ATTORNEY JOSEPH GUMINA FEATURED IN MERIT SHOP CONTRACTOR

Recently, the *Merit Shop Contractor* magazine featured Attorney Joseph Gumina's article entitled "COVID-19 and Liability." In the article, Attorney Gumina emphasizes methods for construction employers to prevent and control worksite hazards relating to COVID-19. The article also discusses general safety and health mandates a construction employer should follow in order to help protect themselves from possible COVID-19 litigation. This article is a must read for all construction employers.

Read the full article here.

HEALTH CARE LAW ADVISOR ALERT: VIDEOCONFERENCING CONSIDERATIONS FOR HEALTH CARE LITIGATORS

These days, litigators are routinely taking depositions and participating in hearings over Zoom or other videoconferencing apps and software. Frequently, these depositions and hearings are set up using videoconferencing systems chosen, hosted, and controlled by a court, an arbitrator, or a court reporter. There has been significant discussion and administrative guidance about the use of videoconferencing by health care providers since the pandemic began. Health care litigators should also consider the implications of video depositions or hearings on HIPAA security obligations.

Zoom reports that it is HIPAA compliant. However, these features must be requested by the subscriber, typically through a Zoom for Healthcare subscription. Microsoft Teams also reports it is capable of HIPAA compliance, as does Google Meet.

Litigators who anticipate protected health information (PHI) may be discussed or contained in documents shared through a videoconferencing platform for purposes of a deposition or hearing should inquire with the host about the type of subscription and system capabilities. Some court reporters offer special HIPAA-compliant rooms with certain features disabled.

With the rapid transition to videoconferencing to conduct a substantial amount of litigation tasks, guidance in this area is likely to continue to evolve along with videoconferencing system capabilities. Health care providers and their outside litigators should stay informed and be prepared to ask the right questions to ensure they are not overlooking HIPAA obligations.

The attorneys who contribute to the Health Care Law Advisor are available to assist health care providers with a variety of legal matters. Please contact us if you need assistance navigating the pandemic-related changes to health care litigation.

EMPLOYMENT LAWSCENE ALERT: DOL UPDATES FFCRA LEAVE REGULATIONS

On September 11, 2020, the Department of Labor issued updated regulations regarding the Families First Coronavirus Response Act and leave available under that law. These updates were issued in response to a recent federal district court ruling out of the Southern District of New York that invalidated portions of DOL’s original rules under the FFCRA because the agency exceeded its authority in issuing certain portions of its rules. These updated regulations are effective on September 16, 2020.

Most notably, the new DOL regulations update the definition of “health care providers” that are excluded from the FFCRA. The original definition included anyone employed at a hospital, medical school, and a variety of other places where medical services are provided, as well as individuals employed by a business that produced medical equipment. This definition was criticized as being overbroad and including many more workers than the traditional FMLA definition of health care provider. DOL has revised the definition to include both those who meet the traditional FMLA definition of health care provider who can issue an FMLA certification, as well as individuals capable of providing health care services such as diagnostic services, preventative services, treatment services, or other services that are integrated with and necessary to the provision of patient care. Non-medical personnel such as IT professionals, building maintenance staff, human resources personnel, food services workers, records managers, consultants, and billers are no longer considered health care providers, even if they work at a hospital or other medical service provider.

Employers should take notice that the DOL clarified its stance on intermittent leave under the FFCRA. While intermittent leave is still available only with the agreement of the employer, the DOL clarified that if a child is going to school under a school-mandated hybrid model (e.g., in person two days per week and remote learning three days per week), an employee’s need for leave only on those days that their child is home engaged in remote learning would not be considered intermittent leave, and, therefore, the employer’s agreement for such a leave schedule would not be necessary. On the other hand, the DOL explained that if it is the parent's choice to have the child attend remote learning instead of in person classes, rather than the change being imposed by the school, then the parent would not be eligible for any FFCRA leave because the school is not "closed" due to a COVID-19 related reason. Under those circumstances, the employer could lawfully deny the employee's request for FFCRA leave.

O'Neil, Cannon, Hollman, DeJong and Laing remains open during this time. We encourage you to reach out with any questions, concerns, or legal issues you may have, including those related to COVID-19.

TAX AND WEALTH ADVISOR ALERT: STRIKE WHILE THE GIVING IS GOOD—HISTORICALLY HIGH ESTATE AND GIFT TAX EXEMPTIONS MAY BE REDUCED OR ELIMINATED AS EARLY AS JANUARY 1, 2021

With the economy still struggling, one bright spot remains for those who are willing to make an investment of time and money in estate planning. The combination of lowered asset values, reduced interest rates, and historically high estate and gift tax exemptions present a unique opportunity to implement estate planning techniques that will yield significant tax savings. But those looking to take advantage of this unique opportunity should act now, because a rebound in asset values and the outcome of the November 2020 election may make this unique opportunity go away.

The Gift, Estate, and GST Tax Exemptions for 2020

The Tax Cuts and Jobs Act of 2017 created a significant opportunity to transfer wealth by effectively doubling the federal estate and gift tax exemption for transfers made after 2017. The current exemption for 2020 allows an individual to transfer up to $11,580,000 (or up to $23,160,000 for a married couple) over the course of his or her lifetime without incurring gift or generation-skipping transfer ("GST") tax. Any unused amount is available to eliminate estate and GST tax upon the individual's death. Moreover, a surviving spouse inherits the unused gift and estate tax exemption (but not the GST tax exemption) of the first spouse to die if an election is made on a timely filed estate tax return for the first spouse's estate.

Any amounts gifted during life or transferred upon death in excess of the federal estate and gift tax exemption (over $11,580,000 for an individual or $23,160,000 for a married couple) are subject to a 40% estate and gift tax rate at death, plus any taxes that may be imposed by the decedent's state of domicile (Wisconsin has neither an estate nor gift tax). In addition to the gift or estate tax, a separate GST tax of 40% is imposed on transfers in excess of the exemption amount that are made to grandchildren or more remote descendants.

The Scheduled Reduction of the Gift, Estate, and GST Tax Exemptions

Currently, the estate and gift tax exemptions are the **highest** they have ever been since the modern estate tax was implemented in 1916 (with the single exception of 2010, when the estate tax was briefly repealed). However, effective January 1, 2026, the exemption will be reduced to $5,000,000 (or effectively $10,000,000 for a married couple), adjusted for inflation back to 2010.

This means that while currently a married couple can transfer over $20,000,000 without estate or gift tax, if exemptions are cut in half as scheduled on January 1, 2026, then the same couple can only transfer approximately $10,000,000 without estate or gift tax. At a 40% tax rate, the couple creates an approximate $4,000,000 in savings by making a transfer today at current exemption levels. That is $4 million going to their beneficiaries rather than taxes!

And the good news is that gifts made now utilizing 2020's record-high exemptions may not be "clawed back" as provided in regulations published by the IRS, even if exemptions are later reduced on January 1, 2026, or eliminated by Congress sooner as explained below. The importance of these "anti-clawback" regulations is that taxpayers can utilize today's higher exemption amounts without fear of future penalty or "clawback" and should act before the scheduled reduction.

The Presidential Election

While a deadline of December 31, 2025, for the scheduled reduction may seem like plenty of time to take advantage of these high exemptions, the 2020 presidential and congressional elections and the impact of the pandemic may bring about some drastic changes to estate planning as soon as January 1, 2021.

First, there is a real possibility that taxes may be increased to support the massive amounts spent by Congress on COVID-19 relief. The gift, estate, and GST tax rates could be viewed as the easiest taxes to raise because they would impact only the wealthiest of taxpayers, and not those perceived to be struggling the hardest due to the novel pandemic. It is possible for the gift, estate, and GST tax rates to be increased from the current 40% to 55% or even higher.

Second, there is speculation that if the Democratic Party wins the presidency and gains control of Congress following the November 2020 election, the exemption amount might be reduced to an amount as low a $3,500,000 even before the expiration date of January 1, 2026. In fact, such a change could be effective as soon as January 1, 2021, if Congress passes legislation having retroactive effect.

Additionally, while the Democratic Party's presidential nominee, Joe Biden, has not proposed any specific changes to the estate exemption amounts and tax rates, his recently released economic plan calls for the "wealthiest Americans [to] shoulder more of the tax burden," including raising federal estate taxes "back to the historical norm." This seems to indicate that if Biden and the Democratic Party are successful come November, exemptions going forward could be significantly lower than they are under current law, and thus most tax commentators believe that the current exemption amounts are the best we are going to see.

Maximize Higher Gift, Estate, and GST Tax Exemptions Before It is Too Late—Plan Now!

Gifting assets outright or in trust now, while the exemption levels are still at their historic high, allows taxpayers to "lock in" these high exemption amounts without fear of a clawback or an exemption reduction as soon as January 1, 2021. There are several effective estate planning structures that can be used to take advantage of depreciated asset values, record-low interest rates, and record-high exemption amounts, but waiting for official election results come November 3 will likely make it difficult to implement these structures.

Some of these structures require several months to implement. Other than planning to reduce gift and estate taxes, there are many other considerations for taxpayers when transitioning wealth to their family, e.g., how and when to benefit family members; choosing trustees; choosing the state of trust administration for asset protection and income tax planning objectives; considering multi-generational planning; and charitable giving and identifying which assets to gift. Additionally, since certain assets may require professional valuations, these transactions may require more time to implement, so now is the time to act in order to ensure that the transactions can be completed before year's end.

Conclusion

The current confluence of lowered asset values, reduced interest rates, and historically high estate and gift tax exemptions may make this one of the best times in history to transfer wealth efficiently with minimal estate tax implications, but the time to act is now. Many estate planning techniques take time to implement, so do not wait until November 2020 to consider making changes to your estate plan.

Regardless of which political party stays in power or takes control in November, our team at O'Neil Cannon realizes that there is no one-size-fits-all strategy to address your estate planning goals and objectives. We are prepared and ready to help you build a comprehensive plan tailored to your needs. If you are interested in taking advantage of these unparalleled opportunities for tax savings, please speak to your regular OCHDL contact, or the author of this article, attorney Britany E. Morrison, to discuss how you can strike while the giving is good.

TAX AND WEALTH ADVISOR ALERT: THE IMPORTANCE OF BENEFICIARY DESIGNATIONS

Some of your most significant assets, like your life insurance and retirement accounts, ask you to make beneficiary designations. If you make valid beneficiary designations on these assets, then upon your death they will pass directly to your named beneficiaries without being subject to the probate process. Click here to view our article on probate and why you might want to avoid it.

Many people overlook the importance of beneficiary designations and neglect to name beneficiaries because they think their other estate planning documents will cover those assets. However, beneficiary designations operate independently from other estate planning documents, like a will or trust agreement. Therefore, you should make beneficiary designations because your other estate planning documents will not control how these assets are to be distributed and to whom they should be distributed. If you neglect to name beneficiaries, then these accounts or policies could become part of your estate and be subject to the probate process.

Just as it is important to make beneficiary designations, it is equally as important to review and, if necessary, update those designations. Major life events, changes in circumstances, or even a change of heart can all warrant an update to beneficiary designations. It is good practice to review your estate plan every three to five years, and each time you do so you should be reviewing your beneficiary designations.

Finally, it is important to consider any unintended consequences to naming someone as a beneficiary. For example, if a special needs person receives assets through a beneficiary designation, then he or she may no longer be eligible for government benefits. In these circumstances and in others, you should consult with an estate planning attorney to discuss your options.

Beneficiary designations are an important part of your estate plan and require special attention. If you would like more information on beneficiary designations and estate planning in general, please contact attorney Kelly M. Spott.

HEALTH CARE LAW ADVISOR ALERT: WELL-DRAFTED ASSIGNMENT OF BENEFIT FORMS ARE CRITICAL WHEN FIGHTING ERISA CLAIM DENIALS

Most private health insurance coverage in the United States is employer-sponsored and governed by a federal law known as the Employment Retirement Income Security Act of 1974 (ERISA). Navigating an appeal of a benefit denial issued by an ERISA-governed health plan can be confusing. A quick review of federal regulations governing ERISA benefit denials, which can be found **here**, suggests how challenging it may be for health care providers to navigate the ERISA claims landscape successfully.

ERISA benefit denials are frequently written by a health insurer or third-party administrator (TPA) that is not the legal entity truly providing the health benefits to the patient. The legal entity providing the benefits—the health insurer**,** so to speak—is known as an "ERISA plan." When a health care provider obtains an assignment of its patient's benefits, those rights are against the ERISA plan, not necessarily the health insurer or TPA that may have written a benefit denial letter.

Health care providers can improve their chances of successfully recovering benefits from ERISA plans by ensuring that their Assignment of Benefit (AOB) forms are properly worded. AOB forms should fully authorize a provider to pursue all of its patient's appeal rights under ERISA. In addition, AOB forms should allow a health care provider to obtain full information about the ERISA plan's benefits, so that the provider can properly assess what benefits are available for various medical procedures. Absent appropriate AOB language, a provider's billing administrators may find themselves stymied when attempting to obtain the health benefits that both the provider and patient deserve. A review of AOB form language may be warranted to ensure that a health care provider has the best possible chance of recovering benefits from ERISA plans successfully.

Doug Dehler is a shareholder and a member of the firm's Litigation group. Doug's practice includes advising clients on insurance coverage and health benefit issues.

TRUMP ADMINISTRATION HALTS RESIDENTIAL EVICTIONS UNTIL DECEMBER 31, 2020

Yesterday, the Trump administration announced an order temporarily halting certain residential evictions until the end of the year. The eviction moratorium, which is being enacted by the Centers for Disease Control and Prevention pursuant to its authority under Section 361 of the Public Health Service Act (42 U.S.C. § 264 *et seq.*), seeks to prevent the further spread of COVID-19. The nationwide moratorium could apply to as many as 40 million residential tenants.

Despite its reach, the moratorium is not a blanket protection for all residential tenants. To qualify for protection under the moratorium, a tenant must expect to earn no more than $99,000 this year (or no more than $198,000 if filing a joint tax return), or not have been required to report any income in 2019 to the IRS, or have received a stimulus check under the CARES Act. Further, a tenant must provide a sworn declaration to his or her landlord indicating that (1) the tenant has used best efforts to obtain government assistance, (2) the tenant is unable to pay full rent because of a loss of household income or extraordinary medical expenses, (3) the tenant is using best efforts to make partial rent payments, and (4) eviction would cause the tenant to be homeless or live with others in close quarters.

The moratorium does not relieve a tenant of his or her obligations to pay rent, and a landlord may continue to charge applicable interest, penalties, and fees under the lease for nonpayment of rent. Landlords also may still evict tenants for reasons besides not making rent, such as criminal activity, threatening the health and safety of other tenants, damaging property, and violating other provisions under the lease. Landlords who violate the order may face criminal penalties.

The order does not apply to commercial leases, nor does it apply in any state or local area that already has a moratorium on residential evictions that provides the same or greater level of protection. Nothing in the order precludes states or local authorities from imposing additional requirements.

O'Neil Cannon remains open and ready to help you. For questions or further information relating to the eviction moratorium, or insolvency concerns relating to bankruptcy or receivership, please contact the authors of this article, attorneys Jessica K. Haskell and Nicholas G. Chmurski.

EMPLOYMENT LAWSCENE ALERT: EMPLOYERS MUST IMMEDIATELY DECIDE WHETHER TO IMPLEMENT SEPTEMBER 1, 2020 PAYROLL TAX DEFERRAL

On August 8, 2020, President Trump issued an Executive Memorandum directing the Secretary of the Treasury to defer the withholding, deposit, and payment of the employee portion of the Social Security tax (6.2% of wages) for the period beginning on September 1 and ending on December 31, 2020. The deferral applies for employees whose pre-tax bi-weekly wages or compensation is less than $4,000. On an annualized basis, this equates to a salary not exceeding $104,000.

The IRS recently issued limited guidance on the implementation of the deferral. Open issues and takeaways are summarized below.

Additional Detail

In addition to calling for the deferral of the payroll tax, the Memorandum directs the Secretary to explore avenues for eliminating the taxpayers' obligation to repay the deferred taxes in the future. It should be noted that only Congress, not the Secretary, has the authority to waive taxes.

The Memorandum does not provide detail on how the payroll tax deferral will be implemented. In related interviews, the Secretary commented that, while he hoped that many companies would participate, he couldn't force employers to stop collecting and remitting payroll taxes. In other words, he suggested that the payroll tax deferral would be voluntary—a proposition not included in the Executive Memorandum.

Requests for Clarification

Uncertainty surrounding how to implement the payroll tax deferral resulted in requests from multiple trade groups for clarification, including an August 18 letter signed by 33 trade groups, including the U.S. Chamber of Commerce. The letter, submitted to the Secretary and to the respective leader of the U.S. Senate and of the U.S. House of Representatives, notes that under current law, the Memorandum creates a substantial tax liability for employees at the end of the deferral period.

While the stated purpose of the Memorandum was to provide wage earners with additional available spending money, unless Congress later acts to forgive liability for the deferred payroll tax, the affected earners will owe an increased tax bill next year. As the U.S. Chamber of Commerce letter maintains, the deferral “threatens to impose hardship on employees who will face a tax bill” in an amount of double the usual payroll deduction for Social Security (amounting to 12.4% of employee wages) in the first four months of 2021.

The following chart illustrates the U.S. Chamber of Commerce’s assessment of the magnitude of the potential tax bill for employees compared to the immediate benefit of the deferral:

Annual Income	**Bi-Weekly Pay**	**Increase in Take-Home Pay by Pay Period**	**Tax Bill Due in 2021 (based on 9 pay periods)**
$35,000	$1,346.15	$83.46	$751.15
$50,000	$1,923.08	$119.23	$1,073.08
$75,000	$2,884.62	$178.85	$1,609.62
$104,000	$4,000	$248.00	$2,232.00

The U.S. Chamber of Commerce letter further states that many of its employer members would likely decline to implement the deferral, choosing instead to continue to withhold and remit to the government the payroll taxes required by law.

<u>IRS Notice 2020-65</u>

Late in the afternoon on August 28, 2020, the IRS issued Notice 2020-65 to provide guidance regarding the payroll tax deferral. The Notice clarifies that any deferred amounts must be recouped by being collected from employee wages and repaid during the period between January 1, 2021 and April 30, 2021. Interest and penalties begin to accrue May 1, 2021 on any unpaid amounts. While the Notice is silent on the issue, it is presumed, because of the normal operation of payroll tax law, that employers would be responsible for paying any interest and penalties that accrue, in addition to paying any underlying deferred amounts that cannot be collected from employees.

Some questions about how to implement the deferral remain unanswered by the IRS guidance. Specifically, the guidance addresses neither self-employed individuals nor the method for reporting the deferral of taxes on IRS Forms 941 or W2. The guidance is also silent on how to collect deferred tax for an individual who is no longer employed for all or part of the 2021 repayment period. Staffing agencies, in particular, are concerned about employer exposure to the repayment cost in the event that employees for whom taxes were deferred are no longer employed during the repayment period. It is not clear that deducting the amount owed from an employee’s final paycheck would be specifically permitted under either federal or state law, or any applicable bargaining agreements.

Decisions, Decisions

While some employers may welcome the ability to offer the payroll tax deferral to employees as a current relief measure, others may view with some reluctance the prospect of exposure to additional payroll tax costs coupled with the need to re-code payroll software effective September 1, 2020, January 1, 2021, and May 1, 2021. Implementing the current deferral and future double collection would also require careful and accurate communication to employees.

The IRS guidance leaves the door open for employers to avoid, rather than to implement the deferral, and to proceed, instead, to process payroll according the normal procedures. In the language of the guidance, an employer may, "if necessary, . . . make arrangements to otherwise collect the total Applicable Taxes from the employee."

O'Neil, Cannon, Hollman, DeJong and Laing remains open and ready to assist you. To discuss how the Memorandum, IRS guidance, and practical considerations relevant to the payroll tax deferral may apply to your business objectives and circumstances, please speak to your regular OCHDL contact.

JOHN G. GEHRINGER NAMED 2021 BEST LAWYERS® "LAWYER OF THE YEAR"

John G. Gehringer was recently recognized by Best Lawyers as the 2021 "Lawyer of the Year" for Construction Law.

Only a single lawyer in each practice area and designated metropolitan area is honored as the "Lawyer of the Year," making this accolade particularly significant. Receiving this designation reflects the high level of respect a lawyer has earned among other leading lawyers in the same communities and the same practice areas for their abilities, their professionalism, and their integrity.

In addition to the "Lawyer of the Year" award, John G. Gehringer was also listed in the 2021 Edition of *The Best Lawyers in America* in the following practice areas:

- Commercial Litigation
- Corporate Law
- Real Estate Law

Best Lawyers has published their list for over three decades, earning the respect of the profession, the media, and the public as the most reliable, unbiased source of legal referrals. Since it was first published in 1983, *Best Lawyers* has become universally regarded as the definitive guide to legal excellence.

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20 OCHDL LAWYERS SELECTED AS 2021 BEST LAWYERS®; ANOTHER 5 NAMED BEST LAWYERS: ONES TO WATCH

We are pleased to announce 20 of our lawyers have been included in the 2021 Edition of *The Best Lawyers in America,* and an additional five have been selected as 2021 *Best Lawyers: Ones to Watch*.

The following are the O'Neil, Cannon, Hollman, DeJong and Laing lawyers named to the 2021 lists:

Best Lawyers in America

- Douglas P. Dehler – Litigation – Insurance
- James G. DeJong – Corporate Law, Mergers and Acquisitions Law, and Securities / Capital Markets Law
- Seth E. Dizard – Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law and Litigation – Bankruptcy
- Peter J. Faust – Corporate Law and Mergers and Acquisitions Law
- John G. Gehringer – Commercial Litigation, Construction Law, Corporate Law, and Real Estate Law
- Joseph E. Gumina – Employment Law – Management and Litigation – Labor and Employment
- Dennis W. Hollman – Corporate Law and Trusts and Estates
- Grant C. Killoran – Commercial Litigation and Litigation – Health Care
- JB Koenings – Corporate Law
- Dean P. Laing – Commercial Litigation, Personal Injury Litigation – Plaintiffs, and Product Liability Litigation – Defendants
- Gregory W. Lyons – Commercial Litigation and Litigation – Insurance

- Patrick G. McBride – Commercial Litigation
- Thomas A. Merkle – Family Law
- Joseph D. Newbold – Commercial Litigation
- Chad J. Richter – Business Organizations (including LLCs and Partnerships) and Corporate Law
- John R. Schreiber – Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law and Litigation – Bankruptcy
- Jason R. Scoby – Corporate Law
- Steven J. Slawinski – Construction Law

Best Lawyers: Ones to Watch

- Kelly M. Spott – Trusts and Estates
- Trevor C. Lippman – Litigation – Trusts and Estates
- Erica N. Reib – Labor and Employment Law – Management and Litigation – Labor and Employment
- Christa D. Wittenberg – Commercial Litigation

About Best Lawyers

Best Lawyers has published their list for over three decades, earning the respect of the profession, the media, and the public as the most reliable, unbiased source of legal referrals.

Best Lawyers: Ones to Watch recognizes associates and other lawyers who are earlier in their careers for their outstanding professional excellence in private practice in the United States.

Lawyers on *The Best Lawyers in America* and *Best Lawyers: Ones to Watch* lists are divided by geographic region and practice areas. They are reviewed by their peers on the basis of professional expertise, and they undergo an authentication process to make sure they are in current practice and in good standing.