EMPLOYMENT LAWSCENE ALERT: OSHA PENALTIES TO DRAMATICALLY INCREASE IN 2016

In early November, President Obama signed the Bipartisan Budget Act of 2015. One item that should be of particular note to employers is that, under the Act, OSHA penalties will rise significantly.

Because OSHA penalties have been consistent for over two decades, once the Act goes into place on July 1, 2016, there is an immediate "catch-up" provision that will adjust the penalties as much as 150%. However, OSHA is also required to adjust the penalties on January 15 every year based on the Consumer Price Index ("CPI"). Because the CPI has increased 82% since the OSHA penalties were set in 1990, there is a possibility that the fines could be raised by that amount. The below chart shows the current penalty amounts and the amounts that they may be increased to:

Type of Violation	Current Maximum Penalty	Adjusted Maximum (150%)	Adjusted Maximum (182%)
Willful Violation	$70,000	$105,000	$127,400
Serious Violation	$7,000	$10,500	$12,740
Other-The-Serious Violation	$7,000	$10,500	$12,740
De Minimis Violation	$7,000	$10,500	$12,740
Failure to Abate Violation	$7,000	$10,500	$12,740
Repeat Violation	$70,000	$105,000	$127,400

These new fines will go into place August 1, 2016. Therefore, employers must keep a keen eye on safety now more than ever because OSHA has increased enforcement and now will increase its monetary penalties.

These new fines will go into place August 1, 2016. Therefore, employers must keep a keen eye on safety now more than ever because OSHA has increased enforcement and now will increase its monetary penalties.

LOCAL COURT RULES IN WISCONSIN

While litigators most likely are familiar with the various state and federal local court rules

impacting courtroom practice in their geographic areas, they may not be as familiar with the local rules for courts in other areas in which they do not usually practice but have a case.

Wisconsin's state courts have various different sets of local rules. To assist attorneys in complying with these differing local rules, the State Bar of Wisconsin maintains a page on its website—www.wisbar.org—with links to them.

Milwaukee County is the most populous county in Wisconsin, and its Circuit Court has its own local rules which can be found here:

The Circuit Courts for the various counties outside Milwaukee comprising the greater Milwaukee metropolitan area also have their own local rules, including:

- The Kenosha County Circuit Court which can be found here.
- The Ozaukee County Circuit Court which can be found here.
- The Racine County Circuit Court which can be found here.
- The Sheboygan County Circuit Court which can be found here.
- The Washington County Circuit Court which can be found here.
- The Waukesha County Circuit Court which can be found here.

Wisconsin's federal courts also have their own local rules.

- The local rules for the United States District Court for the Eastern District of Wisconsin can be found here.
- The local rules for the United States District Court for the Western District of Wisconsin can be found here.
- The local rules for the Wisconsin Bankruptcy Courts can be found:
    - Here for the U.S. Bankruptcy Court for the Eastern District of Wisconsin;
    - Here for the U.S. Bankruptcy Court for the Western District of Wisconsin.

In addition, various Wisconsin federal court judges, particularly those in the Eastern District of Wisconsin, have their own practice preferences, some of which can be found:

    - Here for the U.S. District Court for the Eastern District of Wisconsin; and
    - Here for the U.S. Bankruptcy Court for the Eastern District of Wisconsin.

Local rules are subject to periodic modification, so it is advisable to review the local rules at the beginning of each case and thereafter as necessary.

For more information about Wisconsin's state or federal local court rules, please contact Grant Killoran at 414.291.4733

TWENTY ATTORNEYS ELECTED TO THE WISCONSIN SUPER LAWYERS LISTS

O'Neil Cannon is proud to announce that the following sixteen attorneys were selected for inclusion on the Super Lawyers list, which is limited to 5% of all Wisconsin attorneys, as published in the December 2015 Edition of *Milwaukee Magazine and the* Wisconsin *Super Lawyers Magazine*:

- Douglas P. Dehler
- James G. DeJong
- Seth E. Dizard
- Peter J. Faust
- John G. Gehringer
- Joseph E. Gumina
- Dean P. Laing
- Gregory W. Lyons
- Gregory S. Mager
- Patrick G. McBride
- Joseph D. Newbold
- Chad J. Richter
- John R. Schreiber
- Jason R. Scoby

In addition, the following four attorneys were selected for inclusion on the Super Lawyers "Rising Stars" list, which "recognize[s] the top up-and-coming attorneys in the state—those who are 40 years old or younger, or who have been practicing for 10 years or less:"

- Melissa S. Blair
- Megan O. Harried
- Erica N. Reib
- Timothy M. Van de Kamp

The Firm is proud to further announce that Dean Laing, Seth Dizard, and Peter Faust were selected by Super Lawyers as "Top 50 Attorneys" in Wisconsin and "Top 25 Attorneys" in the Milwaukee Area. Dean is one of only 10 attorneys out of over 15,000 attorneys in Wisconsin—and the only commercial litigator—to be selected to The Top 50 list for all 10 years.

Super Lawyers is a national rating service that rates attorneys in all 50 states. The selection process is multi-phased and includes independent research, peer nominations, and peer evaluations. As part of its process, Super Lawyers surveyed more than 15,000 attorneys and judges in Wisconsin, looking for the best attorneys in the State.

The New Jersey Supreme Court recently upheld the findings of a Special Master who made the following determinations about Super Lawyers:

> "[T]he selection procedures employed by [Super Lawyers] are very sophisticated, comprehensive and complex.
>
> It is absolutely clear… that [Super Lawyers does] not permit a lawyer to buy one's way onto the list, nor is there any requirement for the purchase of any product for inclusion in the lists or any quid pro quo of any kind or nature associated with the evaluation and listing of an attorney or in the subsequent advertising of one's inclusion in the lists."

THE WILAW CONNECTION QUARTERLY NEWSLETTER

- Trusts as Parties to Business Agreements
- New Changes to Obtaining Discovery in Wisconsin for Use in Other States
- Limitation of Liability
- Time for the Income Tax Tail to Start Wagging the Estate Planning Dog
- Can Employees Use FMLA to Avoid Overtime?
- Welcome
    - Samantha M. Amore
- Pleased to Announce
    - Congratulations to Our Attorneys Listed in *The Best Lawyers in America*® 2016
    - Attorneys Grant Killoran and Patrick McBride Selected to the 2015 Irish Legal 100



DIZARD SUCCESSFULLY CONCLUDES ANOTHER RECEIVERSHIP: WISCONSIN AVENUE OFFICE BUILDING SOLD TO LENDER AFTER COURT AUCTION

Through a court-ordered auction, a downtown Milwaukee office building that houses the Internal Revenue Service was sold to a lender this month. The previous owners were the target of a lawsuit filed in 2013 that resulted in an auction where the building was purchased

for $14 million. The IRS leases approximately 80 percent of the building, and it is located near The Shops of Grand Avenue. An article about the transaction recently ran in the *Milwaukee Business Journal*.

Attorney Seth Dizard was the receiver of this building leading up to the auction that attracted interest from national investors.

Read full article here.

TAX AND WEALTH ADVISOR ALERT: TIME FOR THE INCOME TAX TAIL TO START WAGGING THE ESTATE PLANNING DOG

Estate planners should now focus less on transfer taxes and more on income taxes when building a plan that provides for a client's loved ones.

This is a change. For a long time, estate planners were focused primarily on the transfer taxes (i.e., estate, gift, and generation skipping), while minimizing income tax planning for their clients. For example, many an estate planner has pontificated *ad nauseum* about the power of lifetime gifting. If the client utilizes the annual gift exemption, gifting removes the value of the gift from the donor's estate, and if the client utilizes the lifetime gift exemption, gifting removes appreciation from transferred property. But, an income tax tradeoff has always existed. If the client makes a gift during life, the donee receives the property with the donor's income tax basis; if the client makes that same transfer at death, the donee will receive the property with a basis equal to date of death value. This is called "stepped-up" basis and presumes property will appreciate in value. For those beneficiaries unlucky enough to receive bequests in 2008 and 2009, they might use the term "stepped-down" basis to reflect their reality.

So, why did these planning strategists place transfer tax avoidance as a higher priority than income tax planning? A few simple reasons are obvious:

1. Until recently, the transfer tax rate was much higher than the capital gains rate (as high as 55% in 2000).
2. The amount excluded from the transfer tax system, known as the estate (or gift) tax lifetime exemption, was relatively low compared to the net worth of a successful client ($1,000,000 in 2001 growing to $3,500,000 in 2009).
3. The first spouse to die left assets valued at an amount equal to the lifetime exemption to a credit shelter trust. Those assets would grow estate tax-free but would not receive

a basis step-up on the death of the surviving spouse.

So what has changed?

1. The rate differential between the transfer tax and capital gains tax was dramatically reduced. The transfer tax is 40% now, and the capital gains tax can be as high as 25–30% when you figure in the impact of the net investment income tax and state tax. But, a differential still exists, so all else equal, the income tax is still lower.
2. The 2012 Tax Act (AFTA) made the concept of portability permanent. Without going too far into the mechanics of portability, the first spouse to die leaves assets to the surviving spouse tax-free, and portability allows the surviving spouse to utilize both spouses' lifetime exemptions at death. Further, property of the two spouses will receive a full basis step-up on the death of the surviving spouse. Nevertheless, while that gives us an income tax planning tool, it does not make income tax more important than transfer tax.
3. The real paradigm shift comes from the dramatic increase in the estate tax exemption. In 2015, each spouse can leave $5.43 million (10.86 million working in concert) without the imposition of estate taxes. This will remove millions of people from a world of being concerned about transfer taxes; however, those same people and their heirs are subject to capital gains taxes at very low income thresholds. For example, assume Mom and Dad are worth $3,000,000 and are in their late 50s. In the past, they would give assets they believed to have high appreciation potential to their two children, both of whom are in their 30s and each of whom makes $100,000 per year. Based on the Rule of 72, the appreciation would be subject to an onerous estate tax in the parents' hands; in the hands of their children, the appreciation would be subject to a much lower capital gains tax when the children elected to sell the asset. Under a better method, Mom and Dad would sell appreciating assets to an irrevocable grantor trust, retain the income tax exposure on future sales, and "leverage" the gift to the children. Now, however, Mom and Dad should hold onto low basis, highly appreciating assets to receive the income tax step-up upon the survivor's death. A closer look at the strategy should be taken only when Mom and Dad's net worth begins to approach the indexed estate tax exemption. In other words, the planning world is now turned on its head and waiting is the better strategy than giving for clients whose net worth is under the exemption amount.

At the end of the day, clients will want to seek out advisers who can navigate the world of both income and estate taxes, and can help them build a plan to take care of the people they care about while minimizing the impact of all taxes. No more cookie cutter plans; no more cookie cutter planners.

If you have any questions, please contact Attorney Joseph M. Maier at O'Neil Cannon at 414-276-5000.

NEW CHANGES TO OBTAINING DISCOVERY IN WISCONSIN FOR USE IN OTHER STATES

Obtaining discovery in Wisconsin for cases pending outside the State will soon become a lot easier. Until the end of 2015, a party in out-of-state litigation will still need to obtain the appropriate commissions from the court handling the underlying litigation and then file those commissions along with the necessary petition materials in a Wisconsin court to have a subpoena issued for testimony or documentary evidence to be given or produced here. However, effective January 1, 2016, this process will become much more streamlined as Wisconsin finally adopted the provisions of the Uniform Interstate Depositions and Discovery Act (UIDDA).

The UIDDA is a uniform act that is patterned after Rule 45 of the Federal Rules of Civil Procedure. It sets forth an efficient and inexpensive procedure through which litigants can seek and obtain discovery from witnesses located outside the jurisdiction of the trial court. The UIDDA was promulgated in 2007 and has since, at the time of this writing, been enacted in 35 states plus the District of Columbia and the U.S. Virgin Islands.

Specific provisions of the proposed rule change and their interplay with current Wisconsin law were discussed at an open administrative rules conference on December 5, 2014, at which the court voted to return the petition to the Judicial Council for editing and refinements consistent with the court's discussions. On March 24, 2015, the Judicial Council filed an amended petition containing such changes. The matter was discussed further at an open rules conference on June 10, 2015, at which the court voted unanimously to adopt the amended petition, with certain changes to the language and comment regarding the issuance of a subpoena.

By an order dated July 7, 2015, the court ordered that, effective January 1, 2016, Wis. Stat. § 887.24 be repealed and recreated to incorporate the provisions of the UIDDA as modified to comport with Wisconsin law. A copy of the court's July 7th order can be found here.

As recreated, the new Wis. Stat. § 887.24 will allow for subpoenas to be issued for discovery in Wisconsin by two methods:

- First, a party may have a subpoena issued by a clerk of circuit court by submitting a foreign subpoena to the clerk in the county in which the discovery is sought. When submitted, the foreign subpoena must be accompanied by an appropriate Wisconsin subpoena form that includes certain information that is specified in the statute. No filing fee will be required, and the clerk will not open a case file; however, the clerk may keep a record of the subpoenas issued.

- Second, a party may elect to retain an attorney authorized to practice law in Wisconsin to sign and issue a subpoena in his or her capacity as an officer of the court. Any subpoenas issued by Wisconsin attorneys must contain the same statutorily required information as that required for subpoena forms submitted to a clerk of circuit court.

To avoid any conflicts with the rules relating to the unauthorized practice of law, Wis. Stat. § 887.24(3)(d), as recreated, specifically provides that requesting the issuance of a subpoena through either of the prescribed methods in § 887.24(3) will not constitute an appearance in Wisconsin courts. However, should the need for a protective order arise related to the subpoena or should there be a need to enforce, quash, or modify the subpoena, then a special proceeding will need to be started in the circuit court in the county in which the discovery is sought.

The full text of Wis. Stat. § 887.24, as repealed and recreated, can be found here.

In closing, while Wisconsin lawyers will no longer be needed to serve as local counsel to petition a Wisconsin court to secure discovery for out-of-state parties, they should still understand the rule change to not only effectively counsel out-of-state lawyers and parties on how to obtain discovery in Wisconsin, but also because they may be called on directly to issue subpoenas for discovery from witnesses located in Wisconsin for use in litigation pending elsewhere.

LIMITATION OF LIABILITY

From time to time in drafting an agreement, one of the parties may wish to limit contractually any remedies or liability that the other party might seek at a later point in time. For example, a software developer might seek to limit any possible liability associated with the development of the software or with respect to the contract in any way. Another example would be in a purchase or sale of a business, where a seller may wish to limit liability that the buyer might assert at some future point in time.

In the case, *Aurora Health Care, Inc. v. Codonix Inc.*, *2006 WI 1589629 (E. D. Wis. 2006)*, our firm was defending a party who was sued under a long and sophisticated contract. One part of the contract sought to limit liability to a particular sum or to three times the amounts paid under the contract. Furthermore, there was a limitation which provided that in no event will either party be liable for any consequential, indirect, special, or incidental damages. While there may be a dispute as to the meaning of those terms, clearly this is an attempt to limit liability under the contract.

Contractual remedies such as the ones mentioned above have often been upheld by the courts. In a Seventh Circuit case, the parties' contract contained remedy limitations that excluded lost profits, special, contingent, incidental, or consequential damages. Even in the face of those contractual limitations, the claimant sought significant sums of money in lost profits damages. The court noted that both parties were sophisticated commercial parties and that the limitation of remedies provisions still provided the plaintiff with a minimum adequate remedy, and therefore, the remedy limitation "did not fail of its essential purpose." In essence, the Seventh Circuit said, "a deal is a deal."

Provisions that relate to lost cost savings are typically treated as consequential damages or lost profits. A court may determine that a contract does not fail of its essential purpose because someone was denied a certain remedy since the remedy provided for in the contract was a product of that party's own negotiation and making. In other words, if you helped design the contract and you signed it, you made your own bed and you must sleep in it.

Limiting liability or, for that matter, limiting warranties that might be available and the remedies that might flow from those warranties are part of a negotiation that allocates risk in accordance with the parties' sound business practices. The courts may say that a commercial purchaser can better assess its economic expectations and anticipate problems with meeting those expectations by demanding particular warranties to address the problems, or to ensure against that particular risk. In fact, some courts have indicated that if a commercial purchaser wants a product of higher quality, or better durability, or a better warranty, the purchaser is free to negotiate in the marketplace.

If a party wants stronger warranties and remedies, they are likely to have to make other concessions such as an increase in the price.

Care should be taken in the negotiation of provisions which may limit the liability of the parties to the contract or may limit any warranties under the contract. If a party is concerned about any such limitations, then the best approach may be to seek to negotiate more favorable terms rather than pursuing a claim at a later point in time where the other side will argue that the opponent is seeking to re-write the contract.

If you have any questions, please contact Attorney Randy L. Nash at O'Neil Cannon at 414-276-5000.

DIZARD MENTIONED IN JOURNAL SENTINEL:

OWNERS OF MILWAUKEE BUILDING DECLARED NUISANCE FACE COURT ORDER

In a recent article published by *The Journal Sentinel*, Dizard was mentioned for his court-appointed receivership of a local Milwaukee apartment building that has been declared a public nuisance.

Attorney Seth E. Dizard is the head of the firm's Banking and Creditors' Rights Practice Group. He has extensive experience serving as a court-appointed receiver throughout the State of Wisconsin for businesses, construction projects, real estate developments, marital and family estates, rental income properties, and high net worth individuals.

Read full article here.

GRANT KILLORAN AND PATRICK MCBRIDE SELECTED TO THE 2015 IRISH LEGAL 100

Grant Killoran and Patrick McBride, shareholders in the Litigation Practice Group at O'Neil, Cannon, Hollman, DeJong and Laing S.C., recently were selected by the *Irish Voice Newspaper* to the 2015 Irish Legal 100.

First introduced in 2009, the Irish Legal 100 is a listing of leading legal figures across the United States and honors accomplished and distinguished lawyers of Irish descent from law schools, law firms, the judiciary and industry around the country. Past honorees have included United States Supreme Court Chief Justice John Roberts and United States Supreme Court Associate Justice Anthony Kennedy, and honorees have been invited to meet with Ireland's Ambassador to the United States.

For information about the Irish Legal 100, visit www.irishlegal100.com.

For more information about O'Neil, Cannon, Hollman, DeJong and Laing S.C., including Attorneys Killoran and McBride, visit www.wilaw.com.