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.

EMPLOYMENT LAWSCENE ALERT: WISCONSIN COURT OF APPEALS FINDS NONSOLICITATION OF EMPLOYEES PROVISION UNENFORCEABLE UNDER RESTRICTIVE COVENANT STATUTE

In *Manitowoc Co. v. Lanning*, 2015AP1530 (Aug. 17, 2016), the Wisconsin Court of Appeals ruled—for the first time—that Wisconsin Statute § 103.465, which governs the enforceability of restrictive covenants in employment relationships, applies to employee non-solicitation provisions.

In 2008, John Lanning, an employee at The Manitowoc Co., entered into an agreement that prohibited him, for a period of two years after his employment ended, from either directly or indirectly soliciting, inducing, or encouraging "any employee to terminate their employment with Manitowoc" or to "accept employment with any competitor, supplier or customer of Manitowoc." The Manitowoc Co. claimed that, after leaving the company in 2010 to work for a direct competitor, Lanning communicated with at least nine employees in connection with possible employment opportunities at his new employer. The Manitowoc Co. claimed this was

a violation of the employee non-solicitation provision and filed suit against Lanning. The Circuit Court granted summary judgment in The Manitowoc Co.'s favor, awarding damages and attorneys' fees. Subsequently, Lanning appealed to the Wisconsin Court of Appeals, which ultimately reversed the lower court's ruling.

On appeal, The Manitowoc Co. argued that § 103.465 should not apply to employee non-solicitation provisions but, rather, only to covenants not to compete The Court quickly dismissed that argument, stating that any covenant between an employer and employee that "seeks to restrain competition" or operates as a "trade restraint" clearly falls within the confines of § 103.465. The Court noted that the employee non-solicitation provision limited how Lanning could compete with The Manitowoc Co. and "did not allow for the ordinary sort of competition attendant to a free market, which includes recruiting employees from competitors." Therefore, the Court determined that the employee non-solicitation provision had to comply with § 103.465.

With the applicability of § 103.465 to employee non-solicitations decided, the Court then embarked to determine whether the provision The Manitowoc Co. sought to enforce was reasonably necessary to protect the Company's legitimate business interests from unfair competition from a former employee. The Manitowoc Co. argued that it had a legitimate interest in preventing Lanning from "systematically poaching" its employees, and it believed the provision was narrowly tailored to protect it from such a threat.

The Court disagreed, however, determining that the actual terms of the agreement, as written, were far too broad and, therefore, unenforceable. As drafted, the non-solicitation provision prevented Lanning from soliciting *any* employee, whether entry level or a key employee, to leave The Manitowoc Co. for *any* reason, whether to retire to spend more time with family or work for a competitor. Because the Court found that the provision restricted "an incredible breadth of competitive and noncompetitive activity," it concluded that the employee non-solicitation provision, as drafted, did not protect a legitimate business interest and, as such, the provision could not pass the strict scrutiny that § 103.465 required and, accordingly, found the covenant unenforceable.

In light of this decision, employers should review their current agreements that contain employee non-solicitation agreements. Although employers have the right to require employees to enter into agreements with employee non-solicitation provisions, the provisions must be crafted narrowly and carefully—just like covenants not to compete—to meet the strict scrutiny analysis required by § 103.465. To be enforceable, employee non-solicitation provisions must focus on protectable interests, such as restricting former employees from soliciting current employees with whom the former employee had a direct business relationship with from ending their employment in order to engage in direct competitive activity adverse to the employer. An experienced management-side employment attorney can assist employers with drafting such provisions in order to meet the enforceability

standards required by the Wisconsin restrictive covenant statute.

TAX AND WEALTH ADVISOR ALERT: BUY-SELL PLANNING: THREE MISTAKES TO AVOID

One of the critical planning tools a closely held business plan should have is a buy-sell plan. A plan that addresses what happens to ownership of the company upon certain "triggering events," such as the death, disability, or termination of an owner. A buy-sell plan is a common document for a closely held business, and these plans often contain the same design flaws.

1. **It provides for a fixed price.** At its heart, a buy-sell plan frequently requires someone (an owner) to purchase the stock of someone else (another owner) upon a specific event (the owner's death). Therefore, the agreement needs to establish the price and terms of the stock sale. Price can be established in one of three ways: (a) an agreement between the parties, (b) a formula, or (c) an independent third party appraisal. It is not uncommon for the business owners to agree between themselves on the value of the business and use that value in the buy-sell agreement. There is nothing inherently wrong with that strategy; if no one knows whether they will be the buyer or seller when a triggering event happens, both parties should negotiate a fair value. The problem comes when the owners fail to update their buy-sell plan and the so called "stipulated value" becomes stale over time. The solution is not to avoid a stipulated value; rather, it is to put a provision in the agreement that when the stipulation is too old (18 months is common), the business must be valued in an alternate fashion (such as by appraisal).
2. **It is inconsistent with the succession plan.** I work with a second generation company that has done a very good job of bringing the third generation into the business. The new generation had to work elsewhere first, come in on the ground floor, and now are in a position to take the company to the next level. If you asked the second generation, upon a "triggering event," they planned to bring in the third generation as owners. Indeed, most of the long term strategic planning was centered around making the third generation owners. All of that is awesome and well done. The problem? The buy-sell plan had the second generation owner-siblings buying each other's stock. If things played out the way they actuarially should, the youngest second generation sibling would end up owning 100% of the stock. Another problem? A second generation sibling has children in the business, and one of the main ownership transition strategies of using family gifting does not work under the plan.
3. **It is not funded.** Generally, the purchase terms of a buy-sell plan require the purchasing party to use cash or a promissory note to buy the equity. Consider a $5,000,000 business with two owners. If death is a triggering event, and one of the owners passes away, generally the other owner will not have $2,500,000 in cash lying

around to purchase the deceased partner's equity. So, under most buy-sell agreements, this purchase would have to be made with a large long-term promissory note.

But let's take a quick look at that transaction post-death. Presuming both partners were critical to the business's success, the business is likely to suffer some economic loss following the death of a partner. If that partner had a large role in revenue generation, the loss could be dramatic. The surviving partner will be in a situation where a weakened company needs to support his household income and service a sizeable promissory note. On the other hand, the financial future of the deceased partner's family is dependent on a weakened company's ability to service the note. Not to mention the fact that there will be little or no capital available to invest in company growth.

It is largely for this reason that I insist my clients fund their buy-sell plans with life insurance. A $2,500,000 life insurance policy gives the survivor exactly what he needs (cash to purchase the decedent's equity), the decedent's family what it needs (risk free cash), and the business what it needs (full access to all of its capital to weather the storm and grow). While life insurance is not free, at least it can be paid for while both partners are alive and the business is not in a post-death weakened condition.

So, for closely held business owners, first make sure you have a plan of ownership and leadership succession. Then make sure the buy-sell plan effectively implements the succession strategy, provides for a fair price at transition, and is appropriately funded.

For more information on buy-sell planning contact Joe Maier at 414-276-5000 or joe.maier@wilaw.com

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CHRISTA WITTENBERG PUBLISHED AN ARTICLE IN WISCONSIN LAWYER MAGAZINE

Christa Wittenberg authored an article entitled "Testamentary Capacity: A Sliding-Scale Approach," which appeared in the September issue of *Wisconsin Lawyer* magazine. The article discusses the complex estate planning issues and disputes that can arise in families with loved ones affected by dementia or diminished mental capacity. Given increasing life expectancies and the relative frequency with which these issues can arise, this is a situation that many people either have faced or will face in their lifetimes. When these issues arise, it is important to seek good legal advice promptly.

For more information you can contact Christa at 414-276-5000 or

Christa.Wittenberg@wilaw.com

WHAT DOES IT MEAN TO LITIGATE A CIVIL CASE?

Alternative dispute resolution (ADR) is so named because it provides an “alternative” to litigating a civil dispute before a court in a bench or jury trial. The most popular forms of ADR are mediation and arbitration, although other options exist.

Litigation is when a lawsuit is filed in a court of law. A lawsuit typically involves a dispute over a particular state of affairs: a contract breach, an injury suffered in an accident, or some other dispute situation.

Litigation offers certain advantages. Access to the decision-maker, whether judge or jury, is free of charge, except for minimal filing fees. Discovery is part of the litigation process, and can be wide-ranging, allowing the parties to gather a great deal of information. Third parties can be added to a law suit, if appropriate. The rules of evidence and procedure are well-defined. The final decision can be enforced by the court. If a party loses, that party has the right to appeal. And, litigation does not prevent the parties from attempting ADR or negotiating a settlement before, during or even after trial.

Despite these benefits, litigation also has certain disadvantages. The large case load faced by judges, as well as the demands of discovery and procedural issues, can make litigation both slow and expensive. The broad discovery allowed in litigation and the inherently public nature of litigation can expose damaging or embarrassing details, creating brand or reputation management concerns. Highly technical or complex disputes can be difficult to present to a judge or jury in an efficient and accessible manner, as judges and juries may lack the specialized knowledge needed to fully grasp the issues involved in the dispute. Litigation decisions can be appealed, adding additional expense and extending the duration of the dispute.

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

BEST LAWYERS® HONORS 15 ATTORNEYS IN 2017

O'Neil, Cannon, Hollman, DeJong and Laing S.C. is pleased to announce that 15 lawyers have been named to the 2017 Edition of *Best Lawyers*, the oldest and most respected peer-review publication in the legal profession.

Best Lawyers has published their list for over three decades, earning the respect of the profession, the media, and the public as the most reliable, unbiased source of legal referrals. Its first international list was published in 2006 and since then has grown to provide lists in almost 70 countries.

"*Best Lawyers* is the most effective tool in identifying critical legal expertise," said CEO Steven Naifeh. "Inclusion on this list shows that an attorney is respected by his or her peers for professional success."

Lawyers on the *Best Lawyers in America* list are divided by geographic region and practice areas. They are reviewed by their peers on the basis of professional expertise and undergo an authentication process to make sure they are in current practice and in good standing.

O'Neil, Cannon, Hollman, DeJong and Laing S.C. would like to congratulate the following attorneys named to the 2017 *Best Lawyers in America* list:

- James G. DeJong – Corporate Law, Mergers and Acquisitions Law, Securities/Capital Markets Law
- Seth E. Dizard – Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law, Litigation-Bankruptcy
- Peter J. Faust – Corporate Law, Mergers and Acquisitions Law
- John G. Gehringer – Commercial Litigation, Construction Law, Corporate Law, Real Estate Law
- Dennis W. Hollman – Corporate Law, Trusts and Estates
- Grant C. Killoran – Litigation-Health Care
- Dean P. Laing – Commercial Litigation, Personal Injury Litigation-Plaintiffs, Product Liability Litigation-Defendants
- Gregory W. Lyons – Commercial Litigation, Litigation-Insurance
- Gregory S. Mager – Family Law
- Patrick G. McBride – Commercial Litigation
- Thomas A. Merkle – Family Law
- Steven J. Slawinski – Construction Law

Since it was first published in 1983, *Best Lawyers* has become universally regarded as the definitive guide to legal excellence. *Best Lawyers* is based on an exhaustive peer-review survey. Over 54,000 leading attorneys cast more than 7.3 million votes on the legal abilities

of other lawyers in their practice areas. Lawyers are not required or allowed to pay a fee to be listed; therefore inclusion in *Best Lawyers* is considered a singular honor. *Corporate Counsel* magazine has called *Best Lawyers* “the most respected referral list of attorneys in practice.”