

# DEAN P. LAING NAMED “LAWYER OF THE YEAR”

On July 16, 2019 Dean P. Laing was named “Lawyer of the Year” by the Milwaukee Bar Association at a reception attended by more than 300 attorneys. Dean was recognized for winning two cases at the Wisconsin Supreme Court for defendants and settling several million dollar plus cases on behalf of plaintiffs during the past year. In presenting Dean with the award, the President of the Milwaukee Bar Association stated that Dean is recognized as “one of Wisconsin’s top trial attorneys.”

Dean can be reached at 414-276-5000 or [dean.laing@wilaw.com](mailto:dean.laing@wilaw.com).

---

## OBJECTING TO AN OPPOSING PARTY’S REQUEST FOR ATTORNEY FEES CAN HAVE RAMIFICATIONS

You just lost a case in which the opposing party has a claim for attorney fees pursuant to a contract, statute or other fee-shifting mechanism. The opposing party has now filed a motion for attorney fees. Your initial reaction is to oppose the motion by arguing that the amount of time spent by the opposing party’s attorneys was excessive and their hourly rates are unreasonable. Before pulling the trigger, however, you will want to consider a potential negative ramification of taking that position.

When a party requests an award of attorney fees, the party must establish that its request is reasonable, meaning that the time spent on the case by its attorneys was reasonable in the context of the factual and legal issues in dispute, and that its attorneys’ hourly rates are reasonable in the community in which the case is venued. The party on the other end of the motion, of course, has the right to challenge the fee request. When such a challenge is made, the moving party may counter by seeking discovery of the objecting party’s attorney fees in the case. This is usually done for two reasons: (1) to try to back off the objecting party by creating the risk that its own attorney fees will be discoverable, and (2) to argue to the court that the best evidence of what is reasonable is what the objecting party paid in litigating the same legal and factual issues in the case.

Wisconsin has not yet decided whether such discovery is permissible, but courts in other jurisdictions have frequently considered the issue and are split on their holdings. The majority of courts hold that discovery of an objecting party’s attorney fees is permissible under these circumstances. As one court held, “the defendant’s fees may provide the best available

comparable standard to measure the reasonableness of plaintiffs' expenditures in litigating the issues of the case." *Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 1996 WL 66111, at \*3 (N.D. Ill. Feb. 13, 1996). As another court held, "the time spent by the defense counsel . . . may well be the best measure of what amount of time is reasonable," calling it a "logical yardstick." *Pollard v. E.I. DuPont De Nemours and Co.*, 2004 WL 784489, at \*3 (W.D. Tenn. Feb. 24, 2004).

Numerous other cases hold the same way. See, e.g., *Henson v. Columbus Bank and Tr. Co.*, 770 F.2d 1566, 1574-75 (11th Cir. 1985); *In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 587 (3d Cir. 1984); *Frommert v. Conkright*, 2016 WL 6093998, at \*\*2-3 (W.D.N.Y. Oct. 19, 2016); *Mendez v. Radec Corp.*, 818 F. Supp. 2d 667, 668-69 (W.D.N.Y. 2011); *Cohen v. Brown Univ.*, 1999 WL 695235, at \*\*2-4 (D.R.I. May 19, 1999); *Murray v. Stuckey's Inc.*, 153 F.R.D. 151, 153 (N.D. Iowa 1993); *Coal. to Save our Children v. State Bd. of Educ.*, 143 F.R.D. 61, 64-66 (D. Del. 1992); *Real v. Cont'l Grp., Inc.*, 116 F.R.D. 211, 213-14 (N.D. Cal. 1986); *Blowers v. Lawyers Coop. Publ'g Co.*, 526 F. Supp. 1324, 1325-28 (W.D.N.Y. 1981); *Naismith v. Prof'l Golfers Ass'n*, 85 F.R.D. 552, 562-64 (N.D. Ga. 1979); *Stastny v. S. Bell Tel. and Tel. Co.*, 77 F.R.D. 662, 663-64 (W.D.N.C. 1978); *Vulcan Materials Co. v. Chandler*, 992 So. 2d 1252, 1268 (Ala. 2008); *Paton v. Geico Gen. Ins. Co.*, 190 So. 3d 1047, 1050-53 (Fla. 2016); *Miller v. Kenny*, 325 P.3d 278, 303 (Wash. Ct. App. 2014).

A minority of courts go the other way, holding that what an objecting party paid in attorney fees to defend a case is not relevant on the issue of whether what the plaintiff paid to prosecute the case is reasonable. The most recent case to so hold is *In re Nat'l Lloyds Ins. Co.*, 532 S.W.3d 794 (Tex. 2017). In that case, the Texas Supreme Court held as follows:

To the extent factual information about hourly rates and aggregate attorney fees is not privileged, that information is generally irrelevant and nondiscoverable because it does not establish or tend to establish the reasonableness or necessity of the attorney fees an opposing party has incurred. A party's litigation expenditures reflect only the value that party has assigned to litigating the matter, which may be influenced by myriad party-specific interests. Absent a fee-shifting claim, a party's attorney-fee expenditures need not be reasonable or necessary for the particular case. Barring unusual circumstances, allowing discovery of such information would spawn unnecessary case-within-a-case litigation devoted to determining the reasonableness and necessity of attorney-fee expenditures that are not at issue in the litigation.

*Id.* at 799. Other cases similarly holding include *Hernandez v. George*, 793 F.2d 264, 268 (10th Cir. 1986); *Ohio-Sealy Mattress Mfg. Co. v. Sealy Inc.*, 776 F.2d 646, 659-60 (7th Cir. 1985); *Costa v. Sears Home Improvement Prods., Inc.*, 178 F. Supp. 3d 108, 113 (W.D.N.Y. 2016).

Because Wisconsin has not decided this issue as of yet, and other jurisdictions are split on

the issue, it may be risky to oppose an opponent's request for attorney fees on the grounds that the time spent by its attorneys was excessive or its attorneys' hourly rates are unreasonable, particularly if it is anticipated that the attorney fees you spent likely exceed the attorney fees spent by your opponent.

Dean Laing is the President of O'Neil Cannon, and a member of its Litigation Practice Group. He can be reached at 414-276-5000.

---

## **TAX AND WEALTH ADVISOR ALERT: NOT FEELING SO SECURE: PROPOSED LAW COULD BE COSTLY FOR NON-SPOUSE IRA BENEFICIARIES**

On May 23, 2019, the House overwhelmingly voted (417-3) to approve the SECURE (Setting Every Community Up for Retirement Enhancement) Act and sent it to the Senate for their approval. The bipartisan bill is grabbing headlines for its modification to many retirement issues. Among those modifications is a requirement that could be costly for non-spouse IRA beneficiaries. The requirement forces non-spouse beneficiaries of inherited IRAs to withdraw funds from their account over a 10-year period after the original owner's death rather than the beneficiaries' life expectancy, ending the beneficial tax strategy known as the "stretch IRA."

Under current law, if a person other than a spouse is named as a beneficiary of an IRA account, the beneficiary can take their IRA required minimum distributions over their life expectancy based on a table provided by the IRS. Therefore, withdrawal of the IRA account is "stretched" out over a presumably long period based on the beneficiary's life expectancy. For example, if a 25-year old inherited a \$1 million IRA from his grandfather, he would take distributions over his life expectancy of 57.2 years (as provided by the IRS table). His required minimum distributions would be about \$17,482 ( $\$1,000,000/57.2$ ), which he would need to withdraw yearly over a 57.2-year period. Each year, this would result in a federal tax bill anywhere between \$548 (if he were in the lowest tax bracket) to \$6,468 (if he were in the highest tax bracket). The "stretch IRA" is a beneficial tax strategy, especially for younger beneficiaries, because they have smaller required minimum distributions stretched out through their life expectancy and thus they incur smaller tax bills. Additionally, the stretch allows for tax-deferred growth over longer accumulation periods and a larger amount of money reaching the pockets of the beneficiaries.

The proposed SECURE Act, however, would require beneficiaries to withdraw all the money in the inherited IRA account within a 10-year period from the original owner's death rather than stretch the distributions out over the life expectancy of the beneficiary. The proposed Act allows the distributions to be whenever the beneficiary likes—the distributions can be made at regular intervals or at the end of the period—just as long as they are made sometime in the 10-year period.

Despite the flexibility in distributions, removing the stretch based on life expectancy in exchange for a 10-year period will have significant financial effects for non-spouse beneficiaries of inherited IRAs. The proposed Act will greatly accelerate tax collection, pushing the beneficiaries into high tax brackets, resulting in beneficiaries paying a substantial amount more in taxes than under the life-expectancy stretch. To illustrate, using the previously mentioned example of the 25-year old beneficiary of a \$1 million IRA, if he were to take equal distributions of \$100,000 over the 10-year period, in the first year alone, his income would be bumped up by \$82,517 (\$100,000 versus \$17,482 in life-expectancy stretch), which could easily land him in a higher tax bracket. He would then have a yearly tax bill between \$24,000 (if the distributions were his only income) to \$37,000 (if he were in the highest tax bracket). That is an incredible difference in tax bills, not to mention the loss of tax-free compounding that was allowed for longer periods of time under the life-expectancy stretch.

If the proposed SECURE Act goes into effect, it will no doubt be costly for non-spouse IRA beneficiaries. The landscape of IRA planning will need to change, and IRA owners might consider alternative planning strategies like charitable beneficiaries or investments in life insurance policies versus IRAs to minimize taxes for their loved ones. While we wait to see if the Senate will approve the SECURE Act, we will continue to advise our clients to ensure their compliance and counsel on effective tax minimizing alternatives should the SECURE Act go into effect.

If you are interested in learning more about tax minimizing alternatives for non-spouse IRA beneficiaries, please contact Attorney [Britany E. Morrison](#) at O'Neil Cannon to discuss how we are able to assist you in your needs.

---

## FIRM WINS TRIFECTA

O'Neil Cannon was victorious in three cases before the Wisconsin Supreme Court this year, all involving issues of first impression in Wisconsin.

In the first case, decided on January 29, 2019, the Supreme Court held that bad faith under

the Uniform Fiduciaries Act (“UFA”) requires proof by a bank customer of bank dishonesty whereby the bank willfully failed to investigate compelling and obvious known facts suggesting fiduciary misconduct because of a deliberate desire to evade knowledge of fiduciary misconduct.

In *Koss v. Park Bank*, 2019 WI 7, 385 Wis. 2d 261, 922 N.W.2d 20, an employee of Koss Corporation embezzled \$34 million from the Company over a 10-year period. A significant portion of the embezzled funds came from cashier’s checks obtained by the employee from the employer’s bank accounts at Park Bank, which the employee used for her personal benefit. After the embezzlement was discovered, Koss Corporation sued Park Bank, alleging that Park Bank should have discovered the embezzlement earlier and reported it to Koss Corporation, and its failure to do so was bad faith under the UFA, which precludes claims of negligence against banks. After five years of litigation, the trial court dismissed the case on summary judgment, finding that Koss Corporation failed to meet the high standard for establishing bad faith under the UFA. The Court of Appeals affirmed the dismissal, and the Supreme Court did so as well.

In a 2-3-2 decision, the Supreme Court held that the following “foundational principles” are applicable in analyzing a bank’s conduct when bad faith is asserted under the UFA: (1) bad faith is an intentional tort requiring that a bank employee suspected fiduciary misconduct but purposefully failed to investigate out of a fear of discovering the misconduct; (2) bad faith is reviewed on a transaction by transaction basis, such that the facts known by each individual bank employee are not aggregated to form collective knowledge of the bank; (3) whether a bank acted in bad faith is determined at the time of the breach of fiduciary duty, not by looking back at transactions that occurred many months earlier; and (4) considerations of bad faith require analyses of a bank’s actions to determine its subjective intent.

In applying these bank-friendly standards and principles, the Supreme Court held that “none of Koss Corporation’s factual allegations asserted, or even implied, that Park Bank acted dishonestly such as being motivated by self-interest with regard to the transactions [the customer’s employee] initiated,” and “none of Koss Corporation’s allegations assert that Park Bank suspected that [the customer’s employee] was acting improperly.” Concluding, the Supreme Court held that, while “[t]here is much here from which a claim of negligence could be made,” negligence is not sufficient to establish bad faith under the UFA.

In the second case, decided on March 14, 2019, the Supreme Court held that a business purpose is not required in order for land to be classified as “agricultural land” for property tax purposes. In *State ex rel. Ogden Family Tr. v. Bd. of Review*, 2019 WI 23, 385 Wis. 2d 676, 923 N.W.2d 837, the Ogdens owned property in the Town of Delafield that was originally classified as “agricultural land,” thereby resulting in a low assessed value for property tax purposes. In 2016 the Town reclassified the property as “residential” on the grounds that the property was not being used for a business purpose, which resulted in a 50-times increase in

the assessed value of the property. The Ogdens challenged the reclassification, arguing that the property is used primarily to harvest apples and hay for food and fiber, and to grow Christmas trees, which are agricultural uses. The Town failed to budge, determining that a business purpose is required for land to be classified as “agricultural land” for property tax purposes. The Ogdens filed a petition for certiorari review, which the trial court rejected, siding with the Town.

The Ogdens appealed, and the Court of Appeals reversed, concluding that a business purpose is not necessary for land to be classified as “agricultural land” for property tax purposes. The Supreme Court affirmed, in a unanimous decision, holding that section 70.32(2)(c)1g., Wis. Stats., merely requires the “growing” of crops, not the marketing, selling, or profiting from them, for land to be classified as “agricultural.” As a result, the Supreme Court held that “[a] business purpose is not required in order for land to be classified as ‘agricultural’ for property tax purposes.”

In the third case, decided on May 23, 2019, the Supreme Court held that constructive trust is a remedy, not a cause of action. In *Tikalsky v. Friedman*, 2019 WI 56, 386 Wis. 2d 757, 928 N.W.2d 502, Tikalsky’s parents disinherited him from their estates, leaving their entire estates to their other three children, equally. Following his parents’ deaths, Tikalsky sued his siblings, alleging that two of them intentionally interfered with his expected inheritance. As to his third sibling, Tikalsky sued her for constructive trust arguing that, even though she was innocent of any wrongdoing, she is in possession of a portion of his expected inheritance and, if he prevails on his claims against his other two siblings, his innocent sibling should be required to disgorge the excess portion she received from her inheritance.

The trial court dismissed the innocent sibling from the lawsuit on the grounds that no cause of action for liability was asserted against her and, without a finding of liability against a party, no remedy can be ordered against that party. The Court of Appeals reversed, holding that constructive trust is available against an innocent beneficiary if wrongful conduct is found against any party and it would be inequitable for the innocent beneficiary to hold onto the property received as a result of the wrongdoing.

In a 4-3 decision, the Supreme Court reversed the Court of Appeals’ decision and held that “constructive trust is a remedy, not a cause of action.” The Supreme Court further held that, while “a constructive trust may be imposed on property in the possession of one who is wholly innocent of any” wrongdoing, that remedy is only available where the innocent beneficiary “came into possession of property that was already burdened with a constructive trust,” *i.e.*, the owner of the property must have conveyed the property to an innocent beneficiary in violation of a duty to transfer it to the plaintiff (such as by a court order in a divorce proceeding). Concluding, the Supreme Court held that Tikalsky’s parents “violated no duty to [Tikalsky] when they caused their estate planning documents to transfer part of their estate to [Tikalsky’s innocent sibling]” and, as a result, “where there is no violated duty . . .

there can be no constructive trust.”

Dean Laing represented the bank in *Koss* and the innocent beneficiary in *Tikalsky*. He can be reached at 414-276-5000.

---

## **ATTORNEY GRANT KILLORAN APPOINTED CO-CHAIR OF THE WISCONSIN FELLOWS OF THE AMERICAN BAR FOUNDATION**

Grant Killoran recently was appointed to a three year term as Co-Chair of the Wisconsin Fellows of the American Bar Foundation, beginning September 1, 2019.

The Fellows of the American Bar Foundation is a global honorary society of attorneys, judges, law faculty, and legal scholars whose public and private careers have demonstrated outstanding dedication to the highest principles of the legal profession and the welfare of their communities. Established in 1955, the Fellows support the research of the American Bar Foundation and currently has a membership totaling over 14,000 individuals across the globe. Membership in the Fellows is limited to one percent of lawyers licensed to practice in each jurisdiction.

The American Bar Foundation is among the world’s leading research institutes for the empirical and interdisciplinary study of law. An independent, nonprofit organization for more than 65 years, it seeks to advance the understanding and improvement of law through research projects on the most pressing issues facing the legal system in the United States and around the world today. It seeks to expand knowledge and advance justice through innovative, interdisciplinary, and rigorous empirical research on law, legal processes, and legal institutions. Its research findings are published in a wide range of forums, including leading academic journals, law reviews, and academic and commercial presses.

For more information on the Fellows of the American Bar Foundation and the American Bar Foundation, visit [www.americanbarfoundation.org](http://www.americanbarfoundation.org).

Grant Killoran is a shareholder with the law firm of O’Neil Cannon 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 and health care disputes.

Grant Killoran can be reached at [grant.killoran@wilaw.com](mailto:grant.killoran@wilaw.com) or 414-276-5000.

---

## **EMPLOYMENT LAWSCENE ALERT: EMPLOYERS SHOULD CONFIRM THAT THEIR I-9S ARE IN ORDER**

Recently, President Trump announced that a new round of workplace immigration raids would be postponed until after July 4. Regardless of when or if these raids happen, all employers should take this time to ensure that they are in compliance with federal law by having proper work authorizations for all of their employees. Workplace authorization is governed by the Immigration and Reform Control Act, which allows U.S. companies to hire and employ only U.S. citizens, non-citizen nationals, lawful permanent residents, and aliens authorized to work in the U.S. Employers must have a Form I-9 on file for every current employee hired on or after November 6, 1986. I-9 forms for former employees must be kept until the later of three years from the employee's hire date or one year after their final date of employment. Such forms can be retained on paper or electronically.

To determine compliance with federal immigration laws for lawful work authorization, employers should conduct an audit of their I-9s to confirm, among other things, that each individual who should have an I-9 on file in fact has one on file; that any and all employment authorization documents are current; that all sections of the I-9 form have been fully filled out; and that any changes, such as a name change, have been properly documented. Corrections to I-9 forms must be handled carefully and in compliance with federal law. We have attorneys experienced in assisting employers with I-9 audits. Failure to properly follow the law regarding the maintenance of I-9 forms, including making corrections, can subject an employer to civil and criminal penalties.

---

## **ATTORNEY CHRISTA WITTENBERG WINS 2019 JUDGE TERENCE T. EVANS HUMOR AND CREATIVITY IN LAW COMPETITION**

Christa Wittenberg was recently announced the winner of the 2019 Judge Terence T. Evans Humor and Creativity in Law Competition, sponsored by the Eastern District of Wisconsin Bar Association. The award is given to one attorney each year whose original creative law-related writing piece is selected by the review committee. The competition honors the memory of the Honorable Terence T. Evans, former judge of the U.S. District Court, Eastern District of

Wisconsin, and U.S. Court of Appeals for the Seventh Circuit, who was known for his wit and creativity throughout his life and his work. At the EDWBA Annual Meeting in April, Attorney Wittenberg happily accepted the award of a traveling trophy. Her winning article is below:

## **Boot Camp for Litigators: An Unconventional, Immersive CLE**

By: Christa D. Wittenberg

Are you a litigator looking to improve your skills? Stuck in a career rut? Wishing you could practice the essential soft skills that make lawyers effective in and out of the courtroom? Try our 12-week intensive crash course: Parental Leave, also known as Boot Camp for Litigators. A brand new baby is required for this course; you will need to supply your own.

This innovative CLE emphasizes the skills that separate good lawyers from great lawyers, which are the same skills new babies force upon their parents: tenacity, flexibility, heightened awareness, creativity, and the ability to sift through crap. Our boot camp will give you the skills necessary to make you the litigator you've always dreamed of becoming. It's guaranteed to give you the confidence to tell your opponents you can beat them while using just one arm. Literally.

The course focuses on the following areas:

**Sleep deprivation resistance training:** You will simulate the long days and sleepless nights of trial. Boasting 3-4 hours of interrupted sleep nightly, our boot camp will teach you to be impervious to the side effects of exhaustion in the highest stakes environment: your child's life depends on it.

**Thinking quickly on your feet:** Improvising and adapting to challenging circumstances are crucial skills for litigators. Test your mental and emotional dexterity with countless tear-your-hair-out moments, like diaper blowouts, incessant screaming for no apparent reason, fending off well-meaning strangers trying to touch your child, politely nodding at your relatives' terrible baby advice, and wrestling clothing onto your flailing infant. Like with any good improvisation class, instead of saying "no, please, no," you'll learn to say "yes, and . . . ." You'll roll with the punches and make it work, because there's really no alternative. After completing this boot camp, the next time you combat a challenging witness or argue your point to a frowning judge, your experienced brain will be hardwired to assess the situation and react deftly.

**Reading a jury:** Knowing whether a juror's grimace is disbelief, sympathy, or merely the burrito he had for lunch is an important skill that allows you to adjust your trial strategy on the fly and win the case. After spending 12 weeks trying to guess the reasons for your baby's many, many cries, you will find reading a fully-formed adult as easy as reading a book.

**Public speaking:** There's simultaneously no tougher and no easier audience than a crying baby who could not care less what you are saying. If you can soothe an infant with a spontaneous, animated speech about the jungle animals swinging from his mobile, handling an opening statement will be a breeze.

**Perseverance through tedium:** We all know the exciting and glamorous parts of litigation—trials, depositions, oral arguments—don't come along every day, and that it's the preparation and background work that make up the bulk of our work as litigators. Sifting through thousands of documents for the needle in the haystack, poring over mountains of raw data to build a case, researching all variants of every possible legal theory to support your claims—such work cannot be done without the ability to persist in the face of extreme boredom. At our boot camp, you will face colossal tedium. For 12 weeks, around the clock, your life will follow a dismally predictable cycle: Feed. Change diaper. Soothe. Sleep. Repeat. After you complete this mind-numbing routine for that long, reading every Seventh Circuit decision on diversity jurisdiction since 1950 will sound like some welcome fun.

**Dealing with demanding clients:** You'll rarely meet a client more irrational than an infant, and you don't often have a client who screams at you more than your unsmiling newborn incapable of any other form of communication. Let your little one reinforce your talent for service with a smile.

**Prioritizing:** Parenting, like lawyering, is all about prioritizing. Imagine you have a brief due at midnight, a deposition tomorrow, and a demanding client calling every ten minutes. Now imagine you're in the nursery, there's spit-up on your shirt, poop everywhere else, and a hungry screaming infant lying on the changing table. In both scenarios, the key to success is efficiently tackling the problems in order of priority. Our boot camp will allow you to practice your triage skills in the relative comfort of your own home. For example, you might currently think showering every day or eating your meals while they're hot are important, but you'll soon learn otherwise. The same goes when you're up against competing deadlines and demands—except you'll probably still want to shower when handling your workplace challenges if you don't want to offend your colleagues.

**Gaining perspective:** A healthy dose of perspective can help lawyers keep a clear head, even under great stress. Yes, we all want to do good work, win our cases, and strive for justice. But no single project or case will define you unless you let it. Caring for your child—for 12 weeks and beyond—will force you to slow down and see the forest instead of the trees.

Participants are admitted to Boot Camp for Litigators on a rolling basis. Sign up early, as there is typically a 9-month wait list for this life-changing course. This 12-week intensive course is pre-approved for 2,016 hours of CLE credits. Boot Camp for Litigators can be repeated as many times as you wish; the difficulty level increases each time.

Are you ready to see if our Boot Camp for Litigators can make you a better lawyer? Make the commitment today—if you dare!

---

## **EMPLOYMENT LAWSCENE ALERT: NEW RULE WILL PERMIT EMPLOYER REIMBURSEMENT OF EMPLOYEES' INDIVIDUAL ACA COVERAGE PREMIUMS**

Beginning January 1, 2020, employers will have the option to reimburse employees' individual ACA Exchange (or Marketplace) health insurance premiums under an employer-sponsored Health Reimbursement Arrangement (HRA).

This is a significant change from current rules, which generally permit an HRA to reimburse only group (not individual) health insurance coverage, and which prohibit employer reimbursement of any health insurance coverage provided through the ACA Exchange.

### HRA Overview

An HRA is a type of account-based plan that an employer may use to provide pre-tax reimbursement, up to employer-determined annual limits, of certain employee medical care expenses. Under applicable law, an HRA is a self-funded health care plan, which may be funded only by employer (not employee) dollars. An HRA is subject to ERISA, HIPAA, and certain IRS rules, including the nondiscrimination requirements that prohibit discrimination in favor of highly compensated employees.

### What's Old is New Again

Under final regulations issued jointly, last week, by the United States Departments of Treasury, Labor, and Health and Human Services (the Departments), Employers can once again reimburse certain individual employee health insurance expenses on a pre-tax basis. This practice was broadly permitted under IRS rules in effect from 1961 through January of 2014, when the IRS put a sudden halt to the practice on the grounds that it violated the Affordable Care Act.

### With Some Twists

Prior to 2014, employers could directly reimburse an employee for the cost of that employee's individual insurance coverage premiums. No additional benefit plan or plan document was required. Under the new rules, employer reimbursements of individual insurance premiums may not be made directly, but must instead flow through a documented

HRA program. The HRA must conform in form and operation with applicable Department rules.

Under the law in effect over the last few years, an HRA could reimburse group health plan insurance premiums only if it were “integrated with” an ACA-compliant employer-sponsored group health plan. Under the rules that will take effect January 1, 2020, HRA “integration” with ACA-compliant individual coverage will be available for the first time.

### Why are the HRA Rules Changing?

The final regulations issued jointly by the three Departments last week ultimately result from an October 2017 Presidential Executive Order intended to expand “healthcare choice” and flexibility. HRAs were one of three priorities identified in President Trump’s Executive Order 13813, which directed the Departments to consider proposing regulations or revising guidance as needed “to expand employers’ ability to offer HRAs to their employees, and to allow HRAs to be used in conjunction with non-group coverage.”

### Key Requirements

The final regulations exceed 200 pages and provide extensive detail on the requirements applicable to the new individual coverage HRAs (ICHRA). Among these are the following six key conditions, which must be satisfied in order to successfully integrate an HRA with individual health insurance coverage:

- All individuals covered by an ICHRA must be enrolled in individual coverage through the Exchange.
- The employer may not offer an ICHRA to the same class of employees to whom it offers group health plan coverage. This means that an employee in a particular classification may not be given a choice between a traditional group health plan and an ICHRA. Under a related rule, employers are prohibited from steering participants with adverse health factors into individual, rather than into group, coverage.
- An ICHRA must be offered in both the same amount and under the same terms and conditions to all employees. The HRA may not be more generous or less generous to some individuals based on an adverse health factor.
- The ICHRA must offer an opt-out provision so that an employee may choose to waive ICHRA HRA coverage. This condition is intended to preserve an individual’s eligibility for a premium tax credit for coverage obtained on the Exchange under certain circumstances, such as when the ICHRA offered is either unaffordable or does not provide minimum value in accordance with ACA standards.
- Claims for reimbursement under an ICHRA must be substantiated and confirmed to relate to the cost of individual Exchange health insurance premiums. An employer may rely on an employee’s attestation to this effect, and model attestation forms have been provided by the Departments. If an ICHRA sponsor learns of an incorrect or false attestation, future reimbursements relating to the relevant period may be denied.
- Participants potentially eligible to participate in an ICHRA must be provided with a written notice at least 90 days before the beginning of each plan year (with some exceptions for a shorter notice period in for an initial year of eligibility). The final regulations specify the content that must be provided in the notice.

## Limited Time to Prepare

In order for employers to reimburse employees' purchase of individual ACA-regulated health insurance by January 1, 2020, there is much work to do in relatively little time. Before the November 1 start date of the open enrollment period for 2020 ACA coverage:

- Employers must adopt (or amend existing) HRA Plan documents to comply with the new requirements;
- Employers, as well as Exchanges will need to work to communicate the changes to eligible individuals; and
- All separate State-facilitated Exchanges, as well as the Federal Exchanges must implement any required website coding and enrollment procedures.

The State-facilitated Exchanges have been concerned about a possible 2020 rollout since that date was initially mentioned in proposed rules issued late last year. This April, the administrators of all 12 State Exchanges asked the Departments to postpone the effective date. In response, the Departments have promised to provide technical assistance to the Exchanges to facilitate timely implementation of the new rules. Nonetheless, the final regulations are extremely detailed and complex. Whether, and to what extent, employers (and Exchanges) are able to embrace ICHRA reimbursement of individual health insurance premiums remains to be seen.

The attorneys of the Employment Law team of O'Neil, Cannon, Hollman, DeJong and Laing are closely following these new developments and are prepared to discuss how the change in HRA rules may impact your strategy regarding employee benefits offerings, ACA compliance, or how to amend an existing HRA or MERP (medical expense reimbursement plan) or to adopt a new HRA document to prepare for the reimbursement of individual coverage.

---

## **UNITED STATES SUPREME COURT CLARIFIES STANDARD ON SANCTIONS FOR VIOLATING BANKRUPTCY DISCHARGE**

On June 3, 2019, the United States Supreme Court in *Taggart v. Lorenzen* unanimously held that a bankruptcy court may impose contempt sanctions against a creditor for violating a discharge order where "there is no objectively reasonable basis for concluding that the creditor's conduct might be lawful." The Court rejected the Ninth Circuit Court of Appeals' holding that a creditor's good faith belief that its collection actions did not violate the discharge order—even if unreasonable—shields the creditor from civil contempt sanctions.

A discharge order is a fundamental part of the bankruptcy system. It releases the debtor from

personal responsibility for pre-bankruptcy debts, and enjoins creditors from attempting to collect a debt covered by the discharge order.

But not all debts are discharged. The Bankruptcy Code lists 19 categories of debt that are excepted from discharge. Discharge orders, however, do not specify which of the debtor's debts are discharged. As a result, it may be unclear whether a particular debt is covered by an order, leaving creditors to guess whether the debts owed to them were discharged.

In *Taggart*, the Court resolved when it is appropriate to sanction a creditor who guesses wrong and attempts to collect a debt in violation of a discharge order.

The facts of the case are unusual. Taggart transferred his interest in an Oregon limited liability company to his attorney. The company and the other owners sued Taggart in state court for transferring his interest in violation of the company's operating agreement. On the eve of trial, Taggart filed for Chapter 7 bankruptcy, which stayed the state-court litigation pending completion of the bankruptcy.

After Taggart received a bankruptcy discharge, the state-court action resumed. The state court unwound the transfer and ordered Taggart to pay the company's post-bankruptcy attorney's fees. While Taggart's discharge order would normally cover these fees, the state court concluded that Taggart "returned to the fray" of litigation after bankruptcy, thereby making him liable.

Meanwhile, Taggart returned to the bankruptcy court and asked that it hold the company and owners in contempt for violating the discharge order by seeking attorney's fees against him. The bankruptcy court denied Taggart's request, agreeing with the state court that Taggart had returned to the fray. The district court on appeal disagreed that Taggart had returned to the fray and, as a result, held that the company and owners had violated the discharge order.

On remand, the bankruptcy court imposed contempt sanctions against the company and owners for violating the discharge order. The company and owners appealed the sanctions award, and the Bankruptcy Appellate Panel reversed. Taggart appealed, and the Ninth Circuit affirmed the panel's decision. It held that a creditor's "good faith belief that the discharge injunction does not apply to the creditor's claim precludes a finding of contempt, even if the creditor's belief is unreasonable."

Justice Stephen Breyer's 11-page opinion unequivocally rejected the Ninth Circuit's "good faith belief" standard, holding that civil contempt sanctions are appropriate when there is no "fair ground of doubt" as to whether a creditor's actions violated a discharge order. The Court reasoned that the Ninth Circuit's subjective standard is contrary to traditional civil contempt principles and depends too much on "difficult-to-prove states of mind." The Court similarly rejected a near strict liability standard under which a creditor who violated a discharge order

would be sanctioned, even if the creditor had an objectively reasonable basis for concluding that its conduct was lawful. Because the Ninth Circuit had applied an improper standard, the Court vacated the judgment and remanded for further proceedings consistent with the opinion.

As a practical matter, although the Court did not adopt the Ninth Circuit's subjective standard, *Taggart* is still a win for creditors because it provides some needed clarity on when creditors can be sanctioned for violating a discharge order. However, while this decision may provide peace of mind to many creditors collecting a debt after bankruptcy, it is important that creditors ensure they have an objectively reasonable argument that debts they are collecting were not discharged in bankruptcy. A failure to do so may result in civil contempt sanctions, including the debtor's attorney's fees and costs, damages for emotional distress, and punitive damages.

Creditors should also be aware that *Taggart's* standard on sanctions for violating a bankruptcy discharge order does not apply to violations of the automatic stay. Accordingly, creditors' objectively reasonable belief that their actions did not violate the automatic stay may not insulate them from sanctions.

For further information, please contact [Jessica Haskell](mailto:jessica.haskell@wilaw.com) at 414-276-5000 or [jessica.haskell@wilaw.com](mailto:jessica.haskell@wilaw.com).

---

## **EMPLOYMENT LAWSCENE ALERT: CREATION OF NEW TASK FORCE SIGNALS INCREASED STATE SCRUTINY OF WISCONSIN WORKER CLASSIFICATION**

April 15, 2019 marked not only the end of the 2018 personal income tax season, but also the beginning of a new era of enforcement of Wisconsin employment practices. On that date, Governor Tony Evers issued an Executive Order creating a Joint Task Force on Payroll Fraud and Worker Misclassification (the "Task Force"). This Task Force will focus on workers who should be classified as employees but are misclassified as independent contractors.

The Task Force will be chaired by the Secretary of the Department of Workforce Development ("DWD") and will be staffed by representatives from the DWD, including its Worker's Compensation and Unemployment Insurance divisions, the Department of Revenue, and the offices of the Attorney General and the Commissioner of Insurance.

## Background

Similar task forces have been implemented in recent years in Connecticut and Massachusetts (2008), New York (2016), Colorado, New Jersey, Tennessee, and Virginia (2018), and Michigan (2019).

One of the catalysts for the Wisconsin Task Force creation was the finding, under DWD audits from January 2016 through April 2019, of 5,841 misclassified employees and the related under-reporting of nearly \$70 million in gross wages and \$1.8 million in unemployment insurance taxes. Misclassification of employees also results in the underpayment of Social Security and Medicare-related employment law taxes.

Another impetus for the new interagency coordination is the concern that employers who misclassify workers as independent contractors gain an unlawful competitive advantage that allows them to under-bid or out-compete law-abiding employers.

Prior reviews of employer practices reported by the National Employment Law Project posit that audits of Wisconsin employers have typically revealed worker misclassification in 44% of investigated cases.

## Task Force Mandates

The new Task Force is required to report annually to the Governor by March to describe its accomplishments and recommendation for the prior year. Specifically, the Task Force report must include the amount of wages, premiums, taxes, and other payments or penalties collected as a result of coordinated agency activities, as well as the number of employers cited for misclassification and the approximate number of affected workers. The Task Force must also identify administrative or legal barriers impeding more effective agency coordination. After consultation with representatives of business, organized labor, members of the legislature, and other agencies, the Task Force will also propose changes to administrative practices, laws, or regulations appropriate to:

- reduce agency coordination barriers;
- prevent worker misclassification from occurring;
- investigate potential violations of laws governing worker classifications;
- improve enforcement where such violations are found to have occurred; and
- identify successful mechanisms for preventing worker misclassification.

## Key Take-Away

The Wisconsin Task Force is being implemented at a time when recent federal decisions by the National Labor Relations Board and the United States Supreme Court appear to be permitting some gig economy companies to more easily classify workers as independent contractors, rather than as employees.

As a result of the creation of the Task Force, however, Wisconsin employers should expect

increased scrutiny from the DWD and Department of Revenue regarding independent contractor relationships.

The Employment Law team of O'Neil, Cannon, Hollman, DeJong and Laing recently presented client seminars in Pewaukee and Green Bay on the many aspects of worker classification and are well-positioned to assist Wisconsin employers in reviewing current arrangements or discussing how the law applies under various circumstances.