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.

OCHDL PROUDLY SPONSORS 10TH ANNUAL CHARITABLE EVENT FOR CRS

For the second consecutive year, OCHDL proudly sponsored the Catholic Relief Services (CRS) reception at the Wisconsin Club. This was a very special year, as the humanitarian group celebrated its 10th year here in Milwaukee. As always, a very well received event and powerful message was presented.

The Milwaukee chapter of CRS, which includes OCHDL Shareholder Carl Holborn, brought about a great deal of awareness this year–reaching out to radio stations, publications, and even appeared on TMJ4's *The Morning Blend* to help spread the word about CRS and their charitable mission. The Milwaukee committee is grateful for all the support the Milwaukee community has shown to them over the years and are very proud to be celebrating this ten-year milestone.

CRS is one of the largest international aid organizations in the world. They are also one of the most efficient and effective: Ninety-seven percent of their expenditures go directly to programs that benefit individuals overseas. As part of the universal mission of the Catholic Church, they work with local, national and international Catholic institutions and structures, and other organizations, to assist people on the basis of need, without regard to race, religion or nationality. They alleviate suffering and provide assistance to more than 100 million people in need who live in some of the most impoverished places in over 100 countries.

O'Neil Cannon is honored to have been a part of such a meaningful event.
Read more about CRS >>

SEVENTH CIRCUIT COURT OF APPEALS REJECTS

“WORTHLESS” SUBWAY CLASS ACTION SETTLEMENT

On August 25, 2017, the Seventh Circuit Court of Appeals rejected a settlement of a class action lawsuit that alleged Subway’s “footlong” sandwiches failed to measure up. *In re Subway Footlong Sandwich Marketing and Sales Practices Litig.*, 869 F.3d 551 (7th Cir. 2017). The settlement offered “zero benefits for the class” and only served to enrich class counsel, according to the Court of Appeals. Thus, the class action settlement was rejected and the case was remanded to the district court.

The Subway footlong litigation was ill-advised from the start. It was filed after Subway customers posted pictures on social media allegedly showing that some “footlong” sandwiches measured closer to 11 inches. Several class action law firms jumped on board and quickly filed lawsuits alleging violations of state consumer-protection statutes. But the facts didn’t support the claims. Subway used the same size “raw dough sticks” at all its stores, and that raw dough always weighed exactly the same. Although baking variations caused some of the raw dough sticks to bake up a bit short of 12 inches, those customers who bought slightly smaller sandwiches received no less bread, by volume, than any other. And, the quantity of meat and cheese was the same on each sandwich. Customers also could add a wide range of other toppings to their sandwiches. So, in the end, there was no evidence that any customer was short-changed any food.

The settlement of the Subway lawsuit, which was approved by the district court, required Subway to take certain steps over a period of four years to reduce the likelihood that there would be “short” footlong sandwiches in the future. Although the district court and the parties found value in Subway taking these additional steps, the Seventh Circuit Court of Appeals disagreed. Specifically, the Court of Appeals focused on language in the parties’ settlement agreement stating that, even after these steps were taken, it was still possible that Subway’s footlong sandwiches would be slightly shorter than 12 inches because of baking variations. In the Court of Appeals’ view, the settlement accomplished nothing that would benefit the consumers who made up the class.

Upon concluding that the Subway class action settlement offered “zero benefits” to the class, the Court of Appeals vacated the district court’s order approving the settlement. The case was recently remanded to the district court, where it currently awaits further action.

For more information about the benefits and drawbacks of class action litigation generally, you may contact Doug Dehler at 414-276-5000 or doug.dehler@wilaw.com.

DO YOUR DUE DILIGENCE

Most attorneys during their career have the opportunity or obligation to effectuate service of process of a legal document pursuant to a rule or statute. It can be in any area of the law. My practice area of creditors' rights litigation requires me to serve process of a lawsuit under a statute that, at first glance, is complex, but over time has become engrained in my mind.

For a Wisconsin court to have jurisdiction over an individual defendant in a civil action, a summons must be served personally upon the defendant or, if with reasonable diligence the defendant cannot be served personally, by leaving a summons with a competent family member at the defendant's home. If with reasonable diligence the defendant cannot be served by the above methods, then service may be made by publication and mailing.

I recently represented a client who, two years earlier, had obtained a large money judgment against a defendant/guarantor. Prior to obtaining a judgment in the case, the process server attempted to personally serve the guarantor 4 times – once at his parents' house and, upon learning that the guarantor no longer resided there, 3 more times at his place of business. While attempting to serve at the guarantor's place of business, the process server left his business card asking that he be contacted. The server testified to the court that the guarantor eventually called him, told the server that he would not make himself available for service, and instructed the server to publish. Based on the guarantor's statements, service by publication was initiated. A default judgment was eventually entered against the guarantor after he failed to timely respond to the publication summons. Thereafter, the client initiated and continued to attempt to enforce and collect upon the judgment using supplementary collection procedures.

Twenty months after the judgment was entered, the guarantor filed a motion to reopen the case, asking the court to void its own judgment on the basis that the court lacked personal jurisdiction over him. The guarantor claimed that the creditor did not exercise due diligence in trying to find and serve him personally, thus rendering service by publication ineffective to establish jurisdiction.

Under Wisconsin law, there is no time limitation in bringing such a motion since ineffective service of process renders a court without jurisdiction over a defendant. It matters not whether the judgment is aged nor whether a client has spent thousands of dollars trying to enforce and collect upon the judgment. To make matters more difficult, a defendant's actual knowledge of a lawsuit is not a factor in a court's determination of whether a plaintiff has undertaken due diligence in attempting to serve a defendant.

Needless to say, my client was alarmed when it received the guarantor's motion. So what

does a plaintiff like mine need to do to avoid such a situation? How may a plaintiff find comfort that it exercised due diligence in attempting to personally serve a defendant prior to publishing a summons as a means of service of the lawsuit? Does a plaintiff need to hire an expensive investigator to perform a search of the individual? Should a costly asset/information database search be ordered?

Due diligence is not defined by statute, but Wisconsin is not without judicial authority. A Wisconsin court of appeals has described reasonable diligence as the diligence to be pursued that is reasonable under the circumstances, but not all diligence which may be conceived. Nor is it that diligence which stops just short of the place where, if it were continued, might reasonably be expected to uncover an address of the person on whom service is being attempted. See *Loppnow v. Bielik*, 2010 WI App 66, ¶ 10, 324 Wis.2d 803.

While this judicial statement is somewhat amorphous, in my practice, I have gleaned that judges generally seem to require at least 3 attempts at personal service before service may be made by publication. Such attempts at service, however, may be viewed as futile if a server stops short in making a proper inquiry into the defendant's whereabouts before attempting service. See *Heaston v. Austin*, 47 Wis. 2d 67 (1970); *West v. West*, 82 Wis. 2d 158 (1972) (Due diligence was not established when a husband could have ascertained his wife's address by contacting any one of several relatives or in-laws). Courts may also take into consideration a defendant's statements as to his whereabouts or evasive actions on the part of a defendant in determining whether the due diligence standard was met. See *Welty v. Heggy*, 124 Wis. 2d 318 (Ct. App. 1985); *Emery v. Emery*, 124 Wis. 2d 613 (1985).

In my case, the court's determination ultimately boiled down to the existence of evasive actions on the part of the guarantor. An evidentiary hearing was held and, although the guarantor denied ever speaking to the process server, the court found the process server more credible than the guarantor in regard to the guarantor's evasive maneuvers and statements to the process server. Vital to the court's ruling was the existence of the process server's notes on the face of his affidavit stating that the defendant indicated he would not make himself available and advised the process server to publish.

From this experience, it is clear that meticulous notes, records and other documentary evidence must be kept in regard to a process server's communication with a defendant along with the server's attempts to serve a defendant if publication is the method in which a plaintiff chooses to rely upon to effectuate service of process. Moreover, before choosing a process server it is a good idea to check the server's licensure history, including any reprimands or suspensions that may have been handed down by governing regulatory bodies. This will ensure no negative history exists that could render due diligence testimony from the server incredible.

For more information on this topic contact John Schreiber at 414-276-5000 or

John.Schreiber@wilaw.com.

EMPLOYMENT LAWSCENE ALERT: MULTI-MONTH NEED FOR LEAVE DISQUALIFIES EMPLOYEE FROM ADA PROTECTIONS

Last week, the Seventh Circuit Court of Appeals issued a decision in which it stated that the Americans with Disabilities Act (ADA) does not require employers to give employees more leave after their Family Medical Leave Act (FMLA) allotment runs out. In *Severson v. Heartland Woodcraft Inc.*, the employee had a back condition for which he took twelve weeks of FMLA leave. At the end of his FMLA leave, he requested an additional two or three months of leave to recover from back surgery. The employer denied his request and terminated his employment, telling him that he could reapply once healthy. Instead, the employee filed suit, claiming that the company had violated the ADA by refusing to grant him a leave of absence and by failing to transfer him to a vacant job or a light duty position.

The ADA prohibits employers from discriminating against employees who are "qualified individuals," meaning that they can perform the essential functions of their jobs with or without accommodation. The Seventh Circuit upheld the district court's grant of summary judgment to the employer, finding that the employee was not a "qualified individual" with a disability under the ADA because he could not work, as shown by his need for long-term medical leave. Although there is no bright-line rule for what is considered a disqualifying long-term leave, the Court noted that, while a few days or even a few weeks of non-FMLA time would be acceptable, a period of multiple months is too long as leave does not permit the employee to perform the essential functions of his job. Although the EEOC argued in an amicus brief that a long-term leave of absence is a reasonable accommodation if it is definite, requested in advance, and would allow the worker to return at the end of the leave, the Court rejected this argument stating that such a policy would make the ADA into a medical leave entitlement instead of an anti-discrimination law that requires reasonable accommodations. The Court also rejected the plaintiff's other reasonable accommodation arguments, as he presented no evidence that there were any vacant positions at the time of his termination or that the company provided light duty to employees in any situation.

Although employers should carefully consider their obligations to employees under both the ADA and the Wisconsin Fair Employment Act, determine whether a requested accommodation is reasonable on a case-by-case basis, and engage in the interactive process with employees, this decision will be helpful in guiding employers that are evaluating

employees' requests for extended leave.

EMPLOYMENT LAWSCENE ALERT: IT'S TIME TO AMEND 403(B) RETIREMENT PLAN DOCUMENTS!

If your organization is a public school or university, a tax-exempt charter school or hospital, a church, church-affiliated entity, or other tax-exempt organization, it is eligible to sponsor a 403(b) retirement plan.

For any eligible sponsor of a 403(b) plan, it is critical, to ensure the ongoing tax-compliance of the plan, to conform your document to the form of an IRS pre-approved 403(b) document (available for use since March 2017) no later than March 31, 2020. This date is the IRS-announced end of the "special remedial amendment period" that permits correction of plan language defects retroactive to January 1, 2010, provided that plans are operated in the meantime according to the regulatory requirements.

This means that if your last 403(b) plan amendment and restatement pre-dates March 2017, or is not otherwise in the form of a 2017 IRS-approved document, an amendment and restatement must occur by the deadline to ensure proper compliance. The IRS will not honor, or issue, any letters as to the qualified status of an individual 403(b) plan. This is why all 403(b) plan sponsors must adopt a 2017 pre-approved document. Pre-approved documents are available through a number of plan service providers, third-party administrators, and employee benefits attorneys.

Any employer who, for whatever reason, *never* complied with the final 403(b) regulations (and ERISA, if applicable), and operated 403(b) program subsequent to December 31, 2009 *without* adopting a written 403(b) plan document, may make use of an IRS correction program. Under the IRS's Employee Plan Compliance Resolution System, a properly documented correction and application, together with a fee, can be submitted to obtain administrative relief for the failure to previously document the plan. It is likely that the ability to correct a failure to have a plan document will become significantly more restricted (and expensive) if not addressed prior to March 31, 2020.

In our experience, the IRS has been active, in recent years, in auditing the operations of 403(b) plans of Wisconsin entities and organizations. It should be anticipated that 403(b) plan audits on and after April 1, 2020 will review not only operational, but also documentational, compliance with the 403(b) plan rules.

While the March 31, 2020 deadline is still two and a half years away, it can take some time for 403(b) plan changes to be fully considered and approved by the required bodies (retirement plan committees, and or boards of education or boards of directors) that are common within the organizations of eligible employers.

The existence of the deadline also presents an opportunity for 403(b) plan sponsors to revisit the extent to which current plan design features are functioning to support human resources objectives (on both a recruitment, retention, and costs basis), and whether any design amendments should be considered in conjunction with the required amendment and restatement.