EMPLOYMENT LAWSCENE ALERT: WISCONSIN AND CITY OF MILWAUKEE SAFER AT HOME ORDERS ISSUED – EFFECTIVE MARCH 25, 2020

The State of Wisconsin has issued a statewide Safer at Home Order, which will become effective at 8:00 a.m. on March 25, 2020, and will remain in effect until 8:00 a.m. on Friday, April 24, 2020, or until a superseding order is issued. The full text of the Order can be found here.

The Order requires all businesses in Wisconsin, except businesses the Order defines to be Essential Businesses and Operations, to cease all activities except Minimum Basic Operations. Essential Businesses and Operations means Healthcare and Public Health Operations, Human Services Operations, Essential Infrastructure, and 26 other categories of businesses. Healthcare Operations, which include hospitals, dental offices, eye care centers, personal care agencies, massage therapists, chiropractors, and veterinary care, among other entities, are exempt from the Order, so those businesses may remain open. Essential Infrastructure may also remain open, including, but not limited to, food production, distribution, and sale; certain types of construction; building management and maintenance; airport operations; operation and maintenance of utilities; and internet, video, and telecommunication systems.

Some of the other businesses and industries that qualify as Essential Businesses and Operations include stores that sell groceries and medicine; food and beverage production, transport, and agriculture; organizations that provide charitable and social services; gas stations and businesses needed for transportation; financial institutions and services; hardware and supplies stores; critical trades, including, but not limited to, plumbers, electricians, carpenters, cleaning and janitorial staff for commercial government properties, security staff, HVAC, and moving companies; bars and restaurants for consumption off-premises; supplies to work from home; supplies for Essential Businesses and Operations; transportation; home-based care and services; professional services such as legal, accounting, insurance, and real estate services; child care, subject to the March 18, 2020, DHS limitations; and manufacturing, distribution, and supply chain for critical products and industries.

Essential Businesses and Operations are encouraged to remain open, and to the greatest extent possible, should comply with social distancing requirements, including maintaining a six-foot distance from others, and use technology to avoid meeting in person, including virtual meetings, teleconference, and remote work.

All public and private K-12 schools must close, except for facilitating distance learning and

virtual learning. Public libraries are closed for all in-person services but may continue to provide online services and programming. Schools and public libraries may be used for Essential Government Functions and food distribution. Places of public amusement and activity, salons, and spas must also close.

Businesses that are not considered Essential Businesses and Operations must cease all activities, with the exception of Minimum Basic Operations and remote work. Minimum Basic Operations are the minimum necessary activities to maintain the value of the business's inventory, ensure security, process payroll and employee benefits, or for related functions and the minimum necessary activities to facilitate employees of the business being able to continue to work remotely. All businesses, even those that are considered non-essential, are permitted to continue allowing individuals to work from home.

Additionally, all individuals in Wisconsin are ordered to stay at home or at their place of residence, with certain exceptions. People may leave their homes for Essential Activities, Essential Government Functions, Essential Business and Operations, Minimum Basic Operations, Essential Travel, and Special Situations. Essential Activities include health and safety (e.g., obtaining medical supplies or medication, visiting a healthcare professional); obtaining necessary supplies and services (e.g., obtaining or delivering services and supplies such as food and household consumer products); outdoor activity that complies with social distancing (e.g., walking, biking, hiking, running); working at Essential Business Operations and performing Minimum Basic Operations; and caring for others. Essential Travel includes all travel related to the provision of or access to Essential Activities, Special Situations, Essential Governmental Functions, Essential Business and Operations, or Minimum Basic Operations; travel to care for elderly, minors, dependents, persons with disabilities, or other vulnerable persons; travel to or from educational institutions for purposes of receiving materials for distance learning, for receiving meals, or any other related services; travel to return to a place of residence from outside of Wisconsin; travel required by law enforcement or court order, including transportation of children pursuant to a custody agreement; and travel required for nonresidents to return to their place of residence outside of Wisconsin. All other public and private gatherings of any number of people occurring outside a single household or living unit are prohibited.

The statewide Order is enforceable by local law enforcement, including county sheriffs, and violation and obstruction of the Order is punishable by up to 30 days of imprisonment, or a fine of up to $250, or both.

The City of Milwaukee has issued a city-wide "Stay-at-Home" order, which will become effective at 12:01 a.m. on March 25, 2020, and which is substantially similar to the statewide Safer at Home Order. The Milwaukee Order can be found here.

O'Neil, Cannon, Hollman, DeJong and Laing is considered an Essential Business under both

the Wisconsin and City of Milwaukee orders and 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 coronavirus.

CITY OF MILWAUKEE'S STAY AT HOME ORDER EXEMPTS CONSTRUCTION

On Tuesday, March 24, 2020, the City of Milwaukee's Health Department issued a written Stay at Home Order, which goes into effect on Wednesday, March 25, 2020. In general, the Order requires City of Milwaukee residents to stay at home, and requires all businesses located within the City to "cease all activities at facilities located within the City except Minimum Basic Operations," as defined in the Order. The Order includes a list of exceptions for "Essential Businesses and Operations," which does not prevent employees from working at facilities that are deemed to qualify.

Under paragraph 13h of the City's Stay at Home Order, construction and construction-related activities are defined as "Essential Businesses and Operations," which have been exempted from the mandate of the Stay at Home Order. The Order lists "Building and Construction Tradesman and Tradeswomen" along with "plumbers, electricians . . . operating engineers, HVAC, [and] painting" as "Critical Trades" that are exempt from the Order. "Construction" is also listed in the definition of "Essential Infrastructure," exempt from the Order under paragraph 10.

Suppliers of materials and equipment for construction activities are also exempt from the Stay at Home Order. Under paragraph 13u, "manufacturing companies, distributors, and supply chain companies producing and supplying essential products and services in and for industries such as . . . Construction" are listed among exempt "Essential Businesses and Operations." Although the Order does not specifically mention architects, engineers or other design professionals, such professionals are arguably also exempt from the Stay at Home Order, as "other service providers who provide services that are necessary to . . . Essential Businesses and Operations" under paragraph 13h—the provision which exempts "critical trades," including construction.

At least for the time being, the construction industry in Milwaukee will remain open for business.

The full Order can be found here.

If you have questions contact Steve Slawinski at 414-276-5000 or steve.slawinski@wilaw.com.

TAX AND WEALTH ADVISOR ALERT: WISCONSIN FOLLOWS IRS, STATE TAX FILING DEADLINE EXTENDED TO JULY 15

Wisconsin law already provides that any extension granted by the IRS for filing income taxes also extends the time allowed for filing Wisconsin income taxes. Nevertheless, Governor Tony Evers and Department of Revenue Secretary Peter Barca announced on Saturday March 21, 2020 that Wisconsin law will automatically extend time and waive interest and penalties for taxpayers due to the President's declaration of a national emergency. A summary of what this means for Wisconsin taxpayers is below.

- Tax filers do not have to file any extension forms to be eligible for this new due date.
- There is no limit on the amount of payment to be postponed, and there are no income exclusions.
- This applies to individuals, trusts, estates, partnerships, associations, companies, and corporations.
- This relief is solely for income tax payments, estimated income tax payments, and returns due April 15, 2020.
- There will be no interest or penalty for the period of April 15, 2020 to July 15, 2020.
- Interest, penalties, and underpayment interest for failure to make quarterly estimated tax payments with respect to such postponed federal income tax filings and payments will begin to accrue on July 16, 2020.

We will continue to communicate updates as we receive them. If you are interested in learning more about the new tax filing guidance, please contact attorney Britany E. Morrison at O'Neil Cannon

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EMPLOYMENT LAWSCENE ALERT: WISCONSIN

TO PUT IN PLACE SAFER AT HOME ORDER

Today, March 23, 2020, Wisconsin Governor Tony Evers announced via Twitter that he is issuing a Safer at Home Order tomorrow, Tuesday, March 24, 2020. The Order will likely go into effect shortly thereafter. This Order will follow similar orders in states such as New York, California, and Illinois. The Order will cease all non-essential business statewide. This does not prevent businesses from continuing to have employees work from home. Additionally, essential businesses, such as healthcare, grocery stores, and pharmacies, will continue to remain open. It is currently believed that restaurants will be allowed to continue curbside takeout and manufacturers will be allowed to continue business operations. The Order is also likely to further limit personal interactions, as Gov. Evers's tweets this morning stated that it "means no sleepovers, no playdates, and no dinner parties with friends and neighbors." Employees who work at essential businesses and individuals who need to use the services of essential businesses will continue to be allowed to travel for such purposes. The goal of this order is to be proactive in stopping the spread of COVID-19.

We will provide additional information as soon as it becomes available from the Governor's office.

WISCONSIN'S MASS GATHERING BAN DOES NOT APPLY TO CONSTRUCTION SITES

On Friday, March 20, 2020, the Evers administration issued Emergency Order #8 Updated Mass Gathering Ban. This Order updated and clarified Emergency Order #5, which had been issued three days earlier. Emergency Order #5 imposed "a statewide moratorium on mass gatherings of 10 people or more to mitigate the spread of Covid-19." Under Emergency Order #5, there were numerous exemptions to the "moratorium on mass gatherings," but it was unclear whether or not the mass gathering ban applied to construction work, particularly if being performed outdoors. Emergency Order #5 did not specifically address construction sites. Among other things, Emergency Order #8 clarifies and elaborates on the various exemptions to the statewide ban on mass gatherings. Emergency Order #8 adds a specific exemption for "construction sites and projects, including public works and remodeling projects." It clarifies that the mass gathering ban does not apply to on site construction work. The construction exemption would appear to apply not only to work done outdoors or in open air conditions, but also to construction work performed indoors. Emergency Order #8 therefore makes clear that the statewide mass gathering ban does not require construction work to be shut down.

If you have questions contact Steve Slawinski at 414-276-5000 or steve.slawinski@wilaw.com.

TAX AND WEALTH ADVISOR ALERT: IRS MOVING TAX DAY TO JULY 15 FROM APRIL 15

U.S. Treasury Secretary Steven Mnuchin just announced that the IRS will be moving the tax filing date to July 15 from April 15. Mnuchin says people and businesses will have more time to file and make payments without interest or penalties. Mnuchin made the announcement on Twitter, saying the move came at the direction of President Donald Trump. Further federal guidance in addition to guidance from states is expected.

If you are interested in learning more about the new tax filing guidance, please contact attorney Britany E. Morrison at O'Neil Cannon

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TAX AND WEALTH ADVISOR ALERT: TAXPAYERS MUST FILE BY APRIL 15 BUT CAN DELAY PAYMENTS FOR 90 DAYS

The Treasury Department issued guidance March 18, 2020 saying that taxpayers can delay paying some federal income taxes for 90 days but still must submit their forms to the Internal Revenue Service — or officially request an extension — by April 15.

Individuals can delay payments of up to $1 million in taxes and corporations can get payments of up to $10 million deferred until July 15 without interest and penalties, according to a notice published Wednesday. The guidance also stated that this tax relief would apply to 2020 estimated income tax payments owed by certain taxpayers, such as those who are self-employed.

Taxpayers failing to file their federal returns or request an extension by April 15 could get hit with large penalties—but only if they owe tax. The penalty for failing to file a tax return is 5% of the unpaid tax that should be reported, charged monthly for up to five months. If a person files more than 60 days late, the minimum penalty is the lesser of $435 or 100% of the unpaid tax.

As for state conformity, some states have already issued guidance, while most states, including Wisconsin, have not. Therefore, payments will be due April 15 to the state of Wisconsin unless taxpayers officially request an extension.

If you are interested in learning more about the new tax filing guidance, please contact attorney Britany E. Morrison at O'Neil Cannon

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WHAT HAPPENS IF MY BUSINESS CAN'T PERFORM ITS CONTRACT DUE TO THE CORONAVIRUS?

Many businesses are experiencing interruptions in their operations due to the coronavirus outbreak. These interruptions can be caused by business closures, quarantines, and restrictions on travel and large gatherings. In response to these interruptions, businesses may find themselves unable to perform their contractual obligations or have a vendor or customer that is no longer fulfilling its contractual obligations. Either way, it is important to determine whether nonperformance is excusable given the global pandemic.

Businesses concerned about meeting their contractual obligations due to the coronavirus should review their contracts to determine their options. For instance, many contracts contain a *force majeure* or "Act of God" clause, which may excuse a party's nonperformance when extraordinary events outside of the party's control prevent a party from fulfilling its contractual obligations. Each situation is unique and such a clause may apply for some businesses and not for others. It is important to note that the occurrence of an extraordinary event alone does not excuse performance. Rather, a party seeking to invoke a *force majeure* clause must also show its mitigation efforts and that the event made performance truly impossible. Because the coronavirus pandemic is an uncontrollable and extraordinary event that may prevent a party from performing under a contact, the coronavirus could be considered a *force majeure* event.

A party seeking to excuse its nonperformance based on the coronavirus should review the relevant contract's *force majeure* clause. After all, whether an event qualifies as a *force majeure* event depends on the specific language included in the *force majeure* clause itself. Many contracts will specifically define what constitutes a *force majeure* event. If the parties have defined a *force majeure* event as any event outside the parties' control, then courts may be more inclined to find that the clause encompasses the coronavirus pandemic. Further, courts may apply a *force majeure* clause that specifically lists "acts of government,"

"pandemics," or "quarantines."

It is important to note that a drop in a customer base alone may not result in the application of a *force majeure* clause. For example, in 2018, one federal district court concluded an egg buyer was not relieved of its obligation to purchase eggs because of a drop in demand under Iowa law, but acknowledged a drop in supply due to an outbreak of avian flu might have constituted a *force majeure* event. *Rexing Quality Eggs v. Rembrandt Enterprises, Inc*., 360 F. Supp. 3d 817 (S.D. Ind. 2018).

To reach this conclusion, the court applied the Restatement on Contracts, which is used by Wisconsin courts. Specifically, the court looked to the following guiding principal:

> Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

Id. at 841 (quoting Restatement (Second) of Contracts § 261 (1979)). The court held that "a change in purchaser demand—even a substantial change—is a foreseeable part of doing business." *Id.*

Given the size and changing impact of the ongoing coronavirus outbreak, it is hard to predict how courts will apply this fact-specific analysis to the present situation. Ultimately, whether a viral outbreak like the coronavirus qualifies as a *force majeure* event will depend on how the contract is drafted and the particular facts of the situation. A party seeking to invoke a *force majeure* clause to excuse its nonperformance must be prepared to show its mitigation efforts. Therefore, documenting efforts to overcome the impacts of the coronavirus is key.

Contracts with *force majeure* clauses usually provide what remedies are available to the parties when the clause is invoked. Often, contracts allow for either party to terminate the agreement when one party seeks to invoke the *force majeure* clause. However, contracts may instead permit a party to delay performance until the *force majeure* event is resolved.

Common law remedies may also be available to parties whose contracts lack a *force majeure* clause. Specifically, parties seeking to excuse nonperformance may find relief under the doctrines of impossibility, impracticability, and frustration of purpose. However, whether and under what circumstances these doctrines apply depends on the applicable law in the relevant jurisdiction and the specific facts and circumstances causing the nonperformance.

Overall, businesses impacted by the coronavirus should review their contracts to assess what rights and remedies are available to them in the wake of the coronavirus outbreak. The attorneys at O'Neil Cannon have experience in contract disputes and would be happy to discuss your options with you.

STATE AND FEDERAL FUNDING OPPORTUNITIES FOR SMALL BUSINESSES AFFECTED BY THE CORONAVIRUS PANDEMIC

SBA to Provide Disaster Assistance Loans for Small Businesses Impacted by the Coronavirus

As part of the Trump administration's efforts to combat the coronavirus outbreak and minimize economic disruption to the nation's 30,000,000 small businesses, the U.S. Small Business Administration (SBA) is offering designated states and territories low-interest federal disaster loans for working capital to small businesses suffering substantial economic injury as a result of the coronavirus. Upon a request received from a state's or territory's governor, the SBA may issue, as provided by the Coronavirus Preparedness and Response Supplemental Appropriations Act that was recently signed by the President, an Economic Injury Disaster Loan declaration.

On March 17, 2020, the SBA issued revised criteria for states and territories seeking an Economic Injury Disaster Loan declaration related to the coronavirus. The relaxed criteria will have two immediate impacts:

- **Faster, Easier Qualification Process for States and Territories Seeking SBA Disaster Assistance.** Historically, the SBA has required that any state or territory affected by disaster provide documentation certifying that at least five small businesses have suffered substantial economic injury as a result of a disaster, with at least one business located in each declared county or parish. Under the just-released, revised criteria, states or territories are only required to certify that at least five small businesses within the state or territory have suffered substantial economic injury, regardless of where those businesses are located.
- **Expanded, Statewide Access to SBA Disaster Assistance Loans for Small Businesses.** SBA disaster assistance loans are typically available only to small businesses within counties identified as disaster areas by a governor. Under the revised criteria issued today, disaster assistance loans will be available statewide after an economic injury declaration. This will apply to current and future disaster assistance declarations related to the coronavirus.

Any Economic Injury Disaster Loan declaration issued by the SBA makes loans available **statewide** to small businesses and private, non-profit organizations to help alleviate

economic injury caused by the coronavirus. Once a declaration is made, the information on the application process for Economic Injury Disaster Loans will be made available to affected small businesses within the state. These loans must be used to pay fixed debts, payroll, accounts payable and other bills that can't otherwise be paid because of the disaster's impact. The interest rate is 3.75% for small businesses without credit available elsewhere; businesses with credit available elsewhere are not eligible. The interest rate for non-profit organizations is 2.75%. The SBA offers loans with long-term repayment periods in order to keep payments affordable, up to a maximum term of 30 years. Terms are determined on a case-by-case basis, based upon each borrower's ability to repay.

Governor Evers Seeks an Economic Injury Disaster Loan Declaration from the SBA for Small Businesses Affected by the Coronavirus

On March 18, 2020, Governor Evers submitted a request to the SBA to declare the coronavirus a disaster for the State of Wisconsin. If the SBA declares Wisconsin a disaster area, the SBA will allow Wisconsin small businesses across the state to apply for SBA Economic Injury Disaster Loans, which would offer up to $2,000,000 in assistance for each affected small business. Governor Evers's request to the SBA can be found here.

As of the date of this article, the SBA has declared the following disaster areas: Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Idaho, Maine, Maryland, Massachusetts, Montana, Nevada, New Hampshire, New Mexico, New York, North Dakota, Oregon, Rhode Island, Texas, Utah, Virginia, Washington, and Wyoming. The list continues to grow and the areas eligible for SBA Economic Injury Disaster Loans are continuously updated here.

If Wisconsin is declared a coronavirus disaster area or if your small business is located in one of the declared disaster areas, you can apply for an Economic Injury Disaster Loan through the SBA here.

Wisconsin's Small Business 20/20 Program

On March 17, 2020, the Wisconsin Economic Development Corporation arranged for the deployment of $5,000,000 in emergency funds to create the Small Business 20/20 Program in order to help mitigate the impact of the coronavirus pandemic on small businesses in Wisconsin. The purpose of the program is to ease the' short-term cash flow challenges of these small businesses, and to protect jobs and public health in Wisconsin. The Small Business 20/20 Program provides funds to eligible Wisconsin-based Community Development Financial Institutions (CDFIs) that can make grants available to existing loan clients in order to mitigate the effects of the coronavirus pandemic. Eligible applicants for the Small Business 20/20 Program funds are Wisconsin CDFIs that have a minimum organizational loan portfolio of at least $4,000,000, or a collaborative of CDFIs with a combined organizational loan

portfolio of at least $4,000,000. A list of Wisconsin's 24 CDFIs can be found here.

Approved CDFIs and collaboratives will make program grants available to for-profit businesses that are loan recipients in good standing as of March 1, 2020 with the approved CDFI or its collaborating CDFIs. These businesses must have 20 or fewer full-time or part-time employees and greater than $0 but less than $2,000,000 in annual revenues. Preference for these program grants will be given to service and retail businesses.

Businesses may be granted two months of payroll and rent expenses, up to a maximum of $20,000. These funds must be used for rent and payroll expenses, including covering paid leave (e.g., sick, family, and other leave related to the coronavirus) during the duration of the funding period.

If you have questions relating to the SBA's Economic Injury Disaster Loans or the Wisconsin Small Business 20/20 Program, please contact O'Neil Cannon

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EMPLOYMENT LAWSCENE ALERT: IRS SAYS REDUCED-COST OR FREE COVID-19 TESTING OR TREATMENT WON'T PREVENT INDIVIDUALS FROM MAKING OR RECEIVING HSA CONTRIBUTIONS

In recent guidance, the IRS noted the "unprecedented public health emergency posed by COVID-19" (the disease that results from the 2019 Novel Coronavirus), and the need to remove potential administrative and financial barriers to COVID-19 testing and treatment under the health savings account (HSA) rules.

Issued on March 11, 2020, IRS Notice 2020-15 responds to employer uncertainty as to whether a health plan providing for reduced-cost COVID-19 testing—for individuals who have not yet met their annual deductibles—remains an HSA-compatible high-deductible health plan (HDHP).

That uncertainty arose from the recent wave of insurer and state announcements of the waiver of out-of-pocket costs for COVID-19 testing (and, in some cases, for treatment). Cost-sharing waivers apply, as of this writing, in at least 32 states, including for most, but not all, insurers in Wisconsin. Insurers have agreed to waive cost sharing due, variously, to voluntary agreements by major insurers, state mandates, or state-insurer agreements.

No-cost COVID-19 testing will be required by all private health plans now that President Trump has signed the Families First Coronavirus Response Act.

HSA-Compatible Coverage, Generally

As we described in a prior post, an HSA is a tax-favored account established to receive contributions from an employee, an employer, or both.

To be eligible to make (or receive) HSA contributions, an individual must be covered only under the HDHP and my not have any other coverage (including reduced-cost services), unless such other coverage is expressly permitted by the IRS.

Certain "preventive care" services are specifically permitted and are not considered to constitute "other" health coverage that would disqualify an individual from HSA eligibility. In July of 2019, the IRS expanded the list of "preventive care" to include fourteen additional items and services intended to prevent the worsening of certain chronic medical conditions.

HSA-Compatible Coverage Now Includes Coronavirus-related Services

The result of the newly-issued IRS Notice 2020-15 is that an individual who is covered by an HDHP will not lose eligibility to make (or receive) tax-favored HSA contributions merely because the HDHP permits pre-deductible COVID-19 testing and treatment with reduced (or no) employee cost-sharing. HSA-eligible individuals may continue to contribute to an HSA regardless of whether the HDHP offers, or the individual receives, a reduced-cost or no-cost COVID-19 test or treatment.

Be Aware That:

- As in the past, any vaccination costs continue to count as preventive care and can paid for by the plan at any time during the year, without regard to whether the deductible has been met.
- As recently confirmed by the Centers for Medicare and Medicaid, the costs of certain COVID-19 treatments and services, including testing, isolation, quarantine, and vaccination, are generally covered as essential healthcare benefits under Affordable Care Act rules for individual and small group health plans.
- Self-funded group health plans are not required to waive COVID-19 cost-sharing under the state mandates or insurer agreements (but are impacted under the federal Families First Coronavirus Response Act).

The text of the IRS Notice is available here.

The attorneys of the Labor and Employment Group of O'Neil, Cannon, Hollman, DeJong and Laing are actively monitoring COVID-19 developments and are available to assist employers with related employment law and employee benefit plan compliance matters.