ATTORNEY GRANT C. KILLORAN ELECTED TO THE AMERICAN BAR ASSOCIATION HOUSE OF DELEGATES

The law firm of O'Neil, Cannon, Hollman, DeJong and Laing S.C. is pleased to announce that Grant C. Killoran recently was elected by the State Bar of Wisconsin to serve a two-year term as one of its five Delegates to the American Bar Association House of Delegates.

The House of Delegates is the policy-making body of the ABA. Control and administration of the ABA is vested in the House of Delegates. Established in 1936, the House of Delegates has over 500 members and its actions become the official policy of the ABA, the nation's largest lawyer association.

Mr. Killoran previously served as a Delegate to the ABA House of Delegates from 1997-1999 and 2003-2009.

Mr. Killoran is a shareholder with and the Chair of O'Neil, Cannon, Hollman, DeJong and Laing's Litigation Practice Group. He has diverse trial experience, focusing on complex business and health care disputes.

EMPLOYMENT LAWSCENE ALERT: U.S. SUPREME COURT UNANIMOUSLY REJECTS PRESIDENT'S NLRB APPOINTMENTS

Earlier this year, we alerted employers when the U.S. Supreme Court heard oral arguments in *National Labor Relations Board v. Noel Canning*, a case involving the President's appointment of three members to the National Labor Relations Board ("NLRB") without U.S. Senate approval while the U.S. Senate was on break.

Today, Thursday, June 26, 2014, the U.S. Supreme Court unanimously held that the President exceeded his authority in appointing those three members to the NLRB while the U.S. Senate was on an extended holiday break. Although the Supreme Court ultimately found that the President does indeed have the power under the U.S. Constitution to make "recess appointments" during breaks *between formal sessions* of the Senate and also during breaks in *the midst of a formal session*, the Senate breaks during which the President made his appointments to the NLRB were not considered to be in a formal "recess" within the meaning

of the Constitution.

The Supreme Court's decision in *Noel Canning* opens the door for both employers and unions to call into question hundreds of decisions issued by the NLRB in recent years. This could force the NLRB to revisit certain of its decisions and may force the Board to issue new decisions in those matters. We will continue to keep you informed of the latest developments and effects of the Supreme Court's decision in *Noel Canning*.

OCHDL ATTORNEYS RECOGNIZED AS LEADING LAWYERS IN M MAGAZINE

M Magazine (July 2014) just listed its "Leading Lawyers" in the Milwaukee area, and the list includes the following nine attorneys from O'Neil, Cannon, Hollman, DeJong and Laing S.C.:

- Jim DeJong (Business)
- Pete Faust (Corporate/Incorporation)
- Grant Killoran (Health Care)
- Dean Laing (Litigation)
- Greg Mager (Family)
- Patrick McBride (Insurance)
- Randy Nash (Litigation)
- Peter Walsh (Estate Planning)

In selecting the "Leading Lawyers" in the Milwaukee area, *M Magazine* utilized the services of Avvo, a Seattle-based company that rates all attorneys on a 10-point scale, factoring in peer endorsements, experience, education, training, speaking, publishing, and awards.

U.S. SUPREME COURT RULES INHERITED IRAS ARE NOT "RETIREMENT FUNDS" EXEMPT IN BANKRUPTCY PROCEEDINGS

On June 12, 2014, the United States Supreme Court held that funds in an inherited individual retirement account (IRA) are not "retirement funds" within the meaning of the Bankruptcy Code, and therefore such funds are not exempt from creditor claims in bankruptcy

proceedings.

Ordinarily, when a debtor files for bankruptcy relief, his or her legal and equitable interests in property become part of the bankruptcy estate available to satisfy valid creditor claims. However, the Bankruptcy Code exempts debtors' interests in certain property in order to help debtors obtain a fresh start. Pursuant to 11 U.S.C. § 522(b)(3)(C), debtors are allowed to protect "retirement funds" to the extent they are held in a fund or account exempt from taxation under specified provisions of the Tax Code, such as an IRA.

According to the Court, "retirement funds" are sums of money set aside for the day an individual stops working. Consequently, the Court looked to the legal characteristics of inherited IRAs—as opposed to debtors' personal IRAs—to determine whether such accounts contain funds set aside for the day when the account owner stops working.

The Court held that three legal characteristics of inherited IRAs prevent the funds from coming within the meaning of "retirement funds." First, the owner of an inherited IRA cannot contribute additional money to the account. Second, an owner of an inherited IRA is required to withdraw funds from the account no matter how far he or she is from retiring from the workforce. Third, the owner of an inherited IRA may withdraw all of the funds in the account without incurring a penalty under the Tax Code. If inherited IRAs were exempt under the Bankruptcy Code, a debtor could obtain bankruptcy relief and immediately thereafter withdraw all funds from his or her inherited IRA to purchase a new home, take an extravagant vacation, or go on a shopping spree, even while valid creditor claims went unsatisfied in the bankruptcy proceedings. Since inherited IRAs are not "retirement funds" exempt from a debtor's estate in bankruptcy proceedings, such funds may be used to satisfy valid claims of creditors.

The Court noted that its holding is consistent with the purpose of the Bankruptcy Code's exemptions, and balances the interests of debtors and creditors.

EMPLOYMENT LAWSCENE ALERT: WILL EMPLOYEES SOON BE PERMITTED TO USE COMPANY E-MAIL FOR UNION ORGANIZING ACTIVITIES?

Recent activity by the National Labor Relations Board ("NLRB") suggests that the Board may overturn a 2007 landmark decision in which it held that employees have no statutory right to

use their employers' electronic communications systems for non-business purposes, including union organization and other concerted activities for the purpose of collective bargaining or other mutual aid or protection (also known as "Section 7 rights"). *See* 29 U.S.C. § 157. The Board's 2007 landmark decision is known as the "*Register Guard* decision".

On April 30, 2014, the NLRB issued a Notice and Invitation to File Briefs in the matter of *Purple Communications, Inc.*, inviting parties and other interested individuals and organizations to answer the question of whether the Board should reconsider or overrule its 2007 decision in *Register Guard*. The NLRB invites briefing and evidence to address the following questions:

- Should the Board reconsider its conclusion in *Register Guard* that employees do not have a statutory right to use their employer's email system or other electronic communications systems for Section 7 activity?
- If the Board overrules *Register Guard*, what standards, restrictions, and factors should be applied to employee access to employers' electronic communications systems?
- To what extent and how should the impact on the employer affect the issue?
- Do employees' personal electronic devices, social media accounts, and/or personal email accounts affect the proper balance to be struck between employers' rights and employees' rights under the NLRA to communicate about work-related matters?
- Are there any other technological issues regarding email or other electronic communications systems or any relevant technological changes that have occurred since the Board's 2007 *Register Guard* decision that should be taken into account?

If the NLRB overrules its *Register Guard* decision, employees may be permitted to use employers' email and communications systems for Section 7 activity, including union organizing activities.

Employers should pay close attention to the Board's decision in *Purple Communications, Inc.*, as it could have a significant impact on employers' policies and practices regarding employees' personal use of company communications systems. We will keep you informed when the Board issues its decision.

EMPLOYMENT LAWSCENE ALERT: MUST EMPLOYERS OFFER TELECOMMUTING AS A "REASONABLE ACCOMMODATION"?

A number of courts have traditionally held that attendance is an essential function of most jobs and, on that basis, have found that telecommuting, or working from home, as an

accommodation is not reasonable. Recently, however, the United States Court of Appeals for the Sixth Circuit departed from this traditional notion and held that an employee's request for telecommuting as an accommodation was reasonable and that her physical presence at work was not an essential function of her job. This recent decision by the Sixth Circuit may present a problem for some employers and may be a signal that other federal courts, such as the Seventh Circuit, which oversees the federal district courts in Illinois, Indiana, and Wisconsin, may now be willing to recognize that allowing an employee to work from home may be a reasonable accommodation.

At issue in *EEOC v. Ford Motor Company* was whether a telecommuting arrangement could be a reasonable accommodation for an employee in a resale steel buyer position suffering from irritable bowel syndrome ("IBS"). The employee had formally requested that she be permitted to telecommute on an as-needed basis as an accommodation for her disability. Ford did maintain a telecommuting policy that authorized employees to telecommute up to four days per week, but specifically provided that telecommuting was not appropriate for all jobs, employees, work environments or managers. Ford ultimately determined that the employee's position was not suitable to telecommuting and denied her request.

In defending against the EEOC's claim, it was Ford's position that the employee was not "otherwise qualified" because physical presence at the workplace was an essential job function and that the employee's inability to demonstrate regular attendance made her unable to perform an essential function of her job and, therefore, she was not a "qualified" individual under the ADA and did not fall within the statute's protections.

The Sixth Circuit rejected Ford's argument and, for the following reasons, found that Ford could not show that the employee's physical presence at work was essential to performing her job:

- The assumption that attendance at the workplace is essential for most jobs no longer applies due to technological advances that allow employees to perform a number of tasks remotely;
- Because of those technological advances, positions that require a great deal of teamwork are not inherently unsuitable to telecommuting arrangements;
- The EEOC offered evidence that cast doubt on the importance of face-to-face interactions in the employee's position;
- The employee could still conduct on-site visits to suppliers' places of business if she worked partially or even primarily from her home rather than the employer's facilities; and
- The employer permitted other resale buyers to telecommute, albeit on a more limited basis.

The Sixth Circuit emphasized that determining whether physical presence is essential to a particular job is a highly fact-specific question and that it considered several factors to guide its inquiry, including the following: written job descriptions, the business judgment of the

employer, the amount of time spent performing the function, and the work experience of past and present employees in the same or similar positions.

What Does This Decision Mean for Employers?

Although this decision comes out of the Sixth Circuit, it has opened the door for the EEOC to take an aggressive approach on the issue of whether physical presence in the workplace is truly essential to performing a specific job. The Sixth Circuit's decision in *EEOC v. Ford Motor Co.*, represents a significant departure from the traditional majority viewpoint that regular attendance at the workplace is usually an essential function of the job. For example, in 1995 in *Vande Zande v. Wisconsin Department of Administration*, the Seventh Circuit stated:

"Most jobs in organizations public or private involve teamwork under supervision rather than solitary unsupervised work, and team work under supervision generally cannot be performed at home without a substantial reduction in the quality of the employee's performance. This will no doubt change as communications technology advances, but is the situation today. Generally, therefore, an employer is not required to accommodate a disability by allowing the disabled worker to work, by himself, without supervision, at home. This is the majority view . . . . But we think the majority view is correct. An employer is not required to allow disabled workers to work at home, where their productivity inevitably would be greatly reduced. No doubt to this as to any generalization about so complex and varied activity as employment there are exceptions, but it would take a very extraordinary case for the employee to be able to create a triable issue of the employer's failure to allow the employee to work at home."

The Sixth Circuit's decision in *EEOC v. Ford Motor Co*., may be a signal to other courts that technology has advanced such that the courts need to re-consider this traditional viewpoint.

With the federal courts and the EEOC beginning to embrace the concept that physical presence at the employer's place of business is not an essential job function, this may be the beginning of a slippery slope toward requiring employers to consider telecommuting as an accommodation. The question most employers will have is whether such an accommodation is reasonable, particularly because many employers, like Yahoo! CEO Marissa Mayer, are committed to the philosophy that in-person, face-to-face communication, and interaction fosters the type of collaboration, innovation, and production that is essential to a successful business.

Employers should keep a close eye on how other federal courts address the issue of telecommuting as a reasonable accommodation.

EMPLOYMENT LAWSCENE ALERT: HAVE YOU DONE YOUR HR SPRING CLEANING?

Spring is finally here! Like household cleaning, it is also important to do spring cleaning in the workplace. Spring is a great time for employers to audit their human resources policies and procedures to account for recent changes in state and/or federal law and to find and correct potential problems before they turn into costly claims or lawsuits.

Failing to regularly review your personnel policies and procedures could create litigation risks for your business. The key areas of focus for your workplace spring cleaning should include:

- Reviewing and revising employee handbooks and other individual policies as needed;
- Reviewing and revising your personnel practices and procedures regarding:
    - Avoiding discrimination, harassment, and retaliation in all aspects of employment;
    - Approving and managing leaves of absence;
    - Accommodating disabilities or religious needs;
    - Wage and hour issues; and
    - Disciplinary practices and investigations.
- Identifying any important changes in federal and state law, determining how any changes will affect your policies and procedures, and revising those policies and procedures accordingly.
- Conducting training and re-training for key personnel on important human resources policies such as harassment.

Reviewing your personnel policies and procedures annually and ensuring your employees have the proper training to implement and enforce your policies and procedures is a springtime best practice for employers.

If you would like additional resources to assist you in conducting your human resources audit or are looking for someone to conduct informational training for your employees or supervisors, please contact us.

MILWAUKEE JUSTICE CENTER VOLUNTEERS RECOGNIZED ON THE STATE BAR OF WISCONSIN PRO BONO HONOR ROLL

The Milwaukee Justice Center, organized by Milwaukee County, the Milwaukee Bar Association and the Marquette University School of Law, provides civil legal assistance to

people who cannot afford an attorney. In 2012, the volunteers of the Center provided nearly 9,000 hours of *pro bono*service to 10,659 unrepresented litigants.

Fifteen attorneys from the law firm of O'Neil, Cannon, Hollman, DeJong and Laing contributed the success of the Milwaukee Justice Center in 2012 to include:

- Doug Dehler
- Megan Eisch
- Miles Goodwin
- Grant Killoran
- Justinian Koenings
- Claude Krawczyk
- Gregory Lyons
- Sarah Matt
- Joseph Newbold
- Laura Now
- Jason Scoby
- Steven Slawinski
- Steven Strye
- Timothy Van de Kamp
- Peter Walsh

EMPLOYMENT LAWSCENE ALERT: WISCONSIN PASSES SOCIAL MEDIA PROTECTION ACT – HOW WILL IT AFFECT YOUR EMPLOYMENT PRACTICES?

On April 8, 2014, Governor Scott Walker signed into law the Wisconsin Social Media Protection Act (the "Act"). 2013 Wisconsin Act 208. The new law, which went into effect on April 10, 2014, Wis. Stat. § 995.55, prohibits employers from requesting an employee or an applicant to grant access to, allow observation of, or disclose information that allows access to or observation of the employee's or applicant's "Personal Internet account," defined as an "Internet-based account that is created and used by an individual exclusively for purposes of personal communications."

Specifically, under the new law, employers may not:

- Request or require an employee or applicant for employment to disclose access information for a Personal Internet account or otherwise grant access to or allow

observation of that account as a condition of employment;
- Discharge or otherwise discriminate against an employee for:
    - Exercising his or her right to refuse to disclose access information, grant access to, or allow observation of his or her Personal Internet account;
    - Opposing a practice prohibited under the Act;
    - Filing a complaint or attempting to enforce any right under the Act; or
    - Testifying or assisting in any action or proceeding to enforce any right under the Act.
    - Refuse to hire an applicant for employment because the applicant refused to disclose access information for, grant access to, or allow observation of the applicant's Personal Internet account.

The Act does, however, permit an employer to do any of the following:

- Request or require an employee to disclose access information to allow the employer to gain access to an account, service, or electronic communications device that the employer supplied or paid for (in whole or in part) in connection with the employee's employment or used for the employer's business purposes;
- Discharge or discipline an employee for transferring the employer's proprietary or confidential or financial information to the employee's Personal Internet account without the employer's authorization;
- Conducting an investigation or requiring an employee to cooperate in an investigation if an employer has reasonable cause to believe that there has been:
    - Any alleged unauthorized transfer of confidential, proprietary, or financial information to the employee's Personal Internet account; or
    - Any other allege employment-related misconduct, violation of the law, or violation of the employer's work rules, as specified in an employee handbook, if the misconduct is related to activity on the employee's Personal Internet account.

(Although an employer can require an employee to grant access to or allow observation of the employee's Personal Internet accounts for this purpose, the employer may not require the employee to disclose access information for that account.)

- Restrict or prohibit an employee's access to certain internet sites while using an electronic communication device supplied or paid for in whole or in part by the employer or while using the employer's network or other resources;
- Comply with a duty to:
    - Screen applicants prior to hiring; or
    - Monitor or retain employee communications as required by state or federal laws, rules, and regulations or the rules of a self-regulatory organization.
    - View, access, or use information about an employee or applicant for employment that can be obtained without access information or is available in the public domain; and
    - Request or require an employee to disclose his or her personal e-mail address.

An employee or applicant who believes he or she was discharged or otherwise discriminated

against in violation of the Act may file a complaint with the Department of Workforce Development in the same manner as other employment discrimination complaints are filed and processed with the Department.

Employers should review and revise their policies and practices to ensure that they are in compliance with the Act. For more information about the Wisconsin Social Media Protection Act or if you have questions about whether your practices comply with the new law, please contact us.

KILLORAN NAMED OUTSTANDING SUBCOMMITTEE CHAIR BY THE AMERICAN BAR ASSOCIATION

Grant Killoran, the Chair of O'Neil, Cannon, Hollman, DeJong and Laing S.C.'s Litigation Practice Group, has been selected by the American Bar Association Section of Litigation as an Outstanding Subcommittee Chair for the 2013-2014 ABA year.

Grant serves as the Co-Editor of the ABA Section of Litigation's *Health Law Litigation Newsletter* and is being honored for his work on that publication.

Grant has served as a Co-Editor of the ABA *Health Law Litigation Newsletter* for a number of years. He previously served as the Co-Chair of the ABA Section of Litigation's Health Law Litigation Committee.

Grant's practice focuses on complex business disputes, including those involving the health care industry.