FEMA LAUNCHES COVID-19 FUNERAL ASSISTANCE PROGRAM

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

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

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

- The death must have occurred in the United States;
- The death certificate must indicate the death was attributed to COVID-19; and
- The applicant must be a U.S. citizen, non-citizen national, or qualified alien who incurred funeral expenses after January 20, 2020.

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

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

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

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

TAX AND WEALTH ADVISOR ALERT: IRS

OFFICIALLY DELAYS TAX DEADLINE TO MAY 17

The Internal Revenue Service ("IRS") announced late yesterday that the federal income tax filing due date for individuals for the 2020 tax year will be automatically extended from April 15, 2021, to May 17, 2021. The IRS will be providing formal guidance in the coming days.

The postponement applies to individual taxpayers, including individuals who pay self-employment tax. However, the postponement does not apply to estimated tax payments that are due on April 15, 2021. These payments are still due on April 15. Penalties, interest and additions to tax will begin to accrue on any remaining unpaid balances as of May 17, 2021.

In addition, earlier this year, the IRS announced relief for victims of the February winter storms in Texas, Oklahoma and Louisiana. These states have until June 15, 2021, to file various individual and business tax returns and make tax payments. This extension to May 17 does not affect the June deadline.

The IRS noted that the new deadline does not apply to state tax returns, where the deadlines are set by each jurisdiction. Some states will automatically conform to the new federal deadline, but others will need to decide what to do. Maryland, for instance, recently extended its state filing deadline to July 15. It is expected that Wisconsin will conform to the new federal deadline but no official guidance documents have been released as of yet.

O'Neil, Cannon, Hollman, DeJong and Laing will continue to monitor federal and state law tax changes. For questions or further information relating to the tax filing deadline, please contact Attorney Britany E. Morrison.

TAX AND WEALTH ADVISOR ALERT: BREAKING–IRS TO DELAY TAX DEADLINE TO MID-MAY

The Internal Revenue Service is planning to delay the April 15 tax filing deadline as it grapples with a massive backlog of 24 million returns it has yet to process since the 2019 tax year. The agency is considering setting the filing deadline for either May 15 or May 17, but a decision has not been finalized. May 15 is a Saturday and the IRS typically delays filing deadlines that fall on a weekend or holiday to the next business day, so the final deadline for filers may be the following Monday–May 17. The filing extension would give taxpayers additional time to meet their tax obligations in what many consider one of the most

complicated tax seasons in decades.

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

ATTORNEY GREG LYONS NAMED FELLOW WITH THE AMERICAN BAR FOUNDATION

Attorney Greg Lyons was recently named a Fellow with the American Bar Foundation, a membership that is limited to one-third of one percent of the lawyers in America.

The Fellows of the American Bar Foundation is a global honorary society of attorneys, judges, law faculty, and legal scholars whose public and private careers have demonstrated outstanding dedication to the highest principles of the legal profession and the welfare of their communities. Established in 1955, the Fellows support the research of the American Bar Foundation and currently has a membership totaling over 14,000 individuals across the globe. Membership in the Fellows is limited to one percent of lawyers licensed to practice in each jurisdiction.

The American Bar Foundation is among the world's leading research institutes for the empirical and interdisciplinary study of law. An independent, nonprofit organization for more than 65 years, it seeks to advance the understanding and improvement of law through research projects on the most pressing issues facing the legal system in the United States and around the world today. It seeks to expand knowledge and advance justice through innovative, interdisciplinary, and rigorous empirical research on law, legal processes, and legal institutions. Its research findings are published in a wide range of forums, including leading academic journals, law reviews, and academic and commercial presses.

For more information on the Fellows of the American Bar Foundation and the American Bar Foundation, click here.

EMPLOYMENT LAWSCENE ALERT: BIDEN

ADMINISTRATION'S DEPARTMENT OF LABOR WILL UPEND MANY EMPLOYER-FRIENDLY REGULATIONS

In this, the final installment in our series discussing the Biden Administration's workplace initiatives, we will now discuss some of the potential changes forthcoming from the U.S. Department of Labor that employers should note, including changes to the independent contractor test under the Fair Labor Standards Act, a narrowing of the "joint employer" test under the National Labor Relations Act, an expansion of the Family and Medical Leave Act to provide paid leave through passage of the Family and Medical Insurance Leave Act, and a determined Congressional effort to raise the federal minimum wage to $15 per hour.

Independent Contractor Test Under FLSA

Back in September 2020, the Trump Administration proposed a new rule broadening the independent contractor test to make it easier for companies to classify workers as independent contractors, rather than employees, under the Fair Labor Standards Act (FLSA). Under the FLSA, only employees are entitled to minimum wage and overtime compensation. The new rule proposed by the Trump Administration was set to take effect on March 8, 2021. Now, however, the U.S. Department of Labor has delayed the effective date to May 7, 2021.

The Trump Administration's proposed rule was intended to provide more clarity to the multifactor economic reality test that is presently used in determining independent contractor status under the FLSA. The Trump Administration believed that the economic reality test would benefit from additional clarity because of the way courts have evolved from the text and Supreme Court precedent. The existing economic realities test assesses workers' economic dependence on a potential employer, and many supporters of the proposed independent contractor test argued that the new test was necessary to address concerns that: (1) the core concept of economic dependence remains vague and under-developed; (2) the test lacks guidance about how to balance the multiple factors; and (3) the lines between many of the factors are blurred. The shortcomings of the economic realities test have become more apparent in the new modern and gig economy.

On March 5, 2021, however, the Biden Administration's Department of Labor sent to the White House of Office Information and Regulatory Affairs a new proposal entitled "Independent Contractor Status Under the Fair Labor Standards Act". It is expected that the Biden Administration will adopt new regulations upending the Trump Administration's employer-friendly independent contractor test and will provide a more employee-friendly interpretation relative to whether an individual is an employee or an independent contractor under the FLSA. The U.S. Department of Labor is nearing completion of a regulatory update

to the Trump Administration's proposed independent contractor rules and is simply waiting for White House of Information and Regulatory Affairs' pending regulatory review before releasing the new proposal. Stay tuned for updates as they develop.

Joint Employer Test Under NLRA

In March 2020, the Trump Administration's Department of Labor adopted a final rule narrowing the definition of "joint employer" under the National Labor Relations Act (NLRA) limiting the circumstances under which multiple entities could be deemed the employer of a single worker. The Trump-Era regulation provided that an entity may be considered a joint employer of a separate employer's employees when it has direct control over the employees' essential terms and conditions of employment.

The rule primarily impacts businesses that rely on franchisees or leased workers. The Trump Administration's rule essentially reversed the Obama-Era standard set forth in the National Labor Relations Board's (NLRB) 2015 decision in *Browning-Ferris*. The NLRB's 2015 decision in *Browning-Ferris* lowered the bar for proving an entity was a joint employer by holding that it was no longer necessary that an entity actually exercise authority and control over the terms and conditions of employment or that the control be exercised directly and immediately for a entity to be a joint employer. Fortunately, the NLRB had an opportunity to revisit its *Browning-Ferris* decision in 2020 on remand from the U.S. Court of Appeals for the District of Columbia Circuit. In its 2020 decision, the NLRB reversed course from its 2015 decision, holding that an entity must exercise direct and immediate control over essential terms and conditions of employment of another entity's employees in order to be held a joint employer under the NLRA.

Employers should expect the Biden Administration to attempt to override the new Trump-Era "joint employer" regulation and the NLRB's 2020 decision in *Browning-Ferris* through passage of the controversial Protecting the Right to Organize (PRO) Act of 2021 (H.R. 842), which codifies an expansive "joint employer" standard, which would result in businesses having liability for workplaces that they don't control and workers they don't employ. On March 9, 2021, the U.S. House of Representatives passed 225-206 the PRO Act, again, along party lines. The 2021 version of the PRO Act, among other things, revises the definition of "joint employer" under the NLRA by requiring the NLRB and courts to consider not only an entity's direct control, but to also consider an entity's indirect control, over an individual's terms and conditions of employment including any reserved authority to control such terms and conditions, which standing alone, can be sufficient to make a finding of a "joint employer" relationship.

The U.S House of Representatives previously passed the PRO Act in 2020, but it stalled out in the U.S. Senate. The recently passed Pro Act will continue to have a challenging time in the U.S. Senate unless the Democrats can get around the filibuster rules which will most likely

again stall the bill in the U.S. Senate. Nonetheless, employers should pay close attention to the PRO Act and the Biden Administration's attempt to return to the Obama-Era "joint employer" test where an entity's indirect or unexercised contractually reserved right to control could, alone, warrant finding of a joint-employer relationship.

Family and Medical Insurance Leave Act

The Biden Administration will attempt to expand the Family and Medical Leave Act (FMLA) by supporting job-protected paid leave benefits. Currently, FMLA leave is unpaid unless the employee chooses, or the employer requires, substitution of paid leave (e.g., vacation or PTO).

The Biden Administration will attempt to obtain paid FMLA leave for employees working for private employers through the Family and Medical Insurance Leave (FAMILY) Act (S. 248) which has been recently introduced in the U.S. Senate by Sen. Kristen Gillibrand (D-NY). The FAMILY Act would allow employees to receive up to 12 weeks (60 days) of paid leave in a year for caring for a newborn or newly adopted fostered child, for employee's or employee's family member's serious health condition, or dealing with qualifying exigencies arising from the deployment of a family member in the Armed Services.

However, unlike the FMLA, the FAMILY Act would apply to all employers across the country regardless of their size. That is, eligibility for FAMILY Act benefits would not be tied to FMLA employer coverage and would be available to every individual who has the earnings and work history necessary to qualify for Social Security Disability Insurance. The benefits under the FAMILY Act would be paid through a national family and medical leave insurance fund which would be funded through a payroll tax contribution of 0.20%.

Increase in Federal Minimum Wage to $15

In this series, we previously addressed the Democrats' efforts to increase the federal minimum wage to $15 per hour through a provision in the American Rescue Plan Act of 2021 (i.e., the $1.9 Trillion coronavirus-relief package). Since the posting of our article, the U.S. Senate parliamentarian dealt a deadly blow to the Democrats' efforts to increase the federal minimum wage when she ruled that the bill's proposal did not meet the U.S. Senate's guidelines for reconciliation, and, therefore, the proposal could not be included in the coronavirus-relief package which was passed by both chambers of Congress this week and signed into law by President Biden on March 11, 2021.

Congressional Democrats, however, did not give up without a fight when they attempted to circumvent the U.S. Senate's reconciliation guidelines and the U.S. Senate's parliamentarian ruling by proposing tax penalties for employers with $2.5 billion or more in gross revenue who do not pay their employees at least $15 an hour instead of having a provision in the bill

that directly raised the federal minimum wage. Supporters of addressing a federal minimum wage increase through amendment of the tax code finally relented when the complexity of such a maneuver would delay quick passage of the relief bill which the Democrats wanted completed by March 14, 2021.

The Democrats big push to include a federal minimum wage increase in the corona-virus relief package was an attempt to avoid the U.S. Senate's filibuster rules that a non-budgetary piece of legislation would be subject to under U.S. Senate rules. The Biden Administration, however, will now have to seek an increase in the federal minimum wage through a legislative bill and may have a difficult time getting the bill through the U.S. Senate given the U.S. Senate's current cloture rule to end a filibuster—which requires 60 votes to cut off debate on most matters. We will keep you posted on the Biden Administration's efforts to raise the federal minimum wage.

As always, O'Neil Cannon is here for you to protect your interests. We encourage you to reach out to our labor and employment law team with any questions, concerns, or legal issues you may have regarding any of the new workplace policies or proposed legislation that will be ushered in during the Biden Administration.

WANT TO CHALLENGE A WILL? HERE'S WHAT YOU SHOULD KNOW

If you are upset or disagree with the provisions of a will, you may be wondering if you should challenge it. In this article, we discuss a few grounds for challenging a will and what may happen if your challenge is successful.

A will may be challenged for several reasons. However, being upset or disagreeing with the provisions of a will is not enough. Instead, here are a few grounds for challenging a will:

- Lack of Formalities: The will wasn't executed pursuant to the formalities required under Wisconsin law. For example, the will was not signed by the testator (the person making the will) or witnessed by two non-relative and disinterested witnesses.
- Lack of Capacity: The testator lacked the requisite level of mental capacity to execute the will. For example, the testator suffered from dementia or a mental illness that prevented the testator from fully understanding his or her assets and the effect of the document.
- Undue Influence: The testator was unduly influenced by a relative, friend, care giver, or other third party to execute the will. Undue influence includes fraud, force, and coercion. To read more about undue influence, click here.

Upon a successful challenge, the will may be reformed or set aside completely depending on the circumstances.

Sometimes a will may contain a “no contest” provision that prescribes a penalty against an interested person for contesting the will. In these circumstances, a court may find that the no contest provision is unenforceable if the court determines that the interested person had probable cause for instituting the proceedings. *See* Wis. Stat. § 854.19.

The attorneys in the inheritance litigation team at O’Neil Cannon have extensive experience with will contests and other disputes relating to inheritance litigation. Because the rules for will contests are complex, we encourage you to reach out to the authors of this article or any other attorney in our inheritance litigation team with any questions or concerns you may have related to a will contest.

EMPLOYMENT LAWSCENE ALERT: BIDEN ADMINISTRATION SUPPORTS NEW LAWS PROTECTING EMPLOYEES FROM DISCRIMINATION

In this, the latest installment in our series discussing the Biden Administration’s workplace initiatives, we will now consider the potential impact on employment discrimination laws. At the moment, there are two main legislative actions underway in Congress, and President Biden has lent his support to both these initiatives, as well as other proposals that would affect employment discrimination laws.

Equality Act

In February 2020, the House of Representatives passed the Equality Act, which was originally passed in 2019 but never received a vote in the Senate. The Equality Act would write protections for LGBTQ individuals into Title VII and other federal civil rights statutes and would explicitly prohibit discrimination based on sexual orientation and gender identity. The U.S. Supreme Court’s 2020 *Bostock v. Clayton County* decision held that Title VII protects employees against discrimination due to sexual orientation and gender identity, but the Equality Act would codify that decision for employment purposes and also expand the protections to housing, public accommodations, and other contexts. During debate on the bill, Republican lawmakers in the House voiced concerns about how the Equality Act will affect religious freedom for religious organizations. The bill that passed the House specifically

states that the Religious Freedom Restoration Act, which provides that the government cannot infringe on a person's religious rights unless it has a good reason to do so and does so in the least restrictive way, cannot be used as a defense against a claim of LGBTQ discrimination under the Equality Act.

The Equality Act now heads to the Senate, where it will need 60 votes to overcome the filibuster. To do so, it may require the addition of religious freedom protections. If the Senate passes the Equality Act, President Biden, who has stated that it is necessary to "lock[] in critical safeguards," is likely to sign the bill into law. Whether or not the Equality Act becomes law, given the recency of the *Bostock* decision, the EEOC is likely to prioritize the protection of LGBTQ employees under Title VII.

Pregnant Workers Fairness Act

In February 2020, the House reintroduced the Pregnant Workers Fairness Act ("PWFA"). The PWFA would require private employers with 15 or more employees and public sector employers to make reasonable accommodations for pregnant employees unless such accommodations would impose an undue hardship on the employer. This will codify and expand upon the U.S. Supreme Court's decision in *Young v. UPS*, which held that employers are required to treat pregnant employees no less favorably than they treat non-pregnant workers with similar inabilities to work. Given the *Young* decision, many employers are likely already providing a least some accommodations to pregnant workers. The PWFA, however, would eliminate the comparison to "non-pregnant workers with similar inabilities to work" and simply require reasonable accommodations, absent an undue hardship.

Under the PWFA, employers would also be prohibited from retaliating against pregnant employees for requesting a reasonable accommodation, and a pregnant employee could not be forced to take paid or unpaid leave if another reasonable accommodation is available. The PWFA has bipartisan support and will likely pass the House when it comes up for a vote. Like other legislation, the PWFA would need 60 votes in the Senate to over come the filibuster. Given the PWFA's broad bipartisan support, it is likely that it will get a vote in the Senate, pass, and be signed into law by President Biden.

Other Potential Changes

Currently, in order to prevail on a claim of age discrimination under the Age Discrimination in Employment Act ("ADEA"), an employee must show that age was the "but-for" reason for the adverse employment action. This is a more stringent standard than the "motivating factor" or "mixed motive" standards, which are required to prove other types of employment discrimination, including under Title VII. President Biden has indicated his support for legislation that would eliminate the "but-for" standard and bring the ADEA in line with other anti-discrimination laws that protect employees.

Finally, during his presidential campaign, President Biden expressed support for the Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination in the Workplace Act ("BE HEARD Act"). This proposed legislation would expand Title VII to cover all employers, not just those with 15 or more employees; would expand the definition of employee to include independent contractors, volunteers, interns, and trainees; and would require anti-harassment policies and training. The BE HEARD Act was introduced in the House in 2019, but never received a vote. Given the other pending employment discrimination legislation, it may not be reintroduced, but its underpinnings of expanded rights are an important barometer for where employment discrimination legislation and policy through the EEOC is likely headed over the next four years.

As always, O'Neil Cannon is here for you. We encourage you to reach out to our labor and employment law team with any questions, concerns, or legal issues you may have, including those regarding employment discrimination.

ATTORNEYS CHRISTA WITTENBERG AND DEAN LAING PUBLISHED IN THE WISCONSIN LAWYER

Attorneys Christa Wittenberg and Dean Laing authored an article in the *Wisconsin Lawyer* magazine, entitled "A Litigation's Reprise: Strategies for Requesting Attorney Fees." Their article discusses strategy considerations for litigants requesting attorneys' fees (or objecting to requests for attorneys' fees) after the merits of the case have been resolved. As noted in the article, sometimes disputes over attorneys' fees can be just as contentious as the underlying dispute, and strong lawyering can have a significant impact.

Read the full article **here**.

HEALTH CARE LAW ADVISOR ALERT: CORPORATE PRACTICE OF MEDICINE AND FEE SPLITTING–CONSIDERATIONS FOR TELEHEALTH

VENTURES

The increase in the use of telemedicine during the COVID-19 pandemic has given rise to new business ventures among medical practices, technology companies and sometimes also venture capitalists. The relationship between and among the medical practice, the technology component and the financiers must be carefully structured to comply with federal and state law. If structured appropriately, licensed medical providers can be relieved of business administrative functions and instead focus on clinical care. Core legal doctrines driving the business structure of health care ventures include: (1) the corporate practice of medicine (the "CPOM") doctrine; (2) illegal fee splitting laws; and (3) federal and state physician self-referral and anti-kickback statutes. This article focuses on the implications of the CPOM and fee splitting doctrines on medical services and health care technology ventures.

Corporate Practice of Medicine

The CPOM doctrine prohibits corporations from practicing medicine or employing a physician to provide medical services. *See* WIS. STAT. §448.03(1) (requiring a license to practice medicine); WIS. STAT. § 448.08(1m) (prohibiting fee splitting with non-physicians). The rationale for the CPOM doctrine is that unlicensed entities are not bound by the ethical rules that govern the quality of care delivered by a physician to a patient. Wisconsin's CPOM doctrine is derived not only from the Wisconsin Medical Practices Act, but also from guidance established in Wisconsin Attorney General Opinions.[1] With respect to legally permissible forms of organization for medical providers, the Wisconsin Statutes expressly permit Wisconsin-licensed health care professionals (including, but not limited, to physicians, chiropractors, dentists, podiatrists, optometrists, nurses, pharmacists, and psychologists) to organize themselves and be co-owners in a service corporation and to organize as a professional partnership. *See* WIS. STAT. § 180.1901. Those health care providers whose professional negligence is covered by the Injured Patient and Families Compensation Fund might also organize as a limited liability company ("LLC") with minimal risk of compliance issues, although the law is less clear with respect to LLCs than with service corporations and professional partnerships.[2]

Failure to comply with CPOM and related fee splitting laws can have meaningful implications, such as: (i) physician licensure action or revocation; (ii) liability of non-physician business partners for engaging in medical practice without a license; (iii) voiding of an underlying business arrangement for illegality; and (iv) recoupment of reimbursement payments by commercial or government insurers.[3] A violation of Wisconsin Medical Practice Act requirements may result in a fine of not more than $10,000 or imprisonment for not more than nine months, or for physicians specifically, a fine of not more than $25,000, with certain narrow exceptions. *See* WIS. STAT. § 448.09(1)-(1m).

Which jurisdiction's CPOM doctrine applies to a health care venture depends upon where the patients are located, which can be expansive if telemedicine is involved. Since telemedicine is frequently practiced across state lines, physician groups and telehealth businesses must structure their operations to account for the variability of the CPOM and fee splitting doctrines (and the degree of enforcement thereof) among jurisdictions. For example, New York's CPOM doctrine and related enforcement is strong comparative to Wisconsin law.[4]

Management Services Organizations

Compliance with the CPOM and fee-splitting doctrines becomes more complex when clinical telemedicine or medical technology businesses require equity financing from non-licensed investors.[5] A joint venture for telemedicine services may comply with CPOM and related laws by directing the investment by non-licensed persons or entities into a separate state-approved legal entity, often called a management services organization ("MSO"), that would provide non-clinical, administrative support services to physician group practices and other health care providers. The MSO would be compensated for any business and administrative services provided to the legally separate medical practice, excluding revenue earned directly from professional services fees. MSO support services can include areas such as: (i) financial management, budgeting and accounting services; (ii) information technology (IT) services; (iii) human resources and non-clinical personnel management; (iv) coding, billing and collection services; (v) providing and managing office space[6]; (vi) credentialing and contract management; (vii) vendor management and group purchasing; and (viii) marketing services.

In many jurisdictions, central to the analysis of compliance with the CPOM doctrine is the degree of control that the MSO exercises over the operation of the medical practice and/or the professional judgment of licensed health care professionals.[7] Note that even a high level of control over *business* decisions may be suspect in certain jurisdictions.[8] In Illinois, a direct correlation between the fee earned by the clinical practice and the amount paid to the MSO has been found to violate the CPOM laws in addition to the state's fee splitting statutes.[9] Because a MSO's degree of control over a medical practice may be effectuated by a confluence of multiple factors, and will ultimately be judged against a body of law which varies by jurisdiction (*i.e.,* where patients are located during treatment), all MSO arrangements should be evaluated by legal counsel for compliance purposes.

Fee Splitting Prohibitions

In addition to CPOM concerns, the compensation arrangement between the physician practice and the MSO must be structured to avoid state prohibitions against fee splitting with non-licensed persons or entities. Wisconsin's statutory fee splitting provision prohibits physicians from giving or receiving (directly or indirectly) any form of compensation or anything of value to a person, firm or corporation for inducing or referring a person to

communicate with a licensee in a professional capacity or for professional services that were not personally rendered or at the direction of the other licensed professional. [10] *See* WIS. STAT. § 448.08(1m).

Fee splitting case law varies significantly based upon the law of the local jurisdiction, the specific types of business services provided by the MSO (*e.g.*, leasing of space and equipment, marketing, billing or other business and administrative services), and the compensation structure outlined in the management services agreement.[11] A threshold consideration is whether applicable state law permits fees paid to the MSO that are based upon a percentage of revenue earned from professional services. Some state fee splitting laws permit compensation based upon a percentage of revenue, so long as the consideration is commensurate with the value of services furnished.[12] On the other end of the spectrum, Illinois essentially views any percentage relationship with a physician or professional service corporation as a violation of fee splitting.[13] Additionally, if a MSO generates business or referrals for a medical services entity through marketing or similar services, and under the compensation structure provided by the management services agreement the MSO's marketing services ultimately increase the MSO's revenue stream from the medical services entity, then a management services arrangement is more likely to be scrutinized for illegality in states which enforce fee splitting prohibitions.[14]

In summary, if a telehealth business model depends directly or indirectly on revenues generated from physician services, rather than a technology license, legal analysis for compliance with the CPOM and fee splitting laws is advisable. In addition to legal counsel, a valuation expert should be consulted to ensure that the compensation paid to the non-licensed MSO under the management services agreement reflect the value of each of the various services actually provided by the MSO, rather than increased business volume or referrals.

Irrespective of whether telehealth services will be provided in jurisdictions where CPOM and/or fee splitting laws are strong (or strongly enforced), health care companies should note that the federal Stark or anti-kickback statutes could be implicated if an MSO is deemed to be referring business to the professional services corporation and fee is viewed as compensation for referrals.[15] Recent changes to the federal Stark and anti-kickback laws should generally benefit telehealth and remote patient monitoring; however, experienced legal counsel should be consulted regarding the impact of such fraud and abuse laws on the business arrangement.[16]

[1] *See* WIS. STAT. § 448.03(1) (requiring licensure by the Medical Examining Board to "practice medicine and surgery, or attempt to do so or make a representation as authorized to do so"); WIS. STAT. § 448.08(1m) (fee splitting prohibition). See also 71 Op. Att'y Gen. 108 (1982); 75 Op. Att'y Gen. 200 (1986) (widely criticized and ignored on certain grounds discussed herein).

[2] The Wisconsin Department of Regulation and Licensing, which was disbanded in 2011 and replaced by the Department of Safety and Professional Services ("DSPS"), had for years published frequently asked questions ("FAQ") guidance on its website that prohibited physicians from practicing medicine under an LLC or limited liability partnership ("LLP") form of business. The FAQ was based upon an AG opinion, 75 Op. Att'y Gen. 200 (1986), holding that physicians may not organize as business corporations, but note that LLCs and LLPs did not exist at the time of the AG opinion. This FAQ has been removed, as well as a subsequent FAQ that expressly stated that two or more physicians may enter into either partnerships or service corporations. *See* ANDREW G. JACK ET AL, AMERICAN HEALTH LAWYERS ASSOCIATION, CORPORATE PRACTICE OF MEDICINE: A 50-STATE SURVEY 570(2nd ed. 2020). The rationale for the 1986 AG opinion was that business corporations afforded broad limited liability for their members (no carve out for a member's own professional negligence, as is the case for a service corporation or general partnership). See Adam J. Tutaj, Wisconsin's Corporate Practice of Medicine Doctrine: Dead Letter, Trap for the Unwary, or Both?, STATE BAR OF WIS. PINNACLE, TRACK 3, SESSION 4 (Dec. 2019). In view of the current ambiguity under Wisconsin law with respect to LLCs, any two more medical professionals seeking to organize as an LLC confirm that patients can in fact be compensated for professional negligence by coverage by the Injured Patient and Families Compensation Fund for the area of medical practice at issue.

[3] *See generally* JACK ET AL., *supra* note 2.

[4] *See id*.

[5] Under Wisconsin law, the term "person" (required to obtain a license issued by the Medical Examining Board) extends to partnerships, associations, and corporations. See Wis. Stat. § 990.01(26). *See also* WIS. STAT. § 448.03(1).

[6] Whether a lease agreement between an MSO and a service provider entity is legal often depends upon whether the relationship between lessor and lessee involves referrals. See JACK ET AL., *supra* note 2, at 136-37 (comparing *The Petition for Declaratory Statement of Melbourne Health Associates, Inc. and John Lozito, M.D.*, 9 FALR 6295 (1987), with *The Petition for Declaratory Statement of Joseph M. Zeterberg, M.D.*, 12 FALR 1036 (1990)).

[7] *See* e.g., 83 Op. Cal. Atty. Gen. 170 (July 27, 2000) (emphasizing the impossibility of

distinguishing between professional and non-professional services when scrutinizing an arrangement between an MSO and a union whereby the MSO selected the radiology site and radiologist and paid for radiology diagnostic services for union members in exchange for a fee that included both the gross amount for professional services and the MSO's compensation); JACK ET AL., *supra* note 2, at 69.

[8] *See* e.g., *Andrew Carothers, M.D., P.C. v. Progressive Ins. Co.*, 2019 N.Y. Slip Op. 04643 (June 11, 2019). The New York Court of Appeals held that medical practices that give too much operational and financial control to MSOs are "fraudulently incorporated," and not entitled to reimbursement by no-fault auto insurers. See id. (cited by JACK ET AL., *supra* note 2, at 365-66).

[9] *See TLC The Laser Ctr., Inc. v. Midwest Eye Inst. II*, Ltd., 714 N.E.2d 45 (Ill. App. Ct. 1999) (concluding that where a service agreement provided for an annual fee to be paid to an unlicensed corporation, the arrangement illegally violated the corporate practice of medicine doctrine even where the fee was not a straight percentage, because there was a relationship between the amount of revenue earned and the fee paid).

[10] The Wisconsin Attorney General has issued an opinion that addresses fee splitting. See 71 Op. Att'y Gen. 108, 109 (1982) (asserting that the statutory prohibition against fee splitting was aimed at addressing "fees or commissions [that] were not for any services rendered to the patient, but purely a service rendered to the other physicians or surgeons in the way of sending them this business.")

[11] *See e.g., The Petition for Declaratory Statement of Edmund G. Lundy, M.D.*, 9 FALR 6289 (1987) (emphasizing the state statute's emphasis on prohibited *referrals* when finding no violation of the Florida fee-splitting prohibition under circumstances where a business entity provided office space, equipment, advertising and billing services to family practitioners in exchange for 40% of their respective collections) (cited in Jack et al., *supra* note 2, at 136); *TLC The Laser Ctr., Inc. v. Midwest Eye Inst. II*, Ltd., 714 N.E.2d 45, 56 (Ill. App. Ct. 1999) (finding that where a service agreement provided for an annual fee to be paid to an unlicensed corporation, the arrangement illegally violated the statutory prohibition against fee splitting, even where the fee was not a straight percentage, because "the fee clearly increased as revenues increased"); *Vine Street Clinic v. HealthLink, Inc.*, 856 N.E.2d 422, 434 (Ill. 2006) (holding that a corporation that creates a network of health care providers may receive a flat fee for administrative services, but not a percentage fee, for services rendered). The Illinois Supreme Court reasoned that the flat fee did not implicate public policy concerns because the "flat fee is charged to each participating physician for administrative services rendered, not for referrals, and thus no 'recommendation' component exists." *Id*. at 435. Central to the court's ruling was the fact that the flat fee would not affect the treatment given to the patient. See JACK ET AL., *supra* note 2, at 168-69. See also *Ashley MRI Mgt. Corp. v. Perkes*, No. 001915-05, 2010 WL 441941(N.Y. Sup. Ct. Jan. 26, 2010). In this

case, the court raised significant issues regarding a management relationship under which the non-licensed professional manager received a percentage of the "net revenue" earned by licensed health care professionals in connection with the subleasing of an MRI facility, concluding that such an arrangement "may be an illegal fee splitting arrangement." *Id*. The court in Ashley Management also questioned as a potentially illegal fee splitting arrangement an arrangement whereby one of the unlicensed business entities involved received a flat usage fee for each MRI or diagnostic scan performed by the licensed health professionals. The court explained that the direct sharing of radiology fees with a non-physician raises public policy concerns as to the quality of care and the corporate practice of medicine. See JACK ET AL., *supra* note 2, at 364.

[12] *See* e.g., California Business and Professions Code §650(b); *Epic Med. Mgmt., LLC v. Paquette*, 198 Cal.Rptr.3d 28 (Cal. Ct. App. 2015) (relying on §650(b) in a case in which the management company actually charged a fee equal to 50% of the revenue for office medical services, 25% of the revenue for surgical services and 75% of the revenue of pharmaceutical-related revenues) (cited in JACK ET AL., supra note 2, at 66).

[13] Illinois's Medical Practice Act prohibits direct or indirect payment of a percentage of the licensee's professional fees, revenues or profits to anyone for negotiating fees, charges or terms of service or payment on behalf of the licensee, among numerous other prohibited services. See 225 Ill. Comp. Stat. 60/22.2. The Illinois Medical Practice Act includes several exceptions, including paying fair market value for billing, administrative assistance or collection services. See JACK ET AL., *supra* note 2, at 165-66.

[14] *See* JACK ET AL., supra note 2, at 136-138, 168-69 (summarizing key Florida and Illinois case law defining each state's fee splitting prohibition and emphasizing the courts' concern with payments for developing affiliations with local clinical practices, marketing services and "practice expansion" services, as well as incentives to add patients to a practice, respectively) (citing *The Petition for Declaratory Statement of Joseph M. Zeterberg*, M.D. 12 FALR 1036 (1990); *The Petition for Declaratory Statement of Magan Bakarania, M.D.*, Final Order Issued October 17, 1997; *The Petition for Declaratory Statement of Dr. Gary Johnson, M.D. and The Green Clinic*, 14 FALR 3936 (November 30, 1990); *The Petition for Declaratory Statement of Rew, Rogers and Silver, M.D.'s, P.A.*, 12 FALR 4139, Final Order issued August 25, 1999; *Gold, Vann and White, P.A. v. Friedenstab*, 831 So. 2d 692 (Dist. Ct. App. 2002). *See also E&B Mktg. Enter., Inc. v. Ryan*, 568 N.E.2d 339, 341-42 (Ill. App. Ct. 1991) (determining that an illegal fee splitting arrangement existed under Illinois law where the plaintiff was to receive a fee of 10% of all billings collected by the doctor in exchange for the plaintiff's advertising, which primarily targeted insurance companies); *Vine Street Clinic v. HealthLink, Inc.*, 856 N.E.2d 422 (Ill. 2006) (emphasizing that a flat service fee for administrative services reflected compensation for services actually rendered rather than compensation for referrals).

[15] *See* 42 U.S.C. §1395nn (Physician Self-Referral, or Stark law); 42 U.S.C. §1320a-7b(b) (Anti-Kickback statute). Note that health care ventures must also comply with state health care fraud and abuse statutes.

[16] *See* Medicare and State Health Care Programs: Fraud and Abuse; Revisions to Safe Harbors Under the Anti-Kickback Statute, and Civil Monetary Penalty Rules Regarding Beneficiary Inducements, 85 Fed. Reg. 77,684 (Dec. 2, 2020) (to be codified at 42 CFR pts. 1001, 1003), available at https://www.federalregister.gov/public-inspection/2020-26072/medicare-and-state-health-care-programs-fraud-and-abuse-revisions-to-safe-harbors-under-the (last accessed Feb. 22, 2021); Medicare Program; Modernizing and Clarifying the Physician Self-Referral Regulations, 85 Fed. Reg. 77,492 (Dec. 2, 2020) (to be codified at 42 C.F.R. pt. 411), available at https://www.federalregister.gov/public-inspection/2020-26140/medicare-program-modernizing-and-clarifying-the-physician-self-referral-regulations (last accessed Feb. 22, 2021).

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

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

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