TAX AND WEALTH ADVISOR ALERT: WHAT SHOULD NON-PROFITS KNOW ABOUT THE TAX PLAN?

If you've been following our posts, this is the second installment in our series on the tax plan. Previously, we highlighted the most important changes affecting individuals. (Read full article here) This week, we're discussing the most important changes affecting non-profits. Spoiler alert: the tax plan may cause non-profits to see less revenue and owe more tax in the future! Why would Congress disadvantage non-profit organizations, you ask? In most instances, non-profits were collateral damage.

For starters, we discussed in last week's post that Congress doubled the standard deduction, which will benefit some individuals. By doubling the standard deduction, fewer taxpayers will itemize deductions. Because those who claim the standard deduction do not receive a tax break for donations to charity, those taxpayers have less incentive to donate. This means non-profit organizations may see fewer donations coming through the door. All hope is not lost, however, because the tax plan increased the itemized deduction available to those taxpayers who do receive a tax break for donations to charity. However, this may mean non-profits have to push for larger donations from fewer donors.

Not only did Congress reduce the incentive to give to charity each year, but it reduced the incentive to give at death, too. We also discussed in last week's post that the tax plan doubled the amount someone may leave at death estate-tax free (up to $11,200,000 in 2018), which will benefit the wealthiest individuals. Because fewer estates will receive a tax break for donating to charity, it's possible fewer individuals will provide for charitable donations in their estate plans.

If non-profits weren't already panicking, they should take a seat for the next few changes to the tax code. The tax plan tried to curb what some see as excessive compensation by imposing a 21% excise tax on salary and benefits paid to any one employee in excess of $1,000,000. Although $1,000,00 may seem lofty for a non-profit and may seem like an appropriate limit for non-profit employees such as college football coaches, this change will hurt charitable organizations trying to attract talent away from the private sector through competitive compensation packages. This excise tax may make such compensation packages cost prohibitive.

Further, non-profit organizations may see an increase in the tax they owe on Unrelated Business Taxable Income (UBTI). For those who aren't familiar, the UBTI rules require a non-profit organization to pay tax on income earned through activities unrelated to charitable purpose. Previously, if a non-profit organization engaged in multiple activities unrelated to its

charitable purpose, it could offset the gains and losses from those activities against each other, possibly eliminating taxable income. Going forward, non-profits can't offset gains and losses across activities. UBTI will also be increased by certain fringe benefits paid by a non-profit organization to its employees. Again, this will make it more difficult for these organizations to attract talent away from the private sector.

In sum, non-profits should know that they will see a handful of changes to their tax returns, and they won't likely be happy with the changes. These organizations might consider separating operations into different legal entities to avoid the $1,000,000 cap or condensing unrelated activities to avoid the rule against offsetting gains and losses. As of now, we will continue brainstorming creative solutions for our non-profit clients so they can pursue their charitable missions with tax efficiency.

EMPLOYMENT LAWSCENE ALERT: EMPLOYERS SHOULD REVIEW THEIR EMPLOYEE NON-SOLICITATION AGREEMENTS

On January 19, 2018, the Wisconsin Supreme Court issued a decision in *The Manitowoc Company, Inc. v. Lanning* affirming a 2016 Wisconsin Court of Appeals ruling that expanded the scope of Wis. Stat. § 103.465, which governs the enforceability of restrictive covenants, to include employee non-solicitation, or anti-raiding, provisions. We previously posted a blog about the Court of Appeals decision here.

John Lanning, a long-term employee of the Manitowoc Company, signed an agreement whereby he agreed, for a period of two years after the termination of his employment, not to solicit, induce, or encourage any employee of the Manitowoc Company to terminate his or her employment with the company or to accept employment with a competitor, supplier, or customer of the company. After he terminated his employment, he encouraged multiple employees of the Manitowoc Company to terminate their employment and join him at his new employer, which was a competitor of the Manitowoc Company.

The Wisconsin Supreme Court addressed two questions: 1) Whether employee non-solicitation agreements are "covenants not to compete" governed by Wis. Stat. § 103.465; and 2) if they are, was the provision contained in Lanning's agreement enforceable.

In answering whether non-solicitation agreements are covenants not to compete, the Court acknowledged that the statute has been applied to agreements viewed as restraints on trade, which may take many forms, and opined that the focus of the inquiry about whether a

provision is a covenant not to compete should focus on the effect of the restraint, rather than its label. Therefore, the Court found that, because the non-solicitation provision restricted Lanning's ability to compete fully with the Manitowoc Company by prohibiting him from soliciting employees and competing in the labor market, it was a restriction on his ability to engage in ordinary competition and was governed by the statute.

The Court stated that the purpose of Wis. Stat. § 103.465 is to invalidate covenants that impose unreasonable restraints on employees. The Court found the employee non-solicitation unenforceable under Wis. Stat. § 103.465 because the non-solicitation provision was unnecessarily broad because it restricted Lanning's ability to compete fully in the marketplace with the Manitowoc Company by prohibiting him from soliciting all employees wherever they might work in the world. Such a restriction does not allow for the ordinary sort of competition attendant in the free market and, as a result, was an unlawful restraint of trade.

In order to be enforceable under the statute, a covenant not to compete must 1) be necessary for the protection of the employer, 2) provide a reasonable time limit; 3) provide a reasonable territorial limit; 4) not be harsh or oppressive to the employee; and 5) not be contradictory to public policy. Because the Court found that the employee non-solicitation provision that Lanning had signed was not necessary for the protection of the employer, they only addressed that portion of the test. Because words are interpreted to have their plain meaning, the Court found that the words "any employee" contained in Lanning's agreement prohibited him from soliciting every one of the Manitowoc Company's 13,000 world-wide employees with no limits as to the nature of the employee's position, Lanning's personal familiarity with or influence over the particular employee, or the geographical location in which the employee worked. The company's contention that it had a protectable interest in maintaining its entire workforce was rejected by the Court, which said that, ordinarily, the protectable interest would be limited to top-level employees, employees with special skills or knowledge important to the employer's business, or employees with a set of skills that are difficult to replace. Because the employee non-solicitation provision was not limited in any way, the Court found that it was overbroad on its face and unenforceable.

Based on this decision, employers must carefully review their restrictive covenants, particularly employee non-solicitation provisions, to ensure that they are carefully drafted to be necessary to protect their interests and no broader than needed. The focus must be on protectable, identifiable interest of the company. An experienced management-side employment attorney can assist employers with drafting such provisions in order to meet the enforceability standards required by the Wisconsin restrictive covenant statute.

O'NEIL, CANNON, HOLLMAN, DEJONG AND LAING ELECTS SCOBY AND GAGAN AS SHAREHOLDERS

O'Neil, Cannon, Hollman, DeJong and Laing is pleased to announce that Attorney Jason Scoby and Attorney Bob Gagan were recently elected as shareholders of the firm.

Mr. Scoby has been with the firm since 2009 and is a member of the firm's Business Practice Group and Banking and Creditors' Rights Practice Group. He advises and represents individuals, businesses, and banks on a variety of corporate, banking, and business-related issues, including mergers and acquisitions, commercial loan transactions, corporate issues, contract negotiation and preparation, and business entity selection and formation.

Learn more about Mr. Scoby by visiting his full profile.

Mr. Gagan has been with the firm since 2016. Bob is a respected Wisconsin business law attorney. He focuses his practice on corporate law and commercial litigation as well as municipal law. Mr. Gagan is a Past President of the State Bar of Wisconsin. He previously served as the Brown County representative on the State Bar Board of Governors and also served on the Board of Governors Executive Committee. Mr. Gagan is the co–founder of the Brown County Free Legal Clinic and continues to volunteer his time at this Free Legal Clinic.

Learn more about Mr. Gagan by visiting his full profile.

We are pleased to add both Jason and Bob as shareholders.

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

I'm sure you've heard the news by now–Congress passed sweeping tax legislation at the end of 2017. These changes to the tax code will affect everyone from hairdressers to private equity fund managers. Everyone now wonders, what do I need to know about the tax plan? Over each of the next several weeks, we will tailor our summary of the tax plan by interest group, providing you with what you need to know based on your interests. This week, we will discuss the most important tax law changes affecting individuals. In the following weeks, we

will discuss the changes affecting non-profits, businesses claiming deductions and credits, and businesses considering pass-through or corporate taxation.

When I said this week's post would discuss tax law changes affecting individuals, you probably thought to yourself, doesn't that mean everyone? Yes, it does. Any individual who files an individual income tax return (Form 1040) will see a change on his or her tax return for 2018. You've likely heard about the big-ticket changes–the elimination of many itemized deductions, the doubling of the standard deduction, and the overall reduction of the tax rate. It's important to note that Congress left unchanged the preferential 20% tax rate for long-term capital gains and qualified dividend income. Also, Congress modified the alternative minimum tax (AMT) system, meaning fewer individuals will be subject to AMT than before.

The tax bill made numerous changes to the deductions available to individuals. For those who itemized in the past, the deductions you once claimed may have been eliminated, like the miscellaneous itemized deduction for tax preparation fees or the deduction for interest paid on home equity lines of credit, or the deductions may have been limited, like the deductions you claimed for property taxes and state and local income taxes (now limited to $10,000 combined). By doubling the standard deduction, many individuals who itemized previously will now claim the standard deduction. Although this sounds like it will cause you to pay more tax, the modification of the tax brackets and reduction in tax rates (such as the top rate changing from 39.6% to 37%), may balance out your tax bill.

For the wealthiest individuals, the tax plan gives your estate a break at death. In 2018, individuals can leave $11,200,000 free of estate, gift, and generation-skipping transfer tax (up from roughly $5,500,000). The other rules affecting the estate and gift tax regime, such as the surviving spouse's ability to use the deceased spouse's remaining exemption, remain unchanged. This means married couples have an exemption of $22,400,000.

Now that we've discussed all the major changes, what changes to the tax code have received less media attention? For starters, the tax plan repealed the deduction for moving expenses and the exclusion from income for moving expenses reimbursed by your employer. These changes will have a negative impact on your tax bill if they apply to you. Alternatively, the tax plan expanded the qualified use of section 529 plan funds (a tax-advantaged savings plan for education expenses) to elementary or secondary public, private, or religious school tuition and eligible expenses. This change will have a positive impact on your tax bill if it applies to you.

For those taxpayers subject to the "kiddie tax" (the regime previously applying the parents' income tax rate to a child's income), they will see a change on their tax return going forward. Now, earned income will be taxed at rates applied to single filers, and unearned income will be taxed at rates applied to trusts and estates. These changes will likely increase the amount of tax owed on a child's income. For those taxpayers borrowing from their retirement plans,

the tax plan gives you more time to pay off that balance, potentially saving you income tax.

As you can now glean, the new tax laws are all over the map–some increase the amount of tax you will owe and others decrease it. It's important to note that most of these changes will expire on December 31, 2025. Until then, we'll continue helping clients assess important decisions in light of the new tax code.

O'NEIL CANNON RANKED IN 2018 "BEST LAW FIRMS"

O'Neil Cannon has been ranked in the 2018 U.S. News – Best Lawyers® "Best Law Firms" list in 13 practice areas:

- Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law
- Commercial Litigation
- Construction Law
- Corporate Law
- Family Law
- Litigation – Bankruptcy
- Mergers and Acquisitions Law
- Personal Injury Litigation – Plaintiffs
- Product Liability Litigation – Defendants
- Real Estate Law
- Securities / Capital Markets Law
- Tax Law
- Trusts and Estates Law

Firms included in the 2018 "Best Law Firms" list are recognized for professional excellence with persistently impressive ratings from clients and peers. Achieving a tiered ranking signals a unique combination of quality law practice and breadth of legal expertise.

SEVENTEEN ATTORNEYS NAMED SUPER LAWYERS

Each year, *Super Lawyers* surveys the State's attorneys and judges, seeking the State's top attorneys. The lists for 2017 were recently published and, once again, a large number of our

attorneys are included thereon.

Dean Laing was named one of the Top 10 attorneys in Wisconsin for the third time. He was also named one of the Top 50 attorneys in Wisconsin for the twelfth straight year. In doing so, he is one of only six attorneys out of over 15,000 attorneys in Wisconsin—and the only commercial litigator in Wisconsin—to make the list all twelve years. Dean was also named one of the Top 25 attorneys in Milwaukee.

Seth Dizard and Patrick McBride were also named among the Top 50 attorneys in Wisconsin. This is the fifth time that Seth has made the list. Seth was also named one of the Top 25 attorneys in Milwaukee.

Doug Dehler, Jim DeJong, Pete Faust, Bob Gagan, John Gehringer, Joe Gumina, Greg Lyons, Greg Mager, Joe Newbold, Chad Richter, John Schreiber, Jason Scoby, and Steve Slawinski were also named Super Lawyers, a recognition given to the top 5% of attorneys in Wisconsin. Jim DeJong, Pete Faust, John Gehringer, and Greg Lyons have made the list for the past 10 or more years.

Erica Reib was also named Rising Stars, which is limited to 2.5% of the young attorneys in Wisconsin.

We are extremely proud of these recognitions, but even more proud of the quality of service we provide to our clients.

STEVE SLAWINSKI ELECTED TO THE ABC OF WISCONSIN BOARD OF DIRECTORS

Effective January 1, 2018, Attorney Steve Slawinski was elected to the Board of Directors for the Associated Builders and Contractors (ABC) of Wisconsin. Throughout the country, the ABC is an effective force in business development, education, labor relations, and legislation. The ABC actively promotes merit, or performance-based construction.

For 30 years, Steve has represented his clients in complex construction, business, and real estate litigation. His practice emphasizes the areas of construction litigation and construction law—representing general contractors, subcontractors, owners, design professionals, lenders, and title insurers in construction disputes, both in court and in arbitration.

Steve is pleased to be elected for a three-year term and looks forward to adding his expertise to the board.

‘TIS THE SEASON FOR GIVING

The spirit of the holiday season is upon us once again and the attorneys and staff at O’Neil, Cannon, Hollman, DeJong and Laing wanted to do something special for our community. For our annual holiday donation OCHDL collected 521 pounds of food for the Hunger Task Force.

The Hunger Task Force provides a safety net of emergency food to a network of local food pantries and meal programs. They are the only food bank in Milwaukee that does not charge for food, delivery, or network membership. We are honored to support them and their mission to end hunger.

From all of us at O’Neil, Cannon, Hollman, DeJong and Laing:

“Best wishes for a wonderful holiday and a very Happy New Year!”

EMPLOYMENT LAWSCENE ALERT: INTERNAL REVENUE CODE SECTION 409A SURVIVES REPEAL-AND-REPLACE ATTEMPT

Employer sponsors of nonqualified deferred compensation (NQDC) plans, as well as the executives and other service providers, who benefit from them, can breathe a sigh of relief. The ability to reward and retain key employees with incentive and compensation plans that provide a current opportunity to earn a payment to be provided (and taxed) in the future, will continue to be available, as it has been under American tax law for more than 80 years. Since late 2004, NQDC agreements have been regulated primarily by Internal Revenue Code (Code) Section 409A.

The House Tax Bill

The ongoing viability of NQDC came under direct threat in the initial draft of the Tax Cuts and Jobs Creation Act (TCJA) as proposed by the U.S. House of Representatives Ways and Means Committee on November 2, 2017 (the House Tax Bill). Section 3801 of the House Tax Bill, which was proposed in substantially similar form to the Section 409A repeal-and-replace proposal introduced in a proposed Tax Reform Act of 2014, would have drastically reduced

the ability of employers to reward key employees with deferred compensation arrangements.

As drafted, the House Tax Bill would have eliminated Section 409A and supplanted it with a new Section 409B. These changes, intended to be effective for services performed on and after January 1, 2018, would have meant, as of the New Year, that all NQDC arrangements would become fully taxable upon vesting, with only very limited opportunity to defer taxation until a future year. The proposed law would have applied not only to the common elective, nonelective, incentive payment, and phantom stock forms of NQDC, but would have also expressly *included* the (currently) sometimes-exempt equity-based compensation forms such as stock options, restricted stock units, and stock and stock appreciation rights.

The Joint Tax Committee had estimated that the proposed change would increase revenues by $16.2 billion between 2018 and 2027.

2017 Senate Tax Bill

The language that would repeal section 409A and replace it with a new Section 409B was removed from the final version of the House Ways and Means Committee's Tax House Bill, as issued on November 9, 2017. The Chairman's Mark of the Senate tax reform proposal issued on the same day, however, resurrected the proposals. As unveiled on November 9, 2017 by Senator Orrin Hatch, Chairman of the Senate Finance Committee, the initial Senate version of the TCJA (the Senate Tax Bill) contained the identical Section 409A repeal-and-replace provisions.

Senate Finance Committee Mark Up

Finally, upon the successful amendment offered by Senator Rob Portman, the Section 409A repeal-and-replace proposal was stricken in its entirety from the legislation. This action preserves the current, well-established system, which would have been rendered virtually extinct by the repeal-and-replace proposal. The proposal's demise became known concurrent with the Joint Committee on Taxation's issuance of the Chairman's Modification to the Chairman's Mark of the TCJA late in the day on November 14, 2017.

Impact

The retention of the existing system of taxation for NQDC arrangements is great news for employers and key employees, who can now continue to offer (and benefit from) compensation packages as appropriate to reward and retain top talent. It is also good policy, in that it does not impose limitations on the ability to earn and save for retirement at a time when the general retirement savings rates of Americans across nearly all income levels are widely reported to be insufficient.

OCHDL IS PLEASED TO ANNOUNCE THAT ATTORNEY KELLY M. SPOTT HAS JOINED THE FIRM

Attorney Kelly M. Spott, a graduate of Marquette University Law School, has recently joined the Milwaukee law firm O'Neil Cannon Previously Kelly was an Advanced Planning Attorney at Northwestern Mutual. Kelly is a member of the Business Law and Tax and Succession Planning Groups. She assists clients with estate planning, probate, trust administration and inheritance litigation.

O'Neil Cannon, founded in Milwaukee in 1973, is a full-service legal practice that primarily focuses on providing business law and civil litigation services to closely-held businesses and their owners. The firm represents corporations, institutions, and partnerships at all stages of the business life cycle, helping them start, grow and transition from one generation to the next. We also assist business owners with their personal legal needs including tax and estate planning, family law and litigation—including personal injury litigation.