auctions in 2022, eBay would have been required to report that total to the IRS and to send the seller a form 1099-K reflecting those payments. This would be the case for any payment processor that made payments to individuals or businesses for business-related transactions (StubHub, Etsy, Airbnb, Venmo, Zelle, Square, and the like). In each case, if any one individual or company was paid more than $600 for business-related transactions in 2022, the payment processor would have been required to report the total amount paid to the IRS, and the recipient of the payments would receive a form 1099-K reflecting that total.

Concerns About Errors and Confusion

There was widespread concern that given the lower reporting threshold of $600 per year, many individual taxpayers would receive erroneous 1099-Ks that mistakenly included non-reportable transactions. A Venmo payment for splitting dinner checks with a friend is one example. Only properly reportable transactions, such as payments for business-related products or services, should trigger a 1099-K, and the risk of error with the lower threshold was significant. Of course, those erroneous amounts would also have been reported to the IRS, creating headaches for taxpayers, tax preparers, and the IRS.

The IRS Has Delayed the New Reporting Requirement

In late December 2022, the IRS issued a notice delaying the implementation of the $600 threshold for the 1099-K reporting requirement until 2023, meaning taxpayers should not be receiving 1099-Ks from payment processors such as eBay and PayPal unless the old $20,000/200-transaction threshold was reached during the year.

This does not mean taxpayers are not required to declare all their 2022 income, of course. It simply means that if a taxpayer's transactions for the year were under the $20,000/200-transaction threshold, payments won't be reported to the IRS by the payment processors and the taxpayers won't receive a form 1099-K for amounts they've received.

Be Prepared for 2023

Note that the IRS is not abandoning the new $600 reporting requirement; it's simply giving payment processors, tax professionals, and taxpayers another year to ensure they are prepared to implement it. This means that if you're a taxpayer and you receive payments from online transactions such as eBay, Etsy, StubHub, or Airbnb, or if you have clients pay you via Venmo or Paypal, it's essential for you to keep track of the money you receive via these payment processing services. You should also make sure you pay close attention to non-business payments you receive from friends and family when you split a dinner check or share a weekend cabin rental.

Keep track of expenses you incur related to the reportable payments you receive – for example, if you buy and resell concert tickets, the cost of the original ticket you purchased is an expense related to the money you receive from selling the ticket. Doing so will usually reduce your reportable income. And the more you keep good records, the easier it will be to ensure that any 1099-K forms you receive for 2023 payments are accurate and properly reflect the money you've been paid for goods or services you provided.

Note That Things May Change

The new $600 threshold for 1099-K reporting provoked a predictable backlash from the payment processing industry. Some members have formed an advocacy group called the Coalition for 1099-K Fairness to draw attention to the new requirement and encourage the IRS to, at a minimum, delay its implementation. With the IRS's decision in late 2022 to postpone enforcement of the new rule for a year, at least one of this group's requests has been met (though the IRS did not specifically reference the Coalition when it issued its notice).

According to a survey conducted on behalf of the Coalition, millions of what they call "casual sellers" make less than $5,000 per year selling used or pre-owned goods online. For most of

these people, the Coalition argues that selling things online is not their primary source of income; think “side-gig.” One industry concern is that if millions of people start receiving 1099-K forms for casual transactions, many may stop selling online to avoid the hassle of keeping records of revenues and expenses as though they are operating a full-fledged business.

On the other side is the idea that even “casual sellers” should include their income from smaller-scale transactions on their tax returns. And the thought is that if taxpayers are aware that the revenue they receive from these casual sales is being reported to the IRS, they will be more inclined to include it (or the portion that is properly reportable as income) on their tax returns.

That said, there is no dispute that the new $600 reporting threshold is a drastic change from the old $20,000/200-transaction threshold, and that complying with the new 1099-K reporting requirement will be significantly more burdensome for payment processors of all types. While the $600 threshold may be changed in response to industry and taxpayer pressure, there is no guarantee this will happen, so payment processors and taxpayers should continue to act as though the threshold will remain where it is for 2023.

For questions or further information relating to form 1099-K reporting, please contact Attorney Britany E. Morrison.

GRANT KILLORAN JOINS THE BOARD OF DIRECTORS OF MILWAUKEE FILM, INC.

Grant Killoran of O’Neil Cannon was recently elected to serve on the Board of Directors of Milwaukee Film, Inc.

Milwaukee Film is a nonprofit arts organization dedicated to entertaining, educating, and engaging the community through cinematic experiences, with a vision to make Milwaukee a center for film culture. It operates the Oriental Theatre, a historic cinema palace committed to high-quality and accessible film and education programming. Since 2009, its annual Milwaukee Film Festival has brought together film fans and filmmakers to celebrate the power of cinema. Its education programs and cultures and communities platform provide avenues toward making the Greater Milwaukee community a more empathic and equitable place for everyone to live.

Grant is a shareholder with O’Neil Cannon and past chair of the firm’s Litigation Practice

Group. He has diverse business dispute resolution and trial experience, focusing on complex business and health care disputes.

HOW DO WISCONSIN'S NEW LLC LAWS IMPACT MY COMPANY?

In April of 2022, Wisconsin passed new business entity laws, greatly impacting limited liability companies and their members, and largely overhauling and replacing Chapter 183 of the Wisconsin Statutes, which governs LLCs. This article will help you identify the key changes under the new LLC laws, as well as point you towards the next steps in preparing for this overhaul—including decisions to be made before year-end. For purposes of this article, we'll refer to the new Chapter 183, the Wisconsin Uniform Limited Liability Company Law (WULLCL), as the "New LLC Laws," and refer to the pre-WULLCL Chapter 183 as the "Old LLC Laws."

The first significant deviation from the Old LLC Laws impacts your LLC's operating agreement—the agreement governing the relationship between the members or owners of an LLC. Under the New LLC Laws, the meaning of an "operating agreement" has been expanded to include not only your formal, written agreements (if you have one), but also any verbal agreements, implied understandings, and any combination thereof. It has always been important for the members of an LLC to have a written operating agreement to clearly set forth the understandings governing their relationship. However, that importance is magnified under the New LLC Laws now that you must ensure that ancillary agreements, whether verbal or implied, do not rule the day on a particular issue or disagreement between members.

The New LLC Laws have also brought changes to the reach of certain fiduciary duties that members or managers may owe one another. Under the Old LLC Laws, members and managers of an LLC could waive some of these duties, including those duties of good care and loyalty, as well as the obligation of good faith and fair dealing. However, under the New LLC Laws, these duties are now mandated against members and managers by default unless otherwise provided for in your operating agreement (subject to restraints on how far fiduciary duties can be limited). With that said, if your LLC has an operating agreement currently in place that provides for the waiver of these duties, that waiver will be valid and honored under the New LLC Laws.

Another impactful departure from the Old LLC Laws relates to a member's authority to act on behalf of your LLC simply by virtue of their status as a member (commonly referred to as "apparent authority"). Under the New LLC Laws, the members of your LLC are not automatically granted the authority to act on behalf of the company merely because they are members. Instead, this authority needs to be established, most often either by documentation in your LLC's operating agreement, or by filing a Statement of Authority with the Wisconsin Department of Financial Institutions ("WDFI"). Whichever the method, those documents need to set forth who or what positions in your LLC possess the authority to act on behalf of the company as an agent.

The New LLC Laws may also broaden the rights of certain members to access information regarding your LLC, purely as a result of their membership status, and with no regard for their role in management. Where the Old LLC Laws were silent as to a dissociated member's right to access an LLC's information, the New LLC Laws make clear that dissociated members possess the same rights to access, inspect and copy information regarding an LLC and its activities as an active member possesses, albeit these rights must be exercised through a representative. This means that under the New LLC Laws, a dissociated member may have the right to access certain sensitive information regarding your LLC, including its financial statements, subject to certain statutory restrictions or restrictions set forth in your operating agreement.

Depending on your circumstances, it may also be worth considering some of the more technical updates brought on by the New LLC Laws, particularly with respect to your LLC's Articles of Organization—your company's charter. For one, under the Old LLC Laws, the management designation had to be set forth in your LLC's Articles. However, under the New LLC Laws, if you want your LLC to be managed by a manager or group of managers specifically rather than the members generally, then your LLC's operating agreement must provide for this designation, but its Articles can remain silent as to the same. With that said, your LLC's Articles, in addition to your operating agreement, may still provide for a management designation if your members so choose. Additionally, under the New LLC Laws, your LLC's Articles must provide for both a street address and an email address for your LLC's registered agent.

Given all these updates, the WDFI has provided LLCs with the opportunity to opt in to the New LLC Laws early or opt out in favor of the Old LLC Laws. If you want your LLC to opt in to the New LLC Laws, you can either file a Statement of Applicability no later than December 31, 2022, or, alternatively, do nothing between now and the end of the year and your LLC will automatically be governed by the New LLC Laws beginning January 1, 2023. However, if you want your LLC to opt out of the New LLC Laws and continue to be governed by the Old LLC Laws, **you must file a Statement of Nonapplicability no later than December 31, 2022**. Additionally, this opt-out filing should be paired with member or manager approval, likely in the form of a consent resolution approving the filing.

If you have any doubts or concerns about your LLC being governed under the New LLC Laws, it may be worth filing a Statement of Nonapplicability before the end of the year, even if only precautionary. If you ever decide to be governed by the New LLC Laws in the future, you can simply file a Statement of Applicability and opt in, but once opted in—whether by default on January 1, 2023, or by an opt-in filing—your LLC cannot revert back to governance under the Old LLC 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.

HOME FOR THE HOLIDAYS: GIVE THE GIFT OF LEGAL PLANNING FOR YOUR COLLEGE STUDENT

In the summer flurry of packing and planning to transition their high school student to college life, many parents overlook the legal documents that can help families in the event of a student's financial or health emergency. As many parents learn the hard way when their child suffers a physical or mental health crisis, the law generally prohibits a hospital or medical provider from sharing information about their adult child without their child's consent regardless of whether the child is covered under their health insurance or a dependent for tax purposes. Similarly, while parents can deposit money into their child's checking account, they do not have the ability to act on their adult child's behalf to manage other aspects of his or her financial life. A few simple documents can help families as their teens transition to adulthood.

HIPAA Release and Authorization

HIPAA normally prohibits a medical provider from giving information about a patient to anyone without the patient's consent. A HIPAA release and authorization allows medical professionals to divulge medical records to an individual's personal representative under HIPAA. Students can name one or both of their parents as individuals authorized to obtain such information.

Power of Attorney for Health Care

A power of attorney for health care allows a person to appoint someone to make health care decisions for them if they are unable to do so. The power of attorney does not override or supplant the individual's wishes; it becomes effective only when (i) two physicians or (ii) a physician and a psychologist, nurse practitioner, or physician assistant determine that the

individual is incapacitated. Only one person can be given power of attorney for health care at a time and that person should be aware of the individual's desires and beliefs concerning treatment.

Durable Power of Attorney

A durable power of attorney allows a person to appoint someone to oversee their financial affairs. These powers can be either immediate or effective only in the event of incompetence. For a college student, an immediate durable power of attorney would permit his or her parent to act on the student's financial behalf to the extent the power permits. This power can be broad and cover all accounts, including brokerage institutions, credit cards or banks, or limited to a specific financial institution.

O'Neil Cannon's **Estate and Succession Planning Group** can advise and assist your college student with these important documents.

ATTORNEY SETH DIZARD RECENTLY FEATURED IN SUPER LAWYERS

Attorney Seth Dizard, chair of O'Neil Cannon's banking, receivership, and creditors' rights practice group, was recently featured in the Super Lawyers article "Debt Collection Options for Businesses". In the article, Dizard shares advice and insights for business owners in the area of creditors' rights. Read the full article here.

As the head of the firm's Banking, Receivership, and Creditors' Rights Practice Group, Dizard regularly serves as a court-appointed receiver throughout the State of Wisconsin for businesses, construction projects, real estate developments, marital and family estates, rental income properties, and high net worth individuals. He also represents financial institutions, secured and unsecured corporate or individual creditors, companies seeking to acquire distressed businesses, and financially troubled corporations in both state and federal courts. In addition, he assists business owners by guiding them through the process of informal financial work-outs and refinancing. Dizard has extensive experience serving as court-appointed receiver, and representing court-appointed receivers, throughout the state in assignments for the benefit of creditors (Chapter 128 Receiverships), as well as real estate foreclosures, the winding-up of closely held corporations, and complex post-judgment collection matters.

SUPER LAWYERS RECOGNIZES 25 O'NEIL CANNON ATTORNEYS

Each year, *Super Lawyers* surveys the State of Wisconsin's 15,000 attorneys and judges, seeking the State's top attorneys. Recently, *Super Lawyers* published its lists for 2022, which include the Top 10 Attorneys in Wisconsin, Top 50 Attorneys in Wisconsin, Top 25 Attorneys in Milwaukee, Super Lawyers (consisting of the top 5% of attorneys in Wisconsin), and Rising Stars (consisting of attorneys who are 40 years old or younger or who have been in practice for 10 years or less).

Twenty-five of our attorneys were recognized by *Super Lawyers*, which has referred to the firm as "the Milwaukee mid-sized powerhouse." Those attorneys are the following:

- Nicholas G. Chmurski:
  - Rising Stars
- Douglas P. Dehler:
  - Super Lawyer
- James G. DeJong:
  - Super Lawyer
- Seth E. Dizard:
  - Top 50 Attorneys in Wisconsin
  - Top 25 Attorneys in Milwaukee
  - Super Lawyer
- Peter J. Faust:
  - Super Lawyer
- John G. Gehringer:
  - Super Lawyer
- Joseph E. Gumina:
  - Super Lawyer
- Jessica K. Haskell:
  - Rising Stars
- Grant C. Killoran:
  - Super Lawyer
- Dean P. Laing:
  - Top 10 Attorneys in Wisconsin
  - Top 50 Attorneys in Wisconsin
  - Top 25 Attorneys in Milwaukee

    - Super Lawyer
- Trevor C. Lippman:
    - Rising Stars
- Gregory W. Lyons:
    - Super Lawyer
- Patrick G. McBride:
    - Super Lawyer
- Britany E. Morrison:
    - Rising Stars
- Joseph D. Newbold:
    - Super Lawyer
- Erica N. Reib:
    - Rising Stars
- Chad J. Richter:
    - Super Lawyer
- John R. Schreiber:
    - Super Lawyer
- Jason R. Scoby:
    - Super Lawyer
- Steven J. Slawinski:
    - Super Lawyer
- Kelly M. Spott:
    - Rising Stars
- Christa D. Wittenberg:
    - Rising Stars

Super Lawyers is a national rating service that rates attorneys in all 50 states. The selection process utilized by *Super Lawyers* is multi-phased and includes independent research, peer nominations, and peer evaluations. One court recently had this to say about *Super Lawyers*:

> "[T]he selection procedures employed by [*Super Lawyers*] are very sophisticated, comprehensive and complex. It is abundantly clear . . . that [*Super Lawyers* does] not permit a lawyer to buy one's way onto the list, nor is there any requirement for the purchase of any product for inclusion in the lists or any quid pro quo of any kind or nature associated with the evaluation and listing of an attorney or in the subsequent advertising of one's inclusion in the lists."

We are proud to be one of the few firms in Wisconsin that had more than 50% of its attorneys

receive recognition by *Super Lawyers.*

EMPLOYMENT LAWSCENE ALERT: VOTE! AND REMEMBER THAT YOUR EMPLOYEES ARE ENTITLED TO TIME OFF TO VOTE!

Tuesday, November 8, 2022, is Election Day. Although early voting is underway, many people will want to vote in-person on Election Day. All Wisconsin employers, regardless of size, are required to provide employees who are eligible to vote up to three consecutive hours of unpaid leave to vote while the polls are open (from 7 a.m. until 8 p.m.). Employees must request the time off prior to Election Day. Employers cannot deny voting leave on the basis that employees would have time outside of their scheduled work hours to vote while the polls are open, but employers can specify which three hours an employee may utilize (e.g., the beginning or end of the workday). Employers may not penalize employees for using voting leave. Although voting leave is unpaid, employers should remember that, under the FLSA, they may not deduct from an exempt employee's salary for partial day absences.

Additionally, all Wisconsin employers are required to grant 24 hours of unpaid leave to an employee who is appointed to serve as an election official. This election official leave is for the Election Day on which the employee serves in his or her official capacity. Employers may not penalize employees for using election official leave. Employees must provide their employers with notice of their need for this leave at least seven days prior to Election Day.

Finally, Wisconsin employers are not permitted to make threats that are intended to influence the political opinions or actions of their employees. Specifically, employers cannot distribute printed materials to employees that threaten to shut down the business, in whole or in part, or to reduce the salaries or wages of employees if a certain party or candidate is elected or if any referendum is adopted or rejected.

As always, O'Neil, Cannon, Hollman, DeJong and Laing is here for you. We encourage you to reach out with any questions, concerns, or legal issues you may have.

O'NEIL CANNON RANKED IN 2023 "BEST LAW

FIRMS”

O’Neil Cannon has been ranked in the *2023 U.S. News – Best Lawyers*® “Best Law Firms” list in 16 practice areas:

- Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law
- Business Organizations (including LLCs and Partnerships)
- Commercial Litigation
- Construction Law
- Corporate Law
- Employment Law – Management
- Litigation – Bankruptcy
- Litigation – Insurance
- Litigation – Labor and Employment
- Mergers and Acquisitions Law
- Personal Injury Litigation – Plaintiffs
- Product Liability Litigation – Defendants
- Real Estate Law
- Securities / Capital Markets Law
- Tax Law
- Trusts and Estates Law

Firms included in the 2023 “Best Law Firms” list are recognized for professional excellence with persistently impressive ratings from clients and peers. Achieving a tiered ranking signals a unique combination of quality law practice and breadth of legal expertise.