TAX AND WEALTH ADVISOR ALERT: A TOOL TO SOLVE THE FIRST SIN: THE VISIONARY ORG CHART

For those of you who have read this blog, you know that the first of the seven deadly sins of succession planning is not putting leadership first. You cannot have a successful succession planning without answering a critical, threshold question: “if not you, then who?”

Sometimes that answer is simple, oftentimes it is not. Frequently the current owner or owners need guidance and direction in answering that question. In those situations, one of the most helpful tools I use in working with my clients is a visionary org chart. The way a visionary org chart works is that we pick a time in the future—maybe three years out, maybe five. The discussion focuses on what the vision is for the company at that time—what markets will the business be in, what will the revenues be, who will be the competitors, etc. Then, the focus shifts to what roles need to be filled for the company to achieve that vision. Those roles are mapped out on the company’s visionary org chart. In other words, what does the company’s org chart need to look like on ____, 2019 for the company to achieve the vision?

Once we have the visionary org chart created, we begin to fill in the roles with the company’s current talent. As part of that process, a few critical issues almost always come to a head:

- We almost always have critical roles that have no current talent to fill them
- We almost always have talent without a role
- Sometimes we have a great discussion about a currently poor fit between company talent and current roles, and the potential to reemploy that talent into a better role for company success
- Because people will be three years (or whatever period of time in the future we use) older, transition of talent becomes a stark reality
- This process almost always results in a change in the company’s current org chart. In other words, pulling the leadership team out of the day-to-day and having them think about the future success of the business, causes them to recognize issues that need to be addressed immediately

So what does your visionary org chart look like? What weaknesses does it reveal? What opportunities does it highlight? Addressing these challenges will inevitably help maximize the value of your business and best take care of the people you care about.

ATTORNEY GREGORY S. MAGER RECOGNIZED AS A BOARD CERTIFIED FAMILY LAW TRIAL ADVOCATE

The National Board of Trial Advocacy (NBTA) has recognized attorney Gregory S. Mager, a shareholder at O'Neil, Cannon, Hollman, DeJong and Laing S.C., as a Board Certified Family Law Trial Advocate. The NBTA is the first American Bar Association accredited attorney board-certifying agency in the world. The organization certifies specialists, predicated on high standards of demonstrated competence and integrity.

"*With less than 4% of all practicing lawyers certified by an ABA-accredited or state-sponsored certification board, board certification is not only highly important to the profession of law but also paramount to consumer protection. In so doing, it differentiates such attorneys for having objectively established their specialized proficiency in the practice of law*."
http://www.nbtalawyers.org/

Contact Greg today for assistance with your family law matters at 414-276-5000 or Gregory.Mager@wilaw.com

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EMPLOYMENT LAWSCENE ALERT: EEOC ISSUES DRAFT PROPOSED ENFORCEMENT GUIDANCE ON RETALIATION AND RELATED ISSUES

Recently, the U.S. Equal Employment Opportunity Commission ("EEOC") published Draft Proposed Enforcement Guidance on Retaliation and Related Issues in order to get public input. The EEOC handles employment discrimination laws, including retaliation claims by employees who engage in "protected activity," such as employees who complain about discrimination, file a charge of discrimination, or participate in an employment discrimination proceeding. Despite the fact that retaliation is the most frequently alleged type of charge filed with the EEOC, it last published guidance on the matter in 1998. It has used this Draft Proposed Guidance as a way to clarify its stance on certain points of law and an attempt to expand the definition of retaliation.

Among the proposed changes is the EEOC's rejection of the "manager rule," whereby an employee who has a job responsibility that involves policing discrimination in the workplace (e.g., human resource manager) is not engaged in "protected activity" if that person is simply

performing his or her job. The EEOC proposes to focus on the "oppositional nature of the employee's complaints or criticisms" instead of the employee's job duties. Therefore, while someone such as a human resources manager would not always be protected under the retaliation provisions, that person would also not have to step outside of their role and assume a position adverse to the employer to receive protection.

The EEOC considers internal complaints to be included in the "participation" aspect of retaliation, regardless of whether a formal charge is filed. Additionally, the EEOC proposes that an individual engaged in "participation" in an employment discrimination proceeding does not have to be "reasonable" in either the belief that discrimination occurred or in how the employee presents himself. In fact, the participation could be wrong, defamatory, or malicious. Oppositional activity must still be objectively reasonable to be protected.

In a nod to the National Labor Relations Board, which has held that discussing compensation among employees constitutes protected, concerted activity, the EEOC's Draft Proposed Guidance state that conversations about pay "may constitute protected opposition under the equal employment opportunity laws, making employer retaliation actionable based upon the facts of a given case." The EEOC gives the example of an employee who discusses the fact that she is being discriminated against due to her gender, as evidence by her lower pay than similarly situated male employees.

The Draft Proposed Guidance also expand on the definition of "materially adverse employment action" to include: disparaging the employee to others or in the media; making false reports to government authorities; threatening reassignment; scrutinizing the employee's work or attendance more closely than that of other employees, without justification; giving an inaccurately lowered performance appraisal or job reference, even If not unfavorable; removing supervisory responsibilities; engaging in abusive verbal or physical behavior that is reasonably likely to deter protected activity, even if it is not sufficiently "severe or pervasive" to create a hostile work environment; requiring reverification of work status, threatening deportation, or initiating other action with immigration authorities; and taking any other action that might deter reasonable individuals from engaging in protected activity. Although the EEOC acknowledges that some courts would find these actions insufficient to constitute a materially adverse employment action, it believes that this interpretation is supported by Supreme Court reasoning.

The public has until February 24, 2016 to submit input, and after that, final guidance will be published. Although, even when finalized, the guidance is simply a reference tool for investigators and not law, employers should be aware of the EEOC's new proposed guidance, particularly the above points. Not only will the EEOC be using these in order to issue initial determinations, but these are items the EEOC is likely to aggressively pursue in litigation as well.

ADA WEBSITE COMPLIANCE CASES MOVE FORWARD; SENATORS URGE REGULATORY ACTION

As we discussed in a recent article, class action lawyers have been sending demand letters and filing lawsuits claiming that websites belonging to businesses and organizations are "places of public accommodation" and are in violation of the Americans with Disabilities Act (ADA) because they are not accessible to people with visual and hearing impairments.

On January 29, 2016, several consolidated cases in the Western District of Pennsylvania moved forward after a scheduling conference. While claims against some of the defendants have resolved through settlement, claims against the National Basketball Association and Toys "R" Us, among others, are moving forward rapidly, with the parties scheduled to complete depositions in March 2016, and with trial scheduled for May 2, 2016.

Meanwhile, nine Senators from across the country, all Democrats, have sent a joint letter to the Office of Management and Budget urging it to complete its review of the proposed regulations regarding accessibility standards for websites and to impose strict ADA compliance regulations for companies. While the Senators commended the Department of Justice's prosecution of various institutions for having websites that are allegedly not compliant with the ADA, they stated their concern that companies were "exploiting the lack of regulatory clarity" by maintaining non-accessible websites, which the Senators believe to be in violation of the ADA.

These developments show that the issue of whether your company's website complies with the ADA is not going to go away soon. Plaintiffs' lawyers representing visual and hearing impaired groups will likely continue to broaden the scope of who they sue for alleged ADA violations. If you receive a letter demanding action or requesting a settlement, it is important to know your rights before agreeing to anything.

If you have any questions, please contact Attorney Erica N. Reib of O'Neil Cannon at 414-276-5000 for more information.

THE WILAW CONNECTION QUARTERLY NEWSLETTER

- Tax Court Affirms Discount for Family Partnership
- Is Your Company's Website Compliant with the Americans with Disabilities Act (ADA)?
- New Law Changes Wisconsin Sales and Use Tax Rules for Construction
- IRS Delays Affordable Care Act
- Why I Would Rather Be a Beneficiary… Part One: Trusts Protect People from Themselves and Others
- Proud to Be a Member of Meritas, A Multi-National Network of Business Law Firms
- Pleased to Announce:
    - Congratulations to Our Attorneys Listed in the 2015 Edition of Super Lawyers
    - Recognized as One of the Top Business Law Firms in Wisconsin
    - Attorney Gregory S. Mager Board Certified Family Law Trial Advocate by the National Board of Trial Advocacy

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EMPLOYMENT LAWSCENE ALERT: NLRB HOLDS THAT POLICY PROHIBITING RECORDING DEVICES IN THE WORKPLACE VIOLATES EMPLOYEES' SECTION 7 RIGHTS

In a recent decision, the National Labor Relations Board (NLRB) struck down an employer's work rule that prohibited employees from recording workplace meetings and conversations without management approval, finding that such a policy could prevent employees from engaging in protected activity, which is protected by Section 7 of the National Labor Relations Act (NLRA).

In this case, the employee handbook had, like many employee handbooks, a policy prohibiting employees from recording company meetings and other aspects of the workplace. These policies are typically put in place to protect employees' privacy and to protect employers' confidential information and trade secrets. However, a 2–1 majority of the NLRB found that employees could reasonably understand such a rule to prohibit unionization efforts or engagement in other collective or concerted activities to advance their job-related interests. The NLRB held that photo, audio, and video recording at the workplace could be a protected activity under certain circumstances, such as documenting picketing activities,

unsafe working conditions, discussions regarding terms and conditions of employment, or an employer inconsistently applying workplace rules. Because the rule in question was simply a blanket rule prohibiting recording, the NLRB ordered the company to remove the policy.

The NLRB is showing no signs of slowing down in its quest to expand the reach of Section 7 far beyond the traditional view of "protected, concerted activity." Employers should carefully review and consider their workplace policies in light of this ruling and other NLRB decisions that have found other workplace rules infringing upon employees' Section 7 rights. Employers' rules restricting use of recording devices need to either be tied to particular employer interests, such as maintaining a customer's privacy or an employer's trade secrets, or be narrow enough to only prohibit recording in limited circumstances. Otherwise, employers, even non-union employers, could be subject to an NLRB unfair labor charge challenging their workplace recording policies.

TAX AND WEALTH ADVISOR ALERT: TAX COURT AFFIRMS DISCOUNT FOR FAMILY PARTNERSHIP

The United States Tax Court is reminding some taxpayers to run their family like a business. In the *Estate of Barbara M. Purdue* decision, the court affirmed the use of discounts in an estate tax dispute involving a family partnership, which was critical to minimizing the estate's tax liability. Most importantly, the court affirmed the use of discounts because the family actually treated the partnership like a business.

While taxpayers and tax practitioners wonder what will come of the IRS's threat to disallow discounts under this method of estate planning, this case is a good reminder to taxpayers that they should follow through with all the steps of their family partnership based estate plan if they want it to be effective. A plan on paper alone will not cut it.

The court in the *Estate of Barbara M. Purdue* cited to several actions taken by the family that proved the family partnership was formed for a nontax reason—to consolidate and manage the family's investments. To start, the partnership formalities were respected: The decedent maintained assets outside of the partnership to pay for living expenses, the partnership had its own bank accounts, and she did not comingle her assets with the partnership's assets. Further, the five children ran the business like a business. The Purdue children held an initial partnership meeting and agreed to hire a professional management advisory firm and to hold annual meetings. At the meetings, the children discussed the family's accounts and assets, approved distributions, heard presentations from the investment manager, and received estate tax planning updates and advice.

All families already managing or considering managing their assets under this type of estate plan should take note; the court barely mentioned the formal planning documents in this case. Although such documents are important, planning does not stop after the documents have been signed.

NEW LAW CHANGES WISCONSIN SALES AND USE TAX RULES FOR CONSTRUCTION CONTRACTORS

A new Wisconsin law allows contractors to purchase materials tax-free for construction projects undertaken by certain tax-exempt government and non-profit entities. Under former law, such entities generally had to purchase the construction materials directly themselves in order to receive the Wisconsin sales and use tax exemption. Now, construction contractors may make tax-exempt purchases of construction materials for projects owned by exempt entities. These entities generally include the State of Wisconsin and its agencies, counties, municipalities, school districts and other units of local government, sewerage commissions and districts, water authorities, religious, charitable and non-profit entities, and Indian tribes. The new law took effect on January 1, 2016, and applies to construction contracts entered on or after that date.

To qualify for the tax exemption, the contractor must transfer the materials to the exempt entity, and the materials must become “a component of a facility in this state that is owned by the entity.” The new law defines “facility” as a “building, shelter, parking lot, parking garage, athletic field, athletic park, storm sewer, water supply system, or sewerage and waste water treatment facility.” There is a notable express exception. A “facility” does not include a highway, street, or road. Consequently, the new rules will not apply to road and highway projects.

The purpose of the new law is to avoid inflation of the cost of public construction projects due to difficulties in realizing the sales and use tax exemption under prior law. The new law should help government and non-profit entities take full advantage of their tax-exempt status in connection with construction projects. It will also simplify the material purchasing process both for the tax-exempt owner and for the contractor.

If you have any questions, please contact Attorney Steve J. Slawinski at O’Neil Cannon at 414-276-5000.

WILLIAM RYAN DREW RECOGNIZED BY THE MILWAUKEE COUNTY BOARD OF SUPERVISORS

Attorney William Ryan Drew was honored recently by the members of the County Board for his 30 years of service to the residents of the city of Milwaukee and Milwaukee County. Mr. Drew's commitment to the residents of Milwaukee County began in 1985 when he recommended the creation of the Research Park and served on the Park's Board of Directors as the Personal Representative of former County Executive Tom Ament. In 1998, he was appointed as Executive Director of the Research Park and coordinated the Park's high-technology development on the approximately 150 acres of Milwaukee County-owned land in Wauwatosa. The Research Park is currently the largest Milwaukee-area office complex with 14 buildings and over 5,000 employees. The Technology Incubator, which is located within the Research Park, serves as a business incubator for start-up technology companies. To date over 1,100 jobs have been created.

Mr. Drew's service to our community also involved several other appointments and elected positions. These include: Director of Administration for Milwaukee County, Commissioner of City Development for the City of Milwaukee, Treasurer of the Southeastern Wisconsin Regional Planning Commission, President of the Milwaukee Common Council, and Fourth District Milwaukee Alderman. In addition, he served as President of the Board of Directors for the City of Milwaukee Retiree's Association, Board of Directors for the National Center for Housing Management, and is on the Board of Visitors for the Les Aspin Center for Government at Marquette University.

Mr. Drew began his Real Estate and Construction practice at the downtown law firm of O'Neil, Cannon, Hollman, DeJong and Laing in 1988. He uses his extensive background in city, county, and state government to help clients resolve municipal and real estate development issues they encounter when dealing with government agencies.

TAX AND WEALTH ADVISOR ALERT: IT'S ALL ABOUT LEADERSHIP… STRUCTURE

Loyal readers of this blog (thank you!) know that my position on succession planning is that success depends primarily on leadership. A business is successful based on the quality of its

decisions, which means its success depends on the ability of the decision-makers. In my opinion, too much succession planning time, energy, and client money is wasted on issues of taxation and asset protection, and too little energy is focused on the more important first question—if not you, then who?

In this blog post, I want to share a quick anecdote on this issue from my practice. I met with a potential client last year who was the 100% owner of a business he purchased from his parents. As I got to know this person, it was clear he was smart; incredibly savvy, he knew his industry, and he knew his business. Eventually, we came to the issue of succession. His plan was to leave 50% of the company's stock to each of his two children. I began to question him about how the children worked together, how they collaborated, what their values and beliefs were, and how they meshed. The client, sheepishly, had no answers to any of these questions. While he had prepared his children to do their jobs well, he had not prepared them for the role they were to play—50% owners of the company. These two people could collaborate to drive company success or deadlock to drive it into the ground. And he had no idea which.

What is interesting is this client was more thoughtful, smart, and well prepared than 95% of the clients that walk through my door. He prepared his children well for their future jobs; prepared clients, vendors, and employees well for transition; and prepared himself well for retirement. But as I ask my clients all of the time—what would Apple do? Would they implement an untested decision-making structure? Absolutely not. So, remember, it is not only the who (makes the decisions) that needs to be thought through, but the how (decisions will be made). And the owner needs to always keep in mind, the business needs to come first; it is the economic engine that drives happiness.