FEDERAL DISTRICT COURT TO RULE NOVEMBER 22, 2016 ON ATTEMPT TO BLOCK NEW OVERTIME RULES

As we have previously reported, the U.S. Department of Labor (DOL) has issued an update to the federal overtime regulations defining the overtime exemption for executive, administrative, and professional employees, known as "white-collar" exemptions. These changes focus primarily on updating the salary level for white-collar employees including increasing the minimum salary threshold from $455 per week to $913 per week, among other changes. The new rule is set to go into effect on December 1, 2016.

The new overtime regulations have been controversial and subject to various challenges. Specifically, twenty-one states and certain business groups have sued the DOL in Texas federal district court in an attempt to block the DOL from implementing the new overtime rules. Yesterday, November 16, 2016, the federal district court held a hearing on a motion to enjoin the DOL from implementing the new overtime rules. During the hearing, the federal district court judge stated that the Court would make a decision on the motion for a preliminary injunction by November 22, 2016. This is welcome news given that the new overtime rules' effective date is just two weeks away.

During the motion hearing, the business groups and states made various arguments about why the rule should not be implemented, including that the drastic increase in the salary threshold was a "fundamental, radical social policy change." It was also argued that implementation of the new overtime rules should be at least delayed until it could be reviewed by President-elect Trump's administration. In response to that argument, the Court stated that what a new administration may do with the new overtime rules is not relevant and too speculative to affect as how the Court would rule. On the other hand, the DOL argued that the agency had reached these new salary levels in a reasonable way through the rulemaking process, and as a result, agency should be entitled to deference from the Court.

The Court seemed receptive to some, but not all, of the arguments to block implementation of the new rules. The judge questioned whether the new salary basis was a *de facto* salary-only test, why the change was so drastic, and how 4.2 million employees could go from being exempt one day to non-exempt the next, despite having the same job duties. However, he did state that his role was not to get involved in policy making and he would not base his decision on whether he thought the rule was good or bad.

It is premature to state for certain as to how the Court may rule; so, the wise course of action for employers, for now, is to continue to move forward with plans on how to implement the new overtime regulations for their workforces on December 1st. We will, of course, provide

you with an update regarding the Court's decision as soon as it is issued.

NINETEEN ATTORNEYS NAMED SUPER LAWYERS

Each year, *Super Lawyers* surveys the State's attorneys and judges, seeking the State's top attorneys. The lists for 2016 were just published and, once again, a large number of our attorneys are included thereon.

Dean Laing was named one of the Top 10 attorneys in Wisconsin for the second time. He was also named one of the Top 50 attorneys in Wisconsin for the eleventh straight year. In doing so, he is one of only seven attorneys out of over 15,000 attorneys in Wisconsin — and the only commercial litigator in Wisconsin — to make the list all eleven years. Dean was also named one of the Top 25 attorneys in Milwaukee.

Seth Dizard and Patrick McBride were also named one of the Top 50 attorneys in Wisconsin. This is the fourth time that Seth has made the list. Seth and Patrick were also named one of the Top 25 attorneys in Milwaukee.

Doug Dehler, Jim DeJong, Pete Faust, Bob Gagan, John Gehringer, Joe Gumina, Greg Lyons, Greg Mager, Joe Newbold, Chad Richter, John Schreiber, Jason Scoby and Steve Slawinski were also named Super Lawyers, a recognition given to the top 5% of attorneys in Wisconsin. Jim DeJong, Pete Faust, John Gehringer and Greg Lyons have made the list for the past 10 or more years.

Megan Harried and Erica Reib were also named Rising Stars, which is limited to 2.5% of the young attorneys in Wisconsin.

In total, we had 19 of our attorneys named to the lists by *Super Lawyers*, representing more than 50% of our practicing attorneys, which is more than 10 times in excess of the 5% statewide standard.

We are extremely proud of these recognitions, but even more proud of the quality of service we provide to our clients.

UNDERSTANDING MEDIATION AS AN ALTERNATIVE TO LITIGATION

The most common form of alternative dispute resolution (ADR) is mediation. During a mediation, a neutral third party (often a retired judge or experienced attorney) works with the parties to try to reach a settlement of their dispute. The mediator does so by focusing on the disputed issues and exploring possible options for settlement. Mediation generally is considered “informal,” unlike litigation or arbitration. It is a non-binding, private process, in which the mediator acts as a neutral intermediary or “deal broker.”

Unlike arbitration or trial, the mediator has no power to require the parties to settle their dispute, insist on a particular result or issue a decision. The parties must come to any agreement themselves. If a settlement cannot be reached, the parties are free to try another form of ADR or go to trial.

Mediation offers a number of advantages. Most mediations take no more than a day or two to complete. Since the mediation process moves quickly and requires significantly less preparation than does litigation or arbitration, mediation generally is cost-effective.

A settlement reached at mediation is final and binding. Unlike a court judgment, the details of a mediated settlement can be kept private, allowing the parties to resolve their dispute while keeping the details of that resolution out of the public eye.

The advantages of mediation, however, do conceal certain weaknesses. Since mediation is non-binding, a mediation that ends with no agreement can feel like “wasted time.” And unless both parties are motivated to settle the dispute and demonstrate a willingness to work together to reach a compromise, mediation is unlikely to succeed.

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

EMPLOYMENT LAWSCENE ALERT: VOTING LEAVE – WHAT WISCONSIN EMPLOYERS NEED TO KNOW

Tuesday, November 8, 2016 is Election Day. While there is no federal law that requires

employers to grant employees leave to vote, Wisconsin law does require voting leave. Wis. Stat. § 6.67. What Wisconsin employers need to know:

- All Wisconsin employers are required to give employees who are eligible to vote up to three consecutive hours of leave to vote while the polls are open. Wisconsin's polls are open from 7:00 AM – 8:00 PM.
- Employers cannot deny this leave on the basis that employees would have adequate time outside of their working hours to vote while the polls are open.
- The law does not require that these hours are paid. However, employers should be cautious about reducing an exempt employee's pay.
- The employee must request the time off to vote prior to the election.
- The employer can specify which three consecutive hours an employee is permitted to utilize as voting leave.
- Employees cannot be penalized for utilizing voting leave.

Two other provisions that Wisconsin employers should be aware of are 1) they may not refuse to let employees serve as election officials under Wis. Stat. § 7.30 or make any threats or inducements to prevent employees from doing so; and 2) they cannot distribute printed materials to employees that contain a threat that if a particular party or candidate is elected that the business will shut down, in whole or in part, or that the salaries or wages of employees will be reduced. Wis. Stat. § 12.07(2)-(3).

EMPLOYMENT LAWSCENE ALERT: IRS ANNOUNCES 2017 EMPLOYEE BENEFIT PLAN LIMITS

The Internal Revenue Service recently published the cost-of-living adjustments to the dollar limits under various employer-sponsored retirement and health plans for 2017. The majority of the dollar limits are either unchanged or will increase only slightly.

Employer-sponsors of benefit plans should update payroll and plan administration systems for the 2017 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 Limit Increasing to $2,600

For 2017, the maximum dollar limitation on employee salary reductions for contribution to health flexible spending arrangements (health FSAs) will increase to $2,600 from the prior limit of $2,550.

2017 Qualified Retirement Plan Limits

For retirement plans beginning on and after January 1, 2017, 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 remain unchanged at $18,000 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 $210,000 to $215,000.
- The limitation on annual additions (meaning total employee plus employer contributions) to a participant's defined contribution plan will increase from $53,000 to $54,000.
- The limit on the amount of annual compensation taken into account under a tax-qualified retirement plan will increase from $265,000 to $270,000.
- 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 increase from $170,000 to $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 $1,070,000 to $1,080,000. The dollar amount used to determine the lengthening of the five-year distribution period will increase from $210,000 to $215,000.

Prior Guidance on Additional 2017 Limits

Social Security Taxable Wage Base

On October 18, the Social Security Administration announced that the Social Security wage base for 2017 will increase significantly (from $118,500) to $127,200. This is the maximum wage base subject to the FICA tax and is also the maximum "integration level" for plans using "permitted disparity."

2017 Health Savings Account Limits

The combined annual contributions to an HSA must not exceed the maximum annual deductible HSA contribution, which for 2017, is $3,400 for single coverage and $6,750 for family coverage. The catch-up contribution for eligible individuals age 55 or older by year end

remains at $1,000.

EMPLOYMENT LAWSCENE ALERT: OSHA DELAYS ENFORCEMENT OF ANTI-RETALIATION PROVISIONS

On October 12, 2016, the Occupational Health and Safety Administration ("OSHA") agreed to further delay the enforcement of the anti-retaliation provisions of the injury and illness tracking rule until December 1, 2016. Enforcement was originally scheduled to begin August 10, 2016 and then delayed until November 10, 2016. OSHA's agreement to once again delay enforcement of its new anti-retaliations provisions is in response to a request from the U.S. District Court for the Northern District of Texas, which is currently considering a motion challenging OSHA's new rules.

Despite its self-imposed delay in enforcement of its anti-retaliation provisions, last week, OSHA released a memo with examples discussing in more detail how the new anti-retaliation amendments will be interpreted and implemented by OSHA. *See* OSHA Memorandum for Regional Administrators (10/19/2016).

OSHA explained that its purpose in including the new anti-retaliation provisions is to address workplace retaliation in three specific areas: (1) Disciplinary Policies; (2) Post-accident Drug Testing Programs; and (3) Employee Incentive Programs. Although neither employee disciplinary policies, post-accident drug testing programs, or employee incentive programs are expressly prohibited by the new rules, employers will need to be careful about how their policies or programs are drafted and enforced so as to not, in the eyes of OSHA, discourage or deter employees from reporting work-related injuries or illnesses.

EMPLOYMENT LAWSCENE ALERT: NEW FLSA OVERTIME RULES MAY HAVE EMPLOYEE BENEFIT PLAN IMPLICATIONS

The Department of Labor's (DOL's) final overtime rule (the Final Rule) takes effect December 1, 2016. As described in our prior post, the cumulative effect of the Final Rule will be to

significantly expand the categories of employees eligible for overtime protection. As part of preparing to comply with the new wage and hour law, employers must also consider whether and how any changes to compensation practices will affect employee benefit plans. This post describes the tax-qualified retirement plan issues that employers should take into account as the December 1 Final Rule deadline approaches.

Classification Changes

To the extent that benefit plan documents condition eligibility on an employee's classification (such as salaried, hourly, exempt, or non-exempt), compensation structures revised to comply with the Final Rule could cause large cohorts of employees to either lose or gain benefits. As an example, if a specific employee is reclassified from hourly to salaried status (or vice versa) in response to the Final Rule, that individual might gain (or lose) the right to participate in an employee benefit plan. Corresponding modifications to the terms of those plans may be necessary to continue to provide current benefit levels and, or, to ensure that retirement plans will continue to satisfy underlying participation requirements in light of resulting eligibility changes.

Compensation Changes

By the same token, FLSA-related compensation adjustments may result in unanticipated changes to overall benefit contribution obligations. This is particularly true for 401(k)s, and similar tax-qualified retirement plans, under which employer contributions are calculated in accordance with a specific plan definition of "compensation." The impact of pay changes on employer retirement plan contributions will vary case by case, but in general, may fluctuate not only to the extent that employee base pay is increased or decreased, but also by whether a given plan's "compensation" definition includes or excludes overtime pay.

Tax-Qualification Compliance Issues

In some cases, plan compensation definitions should be amended as required to attain a result in line with overall benefits and compensation objectives. Although a tax-qualified retirement plan may exclude (or be amended to exclude) overtime pay from its compensation definition, such exclusion is permissible only if the compensation taken into account after the exclusion satisfies annual nondiscrimination testing requirements. Employers that expect a significant increase in overtime wages as a result of compliance with the Final Rule, as well as employers with plans already excluding overtime pay, should determine now whether projected increases in overtime wages could affect their plans' ability to continue to satisfy tax nondiscrimination requirements in light of existing or revised plan terms.

Employers choosing to amend a retirement plan's compensation definition to exclude

overtime pay will need to consider other legal and operational issues in addition to nondiscrimination testing. For example, in the case of a “safe harbor” 401(k) plan, the modification may need to be coordinated with the start of a plan year. In addition, time may be needed to update payroll systems and plan administrative processes to properly capture the new pay exclusion.

Proceed with Caution before Reducing Benefits to Offset New Overtime Costs

Some employers may be facing higher compensation costs as part of a strategy for maximizing the available exemption from the overtime rules. While it may be tempting to offset some of these costs by reducing employee benefits spending, it is crucial to consider underlying benefit-related legal requirements as they proceed. In some cases, benefit reductions are limited by law, while in others, unintended consequences may result.

For example, the Affordable Care Act requires large employers (generally 50 employees and above) to either offer “affordable” and “minimum value” health care coverage to certain employees or risk exposure to significant tax penalties. A large employer may incur penalties, without regard to whether an employee is exempt or non-exempt under the Final Rule, if he or she works more than 30 hours per week but is not offered ACA-compliant coverage. A reduction or elimination of an employer premium contribution (or an increase in employee cost sharing) must therefore be carefully analyzed to assess the extent to which it could affect a group health plan’s “minimum value” and “affordability” metrics, thereby increasing employer exposure to ACA penalties.

Conclusion

It is no surprise that the Final Rule requires many employers to make extensive changes to their compensation and employee classification practices. What may be more surprising is the extent to which FLSA-related changes promise to impact employee benefit plans, as well. To avoid any benefits cost or compliance surprises, employers should carefully review whether and how sponsored employee benefit plans will be affected by other changes made to comply with the Final Rule.

NINTH ANNUAL MILWAUKEE ARCHBISHOP’S CRS RECEPTION

Earlier this month, OCHDL proudly sponsored a charitable event at the Wisconsin Club, downtown Milwaukee, in honor of Catholic Relief Services; the official international

humanitarian agency of the Catholic community in the United States. The event had many influential guests in attendance, including Archbishop Listecki, Dr. Carolyn Woo, CEO and President of CRS, and Coach Wojciechowski of Marquette University. The event generated a great deal of awareness, as well as the much needed funds to support this overall amazing cause.

Catholic Relief Services 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 are honored to have been a part of such a meaningful event and encourage everyone in the community to look into this selfless agency.

Read more about CRS >>

ATTORNEY TREVOR C. LIPPMAN SELECTED AS PARTICIPANT IN THE G. LANE WARE LEADERSHIP ACADEMY

We are pleased to announce that Trevor C. Lippman was selected to participate in the inaugural class of the G. Lane Ware Leadership Academy. Trevor was 1 of 23 attorneys chosen to participate in this program.

The Wisconsin State Bar's Development Committee recently developed the G. Lane Ware Leadership Academy as an inclusive leadership development training program. The committee's objectives in creating this program are to empower participants with the skills, strategies, and resources to become effective leaders in all walks of life.

The G. Lane Ware Leadership Academy is a multi-session training program designed to help lawyers enhance their leadership skills, to build professional networks, to inspire involvement, and to foster professional development. The inaugural class will begin the

program this November and end in the spring of 2017.

This is a great opportunity for Trevor to enhance his practice and enrich his career, and he is excited to be a participant.

FIRST PLACE IN THE 2016 STUDENT INTERN COMPETITION

In September, Jessica Schultz was awarded first place in the 2016 Turnaround Management Association (TMA) Chicago/Midwest Chapter Student Intern Competition. Jessica is currently a third-year law student at UW-Madison Law School, and she spent the summer of 2016 as a Law Clerk with O'Neil, Cannon, Hollman, DeJong and Laing, S.C.

TMA is a global non-profit organization comprised of turnaround and corporate renewal professionals with more than 9,000 members in 55 chapters worldwide. The competition involved both a written and oral component. Jessica's application focused on work she performed with distressed and insolvent businesses under the supervision of Seth Dizard, a Shareholder of the firm who frequently serves as a court-appointed receiver for distressed companies.