EMPLOYMENT LAWSCENE ALERT: NEW OSHA ANTI-RETALIATION PROVISION REQUIRES EMPLOYERS TO RETHINK THEIR SAFETY-RELATED POLICIES

Last week, the Occupational Safety and Health Administration (OSHA) finalized new record-keeping and reporting rules that require certain employers to electronically submit information about workplace injuries and illnesses to OSHA. The electronic reporting requirements of the rule apply only to employers with 250 or more employees and to employers with between 20 and 249 employees in certain "high-risk" industries, such as construction and manufacturing. A full list of the affected industries can be found here . The full rule (which can be found here) goes into effect January 1, 2017, while certain provisions, like the anti-retaliation provision, go into effect August 10, 2016. Non-personal injury and illness information reported under the rule will be posted on a publicly accessible OSHA website. The new rule does not change the requirement that employers with 10 or more workers in most industries prepare injury reports, compile a log of these incidents, and complete an annual summary of work-related illness and injuries, which OSHA can access during an investigation.

The new rule further requires employers to inform workers of their right to report work-related injuries and illnesses without fear of retaliation and provides additional information on employees' rights to access workplace injury data. Moreover, OSHA's new rule prohibits any workplace policy or practice that could discourage employees from reporting workplace injuries or illnesses. Such policies subject to greater scrutiny under OSHA's new anti-retaliation rule could include post-accident drug testing policies. Employers will have to review their safety-related policies to determine if their policies or practices run afoul of OSHA's new anti-retaliation rule or otherwise discourage employees from reporting workplace safety incidents. The anti-retaliation provisions apply to all employers.

OSHA's stated purpose for the additional reporting and public access are to increase workplace transparency and to encourage employers to increase their efforts to prevent work-related injuries and illnesses. However, employers should be cautioned that such information will make it easier for OSHA to target companies with multiple injuries or illnesses for compliance and enforcement actions, despite any precautions that are being taken, as well as open up companies with high rates of illness or injury to increased union organization.

Employers of all sizes and in all industries should continue to strive to achieve workplace safety. They should also immediately review their workplace safety policies to make sure that appropriate anti-retaliation provisions are included.

TAX AND WEALTH ADVISOR ALERT: CREDITORS, PREDATORS AND DIVORCING SPOUSES ARE WHY HAVING A TRUST MAY BE BETTER THAN A WILL

As I have stated before, when people find out what I do, the most common “cocktail party” question I get is “do I need a will?” Over time, my answer to that question has evolved. I used to respond by asking a couple of questions: Do you have minor children? Who do you want to get your property when you die? Now, my answer is “you don’t need a will or an estate plan, but let me tell you why you want one: to protect your loved ones from creditors, predators, and divorcing spouses.”

As I have mentioned in previous blog articles, virtually all of the plans I have created in the last three years, leave Mom and Dad’s assets not to the children, but to lifetime trusts for their children’s benefit. As I tell my clients, the reason I recommend this structure is simple—if you could control your property and still keep it protected from creditors, you would. Unfortunately, under the laws of most states, the clients cannot do that. In general, they have a choice; own the property and expose it, or give away the property—along with control and enjoyment of the property—and protect it. Generally, clients are appropriately reluctant to give away the property they worked hard for and are left accepting creditor risk.

But, those same rules do not apply if Mom and Dad leave property in trust for the children. In that case, those children can control the property as trustees and enjoy the property as beneficiaries. However, because those children did not create the trust (Mom and Dad did), if the children engage in dumb behavior and get sued, unlike property left to children under a will which would be exposed to creditors, the property left in trust is not exposed. Or, if the children make poor investments in a business and sign personal guarantees, the property in trust cannot be seized by the bank, whereas property left outright to those children can be seized. And, perhaps most important, given the statistical likelihood that a child’s marriage will end in divorce, property left to the child in trust, will stay with that child, and not go to the person that broke the heart of Mom and Dad’s baby.

So, do you need a will? Maybe not. Do you want an estate plan that protects your family from creditors, predators, and divorcing spouses? Absolutely.

EMPLOYMENT LAWSCENE ALERT: WISCONSIN TO IMPLEMENT DRUG TESTING RULES FOR UNEMPLOYMENT RECIPIENTS

On Wednesday, May 4, 2016, Wisconsin Governor Scott Walker approved an emergency rule submitted by the Wisconsin Department of Workforce Development. Under this emergency rule, certain individuals receiving unemployment benefits will be required to be drug free in order to continue receiving unemployment benefits.

Specifically, the new rule will require individuals who are receiving unemployment benefits to pass a pre-employment drug screen for new employment where such drug screens are a condition of employment if they want to remain eligible to receive unemployment benefits. Those who fail the drug screen must comply with substance abuse treatment and a job skills assessment to remain eligible for unemployment benefits. Also, individuals who refuse to take a pre-employment drug screen as part of an offer of new employment may be denied unemployment benefits. The new rule will take effect upon official publication later this week.

THE WILAW CONNECTION QUARTERLY NEWSLETTER

Newsletter Article Highlights:

- Firm Obtains Big Win in Koss Litigation
- “The judgment is affirmed by an equally divided Court”
- Undue Influence in Wisconsin Part 1: Inheritance Disputes and Claims of Undue Influence
- Whether Website Presence Exposes Publisher to Lawsuits in Wisconsin Analyzed in Recent Case
- How Wisconsin’s Knife Law Reform Impact Employers
- Building a Great Plan: It All Starts With Vision
- Proud to Be a Member of Meritas, A Multi-National Network of Business Law Firms

Pleased to Announce:

- Attorney Joe D. Newbold Elected as Shareholder
- Attorney Trevor C. Lippman Selected for Leadership Development Summit

Upcoming Events:

- Run for Justice MJC 5K

LEGISLATIVE ALERT: NEW RULES AND PROCEDURES REGARDING MORTGAGE FORECLOSURES

Wisconsin recently enacted Act 376 modifying certain aspects of mortgage foreclosure proceedings, most notably a reduction to the period of time that owner-occupied, non-commercial property may be redeemed and the process of declaring a property abandoned.

Under current law, a judgment of foreclosure must specify a length of time, called a redemption period, during which a mortgagor may redeem the mortgaged property by paying the entire amount of the mortgage debt. Upon redemption, the judgment of foreclosure and the underlying mortgage are discharged, and the mortgagor retains the property. Act 376 reduces the foreclosure redemption periods applicable to mortgages upon owner-occupied, non-commercial property that are executed on or after April 26, 2016:

- The period of redemption is reduced from 12 months to 6 months after entry of judgment. This new 6-month redemption period may be extended to 8 months if, upon motion of a mortgagor, a court finds that the mortgagor is attempting in good faith to sell the mortgaged premises and has entered into a listing agreement with a licensed broker.
- If a mortgagee, however, waives its right to a judgment for any deficiency that may remain following sale, the newly enacted 6-month redemption period is cut in half to 3 months. Similarly, the redemption period in such a case may be extended to 5 months if, upon motion of a mortgagor, a court finds that the mortgagor is attempting in good faith to sell the mortgaged premises and has entered into a listing agreement with a licensed broker.

Act 376 also provides that only a foreclosing plaintiff or the city, town, village or county where the mortgaged property is located may petition the presiding court for a finding that the mortgaged property has been abandoned by the mortgagor and its assigns.

If the court makes a finding of abandonment, Act 376 requires immediate entry of a foreclosure judgment and requires the foreclosing plaintiff, within 12 months of such entry of judgment, to hold a sale of the mortgaged premises and have the sale confirmed or release or satisfy its mortgage lien and vacate the judgment of foreclosure with prejudice. If a

foreclosing plaintiff fails to complete either of the above requirements within 12 months of entry of judgment, any party to the foreclosure action or the city, town, village, or county where the mortgaged property is located may petition the court for an order compelling a sale of the property.

If you have any questions, please contact attorney John R. Schreiber at john.schreiber@wilaw.com or 414-276-5000.

EMPLOYMENT LAWSCENE ALERT: DOL ISSUES UPDATED FMLA GUIDE FOR EMPLOYERS

Today, the U.S. Department of Labor, Wage and Hour Division, issued an updated guide for employers on the Family and Medical Leave Act. The guide is designed to provide essential information about the FMLA for employers, including the obligations under the law and the options available to employers in administering FMLA leave. The updated guide contains flowcharts, helpful hints, and other information to explain the FMLA process and regulations. The Employer's Guide to The Family and Medical Leave Act can be found here.

O'NEIL, CANNON, HOLLMAN, DEJONG AND LAING ELECTS NEWBOLD AS SHAREHOLDER

O'Neil, Cannon, Hollman, DeJong and Laing is pleased to announce that Joe Newbold was recently elected a shareholder of the firm. Mr. Newbold has been with the firm since 2011 and is a member of the Litigation Practice Group. Joe concentrates his practice in commercial litigation in both state and federal court. He manages a variety of complex cases involving class actions, commercial real estate, franchise litigation, and intellectual property matters. Joe has extensive experience representing plaintiffs and defendants in challenging civil litigation.

Learn more about Mr. Newbold by visiting his full profile.

TAX AND WEALTH ADVISOR ALERT: BUILDING A GREAT PLAN… STEP FOUR: RESULTS, BEHAVIORS, AND BELIEFS

My last blog post focused on how to build the plan to get from where you are to where you want to go. The plan, to bridge the gap to our most awesome future, requires us to figure out what we need to stop, start, and continue doing to get from where we are to where we want to be. Of course, it is not nearly that simple.

Think of all of the situations in which we profess to want change. Maybe we want to have greater sales success. Maybe we want to lose 30 pounds. We might want to cut spending, so that we can save more. Oftentimes what we need to start, stop, and continue doing is obvious or even simple. Yet we consistently fail to do what needs to be done. Why?

I do a lot of performance, executive, and life coaching. This question is the crux of 95% of what people need help with: "I know what I need to do, but I am consistently failing to do it. What is wrong with me?" Answering this question requires us to step back and be a bit analytical about how results are achieved and think about the vision. The vision is a collection of results that will make us feel a certain way, for example, one of my current clients would like to increase his business profits by 30% because that is what is needed to allow his spouse to stay at home with their children. Another client would like to increase his commission income by 20% so that he can purchase his first BMW. As I stated, the "why" is critical, but so is the "what."

Again, going back to the science, the 30% profit growth or the 20% commission growth is the desired result. The first question, then, is "what behaviors do I need to engage in to achieve the result?" Stated another way, the results driving the vision are the natural results of certain behaviors one chooses to start, stop, and continue doing. In both of these cases, with both of these clients, those behaviors are pretty obvious. In other words, each knew what he had to do differently to achieve his vision.

But each month, the focus of our coaching seems to be what he did not do and why. The reason they are not doing what they need to do is both simple and complex. Let's start with the simple. The reason they are not reaching their goal is that the necessary behaviors to do so violate a belief. For example, take the person who wants to lose 30 pounds. After doing a start, stop, and continue analysis, it is determined that the vision can be attained by no longer eating a bowl of Ben and Jerry's ice cream every night. So the behavior is to cut out the nightly Ben and Jerry's. Most people will stop eating the ice cream, for a while. But then they will have a tough day, or a great day, or see a commercial with ice cream, and have a bowl. Once they have one, they might quit again for a day (and beat themselves up for being

weak), but then have another bowl a day or two later. Eventually, the plan is broken, as the necessary behavior of avoiding ice cream is regularly violated. This is just one example of a perceived “inability” to change necessary behaviors in the long-term. We see this all the time, where people spend rather than save, do not pick up the phone to make introductory sales calls, or do not terminate a culturally cancerous employee. They know the behavior that will lead to the result over the long-term, but they choose not to do what needs to be done.

So why, in our example, did the person eat the ice cream? At first blush, it seems simple; he likes ice cream, but there are a lot of things that we like, that we avoid, so why give in? And that question requires the deep introspection necessary for long-term change. This is when the complexity of the plan starts to take form. What belief do I have that causes me to eat ice cream I should not eat? That is a question that is rarely answered easily, but is critical to achieve the vision. Maybe the answer is that Ben and Jerry’s makes me happy, and I believe that it is necessary to eat ice cream to make me happy when I am sad. Or, maybe it is that I have always associated ice cream with celebrations, so to me, a win is not a win without Chunky Monkey. Or, maybe it’s that my vision is wrong. Maybe, while I would like to be 30 pounds lighter, it is not important enough for me to give up ice cream.

The ice cream example is a good one because it is relatable, but in my coaching, I see this frequently in the professional world. Let’s go back to the advisor who needed to grow commissions by 20% to buy the BMW. He knew that he needs to make 90 calls a day to meet the goal, but was only making 40 calls every other day. He knew what needed to be done, but was not doing it. So we had to dig down to figure out why. What did he believe that caused him to not pick up the phone as much as he should have? With him, after a lot of discussion, he admitted that those calls made him feel like a “cheesy salesperson” rather than a professional advisor. Digging even deeper, we discovered he is an introvert and hates “forced conversations” with strangers. Also, as a millennial, he knew he lacked phone skills and was more comfortable with email and texting. If I would have stopped where most coaches do, by simply telling him to make more calls, the vision would have never been achieved. The vision is only achievable by first addressing the belief that is getting in the way—“phone conversations make me uncomfortable.” You then have to figure out a way to be true to that belief, while still achieving the vision (i.e., email and texting as a way of communication). Building a team to delegate those activities (i.e., hire a phoning assistant) could also achieve the vision. Or perhaps, coming to the personal conclusion, that while phoning is an unpleasant task, it is worth it to achieve the vision.

So, to accomplish true change, the process needs to be:

- What behaviors accomplish the vision?
- What do I need to start, stop, and continue doing to achieve those behaviors?
- Then go to the “third why.” Why am I not currently engaging in those behaviors?

For example, to meet my retirement goal, I need to save 10% of my income, but I am currently only saving 2%—why?

- Under my budget, I can only afford to save 2%—why?
- My budget takes into account my large lease payment on my car—why do I have a large lease payment and an expensive car?
- I believe people will see me as more successful if I drive a nice car, and I believe successful people will only do business with someone successful—why do you believe that? What evidence exists that shows that belief is true? Wouldn't a successful person be able to save 10% of their income for retirement? Is this really about what I want and am I projecting my beliefs onto others?

As a mentor once told me, all the power is in the third "why." I believe that—and the reason is the third "why" is not the reason or the assumption, but rather the emotion, be it fear, insecurity, arrogance, or whatever that is really at the core of the behavior, that is preventing you from getting where you want to go.

So as you now build the plan, the steps are:

- Paint the vision (where am I going and why?)
- Determine, using empathetic honesty where I am right now
- Figure out the behaviors necessary to get from where I am to where I am going
- Determine what I need to start, stop, and continue doing
- Figure out what beliefs are getting in the way by going to the third "why"
- Either change the belief, change the behaviors, or change the vision
- Measure the results and recalibrate if necessary

At the end of the day, the truth is, if the vision is important enough, you will achieve.

EMPLOYMENT LAWSCENE ALERT: WISCONSIN COURT OF APPEALS ISSUES DECISION ON MEANING OF "SUBSTANTIAL FAULT" IN UNEMPLOYMENT

This week, the Wisconsin Court of Appeals issued an important ruling on what "substantial fault" means in the context of unemployment compensation. In 2013, the Wisconsin legislature amended the unemployment insurance statutes to state that, in addition to discharge for misconduct and voluntary termination of work, employees would be denied unemployment benefits if they were terminated by the employer for "substantial fault by the

employee connected with the employee's work." The statute defines "substantial fault" as "those acts or omissions of an employee over which the employee exercised reasonable control and which violate reasonable requirements of the employee's employer but does not include any of the following: 1. One or more minor infractions of rules unless an infraction is repeated after the employer warns the employee about the infraction. 2. One or more inadvertent errors made by the employee. 3. Any failure of the employee to perform work because of insufficient skill, ability, or equipment." Wis. Stat. 108.04(5g)(a).

In O*perton v. Labor and Indus. Review Comm'n et al*., 2015AP1055 (Wis. Ct. App. April 14, 2016) an employee who worked as a cashier had made eight cash handling errors over twenty months, including not requesting to see identification for a credit card purchase of $399 on what turned out to be a stolen credit card. The employer issued her multiple written warnings, and she was warned that further errors could result in termination. After she failed to get identification related to the stolen credit card, she was terminated for her cash handling errors.

Both the Department of Workforce Development and the Labor and Industry Review Commission (LIRC) found that the employee was ineligible for unemployment benefits because her discharge was for substantial fault based on the fact that she continued to make cash handling errors after receiving multiple warnings. Despite LIRC's arguments that the court should defer to its experience and judgment in employment issues, the Court of Appeals took a very narrow view of what constitutes "substantial fault." The Court of Appeals found that there had been no evidence presented that the cash handling errors were "infractions" that violated any specific rule of the employer. The Court of Appeals then went on to determine that the employee's cash handling errors fell into the second category of what is not substantial fault because they were "inadvertent," and it did not matter that warnings had been given because that is not a part of the "inadvertent error" analysis.

The important takeaway for Wisconsin employers is the fact that inadvertent errors, even if repeated after a warning, do not constitute substantial fault under the unemployment statutes. Therefore, in issuing warnings for performance related deficiencies, employers need to cite specific policies and rules that the employee has violated. This will give employers a better chance of showing that the employee has committed an infraction, rather than an inadvertent error, and should be denied unemployment benefits if such an infraction is repeated. At this point in time, it is not certain as to whether this matter will be taken to the Wisconsin Supreme Court. We will keep you updated on any further developments.

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