GRANT KILLORAN RE-ELECTED TO THE AMERICAN BAR ASSOCIATION HOUSE OF DELEGATES

The law firm of O'Neil, Cannon, Hollman, DeJong and Laing S.C. is pleased to announce that Attorney Grant C. Killoran recently was re-elected by the State Bar of Wisconsin Board of Governors to serve another two-year term as one of the State Bar of Wisconsin's five Delegates to the American Bar Association House of Delegates.

The House of Delegates is the policy-making body of the ABA. Control and administration of the ABA is vested in the House of Delegates. Established in 1936, the House of Delegates has over 500 members and its actions become the official policy of the ABA, the nation's largest lawyer association.

Mr. Killoran previously has served as a Delegate to the ABA House of Delegates from 1997-1999, 2003-2009 and 2014 to present.

Mr. Killoran is a shareholder with and the Chair of O'Neil, Cannon, Hollman, DeJong and Laing's Litigation Practice Group. He has diverse trial experience, focusing on complex business and healthcare disputes.

CONTRACTUAL ARBITRATION CLAUSES: ARBITRATOR SELECTION AND QUALIFICATIONS

An increasing number of contracts contain arbitration clauses. But not all arbitration clauses are equally clear, precise, and specific–or equally enforceable.

Like other contract clauses, an arbitration clause may be invalidated under general principles of contract law. The U.S. Supreme Court has ruled that an arbitration clause may be invalid if it is indefinite, fraudulent or unconscionable, or was agreed upon under duress. As a result, commercial arbitration clauses should be clear and specific.

Before agreeing to an arbitration clause, consider how you would want any future arbitration to proceed, and the circumstances under which arbitration would be required.

For instance, consider whether you would like to use the services of a specific alternative dispute resolution provider, such as the American Arbitration Association. If you are

considering such a provider, you might wish to examine its sample arbitration clauses and compare them to your own.

Next, consider the process established to select the arbitrator or arbitrators. Do you want to present your dispute to a single arbitrator or to an arbitration panel? For example, some arbitration clauses specify a panel of three arbitrators: each party picks one arbitrator, and then those two arbitrators choose the third arbitrator.

In addition to considering *how* the arbitrator will be chosen, you also should consider *who* will be qualified to serve as an arbitrator. For example, do you want the arbitrator to have relevant experience in a particular subject area (like architecture, engineering, software, publishing, or employment) or a particular qualification (like a CPA or a JD)? By considering these sort of issues prior to entering into an arbitration agreement, you can reduce the risk of future conflicts and add a degree of certainty to the arbitration process.

If you have any question, please contact Grant Killoran at grant.killoran@wilaw.com or 414-276-5000.

A MUST-READ BOOK FOR FAMILY BUSINESS OWNERS

Recognizing that family-owned business owners throughout Wisconsin have ongoing questions when it comes to selling and transferring ownership of their companies, the law firm of O'Neil Cannon Hollman DeJong and Laing has written *The Art, Science and Law of Business Succession Planning*.

"Our goal is to help owners understand the importance of succession planning and give them a good starting point for implementing it in their own businesses."

Available in paperback on Amazon for $19.95 and as a Kindle ebook for $9.95, the law firm's book explains that whether the plan is to sell the business to fund the owner's own retirement or pass the business on to descendants or other key employees, there are questions that need to be answered sooner rather than later:

• Am I prepared to consider transferring ownership or control of my business during my lifetime?
• Have I made sure that the transition will be orderly?
• Will my key employees stay with the business rather than seek other employment?

• Is my estate sufficiently diversified so that children who are not active in the business may be treated fairly alongside those receiving an interest in the business?

The law firm's corporate and tax attorneys incorporated the latest changes to federal tax law into the inaugural edition of the book.

Book chapters include:

Chapter 1: The Need for Succession Planning
Chapter 2: The Five Objectives of Good Succession Planning
Chapter 3: Objective 1-Maximizing the Value of the Business
Chapter 4: Objective 2-Minimize Taxes
Chapter 5: Objective 3-Provide for the Continuity and Survival of the Business
Chapter 6: Objective 4-Treating Your Children Equitably
Chapter 7: Objective 5-Preserving Family Harmony
Chapter 8: Seven Pitfalls that Work Against a Successful Transition
Chapter 9: What a Good Succession Planner Will Do
Chapter 10: Structuring Buy-Sell Agreements
Chapter 11: The Key Employee Agreement

"If a business fails due to improper planning, children's futures are affected, and so are the futures of every employee who works for the company," Holborn said. "By following the steps necessary to take a company into the next generation, owners are not only potentially benefitting every member of their business team, but also their families and their descendants after them."

STATE BAR OF WISCONSIN TAXATION LAW SECTION BOARD ADDS NEW DIRECTOR AND VICE CHAIRPERSON

On July 1, 2018 Attorney Samantha M. Amore began a three-year term as a Director of the Board of the State Bar of Wisconsin Taxation Law Section. The Taxation Law Section has more than 500 members. The Board's mission is to provide its members with a forum to discuss issues pertaining to federal and state taxation, as well as to recommend legislation and to provide opportunities for professional education and networking.

Samantha is a member of the firm's Business Law and Tax/Succession Practice Groups where she focuses on tax planning. Samantha offers planning strategies on entity selection and

formation; prepares and negotiates organizational documents such as operating and shareholders agreements; and structures mergers, acquisitions and reorganizations. Additionally, she assists clients with various federal and state tax matters, including equity rollovers, like-kind exchanges, and obtaining and maintaining tax-exempt status. Samantha also counsels individuals on estate and business succession planning matters.

Samantha is very pleased to be elected and look forward to being involved with the Board in their new roles.

TAX AND WEALTH ADVISOR ALERT: SALES TAX COLLECTION IN WISCONSIN STARTS OCTOBER 1ST–ARE YOU READY?

Beginning October 1, 2018, Wisconsin will enforce sales tax collection from out-of-state sellers who sell taxable products and services in Wisconsin even if they have no physical presence in Wisconsin. Previously, Wisconsin could not enforce collection for sellers who sold taxable products and services in Wisconsin but who did not have a physical presence, i.e. through having a store or warehouse in Wisconsin. This allowed many retailers to sell over the Internet without charging sales tax. In theory, Wisconsin residents should have claimed and paid tax on those purchases when they filed their income tax returns each year, but compliance rates by residents (in most states across the country) were abysmal.

Thanks to a recent United States Supreme Court decision, *South Dakota v. Wayfair*, states across the country now can enact laws to enforce collection against sellers whether those sellers have a physical presence in the state or not.

You're likely wondering, is this decision good or bad for my business? If you're a business located in Wisconsin, this decision may help your business. Your competitors may have sold products and services in Wisconsin without charging customers for sales tax, but because you had a physical presence here, you would have charged sales tax. Now, the playing field will be leveled, and both you and your competitor will have to charge sales tax. However, this goes both ways; if you sell products or services in other states where you don't have a physical presence, you may now have to charge sales tax on those sales. You will have to learn the local rules in each state, and charge, collect, and remit sales tax in those states. The administrative burden may seem overwhelming.

The Supreme Court approved an exception for small businesses and businesses doing a small amount of business. The exception applies to those who do not have annual sales of products

and services of more than $100,000 in a state or who make less than 200 sales per year in a state. This exception will not apply if the business has a physical presence. States could enact their own exceptions similar to this one discussed by the Court.

While we wait to see how the states will react, we will continue counseling our Wisconsin-based clients to ensure their compliance with out-of-state rules, and we will advise our out-of-state clients to ensure their compliance with Wisconsin sales tax collection–starting October 1st!

TAX AND WEALTH ADVISOR ALERT: SALES TAX RELIEF FOR WISCONSIN CONTRACTORS

Thanks to Wisconsin Senate Bill (SB) 227, contractors working with tax-exempt clients will benefit from a sales tax exemption. Generally, contractors are deemed the final consumers of materials that they incorporate into real property and must pay sales tax on the purchase of those materials. Consequently, exempt clients must purchase those materials directly, or contractors must pass along that expense in the form of a higher contract price. SB 227 now exempts contractors from sales tax when they buy materials for construction projects for tax-exempt organizations or municipal governments.

This legislation reduces administrative burdens for both contractors and exempt entities. Contractors will rely less on related purchasing companies to buy construction materials for exempt entity contracts, and exempt entities should be able to negotiate lower purchase prices with contractors.

The legislation specifies that the purchased construction materials must be incorporated into a “facility,” which is defined as “any building, shelter, parking lot, parking garage, athletic field, athletic park, storm sewer, water supply system, or sewerage and waste water treatment facility, but does not include a highway, street, or road.”

Not all contracts will be exempt under the legislation, such as contracts with the State of Wisconsin and federally recognized Native American Tribes. Contractors and tax-exempt entities should review the law to ensure it applies to their facts.

EMPLOYMENT LAWSCENE ALERT: RULING ON MARQUETTE PROFESSOR CONTAINS LESSONS FOR PRIVATE EMPLOYERS

On Friday, July 6, 2018, the Wisconsin Supreme Court determined that Marquette University had breached its contract with tenured professor John McAdams when it suspended him for discretionary cause after he authored a controversial blog post. McAdams claimed that the blog post fell within his rights to protected speech and academic freedom, whereas the University claimed that it was an unprofessional attack that was outside of those protections. Because the Court determined that the blog post was protected by the doctrine of academic freedom, which was guaranteed under the professor's contract and could not be used as a basis for discretionary cause, the Court held that the University had breached the contract because the blog post was a "contractually-disqualified basis for discipline."

The University argued that the Court had to defer to its internal procedures for suspending and dismissing faculty members and could not second-guess its choices unless the University had abused its discretion, infringed on the faculty member's constitutional rights, acted in bad faith, or engaged in fraud. However, the Court found that "the University's internal dispute resolution process is not a substitute for Dr. McAdams' right to sue in our courts" and that it did not have to defer to the disciplinary procedure because 1) it was fundamentally flawed due to the unacceptable bias on the Faculty Hearing Committee (the "Committee"); 2) the Committee had no authority to bind parties to its decision, because the parties had not agreed that the internal dispute process would replace or limit the adjudication of a contract dispute in court, as can be done with an arbitration agreement; and 3) there was no required procedural process to defer to because, although the Committee makes a recommendation, it is the University president that ultimately makes the disciplinary decision, and there were no rules, procedures, or standards that describe how the president was to make his ultimate decision.

This case should serve as a reminder to all private employers that, while courts generally defer to the decisions of an employer, they will not do so if those decisions or the processes underlying the decisions violate a contractual or statutory right of the employee. For example, if your disciplinary process is tainted by improper and illegal bias on the basis of protected class, the court will not disregard that simply because a disciplinary procedure was followed. Employers should make sure not only that they are following their internal disciplinary procedures but that procedures are fair and impartial and that the decisions stemming from those procedures do not violate the contractual or statutory rights of employees.

EMPLOYMENT LAWSCENE ALERT: NLRB'S GENERAL COUNSEL ISSUES GUIDANCE ON HANDBOOK RULES POST-BOEING

On June 6, 2018, the NLRB's General Counsel issued a memorandum (GC 18-04) to all NLRB Regional Directors providing regional offices general guidance on the new standard regarding the lawfulness of handbook rules under Section 7 as established by the NLRB in *The Boeing Co.*, 365 NLRB No. 154 (2017). In *Boeing*, the NLRB overturned the onerous "reasonably construe" standard that was previously established by the NLRB in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).

In *Lutheran Heritage*, the NLRB held that employers can't maintain workplace policies that workers could "reasonably construe" as barring them from exercising their Section 7 rights. Section 7 provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities…"

The *Lutheran Heritage* standard was criticized as rendering unlawful every policy, rule and handbook provision—such as rules governing workplace civility, open door policies, fraternization, use of recording devices, use of cameras, confidentiality, use of social media, interactions with media, and use of logos and trademarks—that an employee might "reasonably construe" to prohibit any type of Section 7 activity. Simply, the *Lutheran Heritage* standard was unworkable for employers in drafting legitimate and effective workplace policies.

Under the new *Boeing* standard, however, the NLRB will apply a balancing test (balancing employees' Section 7 rights with employer's legitimate business interests) in evaluating whether an employer's facially neutral policy interferes with employees' Section 7 rights by considering two things: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule.

In applying this new balancing test, the NLRB will delineate three categories of facially neutral employment policies, rules and handbook provisions:

- Category 1 includes rules that the NLRB will designate as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is

outweighed by justifications associated with the rule.
- Category 2 includes rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.
- Category 3 includes rules that the NLRB will designate as unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule.

The above three categories will represent a classification of results from application of the new *Boeing* balancing test. The categories are not part of the test itself.

The NLRB's June 6th memorandum will assist NLRB regional offices in assessing on how to handle or process unfair labor charges alleging that a particular employer's policy or handbook rule violates employees' Section 7 rights. In addition, the NLRB's General Counsel's memorandum will guide regional offices regarding the placement of various types of rules into the three categories set out in *Boeing* providing the regional offices a balanced common sense approach in evaluating and processing such unfair labor practice charges against the new standard set forth in *Boeing*.

TAX AND WEALTH ADVISOR ALERT: HOW MUCH SHOULD A TRUSTEE BE PAID?

Let's say you have been named trustee of a loved one's trust. Now, you've just found out how much time and work it will take to fulfill your trustee responsibilities and duties. How much should you be paid to be trustee?

Because every situation is unique, there are no hard and fast rules in Wisconsin on what constitutes "reasonable compensation" for a trustee. Most trust documents will say that the trustee is entitled to "costs and reasonable compensation," but what does that really mean?

First, you should check the actual trust provisions to see if the document provides more specifics on how much you should be paid. If the trust document does not provide specifics, Wisconsin statutes and case law give *some* guidelines on how much you should be paid. Wisconsin statutes specify that trustees are entitled to compensation that is "reasonable under the circumstances." The factors taken into consideration include the size of the trust estate, its complexity, the trustee's skill and experience, the risk assumed in administering the trust, including making discretionary distribution, the amount of time the trustee puts in, and the quality of the trustee's performance.

It is worth noting that if a trust is administered by a corporate trustee, a corporate trustee would normally charge between 1-2% of the trust assets.

A trustee is entitled to be reimbursed for expenses that were properly incurred in the trust administration. This can include the trustee's travel expenses to administer the trust. A trustee should keep all of his or her receipts for these expenses.

Finally, in order to avoid a conflict, a trustee should be transparent with the trust beneficiaries about the trustee's fee. The trustee should clearly document the time he or she spends overseeing the trust so that the beneficiaries know that the requested trustee's fee is made in good faith. The trustee could ask the trust beneficiaries to unanimously agree in writing upon a trustee's fee to take the ambiguity out of the situation, but this can get complicated if the beneficiaries are minors or are disabled.

If you have any questions, please contact Kelly M. Spott at kelly.spott@wilaw.com or 414-276-5000.

EMPLOYMENT LAWSCENE ALERT: SUPREME COURT DECIDES CLASS-ACTION WAIVERS ARE ENFORCEABLE FOR EMPLOYEES

For the last several years, employers have been operating under a cloud of confusion regarding whether provisions in employment agreements that require employees to engage in individual arbitration proceedings, as opposed to class proceedings, are enforceable. Finally, the Supreme Court, in a 5-4 decision, has given us an answer, and the answer is yes, such provisions are enforceable!

In 2012, the National Labor Relations Board (NLRB) took the stance that class waivers violated workers' rights to engage in concerted activity under Section 7 of the National Labor Relations Act (NLRA). Although the Fifth Circuit rejected that stance in *D.R. Horton and Murphy Oil* and held that such provisions were valid and enforceable, the NLRB continued to litigate the issue, claiming that such provisions were not legal. In the intervening years, the Second and Eighth Circuits have agreed with the Fifth Circuit, while the Sixth, Seventh, and Ninth Circuits have agreed with the NLRB.

On Monday, in *Epic Systems Corp. v. Lewis*, the Supreme Court finally settled the dispute. In examining the issue, the Court considered two issues: (1) whether the "savings clause" of the Federal Arbitration Act (FAA) required enforcement of the arbitration agreements as written if

the agreement violated another federal law, and (2) whether the arbitration agreements that waived collective rights violated the NLRA.

In looking at the first issue, the majority found that the FAA required courts to enforce arbitration agreements and, therefore, favored arbitration agreements. Although it acknowledged the general FAA "savings clause," such clause only applies when certain *contract* defenses apply. In examining the case at hand, the majority found that no such contract defenses were applicable and that it could not override the established policy of enforcing arbitration agreements.

The Court also considered whether the NLRA's protection of employees' collective rights displaced the FAA's favored enforcement of arbitration agreement. The majority held that, although the NLRA guarantees employees the right to *bargain* collectively, it neither guarantees the right to *collective action* nor manifests intent to displace the FAA. Because the NLRA was enacted after the FAA, if Congress had intended the NLRA to override the FAA's protections for arbitration agreements, such intent would have needed to be clear. Because it was not clear, the Court found that there was no such intent and that the NLRA's protection of collective rights could not override the FAA's policy of enforcing arbitration agreements as written.

Based on the Supreme Court's ruling in *Epic*, employers are now free to include arbitration agreements that include a waiver of class and collective actions in their employment contracts. Although Congress could amend the law to clearly state that the NLRA, or some other federal law, does not allow for waiver of class or collective actions by employees, such legislative action is unlikely at this point in time. Employers may find arbitration agreements useful as arbitration may be less expensive, faster, and more flexible than traditional litigation.