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!

OCHDL HOLIDAY DONATION TO THE RONALD MCDONALD HOUSE

In the spirit of the holiday season the attorneys and staff at O'Neil, Cannon, Hollman, DeJong and Laing decided to do something special this year. We brought gifts to our firm Christmas Party to be donated to the local Ronald McDonald House, and quite a pile of gifts was indeed donated.

We had the opportunity, earlier this week, to tour the house and witness how the donations and support from the community are directly contributing to helping and touching so many lives. We are honored to have been a part of such an amazing organization.

From all of us at the firm:

"Best wishes everyone for a wonderful holiday and a very Happy New Year!"

O'NEIL, CANNON, HOLLMAN, DEJONG AND LAING S.C. RANKED IN 2017 "BEST LAW FIRMS"

U.S. News and World Report and Best Lawyers, for the seventh consecutive year, announced the "Best Law Firms" rankings. O'Neil, Cannon, Hollman, DeJong and Laing S.C. has been ranked in the 2017 *U.S. News – Best Lawyers*® "Best Law Firms" list in 13 practice areas:

- Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law
- Commercial Litigation
- Construction Law
- Corporate Law

- Family Law
- Litigation – Bankruptcy
- Mergers and Acquisitions Law
- Personal Injury Litigation – Plaintiffs
- Product Liability Litigation – Defendants
- Real Estate Law
- Securities / Capital Markets Law
- Tax Law
- Trusts and Estates Law

Firms included in the 2017 “Best Law Firms” list are recognized for professional excellence with persistently impressive ratings from clients and peers. Achieving a tiered ranking signals a unique combination of quality law practice and breadth of legal expertise.

OSHA NEW ANTI-RETALIATION RULES GOES INTO EFFECT DECEMBER 1, 2016

On November 28, 2016, a Texas federal district court denied a motion for an injunction to block the December 1, 2016 implementation of the anti-retaliation provisions found in OSHA’s new injury and reporting rule. Therefore, starting tomorrow, OSHA’s new anti-retaliation provisions will limit post-accident and post-injury discipline and drug testing, as well as how accident and injury-related incentive programs can be administered by employers. These new rules will apply to all employers. Accordingly, all employers should review their safety-related policies and practices to determine if their existing policies or post-accident drug testing policies violate the new anti-retaliation rule.

Additionally, starting January 1, 2017, companies with 250 or more employees must electronically submit their OSHA 300, 300A, and 301 Forms, which cover information about workplace injuries and illnesses. Companies with 20-249 employees in certain “high risk” industries such as construction and manufacturing must electronically submit their OSHA 300A Forms. Our other coverage of these new OSHA rules can be found at our previous blogs here and here .