

EMPLOYMENT LAWSCENE ALERT: WHAT'S A BIDEN PRESIDENCY GOING TO MEAN FOR EMPLOYERS? AN OVERVIEW

The labor and employment law policies and enforcement goals of the federal government rely largely on which party's administration occupies the White House. When inaugurated in January, President Joseph R. Biden made some immediate and significant changes that will affect employers. Also, based on President Biden's statements made during his campaign and the stated goals of others in the Democratic Party, decidedly pro-employee policies, enforcement goals, and legislation are very likely on the way. These changes are all but certain, now, with a Democratically controlled Congress. Over the next five weeks, the OCHDL employment law team will examine five labor and employment areas that employers should know and understand in order to navigate through the new and significant changes that the Biden Administration will likely make in the coming months and years. In the following weeks, we will cover:

- **OSHA:** On January 21, 2021, President Biden signed an Executive Order requiring OSHA to provide guidance to employers on workplace safety during the COVID-19 pandemic. In response, on January 29, 2021, OSHA issued guidance related to COVID-19. This guidance, as well as OSHA's enforcement policies regarding COVID-19, will likely continue to evolve under the new administration.
- **Wage and Hour:** This blog series will also cover potential wage and hour changes such as an updated federal minimum wage and the proposed Paycheck Fairness Act, which would expand the equal pay provisions contained in the FLSA and require that any pay differential between sexes be passed on "a bona fide factor other than sex, such as education, training, or experience."
- **Labor Law:** We'll discuss the future of the NLRB and labor law under a Biden Administration. Significant changes, including the roll back of certain enforcement guidance and the ousting of the General Counsel, have already occurred, and if campaign promises are to be believed, we could have significant additional changes, including the passing of the Protecting the Right to Organize (PRO) Act, which would be a sweeping overhaul of federal labor law including prohibiting the use of class action waivers in arbitration agreements, making it easier for workers to form unions, limiting the impact of right-to-work laws, and codifying an expanded definition of what constitutes a joint employer.
- **Discrimination:** Then, we'll cover the Biden Administration's potential impact on issues of discrimination, including the Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination in the Workplace (BE HEARD) Act, which would require most businesses to provide anti-harassment policies and training and would codify the prohibition of discrimination on the basis of sexual orientation, gender identity, pregnancy, childbirth, a medical condition related to pregnancy or childbirth, and a sex stereotype under Title VII.
- **DOL:** Finally, this blog series will wrap up with potential changes that could come

through the Department of Labor, including changes to the independent contractor test, changes to the joint employer test, and expansions of the FMLA.

As always, O'Neil Cannon is here for you. We look forward to expounding on these topics over the next five weeks and providing you with timely and relevant information over the years to come. We encourage you to reach out with any questions, concerns, or legal issues you may have regarding the anticipated labor and employment law changes under the new Biden Administration.

TAX AND WEALTH ADVISOR ALERT: WISCONSIN DEPARTMENT OF REVENUE SAYS EXPENSES PAID WITH FIRST ROUND FORGIVEN PPP LOANS ARE NOT DEDUCTIBLE

A little less than a month ago, the IRS reversed its original position, and stated that businesses can deduct expenses paid for with the proceeds of a forgiven Paycheck Protection Program (PPP) loan, as further detailed [here](#). However, in [guidance](#) issued on Friday, the Wisconsin Department of Revenue clarified that expenses that are paid with the forgivable PPP funds (in the first round) are not deductible for Wisconsin income/franchise tax purposes and must be added back to Wisconsin income in the year incurred or paid. Therefore, unless the legislature acts, businesses that have received PPP loans may find themselves saddled with unexpected Wisconsin tax liabilities as a result of the Wisconsin Department of Revenue's recent guidance.

The guidance clarifies that both federal and Wisconsin law provide an exclusion from income for forgiveness of debt on the first round of PPP loans and signals Wisconsin's plan to deny the expense deduction. Additionally, second-round PPP loans (those issued in 2021) are also set to be taxed by the state, albeit in the opposite manner: expenses will be deductible, but the loans are set to be treated as taxable income.

As we previously wrote about [here](#), Wisconsin is a static conformity state, meaning that unlike a "rolling" conformity state where the state's tax code automatically conforms to the changes in federal tax law, a static state conforms to the federal tax code as it existed on a certain date. Wisconsin conforms to the Internal Revenue Code (IRC) as it existed on December 31, 2017, and although the Wisconsin Legislature adopted omnibus legislation on April 15, 2020, [A.B. 1038](#), to address the coronavirus pandemic, the bill did not update Wisconsin's conformity date. Rather, the bill included express language that brings the

state's tax code into conformity with several federal tax law changes under the CARES Act, including the CARES Act exception that permits loan forgiveness on a tax-free basis under the PPP from February 15, 2020 through June 30, 2020.

Therefore, absent legislative action, Wisconsin remains set to treat PPP loans and expenses in a complex and confusing manner given the way in which Wisconsin's tax code currently stands in relation to the federal tax code. PPP loans from the first round will not be taxable income, but associated expenses are non-deductible. On the other hand, second-round PPP loans are taxable income, but associated expenses can be deducted. That means small businesses, many of which are struggling from the COVID-19 economic downturn, could have to pay state taxes on their PPP loans unless the state legislature and Governor Tony Evers intervene.

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 taxation under the CARES Act and the new relief bill, please contact Attorney [Britany E. Morrison](#).

THE WILAW QUARTERLY NEWSLETTER

Newsletter Article Highlights:

- Is Your Hotel Website in Compliance with the ADA?
- Federal Trade Commission and Enforcement of Privacy Law
- The Importance of a Power of Attorney for Health Care
- Vaccine Injury Claims and the Federal Vaccine Court

Firm News:

- Pete Faust Elected Managing Shareholder and President of OCHDL
- In Memoriam: Thomas A. Merkle 1944-2020
- 21 Firm Attorneys Recognized by Super Lawyers
- OCHDL Ranked in 2021 "Best Law Firms"

Click the image below to read more.



O'NEIL CANNON ELECTS KELLY M. SPOTT AND TREVOR LIPPMAN AS SHAREHOLDERS

O'Neil Cannon is pleased to announce that Attorney Kelly M. Spott and Attorney Trevor Lippman were recently elected as shareholders of the firm.

Kelly has been with the firm since 2017. Prior to joining OCHDL, she was an Advanced Planning Attorney at Northwestern Mutual. Kelly assists her clients with estate planning, succession planning, probate administration, trust administration, and inheritance litigation. She is licensed to practice law in both Wisconsin and Florida. Kelly maintains an AV rating from Martindale-Hubbell® and has been selected for inclusion on The Best Lawyers in America: Ones to Watch List.

Learn more about Kelly M. Spott by visiting her [full profile](#).

Trevor has been with the firm since 2013 and is a member of the firm's Litigation Practice Group. Trevor assists clients in a wide array of personal and business matters with a strong emphasis in litigation relating to wills, trusts, fiduciary disputes, and inheritance disputes. Trevor has recently been selected for inclusion on the Wisconsin Super Lawyers Rising Stars List and The Best Lawyers in America: Ones to Watch List.

Learn more about Trevor by visiting his [full profile](#).

Both Kelly and Trevor are tremendous additions to the shareholder group, and we are proud to have them on our team.

PETE FAUST ELECTED MANAGING SHAREHOLDER AND PRESIDENT OF OCHDL

Pete Faust has been elected as the Managing Shareholder and President of O'Neil Cannon

Faust replaces Dean Laing, who was the firm's Managing Shareholder and President for six years. Laing will remain a member of the firm's Board of Directors, along with Faust. Laing, one of the top litigators in the state, will continue his litigation practice.

"Dean has been an exceptional leader of the firm and set an extremely high standard for all who follow him," Faust said. "His commitment to the firm and his work ethic are unparalleled. We are very grateful that he has agreed to remain on the Board of Directors."

Faust is a corporate attorney who works primarily in mergers and acquisitions and has been the head of the firm's transactional practice.

BRITANY MORRISON PUBLISHED IN STATE BAR'S INSIDETRACK

Attorney Brittany Morrison authored an article entitled "Telecommuting: Tax Implications for Employers and Employees," which appeared in the State Bar of Wisconsin's newsletter, *InsideTrack*.

In the article, Morrison addresses a few important tax considerations for employers and employees working remotely. You can read the full article [here](#).

For more information on this topic, contact Brittany Morrison at 414-276-5000 or Britany.Morrison@wilaw.com.

TAX AND WEALTH ADVISOR ALERT: BREAKING NEWS-IRS SAYS EXPENSES PAID WITH

FORGIVEN PPP LOANS ARE DEDUCTIBLE

Businesses can now deduct expenses paid for with the proceeds of a forgiven Paycheck Protection Program (PPP) loan. The IRS, in [Revenue Ruling 2021-2](#) issued today, reversed its original position that prohibited businesses with PPP loans from “double-dipping” by paying expenses with a forgivable loan, then writing off those expenses. Congress, in the latest COVID-19 relief bill, as we explained further [here](#), explicitly stated that such expenses were deductible, forcing the IRS to reverse course.

This ruling is sure to provide a significant tax benefit and relief for many small business owners who had availed themselves of the PPP program and found themselves saddled with unexpected tax liabilities as a result of the IRS’s original position.

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 taxation under the CARES Act and the new relief bill, please contact Attorney [Britany E. Morrison](#).

SEASON OF GIVING

The spirit of the holiday season is upon us once again and the attorneys and staff at O’Neil, Cannon, Hollman, DeJong and Laing wanted to do something special for our community. For our annual holiday donation drive, we collected items and monetary donations to be given to the **Milwaukee Rescue Mission**. Milwaukee Rescue Mission is a nonprofit organization that operates homeless shelters in Milwaukee providing food, shelter, clothing, and a range of community services to many needy people in our area.



From all of us at O'Neil, Cannon, Hollman, DeJong and Laing:

"Best wishes for a wonderful holiday and a very Happy New Year!"

TAX AND WEALTH ADVISOR ALERT: NEW COVID RELIEF BILL SAYS EXPENSES PAID WITH FORGIVEN PPP LOANS ARE DEDUCTIBLE

Late Monday, Congress passed a \$900 billion COVID-19 relief bill that includes a provision that allows business owners to claim tax deductions for expenses covered by Paycheck Protection Program (PPP) loan proceeds. The bill goes to President Donald Trump today, who is expected to sign it into law.

Among other tax provisions, the bill specifies that business expenses paid with forgiven PPP loans are tax-deductible. This supersedes IRS guidance (as we previously discussed [here](#)) that such expenses could not be deducted and brings the policy in line with what the American Institute of Certified Public Accountants (AICPA) and hundreds of other business associations have argued was Congress's intent when it created the original PPP as part of the \$2 trillion CARES Act.

This congressional action is sure to provide a significant tax benefit for many small business owners who had availed themselves of the PPP program and found themselves saddled with unexpected tax liabilities.

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 taxation under the CARES Act and the new relief bill, please contact Attorney [Britany E. Morrison](#).

EUROPEAN DATA PRIVACY WATCHDOGS TAKE NEW STEPS

In the past week, European data protection authorities have found substantial European Union General Data Protection Regulation (“GDPR”) violations and issued corresponding fines against high-profile companies. These decisions are informative for companies doing business in Europe as they indicate clear future enforcement priorities by European regulators.

On December 10, 2020, the French Data Protection Authority (“CNIL”) issued fines against Google (€100M; \$120M) and Amazon (€35M; ~\$43M) for improper use of cookies on their websites. Specifically, the CNIL found that the tech giants automatically dropped tracking cookies when users visited their French (.fr) websites. Under the GDPR, these tracking cookies cannot be used without prior consent by the user. Since at least October 2019, European law has been clear that websites must obtain prior consent before utilizing any non-essential cookies.

These fines follow a similar CNIL fine against Google for \$57M for failing to adhere to the GDPR’s transparency obligations.

Meanwhile, on December 15, 2020, Ireland’s Data Protection Commission (“DPC”) slapped Twitter with a fine of €450,000 (~\$547,000) for failing to properly declare and document a data breach. The DPC is Europe’s leading privacy enforcement agency for many large tech companies, including Facebook, WhatsApp, Google, Apple, and LinkedIn, among others. The DPC fine marked the first cross-border GDPR fine issued by the Irish watchdog. Though many have expressed concerns that the DPC has been slow in reacting to privacy violations by non-EU companies, this cross-border decision is somewhat of a landmark decision for the DPC. In addition to the Twitter case, the DPC has a backlog of over 20 cases against large tech firms, many of which are U.S.-based entities.

In 2020, both the [CNIL](#) and the [DPC](#) have recently issued guidance on cookie usage and the notice, consent, and transparency requirements of the GDPR. The Amazon and Google fines, together with the CNIL and DPC guiding opinions, provide insight into their enforcement priorities. The guiding opinions make it clear that the CNIL and the DPC are specifically

targeting companies that are improperly utilizing non-essential cookies; furthermore, the extent of the fines indicate that the regulatory agencies view these matters as particularly egregious violations.

Moreover, the DPC's long-awaited first cross-border decision may be seen as a warning that non-EU companies may no longer find safe harbor in Ireland's lethargic enforcement efforts. Should these decisions act as a harbinger of future enforcement efforts, non-EU-based companies will need to quickly ensure compliance with GDPR regulations concerning non-essential cookies. As these decisions indicate, improper cookie usage could be costly for any company doing business in Europe.

If you or your company have questions or concerns about your cookie usage or compliance with international data privacy laws, please contact us.