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.

PROTECTING THE ELDERLY FROM FRAUD BY CAREGIVERS

In what has become an all-too-common story, it was recently reported that a 92 year-old Wisconsin woman suffering from dementia was defrauded by her caregiver. The caregiver, who allegedly stole $25,000, recently pled guilty to fraud and identity theft. More details on the story, which was reported by Milwaukee WISN 12, can be found here.

Like many who suffer from dementia, the victim of this crime was living in her home, with the assistance of caregivers. While most caregivers are certainly professional and trustworthy, in this case, the caregiver—Andrea Gooseberry who worked for Home Care Assistance—allegedly was not.

The criminal complaint alleges that the caregiver used Marilyn's debit card and identity to steal approximately $25,000 through 47 separate ATM transactions, all of which occurred over the course of one month. According to victim's son, Marilyn was no longer capable of using an ATM card on her own.

The sad news does not end there, unfortunately. The police are also investigating whether four family friends stole another $20,000 from Marilyn.

There are steps that can be taken to reduce the risk that a loved one will be defrauded. For one thing, it is important that steps be taken to monitor a loved one's bank account to identify suspicious transactions. In addition, arrangements can be made to have a financial power of attorney put in place. If necessary, court proceedings can also be filed to seek the court appointment of a representative to take charge of the finances of one who is no longer able to handle his or her finances alone.

Whenever fraudulent activity of the sort described above is discovered, it is important to contact the local authorities. In addition, depending on the circumstances, the filing of a lawsuit may be the best option to put yourself in a position to investigate suspected fraud, particularly if that fraud is not discovered until after your loved one has passed.

If you would like more information on this topic, you are welcome to call Trevor Lippman at 414-276-5000 or trevor.lippman@wilaw.com

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ATTORNEY CLAUDE J. KRAWCZYK INVOLVED IN RESTORING MARQUETTE CAMPUS STATUE

The George Washington statue has returned to Wisconsin Avenue near the campus of Marquette University. The 133 year-old monument had been removed for restoration, which involved removing layers of black corrosion and the repair of splitting bronze. Attorney Claude Krawczyk currently serves as the president of The Westown Association, which raised funds for the restoration effort. In total, the restoration project cost more than $100,000 to complete. Attorney Krawczyk had a special interest in the project, explaining "I can remember seeing [the statue] when I was a kid, it's been there all my life. I think it's an important memory for Milwaukee … an important symbol." Read full story here.

THE WILAW QUARTERLY NEWSLETTER

Newsletter Article Highlights:

- What Should You Do If You are Named Trustee?
- Do Your Due Diligence
- A Deeper Dive Into the Arbitration Process and a Look at the Advantages and Disadvantages of Arbitration
- ACA Employer Payment Notices Arriving Soon
- What Should Individuals Know About the Tax Plan?

Pleased to Announce:

- OCHDL Welcomes New Attorney Kelly M. Spott
- Scoby and Gagan Elected Shareholders
- Congratulations to Our 2017 Super Lawyers

Click the image below to read more.

DEBT COLLECTION SAFE HARBOR MAY NOT BE SO SAFE

Debt collectors recently received clarification on the contents of the collection letters they send on behalf of creditors: The “safe harbor” language set forth by the Seventh Circuit Court of Appeals to avoid liability under the Fair Debt Collection Practices Act is not meant to be copied and pasted into collection letters in every situation. Earlier this month, the Seventh Circuit concluded debt collectors cannot refer to late charges in collection letters sent to consumers if the creditor is prohibited from collecting late charges—even if a debt collector is quoting the safe harbor language that typically precludes FDCPA liability. Rather, debt collectors must ensure the safe harbor language is tailored to the circumstances.

The optional safe harbor language used in Wisconsin, Illinois, and Indiana includes an explanation of variable debts—that “[b]ecause of interest, late charges, and other charges that may vary from day to day, the amount due on the day you pay may be greater” than the amount listed as owed in the collection letter. This safe harbor language may allow debt collectors to avoid liability under the FDCPA because it provides a template for explaining the variable nature of some debts. In the recent case of *Boucher v. Finance System of Green Bay, Inc*., the Seventh Circuit held that this safe harbor precludes liability for inaccurately stating the amount of a variable debt regardless of which FDCPA provision that liability is based upon. But for it to be a truly safe harbor, the debt collector must be sure that the language accurately describes the nature of the debt. In *Boucher*, the debt collector used the safe harbor language as quoted above, even though no late charges or other charges could be added to the debt. The Seventh Circuit held this violated the FDCPA because the average unsophisticated consumer would believe late charges could be added and would thus be misled about the amount or character of the debt.

For more information on debt collection laws, contact Christa Wittenberg at 414-276-5000 or christa.wittenberg@wilaw.com

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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.