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.

THE WILAW QUARTERLY NEWSLETTER

Newsletter Article Highlights:

- 401(k) Plan Errors Cost Sellers of Company Nearly $200,000
- Seventh Circuit Court of Appeals Rejects “Worthless” Subway Class Action Settlement
- Avoiding Pitfalls When Adding Sweat Equity Members in an LLC
- It’s Time to Amend 403(b) Retirement Plan Documents!

Pleased to Announce:

- OCHDL Welcomes New Attorney *Nicholas G. Chmurski*
- Congratulations to Our Attorneys Listed in The Best Lawyers in America® 2018

Click the image below to read more.

EMPLOYMENT LAWSCENE ALERT: ACA EMPLOYER PAYMENT NOTICES ARRIVING SOON

Buried in IRS guidance issued on November 2 is news that the IRS will soon be issuing notices to employers of potential ACA taxes. While the ACA employer payments are widely referred to as “penalties,” they are actually “assessable payments” in the form an excise tax.

Specifically, the IRS has announced that applicable large employers (ALEs) will begin receiving notices of potential liability “in late 2017” if the information reported for 2015 on Forms 1094-C and 1095-C indicates that the employer may owe an employer shared responsibility payment. ALEs are employers with 50 or more full-time (including full-time equivalent) employees for a calendar year. Internal Revenue Code Section 4980H, generally, provides for two circumstances under which an employer may owe an employer shared responsibility payment.

First, under Section 4980H(a), an ALE in 2015 may be penalized if it did not offer health coverage to at least 70% of full-time (30 hour-per-week) employees (and their dependents). The Section 4980H(a) penalty, for 2015, was $177.33 per month (or $2,080 per year, if applicable in all months), multiplied by all full-time employees, and reduced by the first 80 full-time employees. This assessed payment would be triggered if at least one employee (of an ALE not offering coverage) enrolled in subsidized coverage through the Exchange.

Second, under Section 4980H(b), an ALE in 2015 may be penalized if although it offered coverage to at least 70 percent of its full-time employees (and their dependents), at least one full-time employee received a premium tax credit to help pay for coverage through the Exchange, which may occur because the ALE did not offer coverage to that particular employee or because the coverage the employer offered that employee was either unaffordable or did not provide minimum value. The Section 4980H(b) penalty, for 2015, was $260 per month (or $3,120 per year, if applicable in all months) per full-time employee who was not offered coverage (or was offered coverage that was either unaffordable, or did not provide minimum value), and who enrolled in subsidized coverage through the Exchange.

Any potential employer shared responsibility payment that might be assessed would relate to coverage offered (or not offered) to the employer's full-time employees during the 2015 calendar year.

What Information Will the IRS Letter Contain?

The proposed payment notice will be in the form of IRS Letter 226J, which will include:

- a brief explanation of Code Section 4980H;
- an employer shared responsibility payment summary table itemizing the proposed payment by month and indicating for each month if the liability is under Code Section 4980H(a), Code Section 4980H(b), or neither;
- an employer shared responsibility response form, Form 14764, "ESRP Response"; and
- an employee PTC list, Form 14765, "Employee Premium Tax Credit (PTC) List" which lists, by month, the ALE's assessable full-time employees (individuals who for at least one month in the year were full-time employees allowed a premium tax credit and for whom the ALE did not qualify for an affordability safe harbor or other relief (see instructions for Forms 1094-C and 1095-C, Line 16), and the indicator codes, if any, the ALE reported on lines 14 and 16 of each assessable full-time employee's Form 1095-C.

The response to Letter 226J will be due by a specified date, which will generally be 30 days from the date of Letter 226J.

Letter 226J will contain the name and contact information of a specific IRS employee that the ALE should contact if the ALE has questions about the letter.

What Do I Need to Do?

If your business receives a Letter 226J from the IRS, you should carefully review all information and determine whether you believe the proposed payment amount is correct. You may want to consider whether your company was eligible for any transition relief in 2015.

If the Letter is Correct

If you agree with the payment amount determination, you should complete, and return to the IRS the enclosed Form 14764. You should also provide full payment for the amount, either by check, or electronically, using the Electronic Federal Tax Payment System EFTPS system.

If the Letter is Incorrect

If you disagree with the payment amount determination, you will be required to complete and return the "ESRP Response" section of the enclosed Form 14764 to substantiate the basis for your disagreement. Your response may include supporting documentation, such as proof that health insurance was offered, or relevant coverage records. Your response must also specify, on the "Employee PTC List," which changes are requested in order to correct the Forms 1094-C and 1095-C filed for 2015. The Letter 226J will include instructions on how to complete the required forms.

The IRS will respond to an ALE's formal disagreement by sending Letter 227, acknowledging the ALE's response and describing any further actions required. If the ALE disagrees with the IRS conclusions in the Letter 227, the ALE may request, within 30 days, a "pre-conference assessment" with the IRS Office of Appeals.

If, after any additional correspondence or discussions, the IRS ultimately determines that the payment is owed, the ALE will be provide the ALE with Notice CP 220J, which is a notice and demand for payment.

In light of the imminent arrival of the ACA potential payment notices, employers should be prepared to review and respond to Letter 226J quickly. Now is a good time to revisit the coverage offered in 2015, and to ensure easy access to applicable records.

It is important to note that, while scammers might see an opportunity to contact employers to demand payments, the IRS will initially contact ALEs about ACA payments only by letter (and not by email or phone).

A DEEPER DIVE INTO THE ARBITRATION PROCESS AND A LOOK AT THE ADVANTAGES AND DISADVANTAGES OF ARBITRATION

During arbitration, evidence and testimony are presented at a formal arbitration hearing. Discovery may occur before then, but its scope usually is limited by the parties' agreement or the arbitrator rules. After the arbitration hearing, the arbitrator issues a decision, known as an "award."

Arbitration may be binding or non-binding. Most arbitrations held in the U.S. today are binding arbitrations. In a "binding" arbitration, the arbitrator's decision is final, binding, and enforceable in court, similar to a court judgment. Both Wisconsin state and federal courts will enforce binding arbitration decisions. A "non-binding" arbitration does not have these elements of a binding arbitration, but can be helpful for evaluating a case or creating a basis for settlement negotiations between the parties.

The utility of arbitration (and other forms of alternative dispute resolution) in a particular dispute depends on various factors, including the nature of the dispute, the contract at issue and the state and federal laws in question, as well as the potential financial and time-related costs of litigation.

So why do parties choose arbitration? They do so because the arbitration process offers certain advantages. For instance, arbitration allows the parties to choose the place, time, rules, law, and people who will make the decision on the dispute. This flexibility, in turn, can make it easier for the parties to present technical facts since they can often choose a person or panel with expertise to understand a complex situation. The arbitration process also is typically shorter and faster than litigation and a trial due to limited, private discovery and streamlined procedural rules. Finally, most arbitration decisions are final and binding, with no appeals.

As with every dispute resolution process, however, arbitration also has certain disadvantages. Arbitration does not offer the right to a judge or a jury. Discovery is limited not only by the "ground rules" of the selected arbitration forum, but also by the limited power arbitrators have to force non-parties to submit to discovery or to issue subpoenas. Third parties cannot be added to arbitration without their consent, making complex multi-party disputes more difficult to resolve. Court rules of evidence and procedure do not apply. Since complex arbitration can be costly, parties with limited financial resources may be at a disadvantage in arbitration, and may not have the leverage litigation can provide to share or shift costs.

Arbitrators have wide discretion in their decision-making and have no obligation to explain their reasoning to the parties. Appeals from arbitration awards are rare. Typically, an arbitration award can be overturned only as a result of corruption, fraud, partiality, or prejudicial misconduct by the arbitrator.

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

SETH DIZARD NAMED AS A 2017 WISCONSIN LEGAL INNOVATOR BY STATE BAR OF WISCONSIN

In a recent article previewed in the *InsideTrack*, a bi-weekly newsletter by the State Bar of Wisconsin, Seth E. Dizard was featured as a 2017 Wisconsin Legal Innovator. The article will be featured as the cover story of the November Edition of the *Wisconsin Lawyer*. Read the full article here to learn more about this prestigious recognition.

Attorney Dizard is the head of the firm's Banking and Creditors' Rights Practice Group. He has extensive experience serving as a court-appointed receiver throughout the State of Wisconsin for businesses, construction projects, real estate developments, marital and family estates, rental income properties, and high net worth individuals.

EMPLOYMENT LAWSCENE ALERT: IRS ANNOUNCES 2018 FSA, TRANSPORTATION, AND EMPLOYEE BENEFIT PLAN LIMITS

The Internal Revenue Service has released the cost-of-living adjustments to the dollar limits under various employer-sponsored benefit plans for 2018. Several key limits (indicated in bold, below) have been increased for 2018.

Employer-sponsors of benefit plans should update payroll and plan administration systems for the 2018 limits and ensure that any new limits are incorporated into relevant participant communications, enrollment materials and summary plan descriptions, as applicable.

Health FSA Employee Contribution and Transportation Plan Limits

- For 2018, the maximum dollar limit on employee contribution to health flexible spending arrangements (FSAs) will increase to **$2,650** from the prior limit of $2,600. An Employer is not required to adopt the new Health Care FSA increase, but may do so as long as the Health FSA Plan document is expressly amended for this purpose.
- The maximum pre-tax value of a qualified transportation plan for employee parking or transit passes will increase by $5 to **$260** per employee, per month in 2018.

2018 Qualified Retirement Plan Limits

For retirement plans beginning on and after January 1, 2018, the following dollar limitations apply for tax-qualified retirement plans:

- The elective deferral limit under Section 402(g) or the Internal Revenue Code (Code) will increase from $18,000 to $**18,500** for employees who participate in:
  - Code Section 401(k) plans;
  - Code Section 403(b) plans; and
  - Most Code Section 457 plans.

- The catch-up contribution limit for those age 50 and over under will remain unchanged at $6,000 for all plans other than SIMPLE 401(k) and SIMPLE IRAs. (For these SIMPLE plans, the catch-up contribution limit for those age 50 and over under will remain unchanged at $3,000).
- The limitation on the annual benefit for a defined benefit plan will increase from $215,000 to **$220,000**.
- The limitation on annual additions (meaning total employee plus employer contributions) to a participant's defined contribution plan will increase from $54,000 to **$55,000**.
- The limit on the amount of annual compensation taken into account under a tax-qualified retirement plan will increase from $270,000 to **$275,000**.
- The limitation used in the definition of a highly compensated employee (HCE) under Code Section 414(q) will remain unchanged at $120,000.
- The limitation used in the definition of a key employee in a top-heavy plan under Code Section 416 will remain unchanged at $175,000.
- The dollar amount under Code Section 409(o) for determining the maximum account balance in an employee stock ownership plan (ESOP) subject to a five-year distribution period will increase from $1,080,000 to **$1,105,000**.
- The dollar amount used to determine the lengthening of the five-year distribution period will increase from $215,000 to **$220,000**.

Prior Guidance on Additional 2018 Limits

Social Security Taxable Wage Base

As announced in mid-October (and adjusted in November), the Social Security Administration announced that the Social Security wage base for 2018 will increase slightly (from $127,000) to **$128,400**. This is the maximum wage base subject to the FICA tax and is also the maximum "integration level" for retirement plans using "permitted disparity." (The 2018 increase is about 1% higher than the 2017 wage base. In contrast, the 2017 wage base increase was more than 7% higher than the 2016 amount).

2018 Health Savings Account Limits

In May of this year, the IRS announced that combined annual contributions to a Health Savings Account (HSA) in 2018 must not exceed the maximum annual deductible HSA contribution, which will be **$3,450** for single coverage and **$6,900** for family coverage. These limits reflect a $50 and $150 increase over the 2017 maximums, respectively. The catch-up contribution for eligible individuals who will attain age 55 or older by year end remains at $1,000.