O'NEIL CANNON RANKED IN 2022 "BEST LAW FIRMS"

O'Neil Cannon has been ranked in the *2022 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 2022 "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.

EMPLOYMENT LAWSCENE ALERT: OSHA ISSUES DETAILS OF VACCINE MANDATE

Today, the U.S. Department of Labor's Occupational Safety and Health Administration ("OSHA") released the Emergency Temporary Standard regarding COVID-19 Vaccination and Testing, which has commonly been referred to as the Vaccine Mandate. It will officially be published on November 5, 2021. Announced by President Biden in September, the Vaccine Mandate requires all employers with more than 100 employees to either require that employees be fully vaccinated or require unvaccinated employees to submit to weekly COVID-19 tests, both of which are subject to reasonable accommodations for disabilities and sincerely held religious beliefs. The Vaccine Mandate does not apply to individual employees

who do not report to a workplace where other individuals such as coworkers or customers are present, employees while they are working from home, or employees who work exclusively outdoors. Although the majority of the Vaccine Mandate officially goes into effect on January 4, 2022, employers need to start preparing immediately in order to be in full compliance by that date, including establishing and implementing the required written policies. Certain provisions, including the fact that employers must offer paid time-off for employees to receive the COVID-19 vaccinations and recover from any side-effects and must require unvaccinated employees to wear masks, go into effect on December 5, 2021.

For employees who opt to utilize the testing requirement, employers must keep records of each test unvaccinated employees take. If an employee is not vaccinated and does not receive a weekly test or if the employee tests positive for COVID-19, the employer must remove that employee from the workplace. A covered employer may require employees to pay for their own COVID-19 testing.

In order to assess whether or not an employer has 100 employees, employers are required to count all full-time and part-time employees at all of their locations, whether or not they work at the company's facility or remotely. Employers are not required to count independent contractors or leased employees, such as those from staffing agencies. Additionally, franchisees may count their employees separately from the franchisor and from other franchisees. Here are some examples provided in the ETS:

- If an employer has 75 part-time employees and 25 full-time employees, the employer would be within the scope of this ETS because it has 100 employees.
- If an employer has 102 employees and only 3 ever report to an office location, that employer would be covered.
- If a single corporation has 50 small locations (e.g., kiosks, concession stands) with at least 100 total employees in its combined locations, that employer would be covered even if some of the locations have no more than one or two employees assigned to work there.
- If a host employer has 80 permanent employees and 30 temporary employees supplied by a staffing agency, the host employer would not count the staffing agency employees for coverage purposes and therefore would not be covered. (So long as the staffing agency has at least 100 employees, however, the staffing agency would be responsible for ensuring compliance with the ETS for the jointly employed workers.)
- Generally, in a traditional franchisor-franchisee relationship, if the franchisor has more than 100 employees but each individual franchisee has fewer than 100 employees, the franchisor would be covered by this ETS but the individual franchises would not be covered.

The Centers for Medicare and Medicaid Services issued its own emergency rule requiring healthcare workers at hospitals, nursing homes, and other facilities that participate in Medicare and Medicaid to be fully vaccinated by January 4, 2022, but its rule does not allow for a weekly testing option. In the event of an overlap between the CMS rule and the OSHA

rule, the CMS rule will govern. Additionally, in any overlap between the OSHA rule and the requirement that federal contractors be vaccinated, the federal requirement will govern.

The Vaccine Mandate, which has already received significant pushback from certain lawmakers, attorneys general, and business groups, is likely to be challenged in court, and it could be enjoined prior to its effective date. However, employers should not rely on that possibility and should begin preparing now. As always, O'Neil Cannon is here for you and will keep you updated on developments on the Vaccine Mandate as they happen. 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.

THE WILAW QUARTERLY NEWSLETTER – OCTOBER 2021

Newsletter Article Highlights:

- Want to Challenge a Will? Here's What You Should Know
- Can I Really Be Sued There?
- What Should You Do If You Are Named Trustee?
- Wisconsin to Allow Municipalities to Waive Property Tax Penalties and Extend Construction and Building Permits
- Established U.S. Public Health Precedent On Mandatory Vaccination Requirements Upheld (At Least For Now)

Firm News:

- The Firm Welcomes Two New Attorneys
- Four Attorneys Named 2022 "Lawyer of the Year" in the Milwaukee Area by Best Lawyers®
- 19 OCHDL Lawyers Selected as 2022 Best Lawyers®; Another 5 Named Best Lawyers: Ones to Watch
- Grant Killoran Elected to the ABA Board of Governors

Click the image below to read more.



TAX AND WEALTH ADVISOR ALERT: WISCONSIN TO ALLOW MUNICIPALITIES TO WAIVE PROPERTY TAX PENALTIES AND EXTEND CONSTRUCTION AND BUILDING PERMITS

Wisconsin Governor Tony Evers has signed Senate Bill 254, which affects building permit holders and late property tax payments. The bill, which Evers signed on Friday, October 15, 2021, and is now known as 2021 Wisconsin Act 80, allows municipalities and other taxation districts to waive interest and penalties on late 2021 property tax payments. It also adds a timely payment requirement for filing certain property tax claims if payment was submitted by October 1, 2021. The Act also allows holders of certain unexpired construction or building permits or approvals to seek extension of the permit or approval term if the permit is subject to administrative, judicial, or appellate proceedings that may result in the invalidation, reconsideration, or modification of the permit or approval.

For questions or further information relating to 2021 Wisconsin Act 80, please contact Attorney Britany E. Morrison.

HEALTH CARE LAW ADVISOR ALERT: ESTABLISHED U.S. PUBLIC HEALTH PRECEDENT

ON MANDATORY VACCINATION REQUIREMENTS UPHELD (AT LEAST FOR NOW)

American law long has recognized the authority of government officials to address public health emergencies. *See, e.g., Gibbons v. Ogden*, 22 U.S. 1, 205 (1824) (recognizing the "power of a State, to provide for the health of its citizens").

More than a century ago, the U.S. Supreme Court decided the seminal case on the power of the states to respond to a public health crisis in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), where it affirmed the constitutionality of a state statute authorizing local health boards to require residents to be vaccinated against smallpox. As explained in *Jacobson*, the authority to respond to a public health crisis must be "lodged somewhere," and it is "not an unusual, nor an unreasonable or arbitrary, requirement" to vest that authority in officials "appointed, presumably, because of their fitness to determine such questions." *Id.* at 27. The Court intermittently emphasized the necessity of the state's smallpox vaccination regulation, as well as the utilitarian aspect of rules protecting the many at the expense of the few, but ultimately seemed to rely on the basic police power of the state to regulate public health as the basis for its decision upholding the vaccination requirement. *Id.* at 26, 28, 29, 31.

Due to the COVID-19 pandemic, courts around the country have had the opportunity to revisit the *Jacobson* decision. Last year, the U.S. Supreme Court discussed *Jacobson* in a decision enjoining an executive order by New York's governor establishing certain occupancy limits to combat the spread of COVID-19. In *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. ___, 141 S. Ct. 63 (2020), Justice Neil Gorsuch explained *Jacobson*'s imposition on individual rights was "avoidable and relatively modest" and "easily survived rational basis review, and might even have survived strict scrutiny, given the opt-outs [to the smallpox vaccine requirement] available to certain objectors." *Id.*, 141 S. Ct. 63 at 71 (Gorsuch, J., concurring). And Chief Justice John Roberts quoted from *Jacobson*, stating that "[o]ur Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.'" *Id.* at 76 (Roberts, C.J., dissenting) (quoting *Jacobson*, 197 U.S. at 38).

Jacobson also played a pivotal role in two cases addressing COVID-19 vaccination requirements recently considered by the U.S. Supreme Court.

In the first case, *Klaassen v. Trustees of Indiana Univ.,* No. 1:21-CV-238 DRL, 2021 WL 3073926 (N.D. Ind. July 18, 2021), *Pls.' mot. for inj. pending appeal denied,* 7 F.4th 592 (7th Cir. 2021), eight students filed a federal lawsuit seeking to bar enforcement of Indiana University's requirement that its faculty, staff and students be vaccinated against COVID-19, unless exempt from the requirement for religious or medical reasons. Students who do not get vaccinated are restricted from participation in on-campus activities and their class

registrations and university identification cards are cancelled. Exempt students are required to wear masks in public spaces while on campus and be tested for COVID-19 two times a week. The plaintiffs claim the University's rules violate the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution. *Klaassen,* slip. op. at *1.

In July 2021, the district court denied the plaintiffs' request for a preliminary injunction. *Id.* at *45. It ruled Indiana University's COVID-19 vaccination requirement "isn't forced vaccination" and that the U.S. Constitution permits the school to pursue vaccination "in the legitimate interest of public health for its students, faculty and staff." *Id.* at *46. A few days later, the plaintiffs filed a notice of appeal with the Seventh Circuit Court of Appeals and moved for an injunction against the university's requirements pending appeal. *Klaassen,* 7 F.4th 592.

In early August 2021, the Seventh Circuit denied the plaintiffs' injunction request, citing *Jacobson*. Judge Frank Easterbrook, writing for the three-judge panel, found the case "is easier than *Jacobson"* for two reasons. *Id.* at 593. First, *Jacobson* upheld a vaccination requirement that lacked any exception for adults, but the university's requirement has certain religious and medical exceptions. Second, unlike *Jacobson,* the university's requirements do not require any adult member of the public to be vaccinated. Instead, they are "a condition of attending Indiana University. People who do not want to be vaccinated may go elsewhere." *Id.* The court recognized that "vaccination requirements, like other public-health measures, have been common in this nation" and that "given *Jacobson . . .* which holds that a state may require all members of the public to be vaccinated against smallpox, there can't be a constitutional problem with vaccination against SARS-CoV-2." *Id.* The court found that:

> Each university may decide what is necessary to keep other students safe in a congregate setting. Health exams and vaccinations against other diseases (measles, mumps, rubella, diphtheria, tetanus, pertussis, varicella, meningitis, influenza, and more) are common requirements of higher education. Vaccination protects not only the vaccinated persons but also those who come in contact with them, and at a university close contact is inevitable.

Id.

After the Seventh Circuit's ruling, the plaintiffs filed an emergency application for writ of injunction with the U.S. Supreme Court, again seeking to enjoin enforcement of Indiana University's vaccination requirements. *See Klaassen,* Emergency Appl. 21A15 (Aug. 6, 2021). The plaintiffs argued that the university "is coercing students to give up their rights to bodily integrity, autonomy, and of medical treatment choice in exchange for the discretionary benefit of matriculating at IU." *Id.* at 14. But Justice Amy Coney Barrett, the Circuit Justice for the Seventh Circuit, denied the plaintiffs' application without referring it to the full Court for consideration. *Id., denied* (Aug. 12, 2021) (Barrett, J.). At the time of the writing of this article,

the plaintiffs' case continues at the district court.

In the second case, *Maniscalco v. New York City Dep't of Educ.*, No. 21-CV-5055 BMC, 2021 WL 4344267 (E.D.N.Y. Sept. 23, 2021), *Pls.' mot. for inj. pending appeal denied*, 2021 WL 4437700 (2d Cir. Sept. 27, 2021), four New York City public school employees filed a federal class action lawsuit seeking to bar enforcement of New York City's requirement that its public school teachers provide proof of COVID-19 vaccination or face suspension without pay. This requirement does not contain a provision allowing teachers to opt-out of vaccination through COVID-19 testing. The plaintiffs claimed different reasons for not wanting to get the vaccine, including the concern of its long term side effects, and argued that the requirement violates their substantive due process and equal protection rights under the Fourteenth Amendment. *Id.,* slip. op. at *1.

On September 23, 2021, the district court denied the plaintiffs' motion for a preliminary injunction against the requirement, ruling that the plaintiffs could not show a likelihood of success on the merits of their claims. Citing *Jacobson,* the court found that the law allows a state to "'curtail constitutional rights in response to a society-threatening epidemic so long as the [public health] measures have at least some 'real or substantial relation' to the public health crisis and are not 'beyond all question, a plan and palpable invasion of rights secured by fundamental law.'" *Id.* at *3 (citation omitted). The court noted that requiring teachers to "take a dose of ivermectin as a condition of employment" might qualify as an improper invasion of rights, but that "mandating a vaccine approved by the FDA does not." *Id*. The court stated "'the Due Process Clause secures the liberty to pursue a calling or occupation, and not the right to a specific job.'" *Id.* (citation omitted).

Later that day, the plaintiffs filed a notice of appeal with the Second Circuit Court of Appeals and moved for an expedited injunction against New York City's vaccination requirement pending appeal. The Second Circuit issued a temporary injunction in favor of the plaintiffs for administrative purposes so that their motion could be considered by a three-judge motions panel. But on September 27, 2021, that three-judge panel denied the plaintiffs' motion and dissolved the temporary injunction. *See Order of USCA as to [No.] 17,* No. 21-CV-5055, No. 19 (E.D.N.Y. Sept. 24, 2021).

After the Second Circuit's ruling, the plaintiffs filed an emergency application for writ of injunction with the U.S. Supreme Court, again seeking to enjoin enforcement of New York City's vaccination requirement. *See Maniscalco,* Emergency Appl. 21A50 (Sept. 30, 2021). Justice Sonja Sotomayor, the Circuit Justice for the Second Circuit, denied the plaintiffs' application without even waiting for New York City to reply to it, and without referring it to the full Court for consideration. *Id*., *denied* (Oct. 1, 2021) (Sotomayor, J.). This case also continues at the district court at the time of the writing of this article.

While the rise of various COVID-19 requirements inevitably will lead to additional litigation in

various courts around the country, at least for now it seems clear that the *Jacobson* decision continues to provide guidance to public health officials, attorneys and the courts around the country on vaccination issues, as it has for over a century.

Grant Killoran is a shareholder in O'Neil, Cannon, Hollman, DeJong and Laing's Milwaukee office with a practice focusing on complex business and health care disputes and is the immediate past Chair of its Litigation Practice Group. He can be reached at 414.291.4733 or at grant.killoran@wilaw.com*.*

OCHDL IS PLEASED TO ANNOUNCE TWO NEW ATTORNEYS HAVE JOINED THE FIRM

We are pleased to announce Attorney Michael M. Kennedy and Attorney Jason R. Meehan have joined O'Neil Cannon

Attorney Michael M. Kennedy, a graduate of Marquette University Law School, will join the firm's Business Law Practice Group, where he will assist clients in a wide variety of business law matters. Drawing upon his experience as in-house counsel for a large construction company, Michael provides a high-level understanding of contract management and regulation.

Attorney Jason R. Meehan, a graduate of the University of Wisconsin Law School, will join the firm's Litigation Practice Group, where he will assist clients in a wide variety of litigation matters. Prior to joining the firm, Jason was working at the Wisconsin State Public Defender's office, where he managed and represented hundreds of clients charged with misdemeanor and felony cases in Milwaukee County.

We are very pleased to have Michael and Jason join OCHDL.

O'Neil Cannon, founded in Milwaukee in 1973, is a full-service law firm that primarily focuses on providing business law and civil litigation services to closely-held businesses and their owners. The firm represents corporations, institutions, and partnerships at all stages of the business life cycle, helping them start, grow and transition from one generation to the next.

TAX AND WEALTH ADVISOR ALERT: WHAT SHOULD YOU DO IF YOU ARE NAMED TRUSTEE?

Perhaps a friend or loved one has recently passed away and has named you as the trustee of their trust. You may be wondering, “What does it mean to be a trustee?”

Your job as “trustee” makes you responsible for carrying out the terms of the trust. In a nutshell, think of this job as stepping into the grantor’s shoes and making the same decisions he or she would have if they were alive. The grantor likely chose you to be his or her trustee because they trusted you to take care of their loved ones and their finances after they died.

The trustee owes a fiduciary duty to the beneficiaries to put their needs above the trustee’s, protect and invest trust assets prudently, and treat beneficiaries fairly. This fiduciary duty means that the trustee must comply with the trust terms, as well as the applicable state and federal laws. By doing so, a trustee can avoid potential liability for breach of that fiduciary duty.

You can prepare yourself for the trustee’s role with the following overview of a trustee’s job.

Be Knowledgeable of the Trust Provisions and Your Responsibilities.

If you accept the role of trustee, it is important to understand the trust document and your responsibilities. The trust document will tell you what the grantor’s intentions were, who the beneficiaries are, and when they receive distributions of trust assets and under what circumstances.

You should consult with an attorney about your responsibilities and how to execute the terms of the trust in a timely manner. Take the trust document and any information you have about the trust assets to your meeting. To protect yourself from potential liability, do not sell trust assets or make distributions to the beneficiaries until you fully understand the trust document and your responsibilities.

Take Control Over the Trust Assets.

As trustee, you are responsible for managing the trust assets and need to take control over the trust assets. This means that you should contact the decedent’s financial advisor, accountant, and attorney to locate any trust assets. Next, work with the decedent’s financial advisor and banker to update the titles of assets to reflect that you are now the trustee. Make sure you collect any death benefits due from any life insurance policies, Social Security, or any other agency or association. Assets that were titled in the name of the decedent may be subject to a probate proceeding before they can be titled in the name of the trust. Once

assets are titled in your name as trustee, you have the ability to manage and invest the assets.

Create a Budget.

Make sure you understand the costs of administering the trust and that you have adequate liquidity to pay for taxes and other expenses. For example, a trust that owns real estate will need to pay for property taxes and any water, electric, and lawn maintenance bills to preserve its value.

Keep Accurate Records and Prepare a Trust Accounting.

You are responsible for keeping accurate records of all trust transactions. Many trusts require the trustee to give an annual trust accounting to the beneficiaries. The trust accounting will show the fair market value of all trust assets, earned income, taxes, and expenses, and any trust distributions. Keep all receipts, bank statements, brokerage statements, and closing statements on hand to help you prepare a trust accounting. Even if the trust does not require you to prepare a trust accounting, you will still need to keep records of all trust transactions to communicate your decisions to the trust beneficiaries and protect yourself from liability.

Invest the Trust Assets Wisely.

A trustee has a fiduciary duty to invest the trust assets prudently. It is often understood that this means that the trustee will invest the assets to achieve reasonable growth with minimal risk. Diversification is the key to ensuring a proper allocation of liquid assets, capital preserving assets, and income producing assets. An attorney and financial advisor can help you determine the proper investment allocation.

File Tax Returns.

You should work with an attorney and accountant to ensure that all tax returns are filed and paid in a timely manner, including the decedent’s final income tax return and annual trust tax returns. Finally, you should work with an attorney to determine whether an estate tax return is due. If an estate tax is owed, an estate tax return must be filed within nine months of the decedent’s date of death.

Trustee Compensation.

Trustees can be paid “reasonable” compensation for their services. You should consult with an attorney to determine what this means in your situation.

Distribute the Trust Assets.

Finally, the trustee is responsible for distributing the trust assets to the beneficiaries in the manner described in the trust document. For example, the trust could say that the trust assets are to be divided equally between beneficiaries and given to them outright, free of trust. Other trusts may provide that the assets be divided equally between the beneficiaries, but held in a separate trust share for each beneficiary's benefit. Each separate trust share will need to apply for an Employer Identification Number (EIN), file annual tax returns, and prepare annual trust accountings (if required) for the trust beneficiary(ies).

If you have any questions, please contact Kelly M. Spott at kelly.spott@wilaw.com or 414-276-5000.

OCHDL HIGHLIGHTED FOR ORAL ARGUMENTS BEFORE WISCONSIN SUPREME COURT

In a recent article authored by a professor at Marquette University, O'Neil Cannon was prominently mentioned for its activity and success before the Wisconsin Supreme Court. In the article, the professor discusses what law firms were most active and successful before the Court during the Court's past three terms (2018-2021).

The article notes that 13 law firms, including OCHDL, have had at least three oral arguments before the Court during the Court's past three terms and, of those firms, OCHDL had the third most oral arguments. The article also notes that only two of these 13 law firms prevailed in all of their cases before the Court, with OCHDL being one of them.

Additionally, the article examined how each law firm won (or lost) the support of each individual justice in the respective cases they argued. Only one of the firms—OCHDL—was successful in obtaining at least two-thirds of the votes cast by *every* justice who participated in their cases.

OCHDL is honored to be recognized for its success in representing clients before the Wisconsin Supreme Court.

CAN I REALLY BE SUED THERE?

‘Can I really be sued there?’ If you have ever asked that question, you’re not alone—many defendants sued outside of their home state wonder the same thing. For example, if a small family-owned Wisconsin business is sued in a Nevada court, its owners may rightly question whether that is proper.

The answer likely depends on the jurisdiction of the court in question. Personal jurisdiction—that is, a court’s authority over parties to a lawsuit—can be broad, but it is not unlimited. Without jurisdiction over a party, the court does not have authority to decide the dispute. However, if a defendant does not challenge personal jurisdiction at the beginning of a case, that party may forfeit its right to do so, and the case may proceed anyway.

Whether a court has personal jurisdiction depends on an analysis of the United States Constitution, applicable statutes, and the many cases interpreting those sources. As a result, there is not always an easy answer to whether a given court has personal jurisdiction over a party.

In general, a court will typically have personal jurisdiction over an individual whose permanent residence is in the state where the court is located or a corporation incorporated in that state. Beyond those relatively straightforward situations, a court may still have jurisdiction over a party who has sufficient contacts with that state, which depends on many factors.

Because courts can dismiss lawsuits if they do not have personal jurisdiction over a party, this is an important consideration in the early stages of a dispute. Whether you’re contemplating bringing a lawsuit, defending a claim, or negotiating a contract and considering including a clause addressing where parties must resolve any disputes, it is important to keep the principles of personal jurisdiction in mind.

If you are faced with a lawsuit, or need an analysis of jurisdictional issues before a dispute arises, contact Christa Wittenberg at 414-276-5000 or christa.wittenberg@wilaw.com.

GRANT KILLORAN ELECTED TO THE AMERICAN BAR ASSOCIATION BOARD OF GOVERNORS

Grant Killoran of O’Neil, Cannon, Hollman, DeJong and Laing was elected to the Board of Governors of the American Bar Association at the ABA’s Annual Meeting in Chicago in August

2021. Grant will serve a three-year term and represent District 9, which includes the states of Wisconsin, Minnesota, and Missouri.

The 43-member Board of Governors is comprised of 19 District representatives, 18 members-at large, and the following officers of the ABA (serving *ex-officio*): the ABA President, President-Elect, Chair of the House of Delegates, Secretary, Treasurer, and Immediate Past President. The Board of Governors oversees the general operation of the ABA and develops specific plans of action. Grant also has been appointed as the Board of Governors' liaison to the ABA's Section of Health Law, Commission on the American Jury, and Forum on Housing and Community Development Law.

With his election to the ABA Board of Governors, Grant also becomes a member of the ABA House of Delegates. The House of Delegates is the ABA's policymaking body and is responsible for control and administration of the ABA. Grant previously served in the House of Delegates for many years as a representative of the State Bar of Wisconsin.