EMPLOYMENT LAWSCENE ALERT: WAGE AND HOUR LIABILITY—THE HIDDEN DANGER IN ASSET ACQUISITIONS

One of the critical keys to a successful asset acquisition is recognizing potential liabilities and negotiating around those liabilities through a well-drafted asset purchase agreement ("APA"). However, certain liabilities that may attach to the buyer following the sale may not be apparent from the seller's balance sheet or from a typical due diligence review—making the risk a hidden liability. One such potential hidden liability in an asset acquisition is the seller's past wage and hour violations under the federal Fair Labor Standards Act ("FLSA"). Even when the potential liability is identified by the buyer and the parties have negotiated contractual terms in the APA for the buyer not to assume such liability, the buyer may still have exposure for such wage claims when it is deemed a successor under federal common law.

Wage and hour claims under the FLSA can result in significant liability to an employer. Most FLSA claims are brought as a collective action (similar to a class action) on behalf of all similarly situated employees which can result in penalties up to double back wages for up to three years for willful violations plus the opportunity for the recovery of attorney's fees. This can oftentimes lead to hundreds of thousands of dollars in liability and even millions of dollars if the collective class is large enough and the violation involves significant underpayment of lawfully required wages. Typical claims under the FLSA include: (i) misclassification of employees as exempt; (ii) failing to pay employees for hours worked such as for travel time, donning and doffing, meals and rest periods; (iii) failure to properly calculate an employee's "regular rate" of pay in the calculation of overtime; and (iv) improperly classifying workers as independent contractors rather than as employees.

Many business people operate under the general assumption that when a company is sold in an asset sale, as opposed to a stock sale, the buyer acquires the company's assets "free and clear" of the seller's liabilities unless expressly or implicitly assumed by the buyer. However, many federal circuit courts have recognized that when liability is based on a violation of a federal statute involving labor relations or employment, then application of successor liability under federal common law is appropriate in suits to enforce federal labor or employment laws, like the FLSA, to prohibit employers who violated those laws from avoiding liability by selling, or otherwise disposing of, their assets and dissolving. For example, we previously addressed in this blog (click here for the post) the Seventh Circuit's decision in *Teed v. Thomas and Betts Power Solutions, L.L.C.* where the Seventh Circuit imposed successor liability upon the buyer in an asset acquisition for the seller's FLSA violations despite language in the APA that expressly disclaimed such liability by the buyer.

Because a buyer could be held liable as a successor for the seller's past wage and hour violations, it is incumbent upon the buyer to perform a thorough due diligence of the seller's compliance with wage and hour laws. If potential wage and hour compliance issues are detected, then the buyer can take necessary steps to protect itself by: (i) drafting appropriate representations and warranties regarding the seller's compliance with labor and employment laws; (ii) shifting the potential obligation back to the seller through a carefully drafted indemnification provision that properly defines "losses" to include all potential liabilities under the FLSA; (iii) either negotiating a reduced basket (a threshold amount of losses or damages the buyer must incur before it is entitled to indemnification from the seller) or excepting any FLSA liability imposed on the seller from the basket; (iv) negotiating an increased escrow fund to cover any potential indemnification obligation created from any past wage and hour liabilities that may be imposed on the buyer as a successor; and (v) negotiating a purchase price adjustment.

Having an experienced law firm with both transactional and employment attorneys on your side who can recognize and address a buyer's potential exposure to FLSA liability can make the difference between a successful acquisition or an acquisition where the buyer is saddled with a liability it never saw coming. Click here to meet your OCHD&L business law team.

THE WILAW QUARTERLY NEWSLETTER

Newsletter Article Highlights:

- A Must-Read Book for Family Business Owners
- Trends in Arbitration in the United States
- Sales Tax Collection in Wisconsin Starts October 1st–Are You Ready?
- Supreme Court Decides Class-Action Waivers Are Enforceable for Employees

Pleased to Announce:

- State Bar of Wisconsin Taxation Law Section Board Adds New Director, Attorney Samantha M. Amore
- O'Neil, Cannon, Hollman, DeJong and Laing S.C. is Proud to Celebrate 45 Years!

Click the image below to read more.

A TRUSTEE'S DUTY OF LOYALTY IN WISCONSIN

In Wisconsin, anyone who agrees to become a trustee is agreeing to become a "fiduciary." A fiduciary is a person or corporation that has legal obligations to a trust's "beneficiaries," those who will benefit from a trust. In our state, a trustee owes the utmost duty of loyalty to the trust beneficiaries.

A trustee's duty of loyalty requires him or her to administer the trust solely in the interests of the beneficiaries. A trustee violates the duty of loyalty if he or she puts personal interests above the trust beneficiaries' interests.

The trustee is not allowed to profit or make deals for his or her own benefit in the administration of a trust. The duty of loyalty requires that the trustee not be motivated in his or her actions by self-interest or the interests of third parties. A trustee assumes a duty to protect the interests of the trust estate when he or she accepts an appointment as trustee. This means that a trustee cannot allow his or her personal interests to conflict with that duty in any way. This rule is intended to prevent any possible selfish interest of the trustee that can interfere with the trustee's duty to the trust's beneficiaries. Wisconsin courts have held that acting in good faith alone is not enough to satisfy the trustee's duty of loyalty to the beneficiaries.

A trustee must proceed with the utmost caution if he or she engages in a transaction between himself or herself and the trust. For example, if a trustee buys a property owned by the trust, the trustee must be able to show that he or she acted prudently and in a business-like manner with a view to obtain the same fair market value price as he or she might have anticipated with proper due diligence. In general, it is required that trust beneficiaries approve a sale between the trust and a trustee.

If you have any question, please contact Greg Lyons at Greg.Lyons@wilaw.com or 414-276-5000.

EMPLOYMENT LAWSCENE ALERT: SHOULD I USE E-VERIFY OR NOT?

E-Verify is an internet-based system that is operated by the Department of Homeland Security (DHS) in conjunction with the Social Security Administration (SSA). In theory, the program simplifies the process of ensuring new employees have the appropriate work

authorization. After registration, employers enter sections 1 and 2 of the new employee's I-9 Employment Eligibility Verification Form into the system, allowing the system to cross-reference the employee's information with information stored by the SSA. After entering the information, employers would receive either an initial confirmation or a "tentative non confirmation" in seconds. The program sounds like an easy way to navigate the dark waters of unintentional unauthorized employment; however, the program, with many advantages and disadvantages is not for everyone.

The question then becomes—should I use E-Verify or not?

In some cases, the answer is simple. All federal contractors are required to use the program. Similarly, Arizona and Mississippi have passed laws requiring all employers to use the program while South Carolina "encourages" but does not mandate its use. Colorado, Georgia, Missouri, Nebraska, Rhode Island, and Utah have passed legislation that required the use of E-Verify for all public contractors and state agencies while Idaho, Minnesota, and North Carolina require state agencies to use the program.

If your company falls into one of these categories, you must use the program, regardless of the well-documented downfalls. If, however, you live in any other state or are not otherwise required to use E-Verify, each employer must balance the pros and cons of the program before deciding whether to enroll.

Benefits of E-Verify

Simply put, E-Verify is a quick way of receiving an initial determination of a new employee's authorization to work. By entering information from the employee's I-9, the employer receives an automatic reference which provides the employer protection against inadvertently hiring an individual without work authorization. Although the program does not provide complete immunity, it does create a rebuttable presumption that the employer has not violated INA section 274A(a)(1)(A) ("Unlawful Employment of Aliens").

Moreover, if an employer hires a foreign national who recently received a degree in science, technology, engineering, or mathematics (i.e., the STEM fields), voluntary usage of the E-Verify program may make those new employees eligible to work an additional 17 months before the employer is required to file an H1-B petition on their behalf.

Finally, there have been efforts on the federal level to make E-Verify mandatory nationwide. Should these proposed bills turn into law, those employers who have already been using E-Verify will already be familiar with the program. If E-Verify becomes mandated nationally, the program would likely experience technical issues and the error-rate would likely expand. Being familiar with the program would thus be an advantage.

Downfalls of E-Verify

DHS claims that E-Verify is free to use; however, there are some built in costs to consider. First, E-Verify is an “all-or-nothing” program. In other words, employers may not use the program intermittently. Rather, signing up for E-Verify represents an organizational shift that may require extra time, money, and effort to train and supervise staff on how to properly use the system. Depending on the size of the company, this shift may involve significant costs.

Importantly, e-Verify is far from perfect. There have been many reports of e-Verify providing tentative or final non confirmation notices to employees who have proper work authorization—even to U.S. Citizens. Moreover, the issuance of a tentative non confirmation notice requires the employer to provide adequate notice to the new employee, allowing them the opportunity to challenge the determination. Failure to provide adequate and timely notice may open the employer up to legal action by the new employee. Additionally, the system can be cumbersome and difficult to manage, particularly for smaller businesses. For example, with E-Verify, employers may only accept an I-9 List B document if it bears a photograph and employees must possess a social security number. Neither of these requirements is needed to prepare an I-9 outside of the E-Verify program.

Moreover, the government is able to use E-Verify to ensure that employers are timely filing I-9s on behalf of new employees and to correct any errors in a timely fashion. E-Verify provides the government with a swath of information about employers and employees and allows the government to mine this information for employer violations. Voluntarily entering information into this database, in other words, increases the risk that the employer may be investigated and fined for intentional or unintentional violations.

Finally, many immigration reform advocates criticize the program as a means of shifting the burden of immigration enforcement from the government to private employers. Immigration enforcement has always been the responsibility of the federal government. As with the debate behind the implementation of 287(g) agreements by some local law enforcement agencies, critics of the program argue that E-Verify shifts one aspect of enforcement from the government onto private businesses.

In conclusion, employers should weigh the benefits and disadvantages of enrolling in E-Verify before doing so. What may seem like an easy way to ensure the proper work authorization of employees may actually create significant human and financial costs.

For more information on the E-Verify program and to discuss whether enrollment is right for your business, please contact us.

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.