O'NEIL, CANNON, HOLLMAN, DEJONG AND LAING S.C. HOSTS CONTINUING LEGAL EDUCATION SEMINAR FOR SMALL FIRMS AND SOLO PRACTITIONERS

On October 7, 2015, O'Neil, Cannon, Hollman, DeJong and Laing S.C. hosted a Continuing Legal Education seminar entitled "Hot Legal Topics for Small Firms and Solo Practitioners" focusing on legal issues of interest to Wisconsin small firm and solo practice attorneys. Over 50 attorneys attended the event.

The firm's Managing Shareholder, Dean Laing, presided over the event.

Chad Baruch of Dallas, Texas was the keynote speaker for the seminar. Attorney Baruch spoke on effective legal writing. He also spoke on constitutional law issues.

A number of O'Neil, Cannon, Hollman, DeJong and Laing S.C. attorneys also spoke at the event:

- Patrick McBride, Joe Newbold, Melissa Blair, and Christa Wittenberg participated in a panel discussion on the role of judicial clerks and court staff in state and federal court proceedings.
- Tim Van de Kamp presented on commercial lease issues.
- Greg Mager presented on asset protection in divorce and family transfers.
- Seth Dizard presented on recent developments in receivership law.
- Grant Killoran and Greg Lyons presented on legal and practical issues related to commercial arbitration in the United States and abroad.

O'Neil, Cannon, Hollman, DeJong and Laing S.C. will hold this seminar again in the Fall of 2016.

If you would like any additional information regarding the seminar, including copies of the seminar materials, or if you would like to attend the 2016 seminar, please contact Grant Killoran at grant.killoran@wilaw.com or at 414.276.5000.

GRANT KILLORAN APPOINTED TO THE BOARD

OF DIRECTORS OF NORTH POINT LIGHTHOUSE FRIENDS, INC

Grant Killoran, Chair of the Litigation Practice Group at O'Neil, Cannon, Hollman, DeJong and Laing S.C., recently was appointed to the Board of Directors of North Point Lighthouse Friends, Inc.

North Point Lighthouse Friends is a non-profit organization committed to increasing public awareness of the history of North Point Lighthouse Station in Lake Park in Milwaukee, Wisconsin.

North Point Lighthouse Station is located at 2650 North Wahl Avenue in Milwaukee. The North Point Lighthouse began operating in 1885 and presently is comprised of 74-foot tower made of cast iron structural steel. North Point Lighthouse Station includes the North Point Lighthouse and a two-story Queen Anne-style wood frame dwelling known as the Keeper's Quarters, which was occupied from 1888 through 1994 by lighthouse keepers and their families and U.S. Coast Guard employees. North Point Lighthouse Station was decommissioned in 1994.

North Point Lighthouse Friends manages North Point Lighthouse Station for Milwaukee County following its transfer to the County from the U.S. Coast Guard. North Point Lighthouse Friends provides opportunities to adults and children to tour North Point Lighthouse Station and participate in special programming related to it and maritime issues.

North Point Lighthouse Station was placed on the National Register of Historic Lighthouses in 1980 and the National Register of Historic Places in 1984. It was designated as a Milwaukee County Landmark in 2005.

North Point Lighthouse Station is open to the public for tours from 1:00 p.m. to 4:00 p.m. on Saturday afternoons year round, as well as tours upon request with advance reservations.

For more information regarding North Point Lighthouse Station, please go to www.northpointlighthouse.org.

ATTORNEY SLAWINSKI QUOTED IN

COMMERCIAL OBSERVER: SEVENTH CIRCUIT SETS TITLE INSURANCE PRECEDENT

Steven J. Slawinski was interviewed by *Commercial Observer* recently regarding his role in the case *BB-Syndication Services, Inc. v. First American Title Insurance Co., 780 F.3d 825 (7th Cir. 2015).* This case has set the precedent that a lender's title insurance policy does not cover construction liens that arise due to insufficient construction funding.

Read full article here.

EMPLOYMENT LAWSCENE ALERT: CAN EMPLOYEES USE FMLA TO AVOID OVERTIME?

The FMLA requires that covered employers grant eligible employees twelve weeks of unpaid leave for a serious health condition that prevents them from performing the functions of their job. FMLA leave can be taken on an intermittent basis if medically necessary. A recent case out of the United States District Court for the District of Connecticut shows the importance of correctly identifying your obligations under the FMLA and how they may differ from your obligations under other employment law statutes such as the Americans with Disabilities Act.

In *Santiago v. Department of Transportation, et al.*, the employee was diagnosed with "cluster headaches," which he said were "worse than migraines," "completely disabling," and "can last for hours to days depending on the episode." The employee and his doctor determined that his "excessive work schedule," which was essentially anything over eight hours a day or forty hours per week, was a main trigger of his headaches and suggested that his work schedule be limited. Because the employee's job required mandatory overtime, the employer stated that it could not accommodate him and that, if he could not find another job with the employer, he would either need to apply for disability retirement or be terminated. The employer stated that those were his only options if he could not perform overtime, even if he applied for FMLA leave. The employee submitted FMLA paperwork from his physician that outlined his serious health condition and stated that he could not work over eight hours per day. Because he could not perform overtime, he was placed on leave and eventually terminated.

Although the employer argued that the employee was only entitled to leave when he was actually incapacitated, the court found that "[t]he examples in the regulation specifically provide that an employee can take leave to avoid the onset of illness, noting that 'an

employee with asthma may be unable to report for work . . . because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level.'" (*citing* 29 C.F.R. § 825.115(f)).

Furthermore, the employer argued that what the employee was requesting was essentially a permanent accommodation that changed the essential functions of the job. The Court acknowledged that while the employee "might not be able to use the ADA to avoid overtime . . . employees can use their yearly allotment of 12 weeks of FMLA leave to significantly alter their schedules." The Court went on to point out that, unlike the ADA, the FMLA does not include an "undue hardship" defense and the employer is required to provide the mandated 12 weeks of leave.

Decisions like this can put employers between a rock and a hard place, where they need employees to be at work because overtime is an essential function of the job and where they have to comply with multiple laws. Employers also need to carefully evaluate their obligations to make sure that they are properly complying with all relevant employment laws.

OCHD&L IS PLEASED TO ANNOUNCE THAT ATTORNEY SAMANTHA AMORE HAS JOINED THE FIRM

Attorney Samantha M. Amore, a graduate of the University of Wisconsin Law School, has recently joined the Milwaukee law firm O'Neil Cannon She assists individuals, professionals, and business owners with estate and business planning as well as with probate and guardianship. Her prior experience preparing tax returns enables her to advise clients on gift, estate, and income tax matters.

O'Neil Cannon, founded in Milwaukee in 1973, is a full-service legal practice that primarily focuses on providing business law and civil litigation services to closely-held businesses and their owners. The firm represents corporations, institutions, and partnerships at all stages of the business life cycle, helping them start, grow and transition from one generation to the next. We also assist business owners with their personal legal needs including tax and estate planning, family law and litigation—including personal injury litigation.

EMPLOYMENT LAWSCENE ALERT: NLRB ADOPTS NEW TEST FOR JOINT EMPLOYER STATUS

On Thursday, August 27, 2015, the National Labor Relations Board (NLRB) announced an updated test for determining joint-employer status under the National Labor Relations Act (NLRA), changing decades of precedent and significantly expanding the definition of who can be considered a joint-employer. A split Board decided it was necessary to "revisit and revise" the standard in order to keep up with "changing workplace conditions" in the current economic climate.

In the case at issue, Leadpoint Business Services, Inc. (Leadpoint), a staffing agency, provided workers to Browning-Ferris Industries of California (BFI) at a recycling plant owned by BFI to perform a variety of tasks. The temporary services agreement between the companies stated that Leadpoint was the sole employer and denied any joint-employer relationship. It also gave each company-specific aspects of the employment relationship that each was to control. The union wanted to include the Leadpoint employees in a bargaining unit it represented. A regional director determined that the staffing firm was their sole employer and that BFI, therefore, had no obligation to collectively bargain with Leadpoint employees. The union challenged that decision, and the NLRB deemed the two companies joint-employers under its new standard.

Under the previous standard, an entity needed not only to possess the authority to control the terms and conditions of an employee's employment but had to actually exercise direct, immediate control to be considered an employer. The NLRB claimed that the requirement of direct, immediate control had been added to the joint-employer test over the past thirty years and was not based on prior case law, in common law, or in the text of the NLRA, and unnecessarily narrowed the definition of joint-employer under the NLRA.

The new standard states that two or more entities will be deemed joint-employers if they are both employers within the meaning of common law and "share or codetermine matters governing essential terms and conditions of employment." It is no longer necessary that joint-employers actually exercise authority and control over the terms and conditions of employment or that the control be exercised directly and immediately. Under the new standard, the fact that an entity simply has the ability, even if unused, to control the terms and conditions of employment or possesses indirect control through an intermediary will suffice to establish a joint-employer relationship. The NLRB will consider the existence, extent, and object of the control. The NLRB will broadly define 'essential terms and conditions of employment' and include such things as hiring, firing, discipline, supervision, direction, wages, hours, scheduling, seniority, assignment of work, and determination of the manner and method of work performance.

This decision will have a major impact on employers, particularly those who use staffing or subcontracting agreements or contingent employee arrangements. Employers who had previously worked under the impression that their lack of direct control meant that they were not joint-employers could now be subjected to joint bargaining obligations and joint liability for unfair labor practices and breaches of collective bargaining agreements. If found to be a joint-employer, companies will need to collectively bargain with respect to the terms and conditions which it possesses the authority to control. The new standard also takes away much of the certainty with which businesses had interacted with each other.

Companies need to look at their business relationships and see who they could be considered joint-employers with, including vendors, service providers, and other entities with which the company may have indirect control over employees. This decision could also have an impact on how other federal agencies, such as OSHA and the EEOC, look at their joint-employer standards. Employers must keep an eye on any changes in order to avoid unexpected legal pitfalls.

EMPLOYMENT LAWSCENE ALERT: MAKING SURE YOUR WELLNESS PROGRAM COMPLIES WITH THE LAW

Litigation against employers by the EEOC regarding the implementation of wellness programs is ongoing in federal court, but no instructive decisions have been issued by the courts. Employers wishing to implement a wellness program but stay out of litigation may feel like they have little guidance on the issue, but there are some instructions out there on how to avoid, at the very least, disability discrimination lawsuits brought by the EEOC.

In April 2015, the EEOC published proposed interpretive guidance on how employers can run wellness programs without running afoul of the Americans with Disabilities Act (ADA). The EEOC’s guidance is an attempt to balance the ADA’s goal of limiting employer access to medical information and the Affordable Care Act’s goal promoting wellness programs. The proposed rule does not touch on how wellness programs may be affected by any other laws prohibiting discrimination, such as Title VII, the Age Discrimination in Employment Act, and the Genetic Information Nondiscrimination Act (GINA).

As a brief review, the ADA prohibits discrimination against individuals with disabilities and restricts the medical information employers may obtain from employees and applicants. Wellness programs are generally programs and activities that promote a healthier lifestyle or

prevent disease, which in turn attempts to improve employee health and reduce healthcare costs. Wellness programs may also incorporate health risk assessments and biometric screenings that measure an employee's health risk factors. Incentives are usually offered for either participation (participatory wellness programs) or for achieving certain health goals (health-contingent wellness programs). Incentives are both financial and in-kind incentives, such as time-off awards, prizes, and other items of value. These wellness programs, however, must comply with the ADA, among other employment laws.

The focus of the EEOC's attack upon employers' wellness programs has been on whether such programs are voluntary. The ADA generally restricts employers from obtaining medical information from employees through disability-related inquiries or medical examinations. However, the ADA and GINA do permit employers to conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program. Voluntary is defined as neither requiring participation or penalizing employees who do not participate. The main effect of the EEOC's proposed regulations is the extent to which incentives affect the voluntary nature of wellness programs.

In its guidance, the EEOC has decided that it will allow certain incentives related to wellness programs, while limiting others to prevent economic coercion that could render the program involuntary. This can be achieved, according to the proposed rule, by allowing an employer to offer incentives up to a maximum of 30% of the total cost of employee-only coverage to promote participation. Under the proposed rule, employers are not allowed to require participation or deny coverage to or take an adverse employment action against any employee who does not participate. Employers would be further required to provide a notice that clearly explains what medical information will be obtained, who will receive the medical information, how the medical information will be used, the restrictions on its disclosure, and the methods the covered entity will employ to prevent improper disclosure of the medical information. The proposed rule also allows disclosure of medical information obtained by the wellness program to employers only in aggregate form, except as needed to administer an employer's health plan.

Finally, wellness programs must provide reasonable accommodations to employees with disabilities so that such employees have the ability to participate in wellness programs and earn the incentives offered by the employer. This is in line with the employer's duty to accommodate under the ADA.

Despite the EEOC's guidance, there remain unanswered questions. For example, the incentive language allows for up to 30% of the cost of employee-only coverage, but there is no guidance on whether incentives can be offered to encourage other family members who are covered under the insurance to participate in wellness programs. It is also expected that separate guidance on how GINA and wellness programs can coexist will be forthcoming.

Although the notice and comment period on the proposed rule has ended, the final rule is not likely to be issued until the fall. Employers should keep apprised of this rule making to make sure that their wellness programs do not find the attention of the EEOC.

DEAN P. LAING NAMED 2016 BEST LAWYERS "LAWYER OF THE YEAR®"

O'Neil, Cannon, Hollman, DeJong and Laing S.C. is pleased to announce that Attorney Dean Laing was recently selected as the 2016 "Lawyer of the Year" for Product Liability Litigation–Defendants in the Milwaukee area. This is the second year that *Best Lawyers* has recognized Attorney Laing as the "Lawyer of the Year." In 2012, he was honored as Milwaukee's Personal Injury Litigation "Lawyer of the Year."

Only a single lawyer in each practice area and designated metropolitan area is honored as the "Lawyer of the Year," making this accolade particularly significant. These lawyers are selected based on particularly impressive voting averages received during the peer-review assessments.

Receiving this designation reflects the high level of respect a lawyer has earned among other leading lawyers in the same communities and the same practice areas for their abilities, their professionalism, and their integrity.

In addition to the Lawyer of the Year award, Attorney Laing was also listed in *The Best Lawyers in America* 2016 in Commercial Litigation and Personal Injury Litigation–Plaintiffs.

Since the list was first published in 1983, *Best Lawyers* has become universally regarded as the definitive guide to legal excellence.

BEST LAWYERS® HONORS 15 ATTORNEYS IN 2016

O'Neil, Cannon, Hollman, DeJong and Laing S.C. is pleased to announce that 15 lawyers have been named to the 2016 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 over 65 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 B*est 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 2016 *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 52,000 leading attorneys cast more than 5.5 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."

THE WILAW CONNECTION QUARTERLY NEWSLETTER

- "Will My Adult Child With Autism Live Independently? Estate Planning for Families of Adults With Autism Spectrum Disorders"
- "Student Loans: Recent Federal Warning Shots to Financial Institutions"
- Tax and Wealth Advisor™ Alert: "The Seven Deadly Sins of Estate Planning"
- Employment LawScene™ Alert: "Supreme Court Decides Religious Accommodation

Case”
- Publication Watch: *Inside Counsel*, “Anticipating and Managing Wage and Hour Pitfalls”
- Welcome: John M. Calewarts
- Pleased to Announce:
    - Dean Laing and Greg Lyons Recognized by the NADC
- Upcoming Events:
    - *Hot Topics for Small Firms and Solo Practitioners*

