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]

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[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.

EMPLOYMENT LAWSCENE ALERT: BIDEN ADMINISTRATION WILL PROMOTE A SIGNIFICANT SHIFT IN RECENT FEDERAL LABOR LAW

In our series discussing the new workplace initiatives under the Biden Administration, we will next address the Biden Administration's desire to make significant changes in National Labor Relation Board ("NLRB"' or "Board") policy and to roll back the labor law precedent of the Trump Administration's NLRB. The Biden Administration's labor policy through the NLRB will focus on two primary goals: (1) the promotion of collective bargaining and (2) the protection of employees' rights to join and form unions. In pursuing this focused labor policy, the Biden Administration is keeping the promise it made during the Presidential campaign that it will pursue policies and the development of labor law that serves the interests of unions. All employers will need to pay attention for the next four years to the NLRB's development and application of the Biden Administration's labor policies.

Through the former NLRB's General Counsel, Peter Robb, the Trump Administration made significant pro-management policy changes and shepherded pro-management developments in labor law under the National Labor Relations Act (the "NLRA" or the "Act"). Under the Obama Administration, the Democratically–led Board took an expansive view on how the Act should be interpreted and enforced, including a very broad reading of Section 7 of the Act,

which provides that employees have the right to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." The Trump-era Board then narrowed this expanded reach of Section 7.

During the Trump Administration, many of the Obama-era Board policies and decisions were overturned by the Board or by the federal courts, including: (i) overturning of the Board's *Specialty Healthcare* decision that allowed unions to define their own bargaining units, including the recognition of micro-units; (ii) allowing employers, in the Board's decision of *Johnson Controls*, to withdraw union recognition at the expiration of a collective bargaining agreement if the employer can prove that the union does not continue to have majority support amongst bargaining unit employees; (iii) the U.S. Supreme Court's decision in *Epic Systems* overturning the Board's *Murphy Oil* decision where the Supreme Court held that an employer's requirement that employees agree to class- and collective-action waivers in mandatory arbitration agreements does not violate the NLRA; (iv) the Board's *MV Transportation* decision that applied a "contract coverage" analysis instead of a "clear and unmistakable waiver" standard in determining whether an employer with a collective bargaining agreement has the duty to bargain over, or has the right to implement, work or safety rules without bargaining that are within the scope and compass of the parties' existing collective bargaining agreement; (v) overturning, in *Caesars Entertainment*, the Board's 2014 controversial *Purple Communications* decision, which had held that employees have the right to use their employers' email systems for non-business purposes, including communicating about union organizing; and (vi) overturning, in *Apogee Retail*, the Board's decision in *Banner Estrella Medical Center* where the Board ruled that employees have a Section 7 right to discuss discipline and ongoing investigations involving themselves and other co-workers despite an employer's confidentiality policy that prohibits such communications during a workplace investigation.

To follow through on his pledge made during his campaign to be "the most pro-union president," President Biden, as part of his first executive actions, took the unprecedented step to fire Mr. Robb as the NLRB's General Counsel. President Biden broke 85 years of tradition by being the first U.S. President to remove an incumbent NLRB general counsel before the end of his term. Mr. Robb's term was set to end in mid-November. President Biden's termination of Mr. Robb signals a shift in NLRB policy objectives under the Biden Administration and sets the stage for a roll back of the Trump-era NLRB policies and precedent.

President Biden quickly replaced Mr. Robb with Peter Ohr as NLRB's acting General Counsel. Mr. Ohr comes from the NLRB's Chicago Regional Office where he was its Regional Director. Mr. Ohr did not waste any time as the NLRB's acting General Counsel when, in a two-day span, he rescinded 10 Trump-era NLRB General Counsel Memoranda and two NLRB Operations-Management Memoranda issued by his predecessor. Mr. Ohr cited that the rescinded memoranda guidances were either not necessary or in conflict with the NLRB's

policy objective of encouraging collective bargaining. Those guidances rescinded by Mr. Ohr, among others, included: (i) holding that employers may violate the Act when they enter "neutrality agreements" with unions to assist unions in their organizing efforts; (ii) on handbook rules developed following the Board's decision in *Boeing*; (iii) on a union's duty to properly notify employees subject to a union security clause of their *Beck* rights not to pay dues unrelated to collective bargaining and to provide further notice of the reduced amount of dues and fees for dues objectors in the initial *Beck* notice; (iv) on deferral of NLRB Charges under *Dubo Manufacturing Company* that instructed NLRB Regions to defer under *Dubo* or consider deferral of all Section 8(a)(1), (3), (5) and 8(b)(1)(A), and (3) cases in which a grievance was filed; and (v) on instructing NLRB Regions and Board agents on how to proceed during investigations in connections with securing the testimony of former supervisors and former agents and how audio recordings should be dealt with during investigations.

In the meantime, President Biden has nominated Jennifer Abruzzo to become the next NLRB General Counsel. Ms. Abruzzo was the second-ranking NLRB official under the Obama Administration as the agency's Deputy General Counsel. Most recently, Ms. Abruzzo was special counsel for the Communications Workers of America. The White House referred to Ms. Abruzzo as "[a] tested and experienced leader, [who] will work to enforce U.S. labor laws that safeguard the rights of workers to join together to improve their wages and working conditions and protect against unfair labor practices." Richard Trumpka, president of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) supported Ms. Abruzzo's nomination by stating that "the days of the NLRB actively blocking workers from organizing a union are over." Ms. Abruzzo's nomination will have to be confirmed by consent of the Senate, which is currently evenly divided between Democrats and Republicans. Ms. Abruzzo's road to confirmation could be bumpy given the strong criticism by some Republican Senators of President Biden's unprecedented decision to fire Ms. Abruzzo's predecessor, Mr. Robb, before the end of his term.

Biden Administration Will Push Pro-Union Legislation, Including the PRO Act

Besides the change in the NLRB's General Counsel and the effects that change will have on the development of federal labor policy, the Biden Administration, together with the Democratically controlled Congress, is also planning sweeping legislative changes to the Act with the objective to make union organizing easier for employees. The proposed legislation that employers should pay most attention to is the Protecting the Right to Organize (PRO) Act (H.R.2474 and S.1306).

Specifically, pro-union allies of the Biden Administration are pushing the administration to pass the PRO Act, which would be an overhaul of federal labor law under the NLRA. The PRO Act, which the U.S. House of Representatives passed in February 2020, includes in its current form several controversial and seismic shifts in established federal labor law, including:

- Permitting the NLRB to assess civil penalties against employers, ranging from $50,000 to $100,000, for each unfair labor practice violation, which also includes personal liability for managers of alleged violations;
- Providing employees with a private cause of action against an employer for unfair labor practice violations;
- Permitting secondary strikes by a labor organization to encourage participation of union members in strikes initiated by employees represented by a different labor organization;
- Terminating the right of employers to bring claims against unions that conduct such secondary strikes;
- Superseding state's right-to-work laws, by requiring employees represented by a union to contribute fees to the labor organization for the cost of such representation;
- Expanding unfair labor practices to include prohibitions against replacement of, or discrimination against, workers who participate in strikes;
- Making it an unfair labor practice to require or coerce employees to attend employer meetings designed to discourage union membership;
- Prohibiting employers from entering into agreements with employees under which employees waive the right to pursue or join collective or class-action litigation;
- Requiring the NLRB to promulgate rules requiring employers to post notices of employees' labor rights and protections and establishing penalties for failing to comply with such requirement;
- Prohibiting employers from participating in any NLRB representation proceedings;
- Requiring employers to provide a list of voters to the labor organization seeking to represent the bargaining unit in an NLRB-directed election;
- In initial contract negotiations for a first contract, compelling employers and unions to mediation with the Federal Mediation and Conciliation Service in the event the parties do not reach an agreement within 90 days after commencing negotiations;
- Compelling employers to bargain with a labor organization that has received a majority of valid votes for representation in an NLRB-directed election; and
- Providing statutory authority for the requirement that the NLRB must set preelection hearings to begin not later than 8 days after notifying the labor organization of such a petition and set postelection hearings to begin not later than 14 days after an objection to a decision has been filed.

President Biden promised during his campaign to sign the PRO Act. This legislation, however, is currently stalled in the U.S. Senate and may face an uphill battle given the Senate's current cloture rule to end a filibuster—which requires 60 votes to cut off debate on most matters. Consequently, to the extent that the PRO Act is subject to a filibuster in the Senate, it is unlikely that the PRO Act will become law in its current form. Nonetheless, all employers should pay careful attention to the PRO Act and its movement through the U.S. Congress.

What Employers Should and Can Do

Given the Biden Administration's priority of encouraging employees to unionize, and with the pro-labor individuals that President Biden has placed in top leadership positions in the U.S. Department of Labor, including the nomination of Marty Walsh, the former two-term mayor of

Boston and former union leader, to become the next Secretary of Labor, union organizing activity is likely to increase. To lawfully counter those activities, employers can help ensure that employees are accurately informed about unionization to allow employees to make free and clear decisions without coercion about their rights under Section 7. To do so, employers should make sure that their supervisors are properly trained on how to recognize the signs of union organizing activities and how to lawfully respond to employees' questions about unionization.

As always, the labor and employment law team at O'Neil Cannon is here for employers to answer your questions and address your concerns about the changes to federal labor policy and law under the Biden Administration. We encourage you to reach out with any questions, concerns, or legal issues you may have.

EMPLOYMENT LAWSCENE ALERT: THE BIDEN ADMINISTRATION TACKLES WAGE AND HOUR ISSUES

In this installment of our series discussing the new workplace initiatives under the Biden Administration, we will discuss wage and hour issues that employers should prepare for, including an increased federal minimum wage, updated enforcement priorities, and the proposed Paycheck Fairness Act.

Minimum Wage

The federal minimum wage was last increased in 2009. Since then, multiple states and municipalities have increased their minimum wages. However, the federal minimum wage, as well as the minimum wage in Wisconsin, has remained at $7.25. Organizers and activists have supported the "Fight for $15," particularly in industries like fast food, and the Democratic Party has included support for a $15 minimum wage in its party platform since 2016. President Biden made his support of a $15 minimum wage even more clear when he signed a January 22, 2021, Executive Order directing the Office of Personnel Management to develop recommendations to pay federal employees at least $15 per hour and directing his administration to start the work that would allow him to issue an Executive Order within the first 100 days that requires federal contractors to pay a $15 minimum wage.

The Raise the Wage Act proposes a gradual increase, such that the federal minimum wage would increase in increments on a yearly basis between now and 2025 until it reaches $15 per hour. Thereafter, the minimum wage would index to median wages. The first increase, in

2021, would be to $9.50 per hour. Additionally, the Raise the Wage Act would, by 2027, eliminate the “tipped wage,” the “youth wage,” and the 14(c) wage, which can be paid to disabled individuals in certain positions. These changes would affect approximately 27 million workers, and the Congressional Budget Office has projected that it would increase the federal deficit and cost 1.4 million jobs as a result of employers scaling back due to increased costs.

However, increasing the federal minimum wage is no simple task. President Biden included a $15 minimum wage in his stimulus proposal, and the House of Representatives has included a $15 minimum wage in its most recent version of the coronavirus-relief package. However, once the bill reaches the Senate, passing an increased minimum wage will become significantly more challenging. Typically, a bill needs the votes of 60 Senators to make it to the floor, and the increase of the federal minimum wage does not currently have that support.

The coronavirus-relief package, including the increased minimum wage, could, however, be passed through a process known as budget reconciliation, which requires only a simple majority of Senators, with ties broken by the Vice President. In order to be considered part of the budget reconciliation process, the Senate Parliamentarian would have to agree that raising the minimum wage has a direct impact on the federal budget. If she does not, Vice President Harris could overrule her. If it gets past these steps, at least 50 Senators would need to vote in favor of it. At this point, it’s not clear that 50 Senators would vote “yes” to increasing the federal minimum wage to $15 per hour, even if gradually. Additionally, President Biden has admitted that passing an increased minimum wage as part of the coronavirus-relief package is unlikely at this point.

Acknowledging the challenge of getting a minimum wage hike included in the coronavirus-relief package, President Biden has said that he is prepared to engage in separate negotiations on the matter, and other politicians have discussed their potential support of a lower amount, such as $12 per hour. So, while a $15 minimum wage may not be right on employers’ doorsteps, this is not an issue that is likely to go away. Employers should begin evaluating the effect that a minimum wage increase would have not only on the wages of their workers who fall between the current minimum wage and a potential new minimum wage, but also on their ability to retain workers who, while now comfortably over the minimum wage, may end up below, at, or only slightly above it if there is a mandated increase.

Wage and Hour Enforcement Priorities

One of President Biden’s campaign promises was to “ensure workers are paid fairly for the long hours they work and get the overtime they have earned.” This will assuredly lead to an enforcement push at the Department of Labor (“DOL”). Moreover, the DOL is likely to strictly enforce penalties for non-payment of overtime wages. This new stance can already be seen

by the fact that the Biden Administration eliminated the Payroll Audit Independent Determination ("PAID") program. The PAID program was a 2018 initiative that allowed employers to self-report FLSA wage and hour violations, including unpaid or miscalculated overtime. While the PAID program required employers to pay workers 100% of the wages owed, it did not assess the 100% liquidated damages penalty. However, on Friday, January 29, 2021, the DOL announced the immediate end of the PAID program, stating that the program "deprived workers of their rights and put employers that play by the rules at a disadvantage." The DOL added that it "will rigorously enforce the law, and . . . use all the enforcement tools we have available." Employers must make sure that their wage and hour policies and practices comply with the law and should consider performing audits to ensure there are no potential violations. Failure to take these proactive measures could land employers on the wrong side of a time-consuming and costly DOL investigation.

Paycheck Fairness Act

Finally, President Biden supports the Paycheck Fairness Act, which was originally passed in the House of Representatives in 2019 and was recently reintroduced in February 2021. If passed, the Paycheck Fairness Act would expand the equal pay provisions contained in the FLSA and require that any pay differential between sexes be based on "a bona fide factor other than sex, such as education, training, or experience." Currently, federal law requires that any pay disparity between employees of different sexes performing the same job be based on a "factor other than sex." The use of a **bona fide** factor would significantly narrow employers' flexibility in justifying any pay differences. The Paycheck Fairness Act also prohibits employers from restricting employees' discussions of wage information, requires additional employer reporting regarding compensation, and makes it easier for employees to pursue individual and class and collective actions alleging wage discrimination.

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 regarding wage and hour concerns or new policies or legislation under the Biden Administration.

ATTORNEYS MARGUERITE HAMMES AND GRANT KILLORAN PUBLISHED IN THE WISCONSIN LAWYER

Attorneys Marguerite Hammes and Grant Killoran authored an article in the February, 2021 edition of the *Wisconsin Lawyer* magazine, entitled "COVID-19 Vaccination: Legal Landscape

and Challenges." Their article analyzes the authority of Wisconsin public health officials regarding mass vaccination for COVID-19 and the circumstances under which individuals can object to vaccination requirements.

Read the full article here.

EMPLOYMENT LAWSCENE ALERT: WORKPLACE SAFETY IS A TOP PRIORITY FOR THE BIDEN ADMINISTRATION

In our series discussing the new workplace initiatives under the Biden Administration, we will first look at the Biden Administration's efforts on protecting worker health and safety.

Simply, under the Biden Administration, employers should expect to see a more robust Occupational Safety and Health Administration (OSHA), meaning ramped-up OSHA enforcement efforts, including more workplace inspections, more whistleblower protection, and the likely issuance of an emergency temporary standard to address the hazards of COVID-19 in the workplace. In light of the Biden Administration's concerted focus on workplace safety, it behooves all employers to take notice of OSHA's new enforcement policies now, and to review and update, if necessary, all health and safety programs before OSHA knocks on your door.

New DOL Secretary and Deputy Assistant Secretary of Labor for OSHA

To lead the Biden Administration's charge in making workplace safety a top priority, President Biden has nominated Marty Walsh to be the new Secretary of Labor. Walsh is the former mayor of Boston and the former union leader of Boston's Building and Construction Trade Council, an umbrella group of 20 local construction unions. Many believe that Secretary nominee Walsh will be a strong and ardent advocate for worker safety given his background in the construction industry and his former roles as mayor and union leader where he was a strong vocal proponent for more stringent safety regulations for workers.

During his Senate confirmation hearing, Walsh committed to improving workplace safety by increasing the number of OSHA compliance officers and making sure that OSHA has the tools in place to protect workers during the COVID-19 crisis — Walsh's comments would seem to indicate that employers should expect an emergency temporary standard on mitigating and

eliminating COVID-19 hazards in the workplace, a national emphasis program on COVID-19, and increased inspections in workplaces where workers work in close proximity with other workers or customers.

To manage OSHA's new policies and expected emphasis programs, President Biden has chosen James Frederick, the former Assistant Director of the United Steelworkers' Health, Safety and Environment Department to lead OSHA to be the Deputy Assistant Secretary of Labor for OSHA. Fredrick has already commented that OSHA's new guidance on preventing COVID-19 in the workplace is OSHA's "first step" to make it clear "that OSHA is advocating for workers."

President's Executive Order and OSHA's New Guidance on COVID-19 in the Workplace

On January 21, 2021, the day following the Presidential inauguration, President Biden issued an Executive Order outlining his administration's policy on protecting the health and safety of workers from COVID-19. President Biden's Executive Order established a five-step plan to combat COVID-19 in the workplace by requiring the Secretary of Labor, acting through the Deputy Assistant Secretary of Labor for OSHA, to:

1. Issue within two weeks revised OSHA guidance on workplace safety during the COVD-19 pandemic;
2. Consider, by March 15, 2021, whether any emergency temporary standards on COVID-19, including the use of masks in the workplace, are necessary;
3. Review the enforcement efforts of OSHA related to COVID-19 and to identify any changes that can be made to better protect workers and ensure equity in enforcement;
4. Launch a national program to focus OSHA enforcement efforts related to COVID-19 on violations that put the largest number of workers at serious risks or are contrary to anti-retaliation principles; and
5. Coordinate with the Department of Labor's Office of Public Affairs and Office of Public Engagement and all regional OSHA offices to conduct a multilingual outreach campaign to inform workers and their representatives of their rights under applicable law.

On January 29, 2021, consistent with President Biden's Executive Order, OSHA issued a detailed guidance entitled "Protecting Workers: Guidance on Mitigation and Preventing the Spread of COVID-19 in the Workplace." While not legally binding, OSHA, through this guidance, instructs employers on the appropriate control measures that should be implemented in the workplace to help mitigate and prevent the spread of COVID-19. Such measures include: conducting a hazard assessment; identifying a combination of measures that limit the spread of COVID-19 in the workplace (e.g., wearing face masks and social distancing), adopting measures to ensure that workers who are infected or potentially infected are separated and sent home from the workplace; and implementing protections from retaliation for workers who raise COVID-19 related concerns. Employers should consider this guidance as the stepping stone for OSHA to issue an emergency temporary standard on

mitigating and eliminating COVID-19 in the workplace — a directive that President Biden's Executive Order has mandated to be achieved by March 15, 2021.

A COVID-19 National Emphasis Program is Possible

If OSHA issues an emergency temporary standard on mitigating and eliminating COVID-19, employers should also expect that a COVID-19 national emphasis program will come along with it. A COVID-19 national emphasis program will permit OSHA to ramp up inspections and target workplaces where OSHA believes, based on industry and Centers for Disease Control and Prevention ("CDC") data, that workers are most at risk for COVID-19. Presumably, OSHA will target those places of employment where workers work in close proximity to other workers or are forward-facing with customers and the general public. This can include meatpacking plants, warehouses, fulfillment centers, grocery stores, and other retail stores where workers have close contact with customers. If a COVID-19 national emphasis program is established, employers will be chosen randomly by OSHA for inspection based on program criteria rather than based on complaints or reports of accidents. Most employers believe that if they can prevent workplace accidents and avoid having employees complain to OSHA, they can avoid an OSHA inspection, but employers who fall within a national emphasis program's criterion must always be mindful that an OSHA inspection can occur at any time. The question for these employers is will they be ready for an OSHA inspection when OSHA comes knocking.

COVID-19 and a Robust OSHA Requires Employers to Be Proactive

Employers should expect that OSHA will take a stronger and more enforcement-oriented approach to addressing COVID-19 in the workplace through new directives, emergency temporary standards, and policy guidelines mandated by the new Biden Administration. This will require employers to formalize, in writing, their COVID-19 response plan in the same manner that other safety programs are written and to also conduct regular training for all its workers to educate them on what actions they can take to help prevent the spread of COVID-19 in the workplace. Such training should include the obvious health and safety controls that can be put in place such as the requirement that all workers wear face masks, maintain social distancing, and that workers who are ill or exhibiting signs or symptoms of COVID-19 are sent home until they are cleared to return to work based on CDC guidelines.

Finally, employers should also note that as the COVID-19 vaccine becomes more widely available, employers should encourage all their workers to become vaccinated. OSHA recommends, however, that the same safety measures that are in place now to combat COVID-19 should remain in place even after workers are vaccinated. That is, both vaccinated and unvaccinated workers should follow the same safety measures, such as wearing masks and maintaining social distancing, because the CDC has not yet determined whether a vaccinated individual can transmit the COVID-19 virus even though they may have immunity

based on having received the vaccination. As a result, assuming that an emergency temporary standard on COVID-19 will be issued by OSHA, employers should take note that having a vaccinated workforce may not immune their workplace from OSHA citations if COVID-19 safety measures are not being followed and enforced.

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 regarding OSHA's new policies and directives under the Biden Administration.

TAX AND WEALTH ADVISOR ALERT: WHEN SHOULD YOU UPDATE YOUR ESTATE PLAN?

You will experience various changes in circumstances during your life. Some of these changes will warrant updates to your estate planning documents. Indeed, estate planning is often a lifetime process of implementing the proper legal arrangements in the event of your incapacity and upon your death.

Consider updating your estate plan upon any of the following events:

Tax Law Changes

What might have been a proper estate plan under the tax laws that existed at the time you created your estate plan may no longer be appropriate. For example, the Setting Every Community Up for Retirement Enhancement Act, more commonly known as the SECURE Act, was signed into law at the end of 2019 and provides new provisions that may affect your tax and retirement planning situation. It is a great idea to review your estate plan after there is a change in the federal or state tax law.

Family Changes

You should consider updating your estate plan upon your marriage or divorce, and upon the marriage, divorce, or separation of anyone included in your estate plan. You should also consider updating your estate plan upon the illness, incapacity, or death of anyone included in your estate plan. Finally, the birth or adoption of children or grandchildren may warrant some modifications to your current estate plan.

Changes in Financial Circumstances

Your financial situation has likely changed over the years. For example, your assets may have

appreciated or depreciated, or you may have received an inheritance or acquired debt. Depending on your situation, these changes may be grounds for updating your estate plan.

Moving to a Different State

Different states have different laws and ramifications. If you move to a new state, certain documents in your estate plan that are state specific may not be valid in your new state of residence. You should review and update your estate plan anytime you move to a new state, even if you only plan on living in the new state for half the year.

Special Circumstances

There are various special circumstances that may warrant updates to your estate plan or require additional special needs planning. For example, if your child or grandchild has special needs and receives government assistance, you may want to engage in special needs planning to protect those benefits.

If you have experienced any of the above-mentioned changes and would like to update your estate plan, please contact attorney Kelly M. Spott.