WHAT IS ARBITRATION?

Arbitration is a common form of alternative dispute resolution (ADR) in which parties agree to resolve a dispute by submitting it to one or more neutral decision-makers, or arbitrators, for decision. Arbitration consists of a formal hearing, similar to a trial, where the parties are represented by legal counsel and present evidence and testimony. The parties usually have the option to choose the decision-makers.

In Wisconsin, arbitration is governed by the Wisconsin Arbitration Act, which is found in Chapter 788 of the Wisconsin Statutes. Among other things, the Wisconsin Arbitration Act states that an arbitration clause in a contract is valid, irrevocable and enforceable unless certain grounds exist to invalidate the contract. However, a few disputes, including certain disputes over employment contracts, petroleum storage tank remediation and state employment relation matters, are exempt from this rule.

In a dispute governed by a contract containing an arbitration agreement, the Wisconsin Arbitration Act requires Wisconsin courts to send the parties to arbitration, instead of trial, pursuant to the terms of their contract. If a party seeking arbitration has failed to live up to its obligations under the contract containing the arbitration agreement, however, the court may choose whether or not to stay litigation so that the arbitration may proceed.

The Federal Arbitration Act contains a similar rule that “a written provision in any … contract” that indicates an intent to settle contract-related disputes by arbitration “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”

In addition, federal courts may refer civil actions and bankruptcy adversary proceedings to arbitration if the parties consent. Both federal districts in Wisconsin have rules governing arbitration and other forms of ADR. Federal constitutional claims, some civil rights claims and claims involving damages over $150,000 cannot be sent to arbitration from federal court, however.

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

TAX AND WEALTH ADVISOR ALERT: FINANCIAL

ADVISOR SUCCESSION–PART ONE: GOAL CLARITY

Given my combination of experience (13 years in the home office of a national life insurance company) and expertise (working with clients on the creation and execution of succession strategies), a growing part of my practice is in leading financial advisors in the creation of a succession plan that ultimately leads to the sale of a practice. It only takes a glance at the demographics of the advisory world to understand what is at stake. The average age of an American financial adviser goes up materially every year as the recruiting and retention statistics in the industry continue to get more dire. In the next few blog posts, I wish to explore some issues that must be dealt with in the transition of an advisory practice:

1. Goal clarity of both the selling and buying advisor.
2. Valuation of the practice.
3. Transition of client relationships.
4. Managing the risks to the buyer.
5. Taxation of the transaction to the seller.

FINANCIAL ADVISOR SUCCESSION–PART ONE: GOAL CLARITY

I think it might have been A. A. Milne in the book “Winnie the Pooh” that first coined the saying: “If you don’t know where you are going, any path will get you there.” With something as intellectually and emotionally challenging as financial advisor succession, it is critical for both the buyer and seller to be very clear and precise about what they want and need from the transition.

In my experience working with advisors, the set goals are rarely clear; however, the seller wants to get as much purchase price as possible while the buyer wants to pay as little as possible. Certainly price is a factor. The goal of the business owner in developing a succession plan is to maximize value and take care of the people the business owner cares about. But, the successful advisors I have worked with share a common attribute, their financial success is due to their selflessness. Their systems, structures, practices, values and beliefs all center on the achievement of their clients’ wishes, hopes, dreams and desires.

With this cultural mindset, it is not uncommon for the number one goal of the seller to be ensuring his or her clients are taken care of. I am working with a seller right now whose top transition goal is “making sure my clients are taken care of as well or better than I promised. In fact, I want the top goal of this transition to be just that; the buyer must be committed to delivering the promises I made to my clients.” Powerful, right? But also, clarifying. That goal has had immense impact on client transition strategy, staff retention, and even price and

terms.

So, as I reflect on the numerous financial advisor transitions I have quarterbacked, here is a representative list of seller goals:

- Client satisfaction
- Providing an advisor who is young enough to “be around when my clients most need the advice”
- Staff retention
- Strong “fit” with referral sources and advisory team members (including other advisors, attorneys, accountants, bankers and investment bankers)
- Values align
- Personality consistency

Again, maximizing price to the seller, particularly on an after tax basis, is always on the list. But, again in my experience, it gets little focus compared to other goals, probably due to the fact that these advisors built attractive businesses by concerning themselves with doing the right thing rather than the proceeds of any particular transaction.

On the buyer’s side, the goals tend to surround client retention. We will talk in a later blog post about typical pricing in these transactions, but, to put it in the simplest terms, the “typical” price of an advisory practice is very enticing to the buyer if the buyer can retain a high percentage of the client relationships and their resulting revenue. With that in mind, the buyer’s goals tend to focus on the transition period:

- The seller’s advocacy of the buyer as the right person for the client
- The successful transition of client relationships
- The successful transition of referral relationships
- An in depth understanding of the seller’s systems and processes and how those impact the client experience
- Oftentimes, a desire to be mentored by the seller on business, relationship building and substance

As to where the most common goal conflicts exist, the top one is the contingency of the purchase price. As I stated above, simply put, in my opinion, if retention is high, when a market common purchase price of 1.5 to 2x recurring revenue is used in the sale of an advisory practice, the buyer is getting a great deal. Given that, most of the time, the seller is not willing to make the purchase price contingent upon retention. But, again given the critical importance of retention, it is as common for the buyer to want a purchase price contingent on retention. The buyer’s strategy is twofold: one, obviously, is to shift the risk of retention to the seller. The other is to financially motivate the seller to economically own retention and to take all possible steps to insure the client stays with the buyer. One place where we have sometimes bridged this gap is to use a contingent purchase price wherein the seller gets the full purchase price with average retention and gets a material increase in

purchase price with high retention.

The other common area of goal conflict is staff. This conflict is natural and understandable. The seller believes strongly in the staff he or she put together and sees it as the most obvious way to keep the clients and their revenue intact. The seller believes the client has bought “the team” and thinks the buyer would be crazy to change it in any way. The buyer, on the other hand, often has a different style with different strengths. These differences might mean that the buyer’s best team has different strengths and skills than the seller’s perfect team. Also, the buyer might have a team already and want to use that team to service the seller’s clients. These conflicts can often be resolved with creativity, but, in my experience, lack of agreement on the post-transaction team is the issue that craters the transaction.

So that is the first step to a successful advisory transition. Capture each party’s goals and see if they are consistent. If so, then the transaction can move forward. If not, the parties need to determine if they can creatively compromise. If they figure out a workable solution, it is on to the next topic- valuation or, stated another way, an agreement on price.

TAX AND WEALTH ADVISOR ALERT: CREATING A SUCCESSFUL SUCCESSION PLAN: VALUE

A successful succession plan maximizes the value of the business in order to take care of the people the owner cares about. Of course, that raises an important question: “What factors maximize the value of a business in transition?” That question leads to another important question: “Why does a buyer want a particular business?” The answer to this question is of course that the buyer wants a business that will produce sufficient post-transfer cash flows to provide the buyer with (1) sufficient cash to service the debt or equity raised to facilitate the purchase, and (2) earn a rate of return commensurate with the risk of the purchase. Essentially, a buyer wants a business where post-transaction cash flows are projected to grow. With that in mind, here are some of the factors the buyer will find important:

1. A large, diverse customer base – the more customers that are producing the revenue that leads to cash flow, the safer the cash flow will be to the buyer. Contrarily, if the revenue comes from fewer customers, the riskier the replication and retention of the cash flow, and the less the buyer will be willing to pay.
2. Available capacity – the more the business’s revenue can grow from the current capital and people, the more the buyer will be willing to pay. The reason, of course, is that any growth in revenue should lead to a commensurate growth in profit. On the other hand, if revenue growth will require substantial investments in people and capital, the less the

buyer will be willing to pay.

3. Innovative product or service – the more unique and valuable the business's product, the more the buyer will be willing to pay. If the product or service is easily replicable by competitors – or worse, is viewed by the marketplace as a commodity – the less the buyer will be willing to pay.
4. Is the owner Michelangelo? – The question I often ask my succession planning clients is, "how much would you pay for Michelangelo's sculpture studio?" The answer, of course, depends on whether Michelangelo will continue to sculpt. If so, you would pay top dollar (presuming Michelangelo will not demand all of the profits in compensation for his unique skills). If not, you would pay nothing. Likewise, if the cash flow depends on the skills or relationships of the seller, the buyer will pay less. If, on the other hand, the revenues depend on the talents and relationships of the team the seller has built, the buyer would be willing to pay full value presuming that team is willing to stay.
5. Age of the capital and/or team – if the revenue-producing equipment and/or people are getting too old to be counted on for the long term, and as a result the revenue generation capabilities of the business depend on finding and investing in new equipment and/or people, the buyer will be willing to pay less than if the equipment and team have a long useful life.
6. Do the financials tell the true story? – Again, the buyer is purchasing future cash flows, and certainly the best indicator of those cash flows is the business's historic revenues and profits. Oftentimes, the seller has used the business checkbook to pay for personal items, and when that has happened, the seller will seek to add back expenses to cash flows to "normalize" expenses; in other words, to show the buyer what the business is expected to produce when run as a business, not as part business, part personal checkbook. The problem is, the more add-backs the seller applies, the less credible the books become to a sophisticated buyer (not to mention the greater the perceived business risks for a company that was not run compliantly).

With these value drivers in mind, for a seller looking to transition his or her business, it is important to audit these factors and, if possible, remedy the weaknesses. If the owner can better empower the team, report expenses accurately, and focus more on customer diversity, the seller can potentially add 20-25% to the purchase price. And, of course, the time to start addressing these concerns is 3-5 years before the business is to be sold. Any time later than that has a much lower probability of success.

EMPLOYMENT LAWSCENE ALERT: WHAT PRESIDENT TRUMP'S SUPREME COURT NOMINEE COULD MEAN FOR EMPLOYERS

On January 31, 2017, President Donald Trump nominated Judge Neil Gorsuch of the Tenth

Circuit Court of Appeals to fill the vacant seat on the U.S. Supreme Court left open by the death of Justice Antonin Scalia in early 2015. Many employers are wondering what impact a potential Justice Gorsuch would have on employment law decisions, and the news is generally positive. Judge Gorsuch, during his time on the Tenth Circuit, has issued decisions that have gone in favor of both employers and employees. However, he favors a straight forward application of facts to the law to reach conclusions and has been critical of administrative agencies overstepping their authority.

Judge Gorsuch, in line with holdings from the Seventh Circuit, has been critical of the *McDonnell Douglas* burden shifting framework that is frequently used in employment discrimination cases. Judge Gorsuch favors focusing on the real question – whether discrimination actually took place – instead of focusing on whether a *prima facie* case can be established. This straight-forward approach to the facts will likely be welcomed by employers who want to avoid getting bogged down in technicalities.

As we have covered multiple times, in recent years, administrative agencies such as the EEOC, OSHA, and particularly the NLRB have expanded the scope and reach of the employment laws they oversee by broadly interpreting existing laws, often to the confusion and detriment of employers. This expansion could be significantly curbed by a U.S. Supreme Court conservative majority anchored by Judge Gorsuch. In particular, Judge Gorsuch has issued opinions limiting the judicial deference that should be given to administrative agencies and stating that lawmaking should be left to Congress. For example, in his dissent in *Trans Am Trucking Inc. v. Administrative Review Board, U.S. Department of Labor,* Judge Gorsuch penned a dissent that stated that nothing in the Surface Transportation Assistance Act stated that an employee could operate a vehicle in a way the employer forbid and that the DOL did not have the authority to expand the law to say so. He also opined in a case involving the NLRB that the agency did not provide a persuasive explanation to reverse its long-standing precedent that interim earnings should be deducted from back pay awards and, therefore, should not be allowed to change its policy.

Finally, Judge Gorsuch has issued opinions favorable to arbitration agreements, which is of particular interest to employers as the Supreme Court has agreed to hear cases regarding whether the NLRB is correct in its interpretation that arbitration agreements that bar workers from pursuing class actions are illegal restraints of employees' Section 7 rights. If confirmed, Judge Gorsuch may be able to weigh-in on this important issue as the U.S. Supreme Court, yesterday, indicated that it will not address this issue during the Court's current term, but will address it next term. Hopefully, by that time Judge Gorsuch will be confirmed by the U.S. Senate. As a result, then Justice Gorsuch could be the deciding vote on this important issue.

Although Judge Gorsuch's confirmation process is likely to be long and contentious, a Justice Gorsuch anchored U.S. Supreme Court can be something that employers can look forward to in providing common sense to employment laws.

EMPLOYMENT LAWSCENE ALERT: EXECUTIVE ORDER HALTS IMPLEMENTATION OF DOL FIDUCIARY RULE

Early this afternoon (Friday, February 03, 2017), President Trump signed an Executive Order directing the Department of Labor (DOL) to halt implementation of final regulations relating to "investment advice fiduciaries," as defined under ERISA and the Internal Revenue Code.

The Order directs the DOL to reevaluate the regulations and to report back to the President. The regulations, collectively known as the "Fiduciary Rule," had been set to take initial effect on April 10, 2017. The Fiduciary Rule's effective date is now expected to be at least delayed, if not also altered or withdrawn.

The purpose of the Fiduciary Rule, which has been over six years in the making, is to impose a fiduciary standard on individuals and companies receiving compensation for retirement investment advice, including brokers and insurance agents who are currently held to a lesser standard dating to 1975.

The rule would also have required brokers to clearly and prominently disclose any conflicts of interest, like hidden fees or other undisclosed commission payments often buried in the fine print.

A 2015 government study concluded that retirement plan savers lose $17 billion, in the aggregate, each year due to receiving conflicted investment advice that reduces the value of their retirement accounts.

The Trump Administration, on the other hand, takes the view that the DOL rule is unnecessary. The White House Press Secretary called the DOL Fiduciary Rule "a solution in search of a problem," and as protecting consumers "from something they don't need protection from." This view reflects the perspective of those who regard the Fiduciary Rule as an unneeded limit upon investor options and its implementation as a burden upon asset management firms.

Industry spokespersons, as well as politicians with competing views are certain to continue to engage in lively debate regarding the future of the Fiduciary Rule.

While such a discussion has been ongoing over recent years, financial advisors and brokers have steadily worked to update their compensation methods to provide greater transparency to retirement plan savers. For this reason, it is not clear that even the elimination of the

Fiduciary Rule would reverse the market trend of providing greater clarity regarding the fees and costs of investing.

We will continue to monitor relevant developments.

THE WILAW QUARTERLY NEWSLETTER

Newsletter Article Highlights:

- IRS Announces Employee Benefit Plan Limits
- What You Need to Know About Letters of Intent in Commercial Leases
- Understanding Medication as an Alternative to Litigation
- Executive Order Affirms Commitment to Repeal the ACA
- Creditors, Predators, and Divorcing Spouses Are Why Having a Trust May Be Better Than a Will
- Proud to Be a Member of Meritas, A Multi-National Network of Business Law Firms

Pleased to Announce:

- “Best Law Firm” Ranking
- 2016 Super Lawyers Announced

FEDERAL COURT HOLDS WISCONSIN’S RIGHT-TO-WORK 30-DAY REVOCATION PROVISION UNCONSTITUTIONAL

Wisconsin’s Right-to-Work law provides employees the ability to choose as to whether they want to become or remain members of a labor union. Intertwined with that decision is an employee’s right to decide not to pay union dues. In order for an employee to effectively exercise his or her right not to be a member of a union without coercion or duress is the ability to also timely revoke their dues check-off authorizations so they are not committed to pay union dues when they no longer want to be a member of the union.

Wisconsin’s Right-to-Work law was designed to address this issue by prohibiting any dues

checkoff authorizations unless such authorizations are revocable upon 30 days' written notice by an employee. This means, under Wisconsin's Right-to-Work law, that an employee can terminate a dues checkoff authorization upon 30 days' written notice and, moreover, a labor union cannot bind an employee to a period of more than 30 days in which to exercise that right. However, this provision under Wisconsin law runs contrary to the federal Labor Management Relation Act (29 U.S.C. § 186(c)(4)) which permits an employee's authorization for dues check-off to be effective for a period of up to one year or up until the termination date of the applicable collective bargaining agreement, whichever occurs sooner.

Recently, a federal district court in Wisconsin addressed this conflict between the two laws and found that the 30-day revocation provision for dues checkoff authorizations under Wisconsin's Right-to-Work law to be preempted by the federal Labor Management Relation Act (29 U.S.C. § 186(c)(4)), and, as a result, unconstitutional under the Supremacy Clause of the U.S. Constitution. The federal district court premised its holding on a finding that a state law *limiting* the irrevocability of dues checkoff agreements to 30 days directly conflicts with the federal law *permitting* unions to bargain for longer periods of irrevocability. The federal district court further held that the fact that this provision was made part of Wisconsin's Right-to-Work law does not exempt it from federal preemption within the § 14(b) exception to federal preemption.

The federal district court's decision means that a dues check-off authorization that is not revocable for more than one year is lawful and enforceable under 29 U.S.C. § 186(c)(4) despite Wisconsin's Right-to-Work law to the contrary limiting the irrevocability of such authorizations.

The significance of this decision is that labor unions can and will bind employees to continue to pay union dues for up to a year before they can exercise their right to revoke their dues check-off authorization (and usually within a tight revocation window) even though the employee may have decided they no longer want to remain a member of the union. As a result, this federal court decision will have a chilling effect upon employees' right to decide as to whether they want to remain a member of a labor union when they will be compelled by the same union they want to disassociate themselves from into continuing to pay union dues – exactly what labor wanted to accomplish in commencing the lawsuit challenging this provision of Wisconsin's Right-to-Work law.

EXECUTIVE ORDER AFFIRMS COMMITMENT TO

REPEAL THE ACA; MAKES NO IMMEDIATE CHANGES FOR EMPLOYERS

Within hours of being sworn in on Friday, January 20, 2017, President Trump signed an executive order (the Order), that affirmed the administration's policy of seeking "the prompt repeal" of the Affordable Care Act (ACA). The Order, however, neither specifically mentions employers nor has any immediate impact on employers' obligations under the ACA.

It is important to note that the one-page Order does not repeal any specific provision of the ACA, much of which is governed by existing law and regulations that cannot be eliminated with the stroke of even the Presidential pen.

Instead, the Order directs the Secretary of the Department of Health and Human Services the heads of other federal agencies "with authorities and responsibilities under" the ACA to "exercise all authority and discretion available to them", "to the maximum extent permitted by law," to:

- "waive, defer, grant exemptions from, or delay the implementation of any provision or requirement" of the ACA that "would impose a fiscal burden on any State or a cost, fee, tax , penalty, or regulation burden on individuals, families, healthcare providers, health insurers, patients, recipients of healthcare services, purchaser of health insurance, or makers of medical devices, products, or medications"; and to

- "provide greater flexibility to States and cooperate with them in implementing healthcare programs."

Each "department or agency with responsibilities relating to healthcare or health insurance" is directed, "to the maximum extent permitted by law," to:

- "encourage the development of a free and open market in interstate commerce for the offering o healthcare services and health insurance, with the goal of achieving and preserving maximum options for patients and consumers."

While some pundits have quipped that the Order is a license for employers to cease complying with the ACA or to cease offering health insurance, no such authority is contained in the Order. What the Order may permit is greater discretion in granting "hardship exemptions" from the individual mandate. Federal officials in the new administration might also be more receptive to state requests for waivers under Medicaid.

We advise employers to continue to observe the ACA status quo, which includes continuing to focus on complying with ACA Employer Reporting obligations (using IRS Form 1095-C) for the

2016 calendar year.

This is because, as the Order specifically states, any revision of existing regulations can only be changed under the rules of the Administrative Procedures Act, which requires the public issuance of proposed rules, followed by a period of public input. Despite the new administration's Order (and the House of Representative's January 13 vote to begin repealing the ACA), there is no specific change currently available for employers in 2017.

Instead, employers should continue to heed ACA requirements. Only agency rulemaking or congressional action could relieve employers of ACA reporting and other obligations, but either type of action would likely take significant time.

We will continue to monitor developments regarding the possible repeal of the ACA and how any subsequent actions may affect employers' obligations.

WHAT YOU NEED TO KNOW ABOUT LETTERS OF INTENT IN COMMERCIAL LEASES

Both landlords and tenants have legal and personal obligations to understand and abide by each of the terms in their commercial leases. Too often, aspects of these leases are misunderstood or neglected entirely. The following blog series outlines these aspects one-by-one, emphasizing key points and illustrating these concepts via real-life commercial lease tenancies. To start, let's take a look at what you need to know about letters of intent, or LOIs.

LOIs are non-binding.

Although most terms listed in a commercial lease document are considered part of a binding contract, LOIs lack the formality to be considered binding. An LOI is intended to act as a general guide to outline the terms of a proposed lease, offering statements of key terms to the more legal oriented provisions necessary in the final lease agreement.

The most basic terms in a LOI would include:

- the identity of the Landlord and Tenant
- the location of the building and size of the space
- the amount of rent
- term or length of the lease
- extension options beyond the initial term
- personal guarantor or guaranties

- what the space may be used for

LOIs are typically negotiated by brokers.

More often than not, LOIs are negotiated and drafted by brokers, rather than by attorneys. A lawyer typically drafts the final lease agreement. Brokers lack the legal expertise and credentials to independently create legally sufficient binding contracts, which is why LOIs are best-described as written business terms.

LOIs are usually written without input from attorneys.

Because LOIs are typically non-binding, attorneys are not consulted to offer input throughout their drafting. However, both parties involved in any negotiations should understand the relevant legal aspects before engaging in the preparation and execution of LOIs.

For help with questions that come up during your research or negotiation, whether you're a landlord who wants to protect your interests or a tenant hoping to preserve your rights, call John Gehringer at O'Neil Cannon at 414.276.5000 for a strategic consultation about your next steps.

TWO OF ATTORNEY STEVE SLAWINSKI'S CASES RANKED AMONG "TOP 9" BY WISCONSIN LAWYER

Two of Steve Slawinski's recent victories before the United States Court of Appeals for the 7th Circuit were featured in an article published in the December, 2016 issue of the *Wisconsin Lawyer* titled "Top 9 Recent Wisconsin Federal Court Decisions." The article discussed the importance of these court decisions in the areas of Wisconsin contract law and Wisconsin insurance law; encompassing Steve's overall focus of construction law.

For 30 years Steve has represented his clients in complex construction, business, and real estate litigation. His practice emphasizes 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.

Wonderful job Steve, on your hard work and dedication!