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.

THE WILAW QUARTERLY NEWSLETTER

Newsletter Article Highlights:

- Protecting the Elderly from Fraud by Caregivers
- Debt Collection Safe Harbor May Not Be So Safe
- Mental Capacity Issues in Estate Planning Litigation
- Employers Should Review Their Employee Non-Solicitation Agreements
- What Should Businesses Know About the Tax Plan?

Pleased to Announce:

- Steve Slawinski Elected to the ABC of Wisconsin Board of Directors
- Gregory Mager Moderates for the AAML

Click the image below to read more.

GREGORY MAGER MODERATES FOR THE AAML

Attorney Gregory S. Mager recently moderated the Family Court Commissioners' Panel at the 36th Annual Midwinter Seminar for the Wisconsin Chapter of the American Academy of Matrimonial Lawyers.

The American Academy of Matrimonial Lawyers (AAML) was founded to provide leadership that promotes the highest degree of professionalism and excellence in the practice of family law, including divorce and child custody decisions.

The AAML focuses on generating assistance, support, and growth for education, mediation, and arbitration in matrimonial law. The organization makes resources available to its members, including news, publications and other information on important sociological and psychological research concerning marriage breakdown, with particular attention on the consequences for the children of separated and divorced parents.

Greg has been a fellow in the AAML since 2012. He is recognized by judges and peers as one of Wisconsin's premier family law attorneys. He uses his extensive skill, training, and experience to help his clients achieve successful resolutions of their divorce, paternity, custody, placement, and support matters. Greg is uniquely positioned to successfully represent clients in their family law matters, including those involving complex business, financial, and child related issues.

For additional information, please contact Greg at Gregory.Mager@wilaw.com or 414-276-5000.

TAX AND WEALTH ADVISOR ALERT: WHAT SHOULD BUSINESSES KNOW ABOUT THE TAX PLAN?

If you've been following our posts, this is the third installment in our series on the Tax Cuts and Jobs Act, the tax-legislation overhaul passed by Congress and the President at the end of 2017. Previously, we highlighted the most important changes affecting individuals and non-profits. This week, we're discussing big changes affecting businesses claiming deductions. Most people have heard that Congress reduced the corporate tax rate, but people may not realize that Congress paid for that reduction by changing how businesses claim deductions. We'll discuss some of those changes here.

To start, net operating losses (NOLs) can no longer be carried back to prior tax years, and taxpayers must limit their deduction to 80% of their taxable income instead of 100%. These changes may increase taxable income for businesses each year (relative to what taxable income would have been without this change). The good news is that NOLs may now be carried forward to future tax years indefinitely. So, businesses won't lose the benefit of their NOLs, they just lose the benefit of timing.

For businesses claiming research and development expenditures, they can no longer immediately deduct them. Instead, businesses have to capitalize these costs and deduct them over five years. This means businesses have to reduce their taxable income slowly over time instead of claiming a larger deduction immediately. This will increase taxable income; however, businesses have until 2022 before this rule takes effect.

The Act reduced some businesses' ability to deduct interest expenses. Starting in 2018, businesses must determine the amount of interest they can deduct based on a formula. Luckily for small businesses, Congress created an exception to this limitation. "Small businesses" are those with average annual gross receipts of $25 million or less. You might wonder if partners and S corporation shareholders get around this rule because their businesses pass through taxation–they do not; however partners and S corporation shareholders may be able to carry forward interest expense unused by the partnership or S corporation to future years.

Although not great news, the Act explained the above-mentioned changes relatively clearly. Congress explained another change less clearly, and it's causing disagreement among tax practitioners. Previously, businesses could claim a deduction for meal and entertainment expenses, ranging from 50-100% of those expenses. The Tax Cuts and Jobs Act made several changes to the rules governing this deduction, including eliminating the deduction for entertainment expenses (yes, this means those company Brewers tickets are no longer

deductible), reducing the deduction for meals provided to employees at the employer's convenience from 100% to 50%, and *potentially* eliminating the deduction for meals with clients, referral sources, and business prospects. For relationship-based businesses, this latter change may be substantial. Tax practitioners interpreting the plain meaning of the law say those meals with clients, referral sources, and business prospects will not be deductible. Tax practitioners interpreting the intent of the law say those meals will still be deductible because Congress didn't eliminate this deduction on purpose. At this point, the confusion makes it nearly impossible for these businesses to plan for their tax liability in 2018.

On April 2, 2018, the American Institute of CPAs (the AICPA) asked the U.S. Treasury Department and IRS to issue guidance on this issue immediately. Until the Treasury or the IRS speaks up, businesses taking a conservative approach to tax planning might assume these expenses will not be deductible. As with all changes to the tax code, we will keep an eye out for updates and advise our clients as guidance is released.

MENTAL CAPACITY ISSUES IN ESTATE PLANNING LITIGATION

The United States Census Bureau projects that by 2050, the 65 and older population will nearly double that of 2012. Along with this increasing older population comes an increase in the potential for estate litigation based on mental capacity issues.

These types of claims often arise where the testator suffers from a mental or physical condition, such as Alzheimer's disease or Parkinson's disease, that could compromise a testator's ability to have an understanding necessary to execute a valid will or trust or which may make him or her susceptible to being influenced by another person while making decisions about his or her estate. Advanced age, an inability to handle financial affairs, and the testator's personality may be other relevant factors when a challenge to a person's mental capacity arises.

In Wisconsin, any person 18 years or older and of sound mind may make, amend, or revoke a will or trust. Testamentary capacity is presumed, but interested parties, including disinherited heirs, may assert that a will or trust does not reflect the true wishes of the testator. The two main ways to challenge testamentary capacity are through claims that the testator lacked legal capacity or that someone exercised "undue influence" over the testator.

The test for legal capacity in Wisconsin is quite specific and requires that a testator have the mental ability to understand the nature and extent of his or her property and his or her

relationship to the beneficiaries. A testator must also be able to appreciate the scope and general effect of the provisions of his or her will or trust in relation to the beneficiaries. The testator needs to be able to contemplate these elements together for a sufficient period of time, without prompting, to form a rational judgment in relation to them, the result of which is expressed in the will or trust.

Generally, the testator must have a reasonable understanding of the terms of the will or trust, though a complete understanding of legal terms is not necessary.

A claim of undue influence is essentially one of diminished testamentary capacity, and a person challenging a will or trust may prove it by satisfying the following elements:

1. Susceptibility of the testator to undue influence;
2. Opportunity to influence the testator;
3. Disposition to influence the testator; and
4. Coveted or desired result.

As you can see, estate and probate cases involving mental capacity issues are highly fact specific. A precise application of these factors will depend on the circumstances of each case. Court decisions will depend largely on particular circumstances, which makes choosing an experienced estate planning litigation attorney to develop your case crucial.

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

TRENDS IN ARBITRATION IN THE UNITED STATES

Businesses in the United States have used arbitration clauses in contracts for many years. The purpose of these clauses is to encourage (or require) that contract disputes be settled in arbitration rather than by litigation and trial. Consumer and employment contracts frequently include arbitration clauses.

As Internet-based businesses have exploded over the past fifteen years, so have the number and types of business contracts containing arbitration clauses. Businesses frequently include mandatory arbitration provisions in their online “terms and conditions” for use of their sites, products or services. Businesses engaging in international transactions, whether online or offline, also may include arbitration provisions in their agreements to limit litigation in

countries throughout the world.

While business contracts have changed to reflect changes in alternative dispute resolution, litigation, and the business environment, the arbitration process in the United States also has changed to reflect a more technologically-interconnected world in which arbitration, not litigation, is being used to resolve many types of business disputes.

As a result, arbitration proceedings now often include many of the rules for the handling of electronically stored information (ESI) that U.S. courts already have enacted. Due to its "electronic" nature, ESI can present challenges involving discovery, security, and authentication that traditional paper-based recordkeeping does not.

Courts have addressed these challenges by creating specific rules addressing ESI issues, as well as by adapting existing rules for paper-based documentation to try to accommodate ESI. Since arbitration proceedings frequently handle disputes involving businesses that create, store, and use large quantities of electronic information, many arbitrators have adopted similar rules. But the rules governing ESI usually differ between litigation and arbitration and one potential advantage of arbitration therefore is the possibility of a limited discovery process. Arbitration often can reduce the amount of "big data" a party must parse in order to find what is relevant to the proceeding at hand.

Arbitration remains the second most popular form of alternative dispute resolution in the United States, after mediation. The formal and binding nature of most arbitration – along with the fact that parties can choose arbitrators with specialized technical knowledge helpful to understand the details of the dispute – makes arbitration an appealing alternative to litigation (and trial), particularly when international jurisdictions may be in play.

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

EMPLOYMENT LAWSCENE ALERT: RECENT LEGISLATION IMPACTS QUALIFIED RETIREMENT PLAN HARDSHIP WITHDRAWAL AND PLAN ROLLOVER RULES

The two-year budget agreement passed by Congress on Friday, February 9th, and signed by President Trump later that day, includes tax policy changes that affect qualified retirement

plans. Specifically, qualified retirement plan hardship withdrawal operations will be impacted by the Bipartisan Budget Act of 2018 (the Budget Act) as follows:

- **Removal of the six-month prohibition on deferrals following a hardship withdrawal.** Section 41113 of the Budget Act directs the IRS to issue updated guidance to permit 401(k) and 403(b) plan participants who have taken a hardship distribution from a retirement plan to continue contributing to the plan, even immediately following the hardship distribution. Under current rules, once a participant elects to take a hardship distribution, no elective deferrals are permitted to be made until six months have passed from the date of the distribution. The revised rule will take effect on January 1, 2019 for plans that have a calendar-year plan year.
- **Inclusion of QNECs, QMACs, and profit-sharing contributions in hardship withdrawals.** Under current regulations, a plan sponsor may specify the sources of a participant's plan assets eligible for a hardship withdrawal, but such assets may in no event include certain employer contributions. Beginning on January 1, 2019 (for calendar-year plans), the Budget Act rules will permit a participant's 401(k) or 403(b) plan assets deriving from employer profit-sharing contributions, as well as from employer corrective contributions known as Qualified Nonelective Employer Contributions (QNECs) and Qualified Matching Contributions (QMACs), to be included in sources from which a hardship withdrawal may be taken. The earnings on such contributions will also be included among the assets available for withdrawal. Section 41114 of the Budget Act not only expands the potential sources of a hardship withdrawal, but also eliminates the requirement (previously elected by some employers) that a participant must have taken a plan loan before qualifying to take a hardship withdrawal.

The Tax Cuts and Jobs Act of 2017 (the Tax Act), signed into law by President Trump on December 22, 2017, affects certain plan loan distributions. Specifically, for all tax-qualified retirement plans that offer loans, including 401(k), 401(a), 403(b), and governmental 457(b) plans, the Tax Act provides for an:

- **Extended Deadline for Rolling Over Certain Plan Loan Offsets.**
  - Background and prior law: A plan loan "offset" occurs when an individual owes an outstanding loan to a qualified retirement plan, but then experiences a distribution event that is either (1) a termination of employment; or (2) the termination of the plan. If the plan, in such situation, permits a participant's account balance to be paid out in full, minus the loan amount, then a plan loan offset occurs. A Form 1099-R is issued, indicating that the offset amount is an actual distribution. If a participant receiving a loan offset takes no action, the offset loan amount is considered or "deemed" to be a distribution, and is subject to taxation. Under these facts, taxation of the offset amount can be avoided if: (1) the distribution is otherwise eligible to be rolled over; and (2) the participant rolls the full amount of the distribution, including the amount of the offset, into an IRA. To include the offset amount in the rollover, the participant will need to contribute personal (or borrowed) funds to the rollover amount. Previously, offset loans could only avoid taxation if such a rollover occurred within the 60-day period beginning on the date

offset distribution.
    - New law, effective for plan years beginning on and after January 1, 2018: The Tax Act expressly extends the time period for avoid taxation by rolling over an offset loan until the participant's deadline for filing a federal income tax return (taking any extensions into account). This change means that in many cases, a participant will have more time in which to effect a tax-free rollover of a loan offset occurring following termination of employment.

Caution: No Change to Basic Tax Rules

Although recent legislation is trending toward easing the rules relating to hardship withdrawals and plan loans, it is important to remember that nothing about the fundamental tax treatment of these distributions have changed.

A common misconception (especially among participants) is that if a participant qualifies for a hardship distribution, then the distribution from the plan is tax-free.
A hardship distribution is subject to the same taxation rules as other plan distributions. Satisfying the standards for a hardship distribution simply entitles the participant to receive an in-service distribution of elective deferrals (and other contributions) from the plan, but the hardship distribution is subject to income taxes applicable to plan distributions. A hardship distribution is also generally subject to a 10% early distribution penalty, unless the participant has reached age 59-1/2. A hardship distribution is never eligible to be rolled over into an IRA.

Similarly, once a plan loan has been deemed distributed (either due to a plan loan repayment default, because a plan does not provide for an offset option upon distribution, or because an offset is not timely rolled into an IRA), the deemed distribution of a plan loan is taxed in the same manner as a regular plan distribution for purposes of determining the tax, including any early distribution penalty. A deemed distribution may never be rolled over into an IRA.

Plan Sponsor Action Items

With respect to plan hardship distributions, employer sponsors of 401(k) and 403(b) plans should prepare for the 2019 plan year by:

- Considering whether it is desirable to add a hardship distribution option to the plan (if not already permitted). If hardship distributions will be added, amend the plan and communicate the availability of the option to participants by preparation and distribution of a Summary of Material Modification (SMM) (or other appropriate form of communication in the event of a non-ERISA plan).
- Plan documents that already provide for hardship distributions should be amended, effective for the first day of the 2019 plan year, to eliminate the 6-month restriction on elective deferrals following a hardship distribution and to expand the permitted accounts from which hardship distributions may be taken. These details should be

communicated to participants in the form of an SMM.

With respect to plan loans, plan sponsors of plans that permit loans should:

- Review the plan loan policy and plan loan provisions to determine if either should be updated to reflect this rule, or consider whether to modify the loan policy to take advantage of this rule. For example, if the plan currently permits continued loan repayments following termination of employment consider whether this option should be continued or eliminated. Consider also whether a loan note should be allowed to be rolled over to a successor plan upon plan termination or if the new extended rollover period provides sufficient flexibility to participants absent a rolled over loan note.
- Consider whether plan participant communications should be revised to alert participants to the greater flexibility now allowable for rollover of loan offset amounts.
- As applicable, confer with any third-party administrator for the plan to avoid inadvertently deeming a participant’s loan a deemed (taxable) distribution.