THE WILAW QUARTERLY NEWSLETTER

Newsletter Article Highlights:

- Should a Contractor Stop Work Due to Nonpayment?
- How a Trust Can Provide Asset Protection for Your Children
- Wisconsin Will Not Tax Forgiven Paycheck Protection Program Loans
- When Are My Employees Entitled to Leave under the FFCRA because their Children are Home from School or Daycare?

Firm News:

- Attorney Joseph Gumina Featured in *Super Lawyers*
- Steve Slawinski Published in *State Bar's Construction Blog*
  - Attorneys Erica Reib, Joe Newbold, and Grant Killoran Featured in *Wisconsin Lawyer*
    - Attorney Kelly M. Spott Admitted into the Florida State Bar

Click the image below to read more.



EMPLOYMENT LAWSCENE ALERT: WISCONSIN FACE COVERING ORDER ISSUED – EFFECTIVE AUGUST 1, 2020

Today, Wisconsin Governor Tony Evers declared a Public Health Emergency and issued an Emergency Order requiring individuals to wear face coverings. This Emergency Order goes into effect at 12:01 a.m. on Saturday, August 1, 2020 and will expire on September 28, 2020,

unless there is a subsequent superseding emergency order.

The Emergency Order applies to all individuals over the age of five when they are indoors or in an enclosed space with anyone outside of their household, other than when inside a private residence. “Enclosed space” is defined in the Emergency Order as “a confined space open to the public where individuals congregate, including but not limited to outdoor bars, outdoor restaurants, taxis, public transit, ride-share vehicles, and outdoor park structures.” Additional guidance included in the Face Covering FAQs states that, even if individuals can socially distance indoors, unless that person is the only person in the room, a face covering must be worn and that the Emergency Order requires face coverings inside businesses and office spaces, unless an exception applies. Exceptions to the face covering requirement include, among other things, the following:

- when an individual is eating, drinking, or swimming;
- when an individual is obtaining a service that requires temporary removal of the face covering, such as dental services; and
- individuals with health conditions or disabilities that would preclude safely wearing a face mask.

Therefore, the Emergency Order will require employees to wear face coverings in most workspaces, unless the employee is in a room and is the only person in that room.

The Emergency Order supersedes local orders that are less restrictive, but those that are more restrictive than the Emergency Order, like that issued by the City of Milwaukee, are not superseded and remain in force. Therefore, it is important to check local guidelines to ensure that all requirements are complied with. The Emergency Order will be enforced by local and state officials, and the penalty for violation of the Emergency Order is a fine of not more than $200.

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.

OCHDL CREATES NEW HEALTH CARE LAW BLOG

Welcome to the first edition of the O’Neil, Cannon, Hollman, DeJong and Laing Health Care Law Advisor. We have created this blog as an informational and educational resource for our clients and contacts. The health care industry changes often and quickly, and we seek to help keep you apprised of important legal developments in the health care field.

Over the past few months, we have spent significant time advising clients on issues relating to the COVID-19 pandemic. We include in this inaugural blog post links to some of our recent writings regarding COVID-19 issues, including links of two cover stories in *The Wisconsin Lawyer* magazine. *The Wisconsin Lawyer* is the monthly publication of the State Bar of Wisconsin and addresses issues of interest throughout the state and country.

Christa Wittenberg and Grant Killoran authored the cover article in the April, 2020 edition of *The Wisconsin Lawyer* entitled "Due Process in the Time of the Coronavirus." Their article analyzes legal concepts governing the measures utilized by public health officials to combat an outbreak of contagious disease, focusing on COVID-19. Their article can be found here.

Grant Killoran, Joe Newbold and Erica Reib authored the cover article in the June, 2020 edition of *The Wisconsin Lawyer* magazine entitled "The New Wave of Litigation: An Early Report on COVID-19 Claims." Their article analyzes the types of claims being made related to the COVID-19 pandemic. Their article can be found here.

We also include a link to a recent article on our firm's Employment LawScene blog related to the COVID-19 pandemic entitled IRS Says Reduced-Cost or Free COVID-19 Testing or Treatment Won't Prevent Individuals from Making or Receiving HSA Contributions.

Lastly, in conjunction with last week's start of the Major League Baseball season, we include a link to an article recently posted in our newsroom by Attorney Pete Faust entitled COVID-19 Raises Privacy Issues for Major-League Baseball. The article discusses not only the current state of privacy policy in the baseball world, but also reviews the obligations of other businesses under the ADA, FMLA, CARES Act, GINA, and HIPAA.

We hope you enjoy this blog. If you have any questions about any of the articles or issues discussed in it, please feel free to contact the authors.

COVID-19 RAISES PRIVACY ISSUES FOR MAJOR-LEAGUE BASEBALL

After months of delay trying to address COVID-19 issues, the 2020 Major League Baseball ("MLB") season finally opened Thursday night with the New York Yankees defeating the Washington Nationals, 4-1, and the Los Angeles Dodgers pulling away from the San Francisco Giants for an 8-1 victory. Because of the COVID-19 pandemic, this season – assuming it is not called off because of COVID-19 outbreaks – will be unlike any prior MLB season. The regular season has been reduced from 162 games to 60 games, the number of playoff teams was

expanded from 10 to 16 teams, games are being played in empty stadiums, and players, coaches, and other staff are subject to extensive COVID-19 testing and daily monitoring.

As of July 17, 80 players have tested positive for COVID-19, 17 of which tested positive after teams began their workouts on July 1. Of those 80 players, the general public knows the identity of only 56 of them. Why only 56, especially since MLB clubs traditionally have disclosed details of a player's injury? For example, when New York Mets pitcher Noah Syndergaard tore the ulnar collateral ligament in his pitching elbow in March, the Mets announced that Syndergaard had suffered the injury and would undergo Tommy John surgery. The Mets later announced that the surgery had been successful, and that Syndergaard was expected to pitch again at some point during the 2021 season.

MLB clubs are more tight-lipped about COVID-19 issues. MLB has effectively created a COVID-19 Related Injured List for players who have tested positive, have been exposed, or have shown symptoms of the COVID-19. The list does not differentiate between players who have tested positive and players who have been exposed to someone who has tested positive for COVID-19, and is not being published as a stand-alone list. Instead, players with positive COVID-19 testing or exposure status will be acknowledged on the normal injury report just like any other injured player. Their injury, however, will be described as an undisclosed injury, an illness, or a non-baseball injury. While naming a player to the injury list with a designation of "undisclosed" does open the door for public speculation regarding a player's health status, the various designations on the list do not function to definitively confirm that a particular player has tested positive for or been exposed to the virus that causes COVID-19.

Why do MLB clubs disclose less about the status of a player who is missing games because of COVID-19 than a player one who is out for the season with a torn elbow ligament?

The simple answer is that the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and the Americans with Disabilities Act ("ADA") provide broad health privacy and confidentiality protections for players. Specifically, HIPAA and the ADA each restrict the clubs' ability to publicize information about employee illness without permission.

How do HIPAA and the ADA Apply?

HIPAA applies to an MLB club in its role as a health-care provider to the players. HIPAA is a federal law that was created to protect sensitive patient health information and prevents disclosure of individual health information without such individual's consent. This privacy rule generally applies only to specified types of covered entities and their associates. Covered entities include healthcare providers and group health insurance plans. Certain business associates and vendors of a covered entity can also be required to observe HIPAA's requirements. Where an entity is either not regulated by HIPAA, or is subject to HIPAA, but

has obtained individual consent, the federal privacy law does not prevent the disclosure of personal medical information. Because professional sports teams provide healthcare to their players via team doctors, they are healthcare providers under HIPAA. The terms and conditions of professional athletes' employment, as documented in the applicable collective bargaining agreement, generally requires player consent to disclose individual medical information relevant to team status.

The ADA applies to an MLB club in its role as an employer. The ADA functions to prohibit employers from discrimination against employees on the basis of a disability and to require employers to treat all information about employee illness as a confidential medical record. While federal guidance indicates that COVID-19 status is unlikely to constitute a disability, the Equal Employment Opportunity Commission ("EEOC") has made clear that employers must treat employee COVID-19 status as confidential.

Why is There Different Treatment?

An elbow injury and a positive COVID-19 test are treated differently because of HIPAA, the ADA, and MLB's collective bargaining agreement and standard player contract. MLB players and clubs must operate in accordance with the health information disclosure rules as currently codified under Article XIII.G.(1) of the collective bargaining agreement known as the 2017-2021 Basic Agreement (the "CBA") and by Paragraph 6(b)(1) of each standard player contract, known as the Uniform Player's Contract ("UPC"). Under these agreements, each player is required to execute a HIPAA-compliant authorization for the use and disclosure of health information about the player. By signing the UPC, the player authorizes disclosure of employment-related injuries. The UPC incorporates the relevant health information disclosure provisions of Article XIII.G. of the CBA, Section 4, which provide that:

> [for] public relations purposes, a Club may disclose the following general information about employment-related injuries: (a) the nature of a Player's injury, (b) the prognosis and the anticipated length of recovery from the injury, and (c) the treatment and surgical procedures undertaken or anticipated in regard to the injury.

If a medical condition, other than an employment-related injury, prevents a player from playing and the player has not provided the club with specific written authorization to disclose information about the medical condition, the club may disclose only that a medical condition is preventing the player from playing and the anticipated absence of the player from the club. COVID-19 status, therefore, is not deemed to be an employment-related injury that would allow an MLB club to disclose details regarding prognosis and treatment. Although a player may authorize a team to disclose his COVID-19 status, such authority is not automatic under either HIPAA or the documents governing the employment relationship. The ADA does not explicitly address employee authorization of an employer to disclose medical information, but does permit limited disclosure as necessary to respond to a request for

reasonable accommodation.

In practical terms, this compliance with the HIPAA privacy and ADA confidentiality rules with respect to COVID-19 means that even if a player tests positive, the club or its staff may not disclose that to the public unless granted permission to do so by the player. Any unauthorized disclosure could constitute a HIPAA violation, for which significant federal civil monetary penalties may apply if the U.S. Department of Health and Human Services investigates a compliant or performs a compliance audit. Additionally, a player might be able to bring a collective bargaining grievance, or to allege a breach of the employment contract.

Lessons for the Rest of Us

Of course, most businesses are not professional sports franchises with collective bargaining agreements providing HIPAA disclosure consent. The caution displayed by the MLB in avoiding the disclosure of player COVID-19 status, however, is a reminder to all employers with access to employee health information and records to carefully assess which health-related information disclosures may or may not be permitted under applicable law.

HIPAA

HIPAA is a complex health privacy law with multiple exceptions and with sometimes conflicting state law counterparts. Health care providers, employer sponsors of self-insured group health plans and their business associates are subject to its requirements and should take care to ensure that affirmative compliance actions are taken and maintained. Violations of these rules, as well as the inability to demonstrate operational and documented (written) compliance, can subject the health care providers, health plan sponsors, or their associates, to large civil, or even criminal, penalties.

The ADA, FMLA, and GINA

For employers who, unlike MLB clubs, are not directly subject to HIPAA, it is important to remember that other laws provide separate protections for employee health information. Any information known to an employer regarding an employee's disability or gathered as a result of an employer-provided medical examination (which can include taking a temperature) should remain confidential. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA and EEOC guidance. Similarly, employers subject to the Family and Medical Leave Act ("FMLA") or the Emergency Family Medical Leave ("EMFL") provisions of the CARES Act must confidentially maintain any records and documents relating to employee (and family) medical certifications and medical histories and created for FMLA or EMFL purposes. The Genetic Information Nondisclosure Act ("GINA") also requires employers to keep all genetic information, including information about an individual's genetic tests, the genetic tests of a family member, family medical history,

regarding employees confidential. The ADA, FMLA, EFML, and GINA all require that such records be stored separately from the usual personnel files.

If you have questions related to your business's obligations under the ADA, FMLA, CARES Act, or GINA, or HIPAA, or seek attorney-client privileged review of your current compliance program, including as to HIPAA policies and procedures, please contact your regular OCHDL attorney or Pete Faust.

ATTORNEY STEVE SLAWINSKI FEATURED IN MERIT SHOP CONTRACTOR

Recently, the *Merit Shop Contractor* magazine featured an article by Attorney Steve Slawinski entitled "Dispute Resolution: Mediation and Arbitration in Today's Construction World." In this article, Attorney Slawinski describes and explains mediation and arbitration, detailing the differences between the two and ultimately how they work.

Read the full article here.

STEVE SLAWINSKI PUBLISHED IN STATE BAR'S CONSTRUCTION BLOG

With the ongoing economic impact of the COVID-19 pandemic, construction lien rights have become more vital than ever to businesses in the construction industry. To help navigate through this topic, Attorney Steve Slawinski recently authored an article entitled "101: Wisconsin's Construction Lien Law," which appeared in the *State Bar of Wisconsin Construction Blog*. In the article he provides a refresher course on the basics of construction liens on privately owned construction projects in Wisconsin.

Read the full article here.

For more information on this topic contact Steve Slawinski at 414-276-5000 or steve.slawinski@wilaw.com.

TAX AND WEALTH ADVISOR ALERT: PLANNING FOR SUCCESSION WITH A BUSINESS SUCCESSION PLAN (PART II)

(Part II) Objectives of the Succession Plan

In our last article we discussed why a well-constructed succession plan is necessary. In this article, we review the essential objectives the plan needs to address.

The objectives of succession planning and the methods used to accomplish these objectives are varied, but include the following:

1. **MAXIMIZE THE VALUE OF THE BUSINESS.** During the owner's tenure at the company, the owner must develop a strong management team involving those family members who are active in the business as well as key employees. This will maximize value and help ensure that upon his or her retirement or demise, the passage of the business to the next generation will be smooth and successful.
2. **MINIMIZE TAXATION AND EXPENSES.** The succession plan should attempt to minimize the amount of income and estate taxes in connection with the transfer of the company ownership to the next generation during the owner's life or upon death. A few items in 2020 to consider in connection with accomplishing this objective are: (a) the use of annualized gifts of up to $15,000 per person, or using lifetime gift exclusion of $11,580,000 per person, (b) the full utilization by both the owner and spouse of each of their Unified Credit of $11,580,000 upon their death, (c) planning for the step up in basis of the business interest upon the death of the owner or his or her spouse, (d) establishing estate planning documents that allow for the transfer of ownership of assets without the costs and delays inherent in probate proceedings, and (e) the use of life insurance to act as a funding vehicle to fulfill some or all of the estate tax liquidity needs of the owner so that the business will not be faced with the dilemma of a transfer at death to the next generation accompanied by an estate tax bill that could cause serious financial problems to the business or the next generation of owners.
3. **TREAT THE CHILDREN EQUITABLY AND PRESERVE FAMILY HARMONY.** Most family business owners want their children who are active in the business to end up with full or at least controlling ownership of the business. This objective can be accomplished while still treating those children who are not active in the business in an equitable fashion by arranging for them to receive non-business assets, life insurance, or minority or non-voting interests in the business coupled with some buy-out arrangement in a fair and equitable Buy-Sell Agreement.

It is important to involve children and other affected parties in the planning process so that they understand the owner's overall objectives, including how equitable treatment is being

achieved. Often, the owner and the owner's spouse will be involved in the initial process and planning, and after a summary of the initial plan reflecting the desires of the owner is agreed upon, the children, both active and inactive, and possibly key employees, are brought into the planning process.

As a result of this process, the owner will clearly establish his or her plan as to who will succeed to ownership and control of the business, when ownership and control will transfer, and how it will be accomplished. By early planning, the owner will have many more options available so that the owner's desires for both the welfare of the business as well as of his or her family can best be achieved.

ATTORNEY BRITANY MORRISON GIVES INFORMATIONAL PPP WEBINAR

Recognizing the need to help clarify some of the potential questions posed from the new law, Attorney Britany Morrison recently presented an informational webinar entitled, "PPP Rules Under the New Flexibility Act and Loan Forgiveness FAQS." In the webinar they discuss the new rules under the Paycheck Protection Program Flexibility Act of 2020, loan forgiveness frequently asked questions, and the "unknowns" of loan forgiveness.

O'Neil, Cannon, Hollman, DeJong and Laing remains open and will continue to monitor Paycheck Protection Program changes. For questions or further information relating to the Paycheck Protection Program, please contact Attorney Britany Morrison.

EMPLOYMENT LAWSCENE ALERT: SUPREME COURT RULES THAT TITLE VII PROHIBITION ON SEX DISCRIMINATION PROTECTS GAY AND TRANSGENDER EMPLOYEES

Today, June 15, 2020, the United States Supreme Court issued a landmark ruling holding that an employer who fires an individual based on his or her sexual orientation or transgender status violates Title VII's prohibition against discrimination "because of . . . sex." In a 6-3 decision, the majority found that "[s]ex plays a necessary and undisguisable role" in a

decision to terminate an individual for being homosexual or transgender, which is "exactly what Title VII forbids." Although the Court recognized that "homosexuality and transgender status are distinct concepts from sex . . . discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second."

Title VII requires the Court to apply a but-for test, under which an employer violates the law if the employment decision is based in part on sex. Therefore, the Court concluded that if you change *only* the individual's sex and it results in a different outcome, that is a violation of Title VII. So, the fact that a man who is attracted to men is treated differently from a woman who is attracted to men means that sex is the but-for cause of the decision. Justice Gorsuch, who wrote the majority opinion, analogized this to an employer firing female employees who were Yankees fans but not male employees who were Yankees fans. Sex does not have to be the sole or even the primary cause of the adverse action. There may be two or more reasons for the termination, but if a different outcome would have been reached if the individual's sex was changed, sex is the but-for cause of the decision. Therefore, because "homosexuality and transgender status are inextricably bound up with sex," a decision based on homosexuality or transgender status takes sex into account in a way that is impermissible under Title VII. Additionally, the Supreme Court did not find it persuasive that homosexual men and homosexual women would be treated the same. Instead, the Court stated that the focus of Title VII is on the individual and how the individual is treated.

The Court found that this decision is in line with prior precedent finding that the following instances violated Title VII where, if the plaintiff had been a different sex, they would have been treated differently: a policy where women with young children were not hired when men with young children were; a policy where women were required to make larger pension fund contributions than men because of longer overall life expectancies; and an instance where a male employee was sexually harassed by male coworkers. In each of these situations, the Court found that there was a violation of Title VII because the result would have been different if the individual was a different sex.

Finally, the Court dismissed arguments that this interpretation was not what Congress intended. First, the Court reasoned that the term "sex" was broad and that, where there are no statutory exceptions to a broad rule, it is not the Court's role to write in such exceptions. Additionally, the Court stated that, while this *result* may not have been what the drafters of Title VII anticipated in 1964, the *meaning* of sex has not changed, and the Court is bound to the plain meaning of the words contained in the statute.

The Supreme Court's decision does not change business-as-usual for Wisconsin employers. In 2017, the Seventh Circuit ruled that sex discrimination under Title VII includes discrimination based on sexual orientation. In addition, the Wisconsin Fair Employment Act prohibits discrimination on the basis of both sex and sexual orientation, and since at least 2015, the

EEOC has taken the policy stance that sexual orientation and transgender status were protected categories under Title VII. The U.S. Supreme Court's ruling serves as a reminder for employers to stay vigilant about enforcing their anti-discrimination and anti-harassment policies and practices for all individuals.

ATTORNEYS ERICA REIB, JOE NEWBOLD, AND GRANT KILLORAN FEATURED IN WISCONSIN LAWYER

An article by Attorneys Grant Killoran, Joe Newbold, and Erica Reib entitled "The New Wave of Litigation: An Early Report on COVID-19 Claims" is featured as the cover story in the June edition of the State Bar of Wisconsin publication *Wisconsin Lawyer*. In their article they analyze the claims being filed relating to the ongoing COVID-19 pandemic in the United States.

Read the full article here.