THE WILAW QUARTERLY NEWSLETTER – AUGUST 2017

Newsletter Article Highlights:

- Don’t Sell Yourself Short: Early Tax Planning to Maximize the Sale of Your Business
- Are You Ready to Comply with the Final Fiduciary Rule?
- Creating a Successful Succession Plan

Pleased to Announce:

- OCHDL included in the prestigious Chambers USA Directory
- Annual Charity Event raised over $14,000 for Milwaukee community

Click the image below to read more.

SEVENTH CIRCUIT UPHOLDS WISCONSIN RIGHT-TO-WORK

In March 2015, Wisconsin Governor Scott Walker signed Right-to-Work legislation into law, which allowed workers covered by union representation to not pay union dues if they do not wish to. Since its passage, the law has been under legal fire, including a failed bid for preliminary injunction to halt the law and a state circuit court ruling that found the law unconstitutional. However, in 2015, the federal district court sitting in the Eastern District of Wisconsin upheld the Right-to-Work law as constitutional, relying heavily on the Seventh Circuit’s 2014 decision, *Sweeney v. Pence*, which upheld Indiana’s right-to-work statute.

On Wednesday, the Seventh Circuit doubled down on its holding in *Sweeny* and upheld Wisconsin’s Right-to-Work law as constitutional. The Court found that the plaintiff unions had failed to provide “any compelling reason” to overturn the *Sweeny* decision. The ruling stated that there have been no intervening developments in statutory, Supreme Court, or even intermediate appellate court law that would cause them to reevaluate their decision in *Sweeney* and that the strong dissent in *Sweeney* and a close vote to rehear the case en banc were not compelling reasons that would justify overturning a three-year old decision. The Court also rejected the unions’ takings clause argument, whereby they claimed that members of the union who did not pay dues but benefitted from the unions’ bargaining and

political activities would be taking the unions' property without compensation. The Court found that, in the event that a taking occurred, state courts could "provide an adequate route for seeking just compensation." Although the union has stated that it is considering its next steps, it appears that Wisconsin's Right-to-Work law will continue to pass judicial scrutiny and be enforceable and constitutional.

CONGRESS CONTEMPLATES "COMP TIME" BILL

In May 2017, the House of Representatives passed the Working Families Flexibility Act, which would amend the Fair Labor Standards Act to allow nonexempt employees in the private sector to choose to receive compensatory time ("comp time") in lieu of overtime pay for hours worked in excess of 40 hours per week. Under current law, employers in the public sector must pay nonexempt employees a rate of at least one and one-half of their regular wage for each overtime hour worked. However, certain government employees can receive comp time in lieu of overtime pay.

The Working Families Flexibility Act would allow private sector employees who had worked at least 1,000 hours in a 12-month period to accrue up to 160 hours of compensatory time per year, at the rate of one and one-half hours of comp time for each overtime hour worked, which could be used upon reasonable notice by the employee as long as such use does not disrupt the employer's operations. The decision of whether to receive overtime pay or comp time would be up to the individual employee or a collective bargaining agreement covering a group of employees, and any compensatory time accrued by the employee but unused by the end of the year would need to be paid to the employee. Additionally, any employee could, with 30 days' notice, choose to cash out their unused comp time and return to traditional payment of overtime. Similarly, employers could, with 30 days' notice, discontinue offering comp time as an alternative option to overtime pay. The bill states that employers may not intimidate, threaten, or coerce employees to choose to take comp time instead of overtime pay or force them to use accrued comp time. If enacted, this provision is one of the most likely to lead to litigation between employees and employers.

The bill is currently pending before the Senate, which may not have enough support to pass the bill. Proponents of the law believe that the bill would add flexibility for workers, while opponents believe that it would undermine the payment of overtime. Similar bills have been proposed in Congress previously, including as recently as 2013. However, the current bill has the support of the Trump administration. We will keep you updated on any further developments and, if passed, on techniques for implementation.

IT'S (ALMOST) JUNE 9! ARE YOU READY TO COMPLY WITH THE FINAL FIDUCIARY RULE?

At 11:59 p.m. on Friday, June 9, 2017 (the Effective Date), the ERISA definition of a fiduciary will expand to include, for the first time, many financial firms and advisors that provide investment advice to certain employer-sponsored retirement plans and individual retirement accounts (IRAs). This is because part of the final Department of Labor (DOL) Fiduciary Rule (described in our prior post) takes effect at this time, and will apply to anyone receiving a fee for providing a "recommendation" regarding covered investment transactions. "Recommendation" is broadly defined to include communications that are likely to be considered a suggestion to take, or to refrain from taking, a particular course of action.

After the Effective Date, ERISA fiduciary duties will also extend to the provision of a recommendation regarding whether or not to take a rollover or distribution from an ERISA retirement plan or an IRA, even if the rollover or distribution recommendation is not accompanied by investment advice.

While the Fiduciary Rule most directly impacts investment advice providers, employer sponsors of ERISA retirement plans should also be aware of the new rules and of the ways in which plan service provider arrangements and internal human resources practices may be impacted by them.

Key requirements and recommendations for both investment advisors and employer retirement plan sponsors are briefly summarized, below.

Action Items for Advisors

Unless an exception or exemption applies, financial advisors who give investment advice to participants of covered plans and IRAs must now observe impartial conduct standards, and some portions of the DOL Best Interest Contract (BIC) exemption or Principal Transaction exemption (if applicable). This means that advisors must, as of the Effective Date:

- provide advice in participants' best interests;
- receive no more than reasonable compensation; and
- avoid misleading statements.

By January 1, 2018, the remainder of the BIC and Principal Transaction exemption rules apply and affected advisors must:

- maintain (and adhere to) written anti-conflict policies and procedures;
- make required disclosures to advice recipients; and
- enter into enforceable written contracts relating to the provision of investment advice services relating to covered employer retirement plans and IRAs.

Advisor Transition-Period

Under a temporary non-enforcement policy issued by the DOL on May 22, 2017, neither the DOL nor the IRS will enforce potential violations of the prohibited transaction rules, provided that the advisors are working diligently and in good faith to comply with the new rules. This temporary non-enforcement policy will end on January 1, 2018, which is also when the remaining parts of the Fiduciary Rule (and exemption) requirements take effect.

Taxes and Penalties for Violation

After January 1, 2018, an advice fiduciary that fails to comply with the new rules, and thereby engages in a prohibited transaction, may be required to refund all fees earned from the transaction and to pay an annual excise tax of 15% on such fees until repayment occurs. To the extent that such a prohibited transaction relates to an ERISA-subject retirement plan, a violation of the rules could potentially also result in legal claims by retirement plan sponsors or IRA investors, civil penalties, and personal liability for losses or improper profits.

Certain Assets Unaffected

The new rules do *not* affect any health, disability, term life, or other health-related arrangements or assets that do not contain an investment component. Personal brokerage accounts (not involving an employer-sponsored retirement plan or any IRA) are also unaffected by the changes.

Action Items for Employer Plan Sponsors

Employer retirement plan sponsors should consider taking the following steps:

- Review existing educational materials provided to participants to determine whether they remain non-fiduciary "investment education," or whether they now constitute fiduciary "investment advice."
- Review practices relating to rollovers into and out of the plan to determine whether they trigger fiduciary advice-related obligations.
- Confirm that in-house employees who provide advice to participants (if any) are not being separately compensated for such advice.
- Review contractual arrangements with advisers to determine which advisers are fiduciaries under the new rules. For those service provider serving as a fiduciary for the first time under the Fiduciary Rule, expect that agreements will be amended or replaced

before January 1, 2018. Any resulting fee changes must be clearly disclosed.
- Expect to receive additional disclosures beginning in 2018 from investment advice fiduciaries that will rely on the BIC exemption to continue receiving certain types of compensation. Among other things, these disclosures must describe any of the advice fiduciary's conflicts of interest, and the types of compensation paid in connection with plan investment recommendations.
- Carefully review all fee disclosures you receive to ensure that you understand what fees are being charged for plan services. Confirm that the fee structure and amounts of compensation received by advisers are reasonable, in light of the services performed.

CHAMBERS USA DIRECTORY INCLUDES RECOGNITION OF O'NEIL, CANNON, HOLLMAN, DEJONG AND LAING S.C.

The prestigious Chambers USA Directory has included O'Neil, Cannon, Hollman, DeJong and Laing S.C. as one of the notable firms in the category of Corporate/M&A. Additionally, Chambers has included Jim DeJong and Pete Faust among their Recognised Practitioners.

The Chambers directories, published by London-based Chambers and Partners, rank attorneys and law firms based on a year-long objective research process. The process includes interviews with outside attorneys and feedback from clients. Learn more at www.chambersandpartners.com.

DON'T SELL YOURSELF SHORT: EARLY TAX PLANNING TO MAXIMIZE THE SALE OF YOUR BUSINESS

What part of selling a business is most important to sellers? Most would respond that receiving the highest purchase price is most important. At first blush, this makes sense. However, sellers often focus on the number of zeros in the purchase price and ignore the fact that paying a large amount of income taxes will effectively reduce the purchase price. *Really*, sellers hope to walk away with the most cash in their pockets, i.e. the most after-tax proceeds. Sellers can maximize their after-tax proceeds by engaging in tax planning early. Too often, sellers lose out on tax savings by not considering the tax consequences of a sale

sooner.

Prior to engaging with a buyer, sellers can identify tax opportunities and risks that affect the purchase price through sell-side due diligence. Generally, buyers prefer to purchase assets (as opposed to stock) and will pay a premium to do so. Sellers prefer stock sales to take advantage of favorable capital gains rates. However, a seller could identify early on that its net operating losses (NOLs) create an opportunity that allows the seller to negotiate a higher purchase price in an asset sale with peace of mind that it can offset its gains with NOLs. Alternatively, if a seller can pass on its NOLs to a buyer through a stock sale, the seller could demand a higher purchase price as the NOLs create value to the buyer by reducing the buyer's future tax liabilities.

Sellers should also pinpoint tax risks that may drive down the purchase price. For example, a seller may discover any of the following in due diligence: failure to file all required income and sales and use tax returns in all required jurisdictions; use of improper accounting methods; poorly designed compensation plans; and failure to comply with local tax laws and transfer pricing methodologies. Ideally, a seller will identify these issues before a buyer does and correct them before the buyer can knock down the purchase price.

Sellers should negotiate certain "minor" aspects of a transaction earlier. Generally, sellers lose leverage and buyers gain leverage as a transaction proceeds. Sellers would often benefit from negotiating certain terms as early as the letter-of-intent stage of a deal, because these "minor" terms have meaningful tax consequences to the seller. For example, parties usually negotiate purchase price allocation at the very end of a transaction when the seller has much less bargaining power even though the purchase price allocation will directly impact the seller's bottom line. Also, if not negotiated early on, the seller may have difficulty renegotiating the form(s) of consideration used even though the range of possible forms of consideration – cash, debt, rollover equity, escrows, earn outs, etc. – creates a range of tax consequences to the seller.

Overwhelmed yet? Most business owners know that differing overall structures create differing tax consequences when selling a business; however, most do not think about the less obvious aspects of a transaction that could have a meaningful impact on the seller's bottom line. By the time many of these tax planning opportunities and risks are identified, the seller has lost the leverage to make meaningful changes. Sellers should engage early in tax planning and sell-side due diligence if they plan to sell a business. Not doing so could leave the seller with a much smaller effective purchase price than expected.

For more information on this topic contact Samantha Amore at 414.276.5000
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THE RUFFED GROUSE SOCIETY MOVES FORWARD

Attorney Seth Dizard was mentioned in the Milwaukee Journal Sentinel for his involvement with the Ruffed Grouse Society and its recent developments to continue moving the organization forward. The society signed a memorandum of understanding with the U.S. Forest Service, and the Society hired its first habitat biologist, a Hales Corners native named Dan Dessecker.

Seth was elected earlier this year to serve on the organization's national board of directors.

Click here to read the full story.

JIM DEJONG SPEAKS TO 2017 CARROLL GRADUATES

Jim DeJong, chairman of the Milwaukee law firm of O'Neil Cannon, provided the keynote address at Carroll University's Commencement Sunday, May 14.

Carroll alumnus DeJong '73 told 2017 graduates that a lot had changed since his days here but one thing is the same, "Carroll is truly a special place." And, of course, Gert is still here. That spurred some giggles among graduates, warming up the crowd before Jim shared his key message: Be present in the moment. "While we can connect with people in various ways electronically, we can only build true relationships with intentional focus and effort," he said.

DeJong has been involved with Carroll University since 1958 and both he and his father the Rev. Lloyd DeJong have served terms on the Carroll University Board of Trustees. Most recently DeJong, the immediate past chair of the board, served as co-chair with Campaign Carroll, working to raise $52.7 million.

More than 670 Pioneers celebrated their Commencement in a ceremony on Main Lawn, where thousands of friends and family gathered for the special occasion.

EEOC WELLNESS LAWSUIT AGAINST WISCONSIN EMPLOYER ENDS IN $100,000 SETTLEMENT

A Wisconsin employer's settlement last month with the EEOC ended the final round of litigation initiated against it by the EEOC over its workplace wellness plan.

In 2009, Manitowoc-based Orion Energy Systems (Orion) implemented a wellness program that included a health assessment. The health assessment consisted of a personal health questionnaire, a biometric screening, and a blood draw. An Orion employee refused to participate and, as a result, was required to pay her full health premium costs of more than $400 per month. (Meanwhile, for employees who participated in the health assessment, the employer paid 100% of the premium cost). The employee openly questioned the purpose of the health assessment, the confidentiality of its results, and the CEO's response to her questions. Approximately three weeks after declining to participate in the health assessment, her employment was terminated. She then filed a complaint with the EEOC, which in turn sued Orion in August 2014, alleging that the company's wellness program violated the ADA as "involuntary" and that the company had retaliated against her in violation of the ADA.

The ADA generally prohibits employers with 15 or more employees from requiring medical examinations or making disability-related inquiries of an employee, unless the examination or inquiry is job-related and consistent with business necessity. The law includes an exception for "voluntary" wellness programs, but the EEOC had not finalized its definition of a "voluntary" wellness program until May 2016, nearly seven years after the events at issue in this case.

In a mixed September 2016 decision, the court for the Eastern District of Wisconsin ruled against the EEOC by finding that the wellness plan was voluntary. The court determined that the health assessment incentive (the premium cost) was permitted within the framework of a "voluntary" plan, and therefore was *not* prohibited under the general ADA medical examination and inquiry rules. While shifting even 100% of the premium cost to the employee was a strong incentive, it was still not an involuntary "compulsion," the court reasoned, because employees could still choose between completing the health assessment or paying the full premium.

While the court's ruling essentially approved the design of the wellness plan, it declined to dismiss the employee's ADA retaliation and interference claims. In other words, it was only the termination (allegedly in response to the employee's refusal to participate in the wellness plan) that the court found troubling.

To resolve these remaining issues, Orion agreed to pay the former employee $100,000. Orion also agreed:

- Not to maintain any wellness program in the future with disability-related inquiries or medical examinations that do not meet the criteria for “voluntary” wellness plans as defined under the May 2016 final EEOC regulations;
- Not to engage in any form of retaliation, including interference or threats, against any employee for raising objections or concerns as to whether the wellness program complies with the ADA;
- To tell its employees that any concerns about its wellness program should be sent to its human resources department;
- To train its management and employees on the law against retaliation and interference under the ADA; and
- To conduct an additional training meeting with its chief executive officer, its chief operating officer, its chief financial officer, its HR director, and all employees responsible for negotiating or obtaining health coverage or selecting a wellness program. This training is to include an explanation of the settlement terms and the ADA’s requirements regarding wellness programs.

While Orion, in the consent decree, “continues to deny the EEOC allegations,” the settlement serves as a reminder to employers not to base any employment decisions on participation or non-participation in a workplace benefit program. Wellness programs must comply not only with multiple provisions of the ADA, but also with HIPAA, the Genetic Information Nondiscrimination Act (GINA), the Affordable Care Act, and other laws. As these rules, and relevant case law, continue to evolve, it is important that employers maintaining, implementing, or considering updating a wellness plan proceed with an awareness of the potential costs of noncompliance.

OCHD&L’S CLAUDE KRAWCZYK JOINS THE PROFESSIONAL RECOGNITION SOCIETY

Attorney Claude Krawczyk has been named to the Greater Milwaukee Foundation’s Herbert J. Mueller Society.
The recognition society acknowledges the efforts of professional advisers who are committed to their clients, philanthropy and the community. Krawczyk is one of 12 new members this year to the society, which now includes more than 300 professional advisers.

The society is named in memory of Herbert Mueller, a local estate planning attorney who, through his quiet efforts, helped shape the Foundation into the strong, stable and successful organization it is today. By the time of his death in 2001 at age 91, Mueller had worked with his clients to start more than a dozen Foundation funds with gifts totaling nearly $50 million.

For more than a century, the Greater Milwaukee Foundation has helped individuals, families

and organizations realize their philanthropic goals and make a difference in the community, during their lifetimes and for future generations. The Foundation consists of more than 1,200 individual charitable funds, each created by donors to serve the charitable causes of their choice. The Foundation deploys both human and financial resources to address the most critical needs of the community and ensure the vitality of the region. Established in 1915, the Foundation was one of the first community foundations in the world and is now among the largest.