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 .

IMPORTANT HIPAA AND ACA BENEFIT UPDATES FROM THE HHS AND IRS

Be Aware: Current Phishing Email is Disguised as Official OCR Audit Communication

As many HIPAA covered entities and their business associates are aware, the Office for Civil Rights (“OCR”) division of the United States Department Health and Human Services (“HHS”) has begun a second-round of audits to examine compliance with the HIPAA Privacy, Security and Breach Notification Rules. Specifically, the audits are intended to review the policies and procedures adopted and employed by covered entities and business associates to meet selected standards and implementation specifications of the Privacy, Security, and Breach Notification Rules.

In an alert issued today, the HHS announced that it has come to their attention that a phishing email is being circulated on mock HHS Departmental letterhead under the signature of the OCR’s Director, Jocelyn Samuels. The email appears to be an official government communication and targets employees of HIPAA covered entities and their business associates. The email prompts recipients to click a link regarding possible inclusion in the HIPAA audit program. The link then directs individuals to a website marketing cybersecurity services. The HHS is taking the unauthorized use of its material very seriously and stresses that the site is in no way associated with the HHS or OCR. Anyone wondering if they have, in fact, received an official HHS or OCR communication may send an email to OSOCRAudit@hhs.gov to seek verification.

IRS Deadline for Providing 2016 ACA Statements to Employees Extended to March 2, 2017

Under the Affordable Care Act’s information reporting rules, an “applicable large employer” (meaning an employer with at least 50 full-time, including full-time equivalent employees) must file a Form 1095-C with the IRS for each employee who was a full-time employee for any month of the calendar year. The employer also must provide each full-time employee a completed Form 1095-C (or a satisfactory substitute for such form).

Larger employers must also provide a Form 1095-C (or substitute form) to each of its full-time employees, regardless of whether the employer offered health coverage to all, some, or none of its full-time employees.

In Notice 2016-70, the IRS recently offered a 30-day extension of the (otherwise applicable) January 31, 2017 deadline to furnish the Form 1095-C statements to employees. The new due date for providing the ACA statements to employees is March 2, 2017. This is a hard deadline; no 30-day extension may be obtained.

Note that there is no extension of the deadline to provide the Forms 1095-C to the IRS under cover of transmittal Form 1094-C. The deadline for paper filing is February 28, 2017 and the electronic filing deadline is March 31, 2017. (Electronic filing is required for applicable large employers filing 250 or more employee statements.)

BREAKING: NEW DOL OVERTIME RULE WILL NOT GO INTO EFFECT DECEMBER 1

Yesterday, a federal judge in Texas issued a nationwide injunction (full decision here) blocking the U.S. Department of Labor (DOL) from implementing its updated overtime regulations, which would have required, among other things, that exempt employees be paid a minimum salary of $913 per week. The judge ruled that the twenty-one states and certain business groups that had sued to block the implementation of the regulations were likely to be successful on the merits of their case and that there would be harm to the states and businesses if the rule was implemented on December 1.

The basis for the ruling is that the new salary basis test is a *de facto* salary test that no longer takes an employee's job duties into consideration. The Court found that the type of work actually performed by the employee is what Congress intended the exemption to be based on, and that the updated DOL rule supplanted the duties test with a minimum salary threshold. The Court found that this was outside the intent of Congress and, therefore, outside of the DOL's statutory authority. Additionally, the judge ruled that the DOL did not have statutory authority to implement the automatic increase provision of the rules, which would have automatically readjusted the minimum weekly salary level every three years.

Although this may not be the end of litigation over this matter, the DOL's new overtime rules will not take effect on December 1, 2016, and therefore, employers do not need to implement any changes. For those employers who have already implemented changes in preparation for the updated overtime rules, they have the option to keep those changes in place or reverse

those changes and wait to see how this matter ultimately resolves. However, employers must keep in mind that, although the minimum salary level will remain, for now, at $455 per week, to be considered exempt, employees must still meet the job duties tests.

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.