TAX AND WEALTH ADVISOR ALERT: NOT FEELING SO SECURE PART II: HOW THE NEW SECURE ACT MAY AFFECT YOUR RETIREMENT AND YOUR TAX SITUATION

The "Setting Every Community Up for Retirement Enhancement" Act (the SECURE Act), signed into law by President Trump on December 20, 2019, pointedly changes many requirements for employer-provided retirement plans, IRAs, and other tax-favored savings accounts. While some of the provisions of the SECURE Act may provide taxpayers with great tax savings opportunities, not all of the changes are helpful, and there may be steps taxpayers can take to minimize its impact. Below is a summary of the key provisions of the SECURE Act that taxpayers should be aware of now, especially since many of the provisions go into effect in 2020.

Repeal of the maximum age for traditional IRA contributions

Before 2020, individuals were prohibited from making traditional IRA contributions upon reaching the age of 70 ½. However, starting in 2020, the SECURE Act allows an individual of any age to make contributions to a traditional IRA if the individual has compensation, such as earned income from wages or self-employment.

This SECURE Act provision eliminates the age limitation, which previously prevented taxpayers older than 72 ½ from contributing to their IRAs. This will allow individuals working into their later years to increase, or catch up with, their retirement savings goals.

Required minimum distribution age raised from 70½ to 72

Pre-2020 retirement plan participants and IRA owners were typically forced to begin taking required minimum distributions, or "RMDs," from their plan when they reached age 70½. The age 70½ requirement was first established in the early 1960s and, until the SECURE Act, had not been adjusted to account for increases in life expectancy.

Under the SECURE Act, the age at which individuals must begin taking distributions from their retirement plan or IRA is increased from 70½ to 72. Notably, RMDs for individuals who turned 70½ in 2019 are not delayed, and instead, such individuals must continue to take their RMDs under the same rules prior to passage of the SECURE Act.

Increasing the age at which distributions are required allows additional time for the IRA to grow untouched. With many taxpayers remaining in the workforce longer, this provision might prove especially beneficial.

Partial elimination of stretch IRAs

If plan participants or IRA owners died before 2020, beneficiaries (both spousal and nonspousal) were generally allowed to draw from the account and pay taxes on their withdrawals over the beneficiary's life or life expectancy (in the IRA context, this is sometimes referred to as a 'stretch IRA').

However, under the SECURE Act, if a plan participant or IRA owner dies in 2020 or after, distributions to most ***nonspouse beneficiaries*** are generally required to be distributed within 10 years after the plan participant's or IRA owner's death. So, for those beneficiaries, the "stretching" strategy is no longer allowed.

Exceptions to the 10-year rule are allowed for distributions to beneficiaries who are (1) the surviving spouse of the plan participant or IRA owner; (2) a child of the plan participant or IRA owner who has not reached the age of majority; (3) a chronically ill individual; or (4) any other individual who is not more than 10 years younger than the plan participant or IRA owner. Beneficiaries who qualify under this exception may generally still take their distributions over their life expectancy (as allowed under the rules in effect for deaths occurring before 2020).

Overall, this change will cause much larger distributions during peak earning years, which will have a significant impact on the tax obligation of nonspouse beneficiaries. Many retirement and estate plans were created to benefit from the pre-SECURE Act "stretch" tax deferral, so the SECURE Act's elimination of the "stretch IRA" might change how you plan to pass on accumulated accounts, or could influence how you need to handle accounts that are passed down to you. For more discussion on this potential tax impact, see Tax and Wealth Advisor Alert: Not Feeling so SECURE: Proposed Law Could be Costly for Non-Spouse IRA Beneficiaries.

If you are interested in learning more about the SECURE Act and how it might affect your retirement and estate planning goals, please contact attorney Britany E. Morrison at O'Neil Cannon to discuss how we are able to assist you.

O'NEIL, CANNON, HOLLMAN, DEJONG AND LAING ELECTS CHRISTA WITTENBERG AS SHAREHOLDER

O'Neil, Cannon, Hollman, DeJong and Laing is pleased to announce that Attorney Christa

Wittenberg was recently elected as a shareholder of the firm.

Christa has been with the firm since 2014 as a member of the Litigation Practice Group. She assists businesses and individuals with prosecuting and defending a variety of civil litigation matters. Her practice includes complex contract disputes, trademark and copyright claims, shareholder disputes, inheritance disputes, class actions, personal injury cases, and fraud and conspiracy claims. Before joining the firm, she was a federal district court law clerk.

Christa will be a tremendous addition to the shareholder group, and we are proud to have her on our team.

THE WILAW QUARTERLY NEWSLETTER

Newsletter Article Highlights:

- Attorneys Christa D. Wittenberg and Grant C. Killoran Featured in Wisconsin Lawyer
- The Potential Impact of Post-Valuation Date Events on Gift Tax Valuations
- New Year – New Labor and Employment Law Developments Every Employer Should Know

Firm News:

- Attorneys JB Koenings and Erica N. Reib Elected as Shareholders
- Congratulations to Our Attorneys Listed in the 2019 Edition of Super Lawyers

Click the image below to read more.

NO-CONTEST CLAUSES

When Denver Broncos owner Pat Bowlen died in June 2019, he left behind a professional football franchise valued at more than $2.5 billion. The validity of his trust, wherein he named one of his seven children as chief executive after he passed, is being fought over in court by his children.

After Bowlen's death, his two oldest daughters, Amie Bowlen Klemmer and Beth Bowlen Wallace, filed a lawsuit challenging the validity of the trust. They argue that Bowlen was subject to undue influence when he executed the trust in 2009 and that he lacked the requisite mental capacity to create the trust. Bowlen lived with Alzheimer's Disease for several years before his death, and the trustees of his trust have run the NFL team since 2014 when Bowlen stepped down for health reasons.

Amie's and Beth's challenge is not without risk because of what is known as a "no-contest clause" contained within the terms of the trust document. The "no-contest clause" could cause them to receive nothing from their father's trust.

Simply put, a "no-contest clause" – also known as an "*in terrorem* clause" – in a will or trust seeks to punish a beneficiary who challenges the decedent's estate plan. Generally, the "punishment" for the beneficiary who challenges the will or trust is disinheritance. The threat of losing out on all or part of an inheritance is often enough to keep a beneficiary from challenging a will or trust with a "no-contest clause" in it.

Laws concerning "no-contest clauses" vary by state. Wisconsin has a statute that addresses the use of "no-contest clauses," explicitly permitting them but limiting their enforcement "if the court determines that the interested person had probable cause of instituting the proceedings." That is, in Wisconsin, the court may decide not to enforce the provision if the court finds that the contestant had sufficient facts to justify why he or she made the contest, even if the contestant's challenge was ultimately unsuccessful. Of course, this means that a court could enforce a "no-contest clause" if the court finds that the challenger had no "probable cause" for bringing the challenge in the first place if the court upholds the will or trust as valid. Accordingly, under Wisconsin law, there is considerable risk involved in bringing a challenge to an estate planning document with a "no-contest clause" in it.

Bowlen's case is in Colorado, which explicitly allows "no-contest clauses" in wills but has no corresponding provision in statutes concerning trusts. Case law on the issue is also sparse, so in this situation, if Amie and Beth are found to be in violation of the "no-contest clause" and the trust is held to be valid, it is quite possible that they would forfeit their shares of the trust. On the other hand, if a court finds they had probable cause to challenge the trust, it's also possible that a court would decline to enforce the “no-contest clause.”

EMPLOYMENT LAWSCENE ALERT: REVIEW YOUR COMPANY’S “TOP-HAT FILING” STATUS NOW TO AVOID INCREASED FORM 5500 PENALTIES

Companies that have entered into arrangements (1) to pay deferred compensation to key employees (including owners), or (2) to provide employee benefits specifically for apprentices or trainees should immediately determine whether a “top-hat filing” is required, and, if so, whether it has been properly filed with the Department of Labor. Two very recent legal developments—increased penalties and a new filing search tool—indicate that enforcement activity on top-hat filing compliance is increasing. Penalties for not filing can be extremely costly, and the penalties have been increased, effective January 15, 2020. Fortunately, a low-cost correction option is available for corrections made prior to a DOL assessment of penalties.

Top-Hat Overview

A top-hat filing is a short informational submission to the DOL that describes the company’s contact information and the nature of the sponsored plan. It is legally required to be submitted with respect to any compensation arrangement for key management and owner employees (or employee benefit plans provided only to apprentices or trainees) that constitutes a top-hat plan. So named in apparent reference to gentility as evoked by Lincoln-era fashion standards, a top-hat plan is an agreement or plan maintained by an employer primarily for the purpose of providing deferred compensation to a select group of key employees, apprentices, or trainees.

The term “select group of management or highly compensated employees” is not clearly defined, but must, instead, be determined in the context of the particular facts and circumstances that apply to the employer. Neither the IRS definition of “highly-compensated employee” or of “key employee” applies in determining whether a compensation arrangement is a top-hat plan. Instead, relevant factors include the duties and responsibilities of the employee and the level of the employee’s compensation as compared to the compensation of the employer’s work force, in general.

Top-Hat Filing – Required within 120 Days of Plan Effective Date

In general, all employer-provided benefits are subject to ERISA’s requirements, unless an exception applies. In the case of top-hat payment arrangements, DOL guidance has expressed that "certain individuals, by virtue of their position or compensation level, have the ability to affect or substantially influence, through negotiation or otherwise, the design and operation of their deferred compensation plan, taking into consideration any risks attendant thereto, and therefore would not need [all of] the substantive rights and protections of" ERISA. The DOL also permits this lower-protection status for arrangements that provide employee benefits (including health benefits) only to apprentices or trainees, or both.

In light of the reduced need for ERISA protections for these plans, the DOL authorizes an exemption from the otherwise-applicable ERISA mandates regarding participation, vesting, funding, and fiduciary rules. Importantly, an additional exemption from ERISA's reporting and disclosure rules is also available, but *only if* a "top-hat filing" is submitted to the DOL within 120 days of the initial effective date of such plan.

Because ERISA's reporting and disclosure rules include the requirement to file an annual Form 5500 to the DOL, this annual Form 5500 filing requirement continues to apply to a top-hat plan unless a top-hat filing has been timely submitted. Alternately, an initial failure to submit a top-hat filing can generally be corrected, retroactively, for a relatively small compliance fee.

Form 5500 Penalties at an All-Time High

An employer that fails to timely file a Form 5500 may be subject to a DOL penalty of $2,233 per day (as adjusted annually for inflation). This new penalty amount of $2,233 per day is effective January 15, 2020. (For the prior year, the penalty amount had been $2,194 per day). This is not a typographical error. The law applies these penalty amounts *per day* for each day past the required filing date(s). The penalties are cumulative and become exponentially large for failures stretching over multiple years. While an aggregate penalty assessment could likely be negotiated downward by experienced ERISA legal counsel, an assessed DOL penalty for a late Form 5500 is guaranteed to be large.

The IRS imposes separate penalties for the failure to timely file a Form 5500, unless a showing of reasonable cause is made. Until recently, the IRS penalty was $25 for each day of the failure up to a maximum penalty of $15,000 per year. Under the Setting Every Community Up for Retirement Enhancement (SECURE Act) enacted on December 20, 2019, however, the IRS penalties for a late Form 5500 have increased tenfold to $250 per day, up to an annual maximum of $150,000. These increased IRS penalties apply for any Form 5500 due to be filed on and after January 1, 2020.

New DOL Top-Hat Filing Search Tool

Earlier this week, the DOL published a new online search tool to enable the public to search for top-hat filings. The search tool is available here. Results can be printed or downloaded to Excel.

Prior to the DOL making the search tool available, generally only benefits professionals and practitioners ever searched for top-hat filings, and then only via a website maintained by a private company that regularly obtained the information from the DOL through Freedom of Information Act Requests.

The issuance of the public DOL search tool is a positive development that will assist employers in confirming their top-hat filing compliance status. Of course, this increased access likely also signals increased DOL interest in enforcing late Form 5500 penalties for those employers that have not timely filed a top-hat statement. In light of the ease of searching, it will now be harder for employers to reasonably contend that they were unaware that a top-hat filing had not been submitted. Similarly, it is conceivable that plaintiffs' attorneys or disgruntled employees could use the tool themselves to determine whether a company is likely out of compliance with the top-hat filing, and therefore, the Form 5500 filing, rules. If this knowledge were used to inform the DOL, which, in turn, could trigger a penalty assessment, the penalty amounts could be devastating.

Correction Option

If you determine or suspect that your company has inadvertently failed to submit a top-hat filing for a covered top-hat plan, take steps right away to amend this oversight by submitting a delinquent filer voluntary compliance application. If you catch the error before the DOL has assessed a penalty, then you can retroactively correct the issue for a fee of only $750 for a single year (or a maximum of $1,500 for multiple years). The IRS generally accepts this same correction method as sufficient to avoid the separate IRS Form 5500 penalties, as well. Indeed, this DOL correction method often works to abate the IRS penalties after these have already been assessed.

Conclusion

It is common for companies that implement deferred compensation arrangements to consider the tax implications of such arrangement, including, for example, the application of Internal Revenue Code Section 409A. Equally important, however, is consideration of the other federal law that may govern such arrangements—ERISA. It is simply not true that all compensation agreements for key employees are exempt from ERISA's requirements. Failure to anticipate this reality—and to submit a top-hat filing when required—exposes the employer to significant Form 5500 penalties.

To avoid these penalties, check on your company's top-hat filing compliance now. The attorneys of the OCDHL Employment Law Team can assist you with assessing whether your company's key employee compensation agreements constitute top-hat plans within the meaning of ERISA, or whether an exemption may apply. If you maintain a top-hat plan for which no top-hat filing was ever submitted, we can assist in correcting the inadvertently missed prior filings, thereby potentially eliminating the existing exposure to thousands of dollars.

ATTORNEYS GRANT KILLORAN, CHRISTA WITTENBERG, AND CHRIS KEELER SPEAK AT STATE BAR OF WISCONSIN'S ANNUAL CONSTITUTIONAL LAW SYMPOSIUM

Grant Killoran, Christa Wittenberg, and Chris Keeler of O'Neil, Cannon, Hollman, DeJong and Laing's Litigation Practice Group recently presented at the State Bar of Wisconsin/Pinnacle's "Annual Constitutional Law Symposium 2019" in Pewaukee, Wisconsin.

Attorney Killoran was the Chair of the symposium and presented on Third Amendment issues. Attorney Wittenberg moderated and presented as part of a panel discussion on due process issues related to public health actions to prevent the spread of contagious diseases. Attorney Keeler co-presented on constitutional issues relating to the incarceration of juveniles.

Attorneys Killoran, Wittenberg, and Keeler were joined at the symposium by speakers from around Wisconsin and the country to discuss various constitutional topics and issues.

Attorney Killoran is a shareholder with the law firm and is the Chair of its Litigation Practice Group. He has significant and diverse trial experience representing clients in Wisconsin State and Federal Courts, and courts around the country, focusing on complex business, health care and employment law disputes.

Attorney Wittenberg is a member of the Litigation Practice Group. She assists businesses and individuals with prosecuting and defending a variety of civil litigation matters, including complex contract disputes, trademark and copyright claims, inheritance disputes, class actions, personal injury cases, and fraud and conspiracy claims. As a former federal district court law clerk, Attorney Wittenberg is intimately familiar with litigation and procedures in federal court. She has also litigated matters in state court, as well as resolved cases through mediation prior to litigation.

Attorney Keeler is a member of the Litigation Practice Group. He concentrates his practice on general business law and complex business litigation by assisting clients with a variety of business and development needs. Additionally, Attorney Keeler devotes a portion of his practice to immigration law, with an emphasis on employment visas and humanitarian matters.

ATTORNEY JOSEPH GUMINA FEATURED IN MERIT SHOP CONTRACTOR

Recently, the *Merit Shop Contractor* magazine featured Attorney Joseph Gumina's safety article on construction contractor compliance with OSHA's fall protection standard (29 C.F.R. § 1926.501). In his article, Attorney Gumina discusses the general requirements of OSHA's construction industry fall protection standard. Despite the simple requirements of the standard, OSHA's fall protection standard continues to be the most frequently cited OSHA standard in the construction industry. Attorney Gumina discusses methods to eliminate, prevent, and control fall hazards on the worksite with a special emphasis on fall protection training so that employees can avoid fall hazards and contractors can achieve effective safety compliance.

Read the full article here.

EMPLOYMENT LAWSCENE ALERT: NEW YEAR – NEW LABOR AND EMPLOYMENT LAW DEVELOPMENTS EVERY EMPLOYER SHOULD KNOW

In 2019, several federal agencies, including the U.S. Department of Labor, Equal Employment Opportunity Commission, and the National Labor Relations Board have either issued new regulations, new guidelines, or employer-friendly decisions that every employer should be aware of as we begin our journey into this 2020 election year. Most of the changes coming at the federal level are the result of the Trump administration's agenda to level the playing field for employers by tilting back for employers the shift that occurred in the legal landscape during the Obama administration. Here are the latest labor and employment law developments every employer should know as we venture into 2020.

U.S. Department of Labor (DOL)

New Overtime Regulations Go into Effect January 1, 2020

Effective January 1, 2020, the salary threshold necessary to exempt executive, administrative and professional employees from the Fair Labor Standard Act's minimum wage and overtime pay requirements increases from $23,660 (or $455 per week) to $35,568 (or $684 per week). The DOL's new rule is the product of the Trump administration's efforts to reset the Obama administration's 2016 final rule that established the salary threshold at $47,476 per year or $913 per week. Now is the perfect time for employers to audit their payroll data to make sure that every employee who is being treated as an exempt executive, administrative or professional employee is being paid at least the salary threshold amount of $35,568 (or $684 per week). Employees who do not meet this new minimum salary threshold should be treated as non-exempt and employers should begin to pay these newly minted non-exempt employees overtime compensation (1.5 times their regular rate) if they work over 40 hours in a workweek.

DOL Issues Final Rule Clarifying the Regular Rate of Pay

In December, the DOL announced a final rule clarifying for employers what "perks" and benefits must be included in the regular rate of pay when calculating overtime compensation. The "regular rate" is the hourly rate that is paid to employees and must not only include an employee's hourly wage rate, but it must also include in its calculation other forms of compensation received in a workweek, including bonuses, commissions, and other forms of compensation, subject to eight specified exclusions. Perplexing to employers, and exposing employers to additional risk for overtime liability, was the uncertainty as to whether certain kinds of "perks," benefits, or other miscellaneous payments must be included in the regular rate. The DOL attempted to eliminate this uncertainty in its final rule by confirming what employers may offer to employees through the following non-exhaustive list of "perks" and benefits without the risk of additional overtime liability:

- The cost of providing certain parking benefits, wellness programs, onsite specialist treatment, gym access and fitness classes, employee discounts on retail goods and services, certain tuition benefits (whether paid to an employee, an education provider, or a student-loan program), and adoption assistance;
- Payments for unused paid leave, including paid sick leave or paid time off;EEOC, EE
- Payments of certain penalties required under state and local scheduling laws;
- Reimbursed expenses including cellphone plans, credentialing exam fees, organization membership dues, and travel, even if not incurred solely for the employer's benefit; the DOL also clarified that reimbursements that do not exceed the maximum travel reimbursement under the Federal Travel Regulation System or the optional IRS substantiation amounts for travel expenses are per se "reasonable payments";

- Certain sign-on bonuses and certain longevity bonuses;
- The cost of office coffee and snacks to employees as gifts;
- Discretionary bonuses, by clarifying that the label given a bonus does not determine whether it is discretionary and providing additional examples; and
- Contributions to benefit plans for accident, unemployment, legal services, or other events that could cause future financial hardship or expense.

The DOL's final rule becomes effective on January 15, 2020.

National Labor Relations Board (NLRB)

Employers Can Cut-Off Union Dues Upon CBA Expiration

In a 3-1 ruling, the NLRB overturned an Obama-era decision (*Lincoln Lutheran of Racine*, 362 NLRB 1655 (2015)) requiring employers to continue to honor the dues checkoff provision in an expired labor contract. In *Lincoln Lutheran of Racine*, the NLRB held that an employer's statutory obligation to check off union dues continues to be enforceable under Section 8(a)(5) of the National Labor Relation Act after expiration of a collective bargaining agreement that establishes the checkoff arrangement. The Obama-era Board reasoned that the "dues checkoff" provision could not just dissipate once a contract expired, but instead could be ignored only if all parties to the contract agreed. On December 16, 2019, the NLRB reversed course in *Valley Hospital Medical Center*, 368 NLRB No. 39 (2019), holding that while dues checkoff provisions are mandatory subjects of bargaining, they also fall into a special "limited category" of unique union rights that are contractual in nature and do not necessarily relate to wages, pensions, welfare benefits, and other terms and conditions of employment. Given its special category, a dues-checkoff provision remains enforceable only during the term of the agreement in which those contractual obligations were created by the parties. Consequently, the Board held that there is no independent statutory obligation to check off and remit dues after expiration of a collective-bargaining agreement containing a checkoff provision, just as no such statutory obligation exists before parties enter into such an agreement. The Board's ruling brings more balance to the bargaining table and provides the employer some leverage when contract negotiations may extend beyond the expiration of the labor agreement. It also incentivizes the union to reach an agreement before expiration of the labor agreement to avoid loss of union dues. Of course, the right to cut-off union dues under the Board's *Valley Hospital* decision does not exist when the employer and the union agree to extend the labor agreement during the pendency of negotiations.

NLRB Provides Employers, Once Again, the Power to Control Company-Owned Email

On December 17, 2019, in *Caesars Entertainment* (368 NLRB No. 143) the NLRB overturned its 2014 controversial *Purple Communications* decision (361 NLRB No. 126) which had held that employees have the right to use their employers' email systems for non-business purposes, including communicating about union organizing. The NLRB's *Purple Communications'* decision overturned its 2007 *Register Guard* decision (351 NLRB No. 70) where the Board recognized the long-standing precedent that the NLRA generally does not restrict an employer's right to control the use of its equipment, which applies to company-owned email systems, and held that while union-related communications cannot be banned because they are union-related, facially neutral policies regarding the permissible use of employers' email systems are not rendered unlawful simply because they have the "incidental" effect of limiting the use of those systems for union-related communications. The *Purple Communications* decision upset this precedent and held, for the first time in the history of the Board, that employees do have the right to use company-owned equipment for non-work purposes. The Board's decision in *Caesars Entertainment* basically restored the standard set forth in the *Register Guard* decision before the *Purple Communications* decision stripped employers of an important property right with the only exception being those rare cases where an employer's email system provides the only reasonable means for employees to communicate with one another. Now, under the *Caesars Entertainment* decision, employers may prohibit employees from using company-owned email systems for non-work-related purposes, including communications concerning union organizing activities. Employers, however, are permitted to implement such a prohibition only if the employer's rules or policies are not applied discriminatorily by singling out union-related activities or communications.

NLRB Restores Employers' Right to Impose Confidentiality in Workplace Investigations

On December 16,2019, in a 3-1 decision, the NLRB overruled a 2015 NLRB precedent (*Banner Estrella Medical Center*, 362 NLRB 1108) that required a case-by-case determination of whether an employer may lawfully require confidentiality in specific workplace investigations. The Board had ruled that employees have a Section 7 right to discuss discipline and ongoing investigations involving themselves and other co-workers. In *Apogee Retail*, 368 NLRB No. 144 (2019), however, the NLRB returned to its previous standard, and now allows employers to implement blanket nondisclosure rules requiring confidentiality in all workplace investigations. The NLRB's ruling aligns itself with the EEOC's position against the backdrop of the #MeToo movement where confidentiality rules imposed during a workplace sexual harassment investigation encourage victims and witnesses to come forward. The standard set forth by the Board in *Apogee Retail* only applies to open and-on-going investigations and only to those employees directly involved in the investigation. Obviously, on the other hand, any confidentiality order or rule imposed by the employer cannot be imposed on employees not involved in the investigation or to an investigation that has concluded. The Board's decision in *Apogee Retail* provides employers an important tool to maintain the integrity of its internal investigations without fear that imposing the safeguards of confidentiality requirements during the pendency of an investigation violates Section 7 rights.

Equal Employment Opportunity Commission (EEOC)

EEOC Rescinds Policy Against Binding Arbitration

The EEOC voted 2-1 to rescind its 1997 *Policy Statement on Mandatory Binding* Arbitration where the EEOC had stated its position that mandatory arbitration agreements that keep workers' discrimination claims out of court clash with the civil rights laws the agency enforces.

The EEOC based its decision to rescind its policy regarding binding arbitration based on the fact that its policy statement did not reflect current law, especially given the Supreme Court's numerous and consistent decisions since 1997 that favor agreements to arbitrate employment-related disputes as being enforceable under the Federal Arbitration Act (FAA). The EEOC found that its 1997 policy conflicted with the arbitration-related decisions of the Supreme Court where the Court rejected the EEOC's previously enunciated concerns with using the arbitral forum – both within and outside the context of employment discrimination claims. It should be noted by employers, however, that the EEOC's decision to rescind its 1997 policy statement on mandatory arbitration should not be construed to mean that employees cannot file charges of discrimination with the agency if they signed an agreement to arbitrate or that the EEOC is prohibited from investigating such charges. Moreover, the EEOC makes clear that its rescission of its 1997 policy should not be interpreted as limiting the EEOC's ability, or that of the employee, to challenge the enforceability of any agreement to arbitrate. This change in the EEOC's policy position regarding mandatory arbitration of employment disputes is not surprising given the long-line of Supreme Court decisions favoring arbitration in employment disputes. Given the positive change in the EEOC's position on mandatory arbitration agreements in employment, along with strong precedent-setting federal court decisions favoring arbitration, employers should consider revisiting whether they should be utilizing agreements with their employees for mandatory arbitration of employment disputes.

TAX AND WEALTH ADVISOR ALERT: THE POTENTIAL IMPACT OF POST-VALUATION DATE EVENTS ON GIFT TAX VALUATIONS

When a gift is made, the fair market value of the gift must be determined for federal gift tax purposes. The fair market value of a gift is important to determine whether the donor's gift exceeds the annual gift tax exclusion amount ($15,000 per person per year in both 2019 and

2020), and if so, how much of the donor's estate tax exemption is being used. The gift tax regulations define "fair market value" as the price that a hypothetical willing buyer would pay a hypothetical willing seller, neither being under any compulsion to buy or sell, and both having reasonable knowledge of relevant facts.

Generally, gifts are valued "as of" the date they are given. In certain circumstances, however, an event that happens after the date of the gift must be taken into consideration. The IRS has recently reiterated this position in IRS Memorandum 201939002 (September 27, 2019). In this case, the donor gifted shares of a publicly-traded corporation, of which he was a co-founder and Chairman of the Board, to an irrevocable trust. The very next day, the corporation announced a merger. The value of the donor's gifted shares increased substantially following the merger announcement.

Even though the merger was announced a day after the gift was made, the IRS determined that the pending merger must be factored into the valuation of the stock. The IRS pointed out that the merger had been negotiated for some time before the announcement and was practically certain to go through.

The IRS reasoned that information that a reasonable buyer or seller would uncover during negotiations would constitute "reasonable knowledge," and would consequently impact the fair market value of the shares. A hypothetical willing buyer is presumed to be "reasonably informed" and "prudent," which means they are assumed to have asked the hypothetical willing seller for information that is not publicly available. Therefore, a hypothetical willing buyer and willing seller, on the date of the gift, would be reasonably informed during negotiations over the purchase and sale of shares and would have knowledge of all relevant facts, including a pending merger.

It is important to remember that post-valuation date events may impact the fair market value of the gifted property for gift tax purposes. A post-valuation date event may be considered if the event was reasonably foreseeable as of the valuation date. Even an unforeseeable post-valuation date event may be probative of the earlier valuation if it is relevant to establishing the amount that a hypothetical willing buyer would have paid a hypothetical willing seller for the subject property as of the valuation date.

If you have any questions on how to value a gift, please contact O'Neil Cannon at 414-276-5000.

EMPLOYMENT LAWSCENE ALERT: HAPPY HOLIDAYS! HERE'S A LAWSUIT!

The holiday celebration season is in full swing and everyone is ready to celebrate! And while that hopefully means reflecting on successes of the past year and bonding with coworkers, employers need to be aware of their exposure to potential liability arising from holiday celebrations and what they need to do to reduce or avoid such potential liability. While not to drive the joy out of the holidays, here are some common concerns employers should be aware of during the holiday season and tips on how to reduce employers' risk:

1. **Is That Mistletoe?:** Prevent Sexual Harassment. In light of the continued focus on the #MeToo movement, employers should stay focused on preventing sexual harassment during the holiday season, which includes any holiday party where coworkers congregate or socialize together. Ensure that your employees are aware of your anti-harassment policy and that they understand that harassment involving any employee at any time, including at a holiday party, will not be tolerated. Remind your employees that, while they are encouraged to have a good time at the holiday party, it is a company-sponsored event where all of your employment policies and rules apply. If you become aware of inappropriate conduct that occurs at the holiday party, you must deal with it appropriately in the same manner as you would address such an incident had it occurred in the workplace. Additionally, if you receive complaints post-party about activities that may have occurred at the holiday party, you must document the incident, do a proper investigation to deal with those issues, and take prompt corrective action, if necessary.
2. **Hey, What's in This Drink?:** Reduce the Risk of Alcohol-Related Incidents. Employers may be subject to liability for injuries caused by employees who consume alcohol at employer-sponsored events. To avoid potential liability, employers should promote responsible drinking and monitor alcohol consumption appropriately. Employers may want to consider either not serving alcohol or hosting their holiday parties at a restaurant or other off-site location where alcohol is served by professional bartenders who know how to recognize and respond to guests who are visibly intoxicated. Employers may also consider providing information regarding or paying for a ride-sharing service such as Uber or Lyft to promote responsible behavior.
3. **It's Icy Outside!:** Minimize the Risk of Workers' Compensation Liability. Workers' compensation benefits may be available to employees who suffer a work-related injury or illness arising from an employer-sponsored holiday party. To avoid this liability employers should make it clear that there is no business purpose to the event, that attendance is completely voluntary, and that they are not being compensated for their attendance at the event. Illnesses caused by contaminants found in food or beverages may create legal exposure if the providers are not properly licensed, so employers should use licensed third-party vendors who have their own insurance coverage to provide food and beverages.
4. **Am I Required to Be Here?:** Prevent Wage and Hour Claims. Non-exempt employees must be paid for all work-related events that they are required to attend. Therefore, to

ensure that the time spent at a holiday party is not considered compensable under state or federal wage and hour law, employers should make it clear that attendance is completely voluntary, hold the party outside of normal working hours, ensure that no work is performed during the party, and make sure that employees are not under the impression that they are performing work.

5. **Happy Non-Denominational Holiday Celebration!:** Avoiding Religious Discrimination Claims. An employer's holiday party or year-end celebration should be about the people who work there and the accomplishments of the organization, not a particular set of religious beliefs unless, of course, you are a religious organization. Employees of all religious and ethnic backgrounds need to feel invited and welcome to attend. Additionally, if employees do not want to attend based on their particular beliefs or practices, an employer may not discriminate or retaliate against the employee for that choice.

So, for this 2019 holiday season, we hope that you spread the joy of the season, have fun, be safe, appreciate the hard work of your employees, and avoid the employment law pitfalls that can come with the holidays!

The Labor and Employment Law Practice Group, O'Neil Cannon